



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 357 OF 2008

ORIENTAL COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

BUBACON AGENCIES LIMITED.....1<sup>ST</sup> DEFENDANT

ABDULLAHI M. ALI.....2<sup>ND</sup> DEFENDANT

AND

MEYMUNA KASSIM.....OBJECTOR

**RULING**

1. The Application before Court is that of the Objector dated 24<sup>th</sup> June 2013 brought under the provisions of **Order 22 rule 51 (1) and (2), Order 51(1)** of the *Civil Procedure Rules*, **sections 1A, 1B, 3A and 37 (2)** of the *Civil Procedure Act* as well as the Auctioneers Act and **rule 12 (b)** of the Auctioneers Rules. The Application seeks Orders that the Proclamation dated 17<sup>th</sup> June 2013 and any attachment issued thereunder be raised and/or lifted and that the Decree Holder should bear the costs of such attachment. The grounds upon which the Application are based were that the execution by way of the Proclamation was illegal and unlawful as it purported to execute the movable goods and property legally owned by the Objector. In the Objector's view, the intended execution was ill motivated and made in bad faith. The property attached is that of the Objector and has nothing to do with the Judgement Debtor.

2. The Application was supported by the Affidavit of the Objector herself sworn on the 24<sup>th</sup> of June 2013. The deponent maintained that the properties proclaimed on 17<sup>th</sup> June 2013 were her personal household goods. She believed that the same had been proclaimed without the Decree Holder or the auctioneers endeavouring to ascertain the ownership of the goods. The Objector went on to say that the premises being L. R. No. 209/10722/50 Nairobi, where the auctioneers proclaimed, belonged to her and had nothing to do with the Judgement Debtor. As a result, she believed that the attachment was wrong and that the Court should uphold her objection. The Court noted that, on 25<sup>th</sup> June 2013, it had ordered a stay of execution pending the inter-parties hearing and determination of the said Application.

3. The Auctioneer, one **Muganda Wasulwa** of Messrs. Keysian Auctioneers swore a Replying Affidavit to the said Application on 15<sup>th</sup> July 2013. He noted that his firm had received instructions to proclaim and sell the Judgement Debtor's assets herein by way of auction after making proclamation. He had

requested the instructing advocates to point out to his firm the Judgement Debtor's assets. The deponent went on to say that on 17th July 2013, he had received information that the Judgement Debtor had previously been served at its premises at South C, Ruby Estate, House No. 93. He had proceeded to that address and proclaimed what he considered were the Judgement Debtor's attachable assets. He had then received a letter from the Objector alleging that the Proclamation was wrongly done. Accordingly, Mr. Wasulwa instructed a private investigators, Wandega Enterprises, to ascertain the whereabouts of the Judgement Debtor. He attached their Report dated 5th of July 2013 to his Replying Affidavit and noted that the investigators had confirmed from the guard at the said premises, as well as a M-Pesa kiosk, that the said house No. 93 belonged to one Abdullah M. Ali a Somali man who resided there with his family. The deponent maintained that as regards to the said investigator's report, it was obvious that the Objector was blatantly lying to Court.

4. One of the employees of the Plaintiff bank, **Wilfred Machini**, also swore a Replying Affidavit in his capacity as the Credit Manager. That Affidavit was sworn on 15th July 2013. The deponent attached a Report from a firm of private investigators, Bayo Enterprises, who had been engaged by the Plaintiff to carry out investigations and to establish the residence of the second Judgement Debtor. He attached a report from those investigators dated 25th October 2010. He noted that it confirmed that the second Judgement Debtor did reside at the said House No. 93, Ruby Estate. He went on to say that on 9th March 2011, Messrs. Integra Trading (K) Company had carried out a proclamation of the second Judgement Debtor's assets at the said house. Pursuant to that proclamation, Mr. Machini noted that the said Judgement Debtor had made a settlement proposal which was accepted by the Decree Holder/Plaintiff bank. However, he did not honour the same and as a result, a further proclamation was made on 27th June 2011. A second proposal for settlement was made by the Judgement Debtor dated 4th July 2011 which was again accepted but dishonoured. Thereafter, the Judgement Creditor's advocates served a Notice to Show Cause on the second Judgement Debtor at the said House No. 93 on 29th November 2012 and, pursuant to an Order obtained on that day, instructed Keysian Auctioneers to attach and sell the second Judgement Debtor's properties. Mr. Machini maintained that the proclamation was done legally and lawfully and that the Objector had not tendered any evidence whatsoever to prove that she was the owner of the proclaimed goods. He urged the Court to dismiss the Objector's Application accordingly.

5. On 14th January 2014, the Objector, with the leave of the Court, swore a Supplementary Affidavit. She stated that she had managed to trace some invoices for the purchase of some of the household goods that were the subject matter of the Objection herein. She annexed copies of such invoices detailing a number of beds, a sofa set, a coffee table and stools, a wall mirror and frame, two bedside tables, a dining table and stool and four carpets. She noted that the purchase of those items had been made several years ago.

6. The submissions on her Application dated 24th June 2013 were filed by the Objector herein on 19th February 2014. They set out the details of the Application before Court and commented upon the two Replying Affidavits as above. The Objector maintained that, upon going through the said two Replying Affidavits, there was no tangible evidence that the second Judgement Debtor was the owner of the proclaimed goods. It appeared that as far as the Plaintiff/Decree Holder, as well as the auctioneer, were concerned, they had established that the second Judgement Debtor was alleged to be residing in the said House No. 93. They had based this presumption upon investigation reports detailing that the second Judgement Debtor resided therein with his wife and several grown-up sons and daughters. Against this, the Objector had proved that she was the Registered Owner of the said house by annexing a copy of a Title Deed to the said house as well as receipts to prove that household goods therein belonged to her. She had not rented the house to the second Judgement Debtor. She submitted that the fact that the Judgement Debtor was believed to be one of the residents of the said house, did not make him the owner of the goods therein. The Objector maintained that the house was her official residence and she had bought the same way back in March 1991. The Objector reiterated that the Decree Holder had failed to establish that the proclaimed items belonged to the second Judgement Debtor or that he had any interest therein. She requested the Court to make it very clear in this and other cases, that it was the duty of the Decree Holder and its appointed auctioneers to establish the ownership of the goods before making attachment. In this regard the Objector referred the Court to the cases of **Transnational Bank Ltd v Florence Odhiambo & 2 Ors (2006) eKLR**, **Hellen Olima v John Kipkemboi Kilel & Anor. (2006) eKLR**, **Jasper Tech Enterprises Ltd v Joseph Mathai Ndungu & Anor (2006) eKLR** as well as **Kem Paper Ltd v Kenya**

**Times Media Trust Ltd & Anor. (2006) eKLR.**

7. The Plaintiff/Decree Holder's submissions were filed herein on 24th March 2014. It maintained that the issue before Court for decision was whether the proclaimed goods belonged to the Objector. It maintained that the Objector had failed to establish her title to the proclaimed goods. The Plaintiff/Decree Holder opined that the sole purpose of the Objector filing her Application before Court was in order to defeat the Judgement herein. The Plaintiff/Decree Holder submitted that the burden of proof as to the Objector's legal or equitable interest in the property, being the subject matter of the execution, lay with her. It was not for the Decree Holder to prove that the goods belonged to the Judgement Debtor. It referred to the Court to the finding of **Waki J.** in **HCCC No. 729 of 2002 Simba Colt Motors Ltd v Lustman & Co.** It felt that the burden of proof has to be discharged under the evidential test of the balance of probability. The Decree Holder maintained that the various reports from Bayo Enterprise Ltd, Integra Trading Ltd and Wandega Enterprises all pointed to the fact that process had been served, at one time or another, upon the second Judgement Debtor at the said House No. 93. The Decree Holder further noted that annexure to the Supporting Affidavit of the Objector, the copy Title Deed indicated that Ruby Holdings Ltd was the registered owner of House No. 93 and not the Objector. The Decree Holder also noted that when the proclamation was carried out on 27th June 2011, at the same premises, the Objector did not make any claim as against the execution. The Decree Holder further submitted that the Objection proceedings had been brought in bad faith, solely calculated to delay and circumvent the execution of the Decree herein. The Application was an afterthought aimed at misleading the Court. In the Supporting Affidavit, the Objector had indicated that she stood to lose Shs. 6,642,211.90 which was exactly the same amount as the Decree Holder was pursuing. It maintained that the Court should ask itself as to how the Objector stood to lose the exact amount that the Decree Holder was pursuing and yet, did not produce any evidence to that effect.

8. The highlighting of submissions came before this Court on 26th June 2014. Only counsel for the Objector came before the Court. Having set the background of the Application, counsel noted that the attached goods were mainly household goods and had not been claimed by any other person other than the Objector. She had not been in a position to get certificates proving ownership. Having said that, the auctioneer did not ascertain the ownership of the proclaimed property before attachment. Finally, counsel produced before Court a copy of this Court's Ruling dated 20th December 2013 in **HCCC No. 561 of 2011** involving the same Defendants and the Objector as herein but a different bank Plaintiff.

9. The Objector's Application is brought under the provisions of **Order 22 rule 51** of the *Civil Procedure Rules, 2010* which reads as follows:

**“22. 51. (1) Any person claiming to be entitled to or have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.**

**(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.**

**(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties”.**

As I understand the procedure in this connection, I consider it necessary that this Court do adopt the finding of **Waki J.** (as he then was) in the oft quoted case of **Simba Colt Motors Ltd** (supra) as cited to Court by the Decree Holder:

**“The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached movable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgement-Debtor.”**

This finding must be correct and I do not concur with the submissions of the Objector that it was up to the auctioneer to verify the ownership of the goods which were proclaimed in this suit.

10. In applications before Court under **Order 21 rule 51**, it is for the Objector to prove that he/she has a legal or equitable interest in the whole or any part of the property attached in execution of a Decree. As a result, it was for the Objector to bring before this Court some evidence of her ownership of the proclaimed goods. From the Schedule of Movable property issued by the said Keysian Auctioneers, it is quite obvious to this Court that what was being proclaimed were household goods. From the 2 copy invoices annexed to the Supplementary Affidavit of the Objector, it seems to this Court that there is real connection as between those items and the proclaimed items. Further, I cannot accept the submission of the Decree Holder that the Title Deed exhibited as “MK 2” to the Affidavit in support of the Application is in the name of Ruby Holdings Ltd. That company might have been the initial registered owner but it is quite clear therefrom that there was a Transfer to the Objector registered on 18th March 1991.

11. In this Court’s Ruling in **HCCC No 561 of 2011** (as above), I had the following to say:

**“To the Court’s way of thinking, the Objector’s residential premises have been invaded unnecessarily and most probably, illegally. It is quite clear, even from the evidence of the Plaintiff/Decree holder itself, that the Objector has had nothing to do with the First Judgement Debtor Company since 2006. That was over seven years ago. I consider it to be outrageous that the Auctioneer, at the prompting of the Plaintiff/Decree Holder, could go to the Objector’s residential home on the tenuous premise that she had a connection with the First Judgement Debtor company all those years ago. Indeed, the Objector has owned her home since March 1991 and this Court accepts her evidence to the extent that she maintained that none of the Judgement Debtors herein had any interest whatsoever in the attached goods and that none of them was a tenant, lessee of or a lodger in the premises.”**

That Ruling resulted from the Objector’s Notice of Motion in that suit dated 20th September 2013. In my view, that Ruling holds good in this matter. The Decree Holder herein relies upon reports from so-called investigators dated March and June 2011, three years ago now. That fact alone should have put the said Keysian Auctioneers on notice when proclaiming the household goods. I hold no store by the Decree Holder’s submission that the Objector had detailed that such goods were worth Shs. 6, 642,211.90. That figure certainly was not contained in either of the Affidavits sworn by the Objector but in Ground No. 4 of the Application before Court and is so obviously a mistake when one bears in mind the figures given for the attached goods in the Auctioneer’s Proclamation dated 17th June 2013.

12. In conclusion therefore, I have no hesitation in allowing the Notice of Motion of the Objector dated 24th June 2013 with costs.

**DATED and delivered at Nairobi this 10<sup>th</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**