



REPUBLIC OF KENYA
HIGH COURT AT ELDORET

Civil Suit 161 of 1994

WYCLIFFE JUMA KHAEMBA..... PLAINTIFF

-versus

ALLAN KARANJA..... DEFENDANT

RULING

The plaintiff/decre holder was granted- judgment against the defendant herein. The defendant applied for stay pending appeal and conditional stay was granted to him. He defendant failed to comply with the conditional stay and when he came for an extension of time within which to comply with the conditions the same was refused.

The decree holder levied execution and attached motor vehicle registration No.KAC 161H. The objector herein National industrial Credit Bank Limited lodged objections to the attachment and filed an application under order 21 rule 57 of the Civil Procedure Rules and all enabling provisions of the law seeking orders that the attachment of the-said motor vehicle be lifted and that the said motor vehicle be released to the objector and that costs of the application be borne by the plaintiff and the defendant.

Notice of objection was issued to the plaintiff/decre holder with a request to intimate whether they wished to proceed with the attachment. The decree holder intimated that he wished to proceed with the attachment hence these objection proceedings. The evidence for the objector was adduced through one of its Managers in charge of the credit, collections. The witness outlined and produced documents to court exhibits 1-6.

The brief facts are that the vehicle was originally owned by Datoos Associated Agencies. The defendant purchased it on hire

- purchase terms being financed by the objector herein. It is admitted by the objector that all these hire purchase instalments
- were fully paid. The objector's witness informed the court that there was an option to purchase after completion of payment of the rentals. That the defendant did not exercise the option to purchase and therefore the vehicle remained, the property of the objector. The option to purchase is contained in clause 4 of the hire purchase agreement which I have perused from the deponent of the respondent/plaintiff through the auctioneer the rentals were fully paid as at 18/5/96. Since this date to the date of attachment the vehicle was in the possession, care and control of the defendant.

The attachment was effected on 17/4/97 as per proclamation in the court file. No objection was lodged by the defendant to the effect that the property was not his. Two months later, the property was advertised for sale. This advertisement prompted these objection proceedings. The objector has come to lay claim

on to this vehicle because on 4/4/97 the defendant telephoned them and asked to be advanced a loan facility. It was stated that the defendant was their valued customer and they did not require much formalities from him. On 11/4/97 upon the objector's request the property was valued by the Automobile Association of Kenya whose value was placed at Kshs. 1,435,000/= on 16 /A/91 the defendant made the request in writing which was accepted. This was followed by a creation of a chattels mortgage of the suit vehicle. But before the chattels mortgage was executed the defendant was sent the cheque on 21/4/97 by which time the vehicle had already been attached by the plaintiff. The chattels mortgage was executed on 21/5/97.

When the objectors witness was cross-examined in court she agreed that as at 16/4/97 the defendant had not exercised his option to purchase the vehicle. Further that the cheque was released on 21/4/97 before the chattels mortgage had been executed because the defendant was a valued customer who had other financial facilities with them while other requests from him were pending processing and there was no fear' that he could run away with their money, she agree that section 4 of the chattels Transfer Act of the Laws of Kenya shows clearly that chattels mortgage becomes effective from the date of registration. She was firm that the defendant never informed them of the attachment till after the property had been advertised for sale. She also informed the court that currently the defendant is not paying the instalments but she does not know why.. That after the attachment is lifted .and the vehicle repossessed is when the defendant will explain why he has defaulted.

In addition to the foregoing the objector's counsel also made the following submissions to court to stress their claim:-

1. That the objection is well founded as they just extended the chattels- mortgage.
2. That the vehicle had been the subject of a hire purchase agreement and the defendant did not exercise his option to purchase and so it remained the property of the objector.
3. That even if the property is sold the objector will have a priority over the proceeds realized and whatever will be realized will not be enough to cover their claim and that of the plaintiff .
4. That the chattels mortgage was presented in time and that is why it was registered.
5. That documents exhibited show that the vehicle was still registered in the joint names of the defendant and objector..

On the basis of the foregoing the objection counsel urged the court. To uphold, the objection proceedings with costs to them.

The plaintiff's/deed holder's counsel relying on the grounds of opposition' and replying affidavit sworn by the auctioneer has opposed the objection proceedings on the grounds:-

1. That notice of objection came two months after attachment on the basis of advertisement for sale.
2. That on 21/4/97 when the cheque was released the vehicle was not under the care and control of the objector and he could not pass any interest.
3. Attachment was before the execution of the chattels mortgage.
4. The defendant was required to report the attachment within 48 hours of the 'attachment but he only reported after the vehicle had been advertised for sale.
5. That section 4 of the chattels Mortgage Act Cap.28 Laws of Kenya states clearly that the effective date of a chattels mortgage is the date of registration. The chattels mortgage herein was registered on 21/5/97 long after the vehicle had been attached.

6. That the objectors claim herein cannot be maintained because section 79 allows attachment of such goods and the objectors claim can only be limited to what was due to them as at the time of attachment and from their own admission nothing was owed to them as at the time of attachment in this case.

In reply counsel for the objector submitted:-

1. That objection can be lodged at any time.
2. That particulars of fraud alleged have not been given and if there is any fraud then it is on the part of the defendant and this cannot be visited on to the objector who is an innocent party.
3. Since the judgement creditor is not claiming any legal interest in the property he will lose nothing if the objection is upheld as he can have recourse to other modes of execution provided for under the law.
4. That the objector had an interest in the property which is not divisible.

From the reading of the depositions of both parties the evidence of the objector's witness and oral submissions of both counsels it is clear that there is no dispute that the hire purchase instalments were in fact completed in 1996, that the defendant had an option to purchase the said property after completion of the payment of the instalments...There is also no dispute that as at the time of attachment there was nothing owing to the objector from the defendant in respect of that vehicle. In fact the defendant came and requested for refinancing after the attachment or a day after the attachment and the objector released the money [even before the chattels mortgage had been executed and registered. The key consideration here is whose property was the suit vehicle as at the time of attachment. The stand of the {objector is that since the defendant did not exercise the option to purchase the vehicle then the vehicle remained their sole property and it could not be attached in satisfaction of the defendant's liabilities and secondly if the same is attachable then their interest ranks in priority over that of the attaching plaintiff/decree holder.

The stand of the plaintiff/respondent on the other hand is that after completion of the payment of instalments of the property the vehicle went to the defendant and since it was attached before the subsequent hiring the same was rightly attached and it should be sold in satisfaction: of the decree herein and if the objectors have any claim to make as owed to them by the defendant they should have recourse to other securities deposited with them and load the amount claimed on to those other securities and if the same is over and above what has been secured then they can file a suit to claim the balance.

Indeed clause 4 of the Hire purchase Agreement exhibited in these proceedings allowed or gave the defendant the option to purchase. I note from the second page of that agreement that the option to purchase fee was Kshs.1,000/= which was added to the amount for the rentals. It follows that all that the defendant needed to do after completing the rentals is to process documentation. In the bundle of documents produced by the objector as exhibit 2 I came across form c which is a transfer of ownership of motor vehicle or tractor. The same was in respect of motor vehicle registration No.KAC 161H. The form is duly stamped and signed by an official of the objector and in it they were transferring the subject

Vehicle to the defendants. This form appears to have been sent to the Registrar of Motor Vehicles to process the transfer. This is evidenced by a letter Ref.MM/N6.3/18 dated 18/4/97 addressed to the Registrar of Motor Vehicles Nyayo House, Kenyatta Avenue, Nairobi. The contents of the letter which I reproduce are as hereunder:-

"Dear Sir,

VEHICLE REG.NO. KAC 161H. AGREEMENT NO 5,0/003122/18

Please ignore and treat as cancelled the transfer of the above vehicle issued on 30th July 1996 as the vehicle has been refinanced for further period of 1 year.

Yours faithfully.

National Industrial Credit Bank Ltd.

Moses Maigua

New Business Manager"

The contents of these two documents show clearly that the defendant exercised the option to purchase and that is why the transfer form was executed in his favour and in fact if there had not been delay in the processing of the transfer the defendant would have been registered as the sole owner. This state of affairs continued until 18/4/97 when that process was cancelled in the period in between 30th July 1996 and 18th April 1997 the legal owner of the property was the defendant and what remained was legal documentation. I am sure that if the said vehicle had been involved in an accidents giving rise to a claim of damages from the defendant the objector could have rightly disclaimed . liability to indemnify.

This is the period in which the,vehicle was attached. I therefore agree with the submissions of the plaintiff's counsel that *as at* that date the property of the vehicle was the defendant's save for documentation of the transfer documents.

The subsequent events show that the defendant set in motion the refinancing process after attachment as we have no evidence of the telephone conversation between him and the objectors witness of 4/4/97. This fact is further fortified by the fact that the letter asking for a refinance though dated 16/4/97 is not stamped with the receipt stamp of the objector and the possibility that it was slipped in to fill up the gap in the processing of refinancing cannot be ruled out.

Further anomalies in the process are the fact that the money was released before the chattels mortgage was executed by the defendant and having agreed that the effective dated of a chattels mortgage is the date of registration it follows that the money released was and still is unsecured as I have not seen any clause in the chattels mortgage showing that the same was to operate retrospectively to cover money released earlier on. All these factors go to show that there appears to have been some mischief on the part of the defendant perpetrated either with the knowledge of the objector or not.

In conclusion, this court after assessing all the relevant factors pertaining to this application and after perusing the relevant documents concludes that:-

1. The defendant exercised the option to purchase and the property passed on to him save for documentation.
2. As at the time of attachment the property in the vehicle was in the defendant save for documentation and it was rightly attached in satisfaction of the decree herein.
3. The refinancing process was set. in motion to defeat the process of execution evidenced by the fact that soon thereafter the defendant defaulted in payment.
4. As at the time of executing the chattels mortgage the defendant's interest in the said motor vehicle had already been attached and the attachment ranks first in priority and in the event of the vehicle being sold the plaintiff's decree should be satisfied first and if there is any balance left the same can be paid over to the objector. "
5. That there appears to be some mischief on the part of the defendant to cheat both the objector and plaintiff out of this vehicle evidenced by the defendant's failure to report the attachment to the objector and his going ahead to process the mortgaging of property already attached and then thereafter default in the payments of instalments and even fail to defend the proceedings herein.
6. That the objector has to fall back onto other securities held by them from the defendant to cover their money and the amount herein over and above what will be paid to them.

7. These proceedings were occasioned by the defendant and he will be called upon to pay the auctioneer's charges to be agreed and or taxed failing which the auctioneer will be at liberty to execute the same.

In the premises and for the reasons given I am inclined to dismiss the objection proceedings with costs to the plaintiff/respondent.

2. The plaintiff/decree holder herein will have a first lien over the proceeds of sale of the motor vehicle.

3. The defendant will pay the auctioneer's charges to be agreed or taxed failing which the auctioneer will be at liberty to execute.

Date at Kitale this 15th day of December 1997

Read and delivered at Eldoret this 13th day of February 1998.

R. NAMBUYE,

JUDGE