



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE NO 823 OF 1991
MATHIGU..... APPLICANT
VERSUS
MWAURA..... DEBTOR

RULING

This is an application by the objector to the attachment of motor vehicle KXK 245 in execution of the decree in this suit. The application is brought under order XXI r 56 of the Civil Procedure Code.

The objector is Stephen Sururu Ole Mpakuanik. By his supporting affidavit he claims that the said motor vehicle is his property as evidenced by the log book annexed to it as Exh F. The judgment debtor is Paul Njenga Mwaura who died after the decree had been passed against him. The objector avers in paragraphs 6 and 7 of his affidavit as follows:

“6: That at the time of attachment of the said vehicle the late Paul Njenga who was a family friend had borrowed the said motor vehicle as being an officer in the Armed Forces and did not need the said motor vehicle frequently as most of the time I was out of town and I was provided with transport.

7: That my agreement with the late P N Mwaura was that he was to maintain the vehicle and have the use of the same provided that he paid me the sum of Kshs 10,000/= for the use which was or to the going rates of car hires.

8: That I had not nor did I have the intention to relinquish the ownership of the said motor vehicle as I had bought the same as an asset and reminder of my stay in United Kingdom.”

In his affidavit decree holder asserted that the objection to the attachment is a fictitious one. Firstly, he relies on the judgment debtor’s own handwritten letter dated 27th November (Exh FGMI) in which, *inter alia*, he had said:

“I request you to instruct the auctioneer to release my vehicle as I have agreed and I am prepared to pay the amount claimed in this case as it is a debt I am aware of. I am prepared to repay the amount by monthly instalment.....”

Secondly, the decree holder relies on the compromise settlement which was worked out before the attached goods, which, he says, included the subject matter of these objection proceedings, were released to the defendant by the court broker. It is also instructive to note that the vehicle KXK 245 is one of the

many items recorded in the court brokers' proclamation of sale which was filed in this case on the 10th May 1992. One of the conditions which was incorporated in the compromise settlement was "the goods attached were to remain under attachment but in custody of the defendant and the defendant not to part with their possession or after their ownership in any manner after likely to affect attachment and sale." The last clause reads:

"In default of any one clause as above the plaintiff to be at liberty to execute the decree as he deems fit and in particular to sell the goods attached."

Mr Kabuki, the advocate, who signed that consent settlement on behalf of the 3 objectors testified in the present objection proceedings to the effect the objector herein was one of his three clients on whose instructions he acted when he signed the compromise settlement.

The issue I have to determine is whether the motor vehicle should remain attached in execution of the decree. If it did not for all practical purposes belong to the judgment debtor why did the objector not ensure that it was excluded from the clause in the compromise by which it remained attached. I give weight to this aspect. I am also fortified in that view by the judgment debtor's own unequivocal admission in his letter to the plaintiff that the vehicle was his property. Therefore, I hold that the mere fact that the log book in respect of the vehicle was still in the objector's name does not at all show that the vehicle was still his property. I am satisfied that it was properly and validly attached. The objection thus fails and is dismissed with costs.

Dated and delivered at Mombasa this 30th day of August, 1993

I.C.C WAMBILYANGAH

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JUDGE