



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 969 OF 1990

PRECAST PORTAL STRUCTURES APPLICANT

VERSUS

KENYA PENCIL COMPANY LTD

DILIP M PATEL

LIVINGSTONE ATEBE MARITA..... RESPONDENT

RULING

The application dated 8th October, 1991, brought by summons in chambers under order XXI rule 57 of the Civil Procedure Rules, seeks an order that the attachment made by the plaintiff on the property known as Nakuru Municipality Block 8/73, be raised and the prohibitory order registered against the title of the said plot be removed.

The application is supported by an affidavit sworn on 7th October, 1991, by Livingstone Atebe Marita, an objector. In the affidavit it is said, putting it briefly, that the objector and one Dilip Patel bought the plot in 1991 from the defendant in this suit and obtained a certificate of lease. He deponed that the plot is therefore wrongfully attached and that the prohibitory order registered against the title pursuant to the attachment is unlawful and should be removed.

According to the said surporting affidavit, this application is necessary because the plaintiff's advocate has intimated that he wishes to proceed with the sale of the said plot.

Shantilal Shah, one of the directors of the plaintiff company swore an affidavit on November 15, 1991, in reply. It is a long affidavit, but it comes to this, that the purported transfer of the property attached was not in good faith and was intended to defeat the anticipated decree against the defendant. In short that it was a fraudulent transfer.

At the hearing of this application Mr C S Joshi for the applicant argued that the objector was an innocent purchaser, and that there was no fraud.

Mr Bhaskar Seth for the decree-holder opposed the application, and went through the replying affidavit to justify the continuation of the attachment and prohibitory order.

Although the application is stated to be under the fifty-seventh rule of order 21, sight must not be lost of the fact that the normal course in objection proceedings begins at rule 53 of the same order. That rule

allows any person who claims to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree, at any time prior to payment out of Court of the proceeds of sale of such property, to begin objections to the attachment. He commences by giving notice in writing to the Court of his objection to the attachment of the property. Such notice sets out shortly the nature of the claim which such person makes to the whole or portion of the property attached. The following rules deal with what happens after a valid notice has been given, and rule 157 merely prescribes the procedure to be followed after the attaching creditor intimates that he proposes to proceed with the attachment, and the objector is directed by the Court to take proceedings to establish his claim. The rule says that such proceedings by the objector shall be by summons in chambers supported by affidavit in the suit in which the application for attachment was made. The summons must be served on the attaching creditor and, unless the Court otherwise directs, on the judgment – debtor. The summons operates as a stay of attachment unless the Court otherwise orders.

The rules do not state what questions are to be dealt with when the objection proceedings are ultimately brought up for hearing. Nor do the Rules say the nature and scope of the determination at the hearing. I take it from the general tenor of the provisions of the Civil Procedure Act and the Rules, relating to execution, that at the hearing of objection proceedings, an inquiry shall be undertaken by the Court whereby the Court shall investigate and ascertain matters which are material to reaching a decision as to whether the objection should be sustained and the execution stopped.

The inquiry is as to the rights of the parties to the objection proceedings. The rights are the rights of the decree – holder to execute the decree in the chosen mode, and the right of the objector is the right to thwart the execution undertaken by the decree-holder.

Although the Rules do not prescribe the extent to which the investigation should go, in a proper case there should be as full an investigation as if a suit were instituted for the purpose of trying the question. It is not possible to define the amount of enquiry which constitutes an investigation. In general, however, the questions to be decided include, whether the property attached is liable to attachment and sale in execution (section 44 of the Civil Procedure Act), any question relating to right title or interest in the property, any questions of trust and *bona fides*, and any questions of fraud.

The objector must adduce evidence to show that at the date of the attachment he had a legal or equitable interest in the property. For this purpose, he may raise an objection on the ground, *inter alia*, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached. So, a mortgagor can bring an objection on the ground that his interest in the property, *viz*, the equity of redemption cannot be attached and sold in execution of a decree against the mortgagee.

The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

(1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or

(2) that the objector holds that property on his own account.

But where the Court is satisfied that the property was, at the time of attachment, held by the judgment – debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-debtor, or that ownership has changed whereby the judgment – debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the Court shall dismiss the objection .

The Court takes into account the grounds of objections raised, and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.

In the instant proceedings, it is agreed on both sides, that before the suit was filed, and, indeed, before judgment was obtained against the defendant in favour of the plaintiff, the plot which is the subject matter of the objection proceedings, belonged to the defendant under a leasehold. After judgment was obtained against it, the defendant sold the plot to the objector and another person. This happened before execution of the decree was taken against the defendant (judgment – debtor).

The replying affidavit opposing the objection states that the defendant knew well that the judgment had been passed against it, and that the only attachable property it had was this plot, whereupon it sold the plot to the objector and another person. The deponent for the decree-holder further says in the affidavit, that on inquiry made by him, it was found that the other purchaser was a brother of the director of the judgment – debtor company which had sold the plot.

It is also on record, that after attachment and a prohibitory order was registered against the plot, and, indeed, after the plot had already been sold out by the judgment – debtor, Manibhai Maganbhai Patel, a bearer of the power of attorney from a director of the judgment – debtor company, swore an affidavit on 3rd September, 1991, stating on oath, that the judgment – debtor company intended to file an appeal in this suit and that “if the said parcel of land is disposed off, then the judgment – debtor will suffer unreparable damages, and the said appeal may not be of any help to them”. Now, if it is true that the judgment – debtor company had sold the plot to other people, and that it had no interest in the plot, how would it suffer irreparable damage by the disposal of a plot that was no longer its plot? This appears in paragraph 11 of an affidavit marked “BHS 7”, attached to the replying affidavit. The said statement on oath, on behalf of the judgment – debtor, gives a reasonable conclusion that the objector and the other registered owner of the lease were merely holding the plot in trust for the judgment –debtor, or that the judgment – debtor effected the transfer and change of ownership merely to put the plot beyond the reach of execution by attachment and sale of the property.

In the face of these sworn facts, it was not enough for Mr C S Joshi for the objector to make a casual dismissal of these matters by saying in passing “Just because judgment has been entered it does not prevent a party from dealing in his property”. (see his submissions). That may be true, but here was not a matter of “just because”. The facts on the decree-holder’s side go beyond “Just...” The objector needed to explain them away; it did not attempt to do so, and the Court believes, on those facts, that the property is held on behalf of the judgment –debtor; or that it was sold in order to defeat the legal process; and that the objector was attempting, knowingly, to assist the judgment – debtor in this scheme. There was no *bona fides* in the transfer of the leasehold from the judgment – debtor, only on paper.

For these reasons, I disallow the objections, dismiss the proceedings and prayers therein, and allow the attachment and prohibitory order to remain unreleased, and execution may proceed. The objector is to pay the costs of these proceedings to the decree-holder. Orders accordingly.

Dated and delivered at Nairobi this 1st day of December, 1993

R.C.N. KULOBA

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JUDGE