



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 109 of 2010

HASSAN ALI OSMAN.....PLAINTIFF

VERSUS

ABDULRAHMAN M. BASHEIKH

MOHAMED AHMED MOHAMED.....DEFENDANTS

RULING

1. For determination is the Notice of Motion dated 16th January 2018 by the Objector, Ali Ahmed Mohamed. The objector seeks stay of execution of warrants of attachment of movable property dated 18th December, 2017 issued pursuant to and in execution of certificate of costs dated 15th November, 2017 and that the said warrant of attachment and all consequential order thereto be set aside.
2. It is the objector's case that the proclaimed goods being motor vehicle Registration Number KBY 054 U Toyota Hilux and other personal items belong to him and does not form part of the property of the judgment debtor. The objector has attached a copy of the logbook for motor vehicle KBY 0544U and VAT certificate of Registration in his name.
3. The objector avers that he was not a party to **Appeal No.109 of 2010** which pursuant to certificate of costs dated 11th September 2017 and pursuant to warrant of attachment dated 18th December 2017 Beyond Auctioneers proclaimed the said motor vehicle Registration No.KBY 054U. The objector further avers that he is not indebted to the decree- holder in any way and stands to suffer irreparable loss if the auctioneer takes away the proclaimed motor vehicle and other goods which the objector alleges are his tools of trade.
4. The objector further states that the certificate of costs was a nullity ab initio as the instructing advocates Kedeki & Company Advooates are irregularly on record for the reason that they never complied with the provisions of Order 9 of the Civil Procedure Rules by seeking leave before coming on record for the decree holder, the suit having been determined and Bill of Costs filed by the firm of V.M Maina & Company Advocates.
5. The application is opposed by the Appellant/Respondent who filed a replying affidavit sworn by himself on 12th March 2018. He depones inter alia, that he appointed the firm of V.W. Maina & Co. Advocates to act for him in CMCC No.2304 of 2009 in the year 2009. The case proceeded and finally came for appeal which is now before this court. He avers that during the appeal, his advocate, Mrs. Maina informed him of her intention to be mostly in Nairobi and therefore will not always be available in Mombasa. That she then introduced the appellant to Ms. Kedeki Advocate who has been acting for him in the appeal. The appellant states that he is surprised that all this while Ms. Kedeki Advocate did not file a notice of change of advocate as required by law and is shocked that this is the major reason why the respondents herein is holding on to so as to frustrate the appellant from receiving his costs of the suit.
6. The appellant avers that the process server has always effected service upon the Respondents at the objector's premises and that all the while the objector has never raised any issue. It is his contention that such a technicality cannot be used to deny him his rightful claim from the applicants and that this is just another way to continuing to frustrate him. He states that the objector's advocate does not reveal to this court the position of the appellant in regard to payment of the respondent's costs.
7. Directions were given that the application be canvassed by way of written submissions. Only the objector filed his submissions within the time granted by the court and agreed by the parties.
8. I have considered the application. It is the objector's case that he is not a party to the proceedings and that his assets have been wrongfully proclaimed. The objector has produced the logbook for motor vehicle Reg. No.KBY 054U. As is evident, the said motor vehicle, whose logbook the objector produced, belongs to the objector. Section 8 of the Traffic Act stipulates as follows:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

9. In this case, there is no contrary evidence to disprove that produced by the objector. On the face of the documents produced before me, I find that the said motor vehicle is the property of the objector.

10. Besides the motor vehicle Reg. No.KBY 054U, the objector has also averred that the other goods that were proclaimed belong to him. The only reason the appellant had given for the said proclamation being carried is that the process server has always effected service upon the judgment debtor at the objector's premises. In my view, service of documents can be effected anywhere the party required to be served can be found. From the appellant's averments in the replying affidavit, it is admitted that the goods were proclaimed at the objector's premises. The court has already found that motor vehicle KBY 054U is the property of the objector. In the circumstances of this case, I find that the objector has discharged the onus of proving that the other proclaimed goods are also his. In arriving at this conclusion, the court needs to emphasize that the mere fact that the judgment debtor was served at the objector's premises was not good reason enough (as was suggested by the appellant) to justify the attachment of the objectors goods, property or assets. I do not think it is necessary to indulge into the issue of representation.

11. In the result, find that the objector's Notice of motion dated 16th January 2018 has merit. The same is allowed. The warrant of attachment dated 10th January 2018 is set aside. I direct that the objector's motor vehicle Registration No.KBY054U and the properties specified in the proclamation dated 10th January, 2018 should not be attached and if already attached, should be released forthwith to the objector.

12. The objector shall have costs to be borne by the judgment creditor/Appellant.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms Nabwana for respondent and holding brief Kaburu for objector

No appearance for Appellant

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19