



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 6 of 1997**

**JENTA MAKOKHA BULUMA.....PLAINTIFF**

**= VERSUS =**

**ESAU NAMULANDA.....1<sup>ST</sup> DEFENDANT**

**BENARD OKWARO BALONGO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 19/1/2018, **JENTA MAKOKHA BULUMA** (hereafter called “objector”) filed an objection opposing a Notice to show cause filed by the decree holder – **BENARD OKWARA BALONGO** and **ESAU NAMULANDA** – expressing intention to sell land parcel No. BUKHAYO/KISOKO/370 (“suit Land” hereafter) by public auction. The intended sale arose from failure and/or refusal by one COSMAS BULUMA to pay costs to the decree holders in this case. The sale had been agreed as suitable option on 11/10/2017 if payment of costs was not forthcoming from Cosmas Buluma within a given period.
2. From the objection as filed, the objector is presently the legal representative of the deceased party for purposes of this matter. It is clear that the deceased party was her husband. And though not expressly stated in the objection, it is inferred that the suit land comprised his estate. It appears to be the objector’s position that the costs said to give rise to the intended sale relate to the living party, not to the deceased, and therefore the suit land, being of the deceased estate, should not be sold.
3. The decree holders responded to the objection vide a replying affidavit filed on 24/1/2018. To the decree holders, the objection was admitted to filing irregularly and is, in any case, overtaken by events. And it is so overtaken because it is already heard and orders made. It also comes out in the response that COSMAS BULUMA had offered to pay costs to the tune of 30,000/= monthly. Default in payment would lead to sale of his share of the suit land. That share is said to be half ( $\frac{1}{2}$ ) of the size of the suit land. Default occurred and hence the intended sale.
4. According to the decree holders, the sale is for half ( $\frac{1}{2}$ ) share belonging to COSMAS, not for the whole land.
5. The objection was canvassed by way of written submissions. The objector’s submissions were filed on 19/1/2018. The objector submitted, *inter alia*, that the objection is lawfully brought, the law having provided for it and, additionally, counsel for the decree holders having mentioned it as a suitable option in case No. ELC No. 143 OF 2017. In the case mentioned (ELC No. 143 of 2017) the objector and others have sued the decree holders and their counsel in a bid to stop the same intended sale in this suit.
6. From the objector’s submissions, it is alleged that the deceased party owned the suit land. He left behind some beneficiaries and the estate is not yet shared out or distributed. Probate proceedings (P&A No. 613 of 2017) are still on-going. The objector asked the court to uphold or allow the objection.
7. The decree holder’s submissions were filed on 14/2/2018. It was reiterated that the Notice to show cause is already heard and determined. It was emphasized that what is targeted in the intended sale is Cosmas half ( $\frac{1}{2}$ ) share in the suit land. To the decree holders, the objector is being used by Cosmas to frustrate execution. It was submitted ultimately that the objection lacks merits and should be therefore dismissed.
8. I have considered the objection, the response made, rival submissions and the proceedings generally preceding the filing of Notice to show cause. The objection filed falls short of some procedural requirements. And because of this the court was reluctant to issue the required notice to the attaching creditors/decreed holders requiring them to intimate whether they intended to proceed with attachment wholly or in part.
9. I think I need to explain: The law providing for objection is contained in Order 22 Rules 51, 52, 53, and 54. Of relevance here is rule 51

and the sub-rules thereunder, which are as follows:

**Order 22 rule 51**

**(1) Any person claiming 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 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 the decree holder of his objection to the attachment of such property.**

**(2) Such notice shall contain the objector's address for service and shall set out 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 parties.**

A holistic reading of this section shows that the notice should be accompanied by an application supported by an affidavit setting out the nature of the objector's claim. The notice and the application should be served within seven (7) days on all parties.

10. In the matter at hand, the court saw the notice but did not see the application. As I write this ruling, there is still no application. And that is why the court hesitated to stay execution and also issue a Notice to the attaching creditor (decree holders) requiring indication from them whether they intended to proceed with execution wholly or in part.

11. Even then however, the notice of objection reached the decree holders and they responded by filing a replying affidavit. No issue was raised as to non-compliance with procedure. I think it is good in the circumstances to proceed with the matter as presented by both sides. In any case, the statute under which this court operates – Environment and Land Court Act, No. 19 of 2011 – at Section 19(1) enjoins that the business of the court should be handled and expedited without undue regard to procedural technicalities.

12. The process for the intended sale of the suit land was started vide an application for execution of decree filed on 22/6/2017. The application requires a Notice to show cause to be issue to show **“WHY L/P NO. BUKHAYO/KISOKO/370 SHOULD NOT BE SOLD IN EXECUTION OF DECREE”**. It is important to realise that the application is about the sale of the entire suit land, not just a half ( $\frac{1}{2}$ ) share belonging to Cosmos, the judgement debtor. And resulting from that application was Notice to show cause dated 23/6/2017 where COSMAS was invited to appear in court on 23/8/2017. It would appear that nothing much happened in court on that date and another date was taken at court registry. It is important also to note here that the Notice to show cause was about sale of the whole of the suit land if the objector failed to pay the sum of money indicated on the notice.

13. It is regarding that notice that the objector filed the objection herein. At that point, the manifest intention of the decree holders was to sell the entire parcel of land and the objection raised by Jenta, the objector, was filed on that basis. In the court's view, Jenta was right to react the way she did at that point in time. True, there is a letter dated 14/11/2017 addressed to the court's deputy registrar requiring issuance of warrants of attachment for sale of  $\frac{1}{2}$  share belonging to COSMAS, the judgment debtor. But that was not communication to JENTA or COSMAS and it does not appear that the warrants asked for were issued and/or served. Land issues are sensitive and abundant caution should have prevailed.

14. I take the position that at the time the objection was filed, and given the information the objector had, it was merited. And it still is because we are dealing with the communication given to COSMAS and/or JENTA at the time. But I must observe that had the decree holders not goofed in the manner they processed the application for execution and the notice to show cause, what I see on court record as their response and submissions has other weighty things to consider. But that is not what should guide me now. The overriding consideration now is that the communication given to the judgement debtor and/or the objector was misleading. That is the information acted on by the objector and she was right to do so.

15. In light of all this, I uphold the objection and allow it. Costs in the cause. I may need to point out that the decree holders are still at liberty to start the process of execution on a sure and proper footing. If the process is again objected to, the court will again be duty bound to consider its merits.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of October, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Objector Present

Counsel for Respondent Present