



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 206 of 2013

1. PAOLA TARLAZZI (*suing through his attorney and or agent*)

2. CARLA TARLAZZI.....PLAINTIFF

=VERSUS=

ROBERTO CIAVOLELLA.....DEFENDANT

R U L I N G

1. This Ruling is in respect to the Plaintiff's/Judgment Creditor's Notice of Preliminary Objection dated 15th June, 2016.

2. In the Notice of Preliminary Objection, the Plaintiff has averred that this court lacks jurisdiction to determine the Defendant's Application dated 31st May, 2016 because it is *res judicata* the Application dated 4th March, 2016 and that the Application dated 31st May, 2016 is frivolous, vexatious and an abuse of the process of the court.

3. The Plaintiff's advocate submitted that the Application dated 31st May, 2016 contravenes the provisions of Section 7 of the Civil Procedure Act; that the issues that have been raised in the Application dated 31st May, 2016 were dealt with by this court in its Ruling of 20th May, 2016 and that the issues that have been introduced in the current Application ought to have been raised when the Application dated 4th March, 2016 was argued.

4. The Plaintiff's counsel submitted that the Defendant's intention is to delay the execution process; that the prayers in the Application before court are the equitable and that those prayers cannot be granted because the Application has not been filed in good faith.

5. The Defendant's advocate submitted that the Application dated 31st May, 2016 is not *res judicata*; that the earlier Application prayed for the stay of execution; that it was after the Judgment Creditor advertised the sale of the Defendant's share that the Defendant realised that the Plaintiff's intention was to sell all the shares belonging to the Defendant and that the issue of selling all the shares has never been ventilated.

6. I have considered the Affidavits, the advocates' submissions and the authorities.

7. In the Application dated 4th March, 2016, the Defendant sought for a temporary stay of execution of warrants of sale of property by public auction of the Defendant's 12 shares in Lilac Limited, 375 shares in

Voaxhall Limited and 350 shares in Melville Limited pending the hearing interpartes as to whether Villa No. 7 and villa No. 8 could be sold to satisfy the decree.

8. It is therefore obvious that by the time the Defendant was filing the Application dated 4th March, 2016, the Plaintiff had already attached 12 shares in Lilac Limited, 375 shares in Voax Hall Limited and 350 shares in Melville Limited.

9. All that Plaintiff wanted in the Application of 4th March, 2016 was for the stay of sale of those shares, and instead to be allowed to sell villa Nos. 7 and 8 and pay off the Plaintiff.

10. Indeed, in his Supporting Affidavit, the Defendant annexed the copies of the Warrant of Sale of the shares and Warrant of attachment of movable and a prohibitory order.

11. After hearing the Application dated 4th March, 2016, this court dismissed it and stated as follows:-

“It is not for this court to direct the Plaintiff on which movable or immovable properties of the Defendant he should have attached for the purpose of satisfying the decree of this court.....At the same time, the court cannot stop the Plaintiff to proceed with the process of attaching and selling the Defendant's shares if, in the Plaintiff's view, that is the most efficacious mode of execution.”

12. By the time the Defendant filed the Application dated 4th March, 2016, he was aware that the Plaintiff had attached his shares. If the shares that had been attached exceeded the decretal amount, then the Defendant should have raised the issue when it argued its Application dated 4th March, 2016.

13. The Ruling of this court allowed the Plaintiff to proceed with the sale of the Defendant's shares with a view of satisfying the decretal amount. The court cannot now stop the said sale just because the Defendant has realised that the value of the shares exceed the decretal sum. That, in my view, is an abuse of the court process.

14. If indeed the value of the shares that have been attached exceed the decretal amount, then the most the Defendant can do is to wait for the sale of the said shares in a public auction then claim for any amount that is over and above the decretal amount from the auctioneer.

15. In the circumstances, I agree with the Plaintiff's advocate that the issues raised in the current Application are issues which were raised, or ought to have been raised in the Application dated 4th March, 2016. The current Application is therefore res judicata.

16. For those reasons, I dismiss the Defendant's Application dated 31st May, 2016 with costs.

Dated, signed and delivered in Malindi this 1st day of **July**, 2016.

O. A. Angote

Judge