



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 210 OF 2009

DUNCAN KABUI.....PLAINTIFF

VERSUS

SAMUEL BEDE OGEMBO..... DEFENDANT

RHODA KASCHANA OGEMBO.....OBJECTOR

RULING

The Notice of Motion before the court for determination is one dated 1st July 2013 filed by the Objector herein, seeking orders for the raising of the proclamation as to the whole of the Objector's property. The grounds for the Notice of Motion are that the Objector is the exclusive owner of all the attached goods and is not a party to the proceedings before this court. Further, that she has no relationship with the Defendant save for the purchase of the aforesaid goods.

The Objector in a supporting affidavit she swore on 1/7/2013 stated that the Claimant/Judgment debtor herein has served a proclamation of attachment/repossession of movable property dated the 17th June 2013, and that she is the legal owner of the proclaimed goods namely assorted furniture; one tractor registration number KUB 104; one motor vehicle registration number KUH 110; and one motor vehicle registration number KYP 228. She further claims that she bought all the above properties in a sale agreement entered between her and the Defendant/Judgment Debtor herein dated 20th August 2012, to help the Defendant/Judgment Debtor clear some of his debts. The Objector attached copies of the said proclamation of attachment, and of the sale agreement entered into with the Defendant.

The Plaintiff/Decree Holder opposed the said Notice of Motion in a replying affidavit sworn on 15th July 2013 wherein he stated that that the sale agreement annexed to the Objector's application is not evidence of ownership, and that the Objector has failed to demonstrate any interest in all the attached goods. Further, that before undertaking the execution process, he commissioned an investigation on the Defendant and his attachable assets, and that it is clear from the aforesaid investigation report that the Defendant's attachable assets are free and clear and that the Objectors' alleged interest is not registered anywhere. The Plaintiff attached a copy of the investigation report dated 17th May, 2013.

The parties were directed by the court to file and exchange their written submissions on the Objector's Notice of Motion. The Objector's counsel relied on submissions dated 22nd November 2013 and filed in court on 25th November 2013, wherein he argued that the Plaintiff/Decree Holder should look for the properties that are rightfully the Defendant/Judgment Debtor's to attach in satisfaction of the decree, and relied on the Court of Appeal decision in **Stanley Kangethe Kinyanjui vs Ketter & 5 Others (2013) e KLR** in this regard.

The Plaintiff's counsel filed submissions dated 3rd October 2013 and argued that the purpose of objector proceedings as stated in **Simba Colt Motors Limited vs Lustan & Company, HCCC No. 729 of 2002** is to provide an objector with the opportunity to establish his claim to the attached moveable property. Further, that the Objector had failed to establish her title to the proclaimed goods, and he cited various decisions of this court on the requirement for an objector to show ownership of the goods that are subject to attachment. The counsel further submitted that the Objector proceedings were filed for the sole purpose of defeating the Plaintiff's judgment, and are an abuse of the process of court. He relied on the Court of Appeal decision in **Muchanga Investments Limited vs Safaris Unlimited (Africa) Limited & 2 Others, Civil Appeal No. 25 of 2002** in this regard.

I have read and carefully considered the pleadings and written submissions by the parties to this application. The Objector's application is brought under Order 22 Rules 51 of the Civil Procedure Rules which provide as follows:

“ (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 all the parties and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief 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 the parties.”

I have perused the proclamation of attachment dated 20th June 2013 and note that it seeks to attach six motor vehicles whose registration numbers are provided as KUH 911, KBS 744, KUH 110, and KYP 228 and two tractors whose registration numbers are KVB 104 and KUP. I have also perused the sale agreement provided as evidence of ownership by the Objector in which she claims to have bought the said vehicles which are the subject of the proclamation from the Defendant, namely motor vehicle registration numbers KUH 911, KBS 744, KUH, KYP 228 and a tractor registration number KUP 104.

The burden of proof in this regard is on the objector to establish her legal or equitable interest in the property which is the subject matter of the execution objected to, and it is not for the decree holder to prove that the goods belong to the Defendant. It was stated as follows in this regard by Hon. Waki J. (as he then was) in **Simba Colt Motors Ltd vs Lustman & Co. (1990)**, HCCC No. 729 of 2002 :

“The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgement-Debtor.”

It is my finding that the Objector has not brought any evidence of any title or document of ownership to the motor vehicles that are the subject of the proclamation of attachment, and that she has not discharged her onus of proving her legal interest in the said motor vehicles. The sale agreement produced as evidence by the Objector of the purchase of the said motor vehicles cannot on its own be evidence of any legal interest in the said motor vehicles. In addition, a sale agreement without any proof of consideration paid is only proof of an intention to sell and not of a binding contract. Likewise, an equitable interest in the said property can only arise upon proof of payment made pursuant to the said sale agreement, and the Objector did not provide proof of any such payments made or consideration she had given pursuant to the said sale agreement.

I therefore find that in the circumstances the objector has not discharged the onus of proving that the said motor vehicles legally belong to her, and is therefore not entitled to the order sought. The Notice of Motion by the Objector dated 1st July 2013 is accordingly denied, and the Objector shall bear the costs of

the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE