



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)
CIVIL APPEAL NO. 9 OF 2013

BETWEEN

AHMED MOHAMMED ABDULAHI APPELLANT

AND

JEDIDAH WARUE NYAGA.....RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Embu (Muchelule, J.) dated 14th November, 2011 and signed and delivered by (Ong'undi, J.) on 16th December, 2011

in

H.C.C.C No. 37 of 2008)

JUDGMENT OF THE COURT

1. The appellant in this appeal filed suit against a one Christopher Njiru Njoroge at the Senior Principal Magistrates Court in Embu as SPMCC No. 104 of 2001. Judgment was entered in favour of the appellant by the trial magistrate against the judgment debtor. The appellant executed the decree in the sum of Ksh. 547,516/= and proclaimed and attached some movable goods.
2. The respondent herein Jedidah Warue Nyaga who is the wife of the judgment debtor lodged objection proceedings before the trial magistrate court asserting that she was the owner of the attached movable goods. The appellant opposed the objection proceedings stating that the judgment debtor (Christopher Njiru Njoroge) was the actual owner of the attached goods. The trial magistrate received oral evidence from the appellant, the respondent herein and the auctioneer in an effort to establish the respondent's ownership of the attached goods. The trial magistrate after considering the objections and submissions dismissed the objection proceedings stating that he was satisfied that the objector's objection was aimed at frustrating the effort of the decree holder from enjoying the fruits of his judgment. He observed that the objector was wife to the decree holder and the objection proceedings were nothing but a conspiracy to defeat the satisfaction of the decree.
3. Dissatisfied with the dismissal of the objection proceedings, the respondent herein moved to the ***High Court in Civil Appeal No. 37 of 2008***, which is the subject of this appeal. The honourable Judge (***Muchelule J.***) reversed the trial magistrate and found that the attached goods belonged to the respondent. The honourable Judge stated that the respondent had produced a certificate of

lease to show that she was the registered proprietor of a plot known as **Runyenjes Township/247** on which there was a petrol pump, hotel and restaurant. That it is on this premises that the hotel and supermarket whose goods were proclaimed and attached were found. That the respondent produced licenses in her name to show that she was the one who operated the businesses on the premises. The honourable Judge held that a registered owner of land on which are developments and businesses should be the *prima facie* owner of the developments and business. The Judge held that to his assessment, the respondent had an insurmountable claim to the property that was attached by the auctioneers. That the objectors claim to the attached property was not in any tangible way dislodged by the appellant or the auctioneer. The appellant herein and the auctioneer were ordered to return all the attached goods to the respondent.

4. Aggrieved by the judgment and order of the honourable Judge, the appellant lodged this appeal. The memorandum lists four grounds of appeal to wit:
 - a. ***The learned Judge erred in law and fact in failing to find that the attached goods were proclaimed on 17th November, 2006, which was 6 months prior to the notice of objection made on 24th May, 2007.***
 - b. ***The learned Judge erred in law and fact in disregarding the appellant's evidence that the judgment debtor and not the objector was the operator of the business upon which the proclaimed goods were found.***
 - c. ***The learned Judge erred in law in failing to find that there was no business license produced in respect of 2006, when the attached goods were proclaimed.***
 - d. ***The learned Judge erred in law in failing to find that the judgment debtor was the husband of the objector in the objection proceedings and he had disposing power over the attached property and which power he could exercise for his own benefit and that such property was liable to attachment and sale in execution of the decree as provided for in Section 44 (1) of the Civil Procedure Act.***
5. At the hearing of this appeal, learned Counsel **P. M. Muchira** appeared for the appellant while learned counsel **Joe Kathungu** appeared for the respondent.
6. Counsel for the appellant elaborated on the grounds of appeal emphasizing that the goods attached were in actual control of the judgment debtor and not the respondent. That the honourable Judge erred in not taking into account that the license that the respondent produced was in respect to the year 2007, and not 2006, when the goods were attached. That the honourable Judge erred and failed to appreciate that it was the judgment debtor who was operating the hotel and petrol station where the goods were attached. That the Judge erred in failing to give weight to the fact that the objector was the wife to the judgment debtor. In addition, it was submitted that the license produced in court was for a property that was different from that at which the goods were proclaimed and attached. Counsel referred this Court to the license granted by Runyenjes Municipal Council on 11th August, 2006, which indicate that the property at which the respondent was licensed to carry on business of bar and restaurant was **Plot D 12** which is not the plot where the goods were attached. Counsel urged this Court to find that under **Section 44** of the **Civil Procedure Act**, the proclaimed goods were under the control of the judgment debtor and could thus be attached to satisfy the decree. Counsel urged this Court to set aside the judgment of the High Court and substitute the same with an order dismissing the respondent's appeal to the High Court.
7. Counsel for the respondent opposed the appeal and urged this Court to uphold the findings and order of the honourable Judge. It was submitted that the critical issue in this appeal as well as in the objection proceedings is to determine who the owner of the proclaimed and attached goods was. Counsel submitted that the respondent had proved that she was the owner of the attached goods. It was submitted that the respondent had a license to operate the hotel and restaurant from which the goods were attached and also the respondent had a lease for the premises from which the goods were attached. The license granted to the respondent on 19th April, 2007, is for **Plot No. 247** which contrasts with the plot referred to by the appellant. Counsel for the respondent further submitted that there was no delay in instituting objection proceedings as was submitted by the appellant. That there were two proclamations made by the appellant's auctioneers and when the second proclamation was done, it was in relation to the respondent's goods and that is why

objection proceedings were filed. Counsel urged this Court to uphold the honourable Judge's judgment.

8. We have considered the record of appeal, the grounds of appeal and the submissions by counsel. We remind ourselves that this is a second appeal and this Court is enjoined to consider only points of law. **Section 72** of the **Civil Procedure Act** stipulates that:-

“Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely: -

the decision being contrary to law or to some usage having the force of law;

(a)

the decision having failed to determine some material issue of law or usage having the force of law;

(b)

a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

(c)

9. In the case of ***Brar – v- Wareng Quarry Achare Construction, (1984) KLR 705***, this Court stated that it is the duty of the trial court in objection proceedings to make a finding about the ownership of the attached movable property even if the property has been sold. It was also stated that it must be proved that the judgment debtor has no attachable interest in the property.
10. The primary issue in this appeal is whether the honourable Judge erred in law in finding that the respondent had proved that she was the owner of the proclaimed and attached goods. We have analyzed the written judgment by the honourable Judge and we find that he correctly observed that a registered owner of land on which are developments and businesses should be the prima facie owner of the developments and business. The operating phrase is prima facie owner and the next issue is whether the honourable Judge erred in not finding that evidence had been led to challenge the prima facie ownership in relation to the attached goods.
11. The record shows that the trial magistrate had received oral evidence from the appellant, respondent and the auctioneer. The trial magistrate had the benefit of seeing and hearing the witnesses and establishing the relevant fact of ownership during the objection proceedings. We find that the honourable Judge did not give due consideration and weight to the fact that the respondent and the judgment debtor were husband and wife. The honourable Judge did not consider the evidence by the auctioneer to determine if the judgment debtor had any attachable interest in the goods. The learned Judge did not give due consideration to the differences in the plot numbers that are indicated in the business licenses that were produced before the trial magistrate. We find that honourable Judge erred in that he failed to determine a material issue of law if the judgment debtor had any attachable interest in the attached goods. We are of the view that had these facts been considered and accorded due weight, the honourable Judge would have arrived at a different conclusion.
12. The upshot of the above is that we hereby allow the appeal, set aside the judgment and orders of the High Court at Embu dated 14th November, 2011, as signed and delivered on 16th December, 2011. We substitute in its place an order dismissing the respondent's appeal to High Court in ***Civil Appeal No. 37 of 2008***. The appellant shall have the costs before the High Court and costs in this appeal.

Dated and delivered at Nyeri this 31st day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR