



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1860 OF 2016**

**CONSOLIDATED WITH CAUSES NO 1858, 1859, 1862, 1863 AND 1864 OF 2016**

**THOMAS OUNDO PAMBA**

**ELIZABETH NDINDA MUTHOKA**

**GEOFFREY WANGA KACHISA**

**EVANS OTIENO**

**JACOB WAMALWA WERUNGA**

**JULIANA NDANU MUENDO**

**VINCENT BIRUNDU OMURWA.....CLAIMANTS**

**VERSUS**

**BEVERLY SCHOOL OF KENYA LIMITED.....RESPONDENT**

**AND**

**NBCA BANK KENYA LIMITED.....OBJECTOR**

**RULING**

1. Pursuant to execution proceedings initiated by the Claimants in this matter, the Objector, NCBA Bank Kenya PLC filed a Notice of Objection under Order 22 Rule 51 of the Civil Procedure Rules.

2. The Notice of Objection is dated 8<sup>th</sup> April 2021 and is based on the following grounds:

- a) That the Objector financed the purchase of the Motor Vehicle Registration Number KCW 177H vide Asset Finance Agreement dated 30<sup>th</sup> September 2019;
- b) That the said Motor Vehicle is registered as collateral for payment of loan balance by the Respondent which currently stands at Kshs. 6,376,664.03 and it has registered interests;
- c) That therefore the Objector is sole and absolute owner of the proclaimed Motor Vehicle Registration Number KCW 177H and was at the time of the proclamation;
- d) That additionally, the Objector is not a party to the suit and is a total stranger to the transactions between the Claimants and the Respondent which led to the suit.

3. Contemporaneously with the Notice of Objection, the Objector filed a Notice Motion of even date seeking the following orders:

- a) An order restraining the Claimants, whether by themselves, their agents, Digit Auctioneers or any other agents from selling Motor

Vehicle Registration Number KCW 177H by public auction and/or private treaty;

b) An interim stay of execution of the Decree issued on 23<sup>rd</sup> July 2020, together with the Warrants of Attachment and Sale dated 3<sup>rd</sup> March 2021 and the Proclamation Notice dated 20<sup>th</sup> January 2021, issued by Digit Auctioneers;

c) An order setting aside the Proclamation and/or Attachment of the Objector's Motor Vehicle Registration Number KCW 177H enlisted in the Proclamation dated 20<sup>th</sup> January 2021;

d) A permanent injunction restraining the Claimants/Decree Holders, acting through their agents, Digit Auctioneers or any other auctioneers from proclaiming, attaching and/or selling the Objector's Motor Vehicle Number KCW 177H as enlisted in the Proclamation Notice dated 20<sup>th</sup> January 2021;

e) An order declaring the Proclamation Notice dated 20<sup>th</sup> January 2021 and the Warrants of Attachment dated 3<sup>rd</sup> March 2021 illegal;

f) An order recalling and quashing the Warrants of Attachment and Sale dated 3<sup>rd</sup> March 2021 together with the Proclamation Notice dated 20<sup>th</sup> January 2021;

g) An order directing the Claimants and/or their agents to unconditionally release Motor Vehicle Registration Number KCW 177H to the Objector.

4. The Notice of Motion is supported by an affidavit sworn by the Objector's Legal Counsel, Jackson Nyaga and is premised on the following grounds:

a) The Objector learnt through the Proclamation Notice dated 20<sup>th</sup> January 2021 that the Claimants, while acting through their agent, Digit Auctioneers, placed a notice for sale of the Objector's Motor Vehicle Registration Number KCW 177H by way of auction after the expiry of the Proclamation Notice;

b) Upon obtaining and perusing the Proclamation Notice and Warrants of Attachment dated 20<sup>th</sup> January 2021 and 3<sup>rd</sup> March 2021 respectively, the Objector noted that the Claimants, while acting through Digit Auctioneers issued a Proclamation Notice against several moveable assets, including the said Motor Vehicle, in execution of the Decree issued in the claim herein;

c) The Objector is a joint owner of the proclaimed moveable property known as Motor Vehicle Registration Number KCW 177H used as security to advance a loan facility of Kshs. 5,843,407 to Beverly Schools Kenya, the Respondent herein, through a Loan Agreement dated 30<sup>th</sup> September 2019;

d) The said Motor Vehicle is jointly registered in the names of the Respondent and the Objector for purposes of securing repayment of loan balance by Beverly Schools Kenya, which currently stands at Kshs. 6, 376,664.03;

e) The Respondent is just a hirer and has no legal and/or beneficial interests in the Objector's Motor Vehicle Registration Number KCW 177H, which has been proclaimed, attached and is scheduled to be sold by way of auction upon expiry of the Proclamation Notice dated 20<sup>th</sup> January 2021;

f) Despite the foregoing, Digit Auctioneers, while acting under the Claimants' express and/or ostensible instructions, has illegally and unlawfully issued a Proclamation Notice, attaching Motor Vehicle Registration Number KCW 177H for sale to satisfy the Decree issued on 24<sup>th</sup> July 2020;

g) Further, the Proclamation Notice dated 20<sup>th</sup> January 2021 and the Warrants of Attachment dated 3<sup>rd</sup> March 2021, are illegal. On the face of the record, the Claimants processed the Proclamation Notice before the issuance of the Warrants of Attachment. By law, the Proclamation Notice cannot precede the Warrants of Attachment;

h) Unless the Court intervenes, the Claimants will proceed either by themselves, their agents and/or servants, particularly Digit Auctioneers to illegally and unlawfully proclaim, attach and sell the Objector's Motor Vehicle Registration Number KCW 177H either by private treaty and/or public auction, causing the Objector irreparable damage and prejudicing recovery of the outstanding loan amount from the Respondent;

i) Therefore, it is in the interest of justice that the Court grants the orders sought in the application.

5. In response to the Objector's Motion, the Claimants filed a Notice of Preliminary Objection dated 19<sup>th</sup> April 2021 and a Replying Affidavit sworn on 14<sup>th</sup> September 2021.

6. In their Preliminary Objection, the Claimants state that:

a) The documents provided by the Objector alleging that Motor Vehicle Registration Number KCW 117H is a property on hire purchase do not meet the threshold of a Hire Purchase Agreement as required under the Hire Purchase Act and thus the purported Hire Purchase Agreement is invalid and a nullity *ab initio*;

b) The Objector's objection being solely based on an invalid Hire Purchase Agreement cannot therefore stand as it is misconceived, scandalous, frivolous, vexatious and a blatant abuse of the court process.

7. In their Replying Affidavit, the Claimants depone that Digit Auctioneers, acting on the instructions of Mudeshi Muhanda & Company Advocates served the Respondent with a seven (7) day Proclamation Notice of immoveable property pursuant to Warrants of Attachment issued on 3<sup>rd</sup> March 2021 for the sum of Kshs. 1,456,882.53.

8. The Claimants further depone that the Objector's stake in Motor Vehicle Registration Number KCW 117H is limited to securing the Objector's financial interests with regard to a Hire Purchase Agreement, by which the Objector advanced a facility of Kshs. 5,843,407 to the Respondent, with the Motor Vehicle as security.

9. The Claimants question the legality of the Hire Purchase Agreement between the Respondent and the Objector on the following grounds:

- a) The Agreement does not provide for repossession or an option to purchase as provided in Section 2 of the Hire Purchase Act;
- b) The value of the facility being, Kshs. 6,400,000 exceeds the prescribed statutory limit of 4,000,000 provided as maximum hire purchase price, under Section 3(1) of the Act;
- c) The Hire Purchase Agreement produced by the Objector is unregistered, undated and bears no stamp duty payment slip as required under Section 5(1) and (4) of the Hire Purchase Act and Section 19(1) of the Stamp Duty Act;
- d) The Objector has not produced any evidence to show that it is licensed to enter into a Hire Purchase Agreement;

10. The Claimants therefore maintain that the Hire Purchase Agreement cannot be used to found objection proceedings and the Objector's remedy lies in contract.

11. The Claimants go on to state that even if the Objector has any interest in the subject Motor Vehicle, the purported Hire Purchase Agreement made provision for remedy and the Objector ought to exercise the remedies in the Hire Purchase Agreement.

12. The Claimants concede that the Warrants of Attachment were obtained subsequent to the Proclamation Notice but add that the Objector has not demonstrated any plausible cause why the execution process should not be allowed to run full course.

13. The Claimants' line of defence against the Objector's plea is that the Agreement upon which the Objector gained an interest in the subject Motor Vehicle was irregular for want of compliance with the Hire Purchase Act.

14. The only thing to say on this account is that the Claimants, not being parties to the Agreement, cannot use it as a Trojan Horse to pursue their case. The Court was referred to the decision in *Aineah Likuyani Njirah v Aga Khan Health Services [2013] eKLR* where the Court of Appeal held that a third party cannot enforce a contract which only incidentally benefits them unless there is express provision for them to do so.

15. In any event, in objection proceedings brought under Order 22 Rule 51(1) of the Civil Procedure Rules, the only duty placed on the Objector is to demonstrate legal or equitable interest in the attached property.

16. Order 22 Rule 51(1) provides as follows:

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

17. It is not in contest that the Objector is duly registered as co-owner of Motor Vehicle Registration Number KCW 177H. The Objector's interest is therefore evident and the objection must succeed.

18. Regarding the issue of the Proclamation Notice preceding the Warrants of Attachment, the Claimants offered no explanation. The only conclusion to make therefore is that the proclamation was not authorised and was irregular.

19. In the result, I make the following orders:

- a) The Proclamation Notice dated 20<sup>th</sup> January 2021 is hereby quashed;
- b) The attachment of Motor Vehicle Registration Number KCW 177H is lifted.

20. Each party will bear their own costs.

21. Orders accordingly.

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Wairimu h/b Miss Muhanda for the Claimants

Miss Eboso h/b for Mr. Mugisha for the Objector