



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 831 OF 2016

JOSEPH KINUTHIA MUNGORA.....CLAIMANT/DECREE HOLDER

VS

EAST AFRICA RAIL & HANDLING

LOGISTICS LTD.....RESPONDENT/JUDGMENT DEBTOR

AND

EQUITY BANK (KENYA) LIMITED.....OBJECTOR/APPLICANT

RULING

1. This ruling flows from the Objector's application brought by Notice of Motion under certificate of urgency dated 22nd October 2018. The application seeks orders to set aside proclamation and attachment dated 13th August 2018 in respect of Motor vehicle Registration Number KBV 072A.

2. The application which is supported by the affidavit of the Objector's Advocate, Camilla Mutsiambo and a supplementary affidavit sworn by its Senior Manager-Legal Services, Roy Akubu is based on the following grounds:

a) That judgment was delivered in favour of the Decree Holder and against the Judgment Debtor on 12th April 2018 in the sum of Kshs. 2,204,810;

b) That the Court directed that the Decree Holder executes the decree by attachment of the Judgment Debtor's moveable assets including Motor Vehicle Registration Number KBV 072A;

c) That the Objector had, prior to the instant suit, advanced to the Judgment Debtor several loan facilities which are still outstanding, which facilities were secured by *inter alia*, a debenture on all the assets of the Judgment Debtor, including Motor Vehicle Registration Number KBV 072A;

d) That the Objector was not notified of the proclamation, on the said Motor Vehicle conducted on 13th August 2018 until 18th October 2018, which notification was by way of a letter from Beyond Auctioneers requesting for a declaration of interest before a scheduled auction;

e) That the Decree Holder irregularly and illegally proclaimed and attached the Motor Vehicle without notifying the Objector despite noting that the Motor Vehicle had been jointly registered in favour of the Objector;

f) That in the circumstances, the proclamation and warrants of attachment over the Motor Vehicle are illegal, irregular and unlawful.

3. In a replying affidavit sworn by the Claimant's Advocate, Shitakha Tom Ambwere on 25th October 2018, it is deponed that the Objector's application was overtaken by events as the auction had taken place and the Motor Vehicle sold.

4. Counsel further depones that the Decree Holder had followed due process and the sale was done in compliance with the law, including advertisement in a newspaper of national circulation on 9th October 2018. He adds that the Objector had not disclosed the extent and nature of its interest in Motor Vehicle Registration Number KBV 072A.

5. Counsel also takes issue with the Objector's failure to disclose other assets held as security and how they can be realized to liquidate the amount owed by the Judgment Debtor to the Objector. Further, the amount secured by the subject Motor Vehicle had not been disclosed.

6. The Objector's application was heard *inter partes* on 13th December 2018. Mr. Adala, Counsel for the Objector submitted that in objection proceedings, all an objector is required to prove is an identifiable interest in the subject of attachment. Pursuant to this principle, Counsel points out that the Objector's interest is evident on the log book of the subject Motor Vehicle.

7. Mr. Adala further submitted that any person exercising right of execution is duty bound to undertake due diligence to confirm whether the subject of attachment belongs solely to the Judgment Debtor.

8. In response, Mr. Ambwere for the Decree Holder submitted that the sale had taken place and the orders sought by the Objector could not therefore be granted. Counsel accused the Objector of failure to disclose the actual loan balance owed by the Judgment Debtor to the Bank.

9. The first issue for determination in this application is whether the Objector has an identifiable interest in the subject of attachment. A copy of the log book of Motor Vehicle Registration Number KBV O72A filed by the Objector indicates that the Motor Vehicle is jointly owned by the Objector and the Judgment Debtor. This is *prima facie* evidence that the Objector has an interest in the Motor Vehicle and both the Decree Holder and the Auctioneer were under a duty to notify the Objector of the intended attachment.

10. In the two affidavits sworn in support of the Objector's application, it is deponed that the Objector was notified of an intended auction by letter dated 18th October 2018 from the Auctioneer. The Objector wrote back on 19th October 2018 declaring its interest in the said Motor Vehicle but the Auctioneer went ahead with the auction on 22nd October 2018 as scheduled. Neither the Decree Holder nor the Auctioneer challenged these averments by the Objector.

11. The Court was unable to understand why, in the face of clear evidence of the Objector's interest in the subject of attachment, the Auctioneer went ahead with the sale up to the point of issuing a Certificate of Sale. I must add that the issue is not how much the Judgment Debtor owes the Objector. The issue is that adverse action was taken against a party with an identifiable interest without giving them an opportunity to state their case.

12. The Court is now being asked to declare the execution process as complete. I respectfully decline. First, the execution cannot be said to be complete until the Motor Vehicle is duly transferred. Second, if the Decree Holder and the Auctioneer had exercised due diligence, they would have discovered the Objector's interest in good time. Third, even if the Court were to give the Decree Holder and the Auctioneer the benefit of doubt, the decision to proceed with the sale in the face of notice of interest by the Objector, smacks of sharp practice that the Court must frown upon.

13. The Decree Holder and the Auctioneer flouted clear execution rules thus rendering the entire execution process irregular and unlawful. For this reason the proclamation and attachment dated 13th August 2018 and the subsequent sale in respect of Motor Vehicle Registration Number KBV 072A are nullified and set aside.

14. The costs of this application will be borne jointly by the Decree Holder and the Auctioneer.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JANUARY 2019

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JUDGE

Appearance:

Mr. Ambwere for the Decree Holder

Mr. Adala for the Objector