



REPUBLIC OF KENYA
EMPLOYMEN AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.190 OF 2015

(Formerly Nakuru 365 of 2013)

(Before D. K. N. Marete)

JOSPHAT MUNKE OLE MPOE.....CLAIMANT

VERSUS

DAVID WAIGANJO KOINANGE.....RESPONDENT

RULING

This is an application by the claimant/decreed holder dated 23rd June, 2015 and brought to court vide a certificate of urgency of even date. It seeks the following orders of court;

1. *That this Application be certified urgent and be heard on a priority basis.*
2. *That the Respondent/Judgment debtor – David Waiganjo Koinange be directed by court through his advocates on record to appear before court to produce and/or furnish the motor vehicle KBQ 635U – Volkswagen Double Cabin Pick-up to Nasioki Auctioneers for attachment within the next seven (7) days from the date of the order hereof.*
3. *That in the event that the Judgment debtor – David Waiganjo Koinange fails to comply with the order under prayer 2 hereinabove, then the court be pleased to issue warrants of arrest against him to be executed by the O.C.P.D Njoro Division.*
4. *That upon arrest of the Judgment Debtor – David Waiganjo Koinange the court be pleased to order that he be detained in prison for a period not exceeding thirty (30) days on account of resisting a lawful execution of a decree of the court.*
5. *That the costs of this Application be borne by the Respondent/Judgment Debtor. and is grounded on;*
 - a. *That a stay of execution issued against the claimant/decreed holder was dismissed on 5th June, 2015 and warrants of execution extended on the same day.*
 - b. *That a proclamation notice had been issued against some properties of the judgment debtor on the 2nd March, 2015 and thereafter a tractor registration No. KTCB 393 L (case) together with one*

disc plough (Nardi) were attached by Nasioki Auctioneers on the 11th June, 2015.

- c. That unfortunately, the Respondent/Judgment Debtor has removed and hidden one of the proclaimed properties being motor vehicle KBQ 635 U _ Volkswagen Double Cabin Pick-up and as such the auctioneers are not able to make an attachment of the already proclaimed vehicle.*
- d. That the said motor vehicle KBQ 635 U – Volkswagen Double Cabin Pick-up is registered solely in the names of the Respondent/Judgment Debtor as per the search records of the registrar of motor vehicles conducted before proclamation on the 25th February, 2015.*
- e. That the auctioneers who had proclaimed the motor vehicle KBQ 635 U – Volkswagen Double Cabin Pick-up on the 2nd March, 2015 have been unable to trace the vehicle from its area of proclamation and despite numerous efforts, the vehicle cannot be located for it has been hidden by the Respondent/Judgment debtor.*
- f. That the court should direct that the Judgment Debtor furnishes the said vehicle either in court or hands it over directly to the auctioneers for he is committing an offence by circumventing the execution process.*
- g. That unless the honourable court expeditiously intervenes and issues orders as prayed for, then the Claimant will suffer substantial loss for he will never be able to effectively execute the valid decree of the court for the sum now totalling to Kshs. 4,602,000/=.*

In a replying affidavit sworn on 1st July, 2015 the respondent opposes the application and states as follows;

1.
2.
3. *That the Motor Vehicle Registration No. KBQ 635 U – Volkswagen Double Cabin Pick-up does not belong to me as alleged since I sold it to Rita Nduku Muthusi sometimes back on 9th October, 2014 (annexed herewith and marked “DWK 1” is a copy of the agreement).*
4. *That I was not served with the Proclamation Notice since it was served on a person allegedly Manager who no longer works with me.*
5. *That the said motor vehicle has since been transferred to RITA NDUKU MUTHUSI and I no longer own that motor vehicle.*

The matter came to court variously until the 11th August, 2015 when the parties were awarded leave to file and serve therein respective written submissions in support of their respective cases and therefore today's ruling of court.

The applicant's case is that upon a grant of judgement on 6th February, 2015 and a decree for Kshs. 4.6 million, the claimant/decree holder commenced execution proceedings and proclaimed motor vehicle registration number KBQ 635U – Volkswagen Pick-up. This was followed by several objection applications for stay of execution which were all dismissed by court. The auctioneers moved on to attach the proclaimed properties but for this car which would not be traced at the place of attachment. It had been removed and hidden by the respondent which action precipitated this application to court.

The claimant at page 3 of his written submissions further contends that before the proclamation of properties was made on 22nd March, 2015 he had conducted a motor vehicle search in the Kenya Revenue Authority on 25th February, 2015 which search revealed that the motor vehicle registration no. KBQ 635U – Volkswagen Double Cabin Pick-up was only owned by the respondent. The claimant

rubbishes the allegation of sale of the motor vehicle to one, Rita Nduku Muthusi and argues that the vehicle should in this event be in possession of the buyer at her Mombasa address. Besides, a further search by the claimant after the filing of this application indicates that the motor vehicle was still registered in the names of the respondent.

The claimant also seeks to rely on the authority of Section 8 of the Traffic Act in proof of ownership as follows;

“The person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle.”

He submits that the law is clear that a *prima facie* proof of ownership of a motor vehicle shall be the registration exhibited on the log book coupled with a current certificate of search from the Kenya Revenue Authority. Again, if the alleged purchaser, Rita Nduku Muthusi had any interest in this motor vehicle, she should have filed an objection to oppose the attachment of the motor vehicle as provided for by the law. Order 22 Rule 21 of the Civil Procedure Rules provides as follows;

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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.

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.”

It is the claimant's further submission that the respondent's transfer of the motor vehicle to Pal-City is a fraud intended to frustrate the application and the execution of the claimant's decree. Any such transfer of the motor vehicle is void after attachment and cannot stand. This is supported by Rule 14 of the Auctioneers Rules 2010 which stipulates as follows:-

“ A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation before they are redeemed by payment in full of the amount in the court warrant or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.”

Further, Section 47 of the Civil Procedure Act, the law provides as follows:-

“Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein, and any payment to the judgment debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.”

The Claimant/Applicant in the penultimate opines and submits that all these inactions by the respondent are only intended to circumvent the due process of court in the execution of a valid decree made to him. He prays that the application be allowed as prayed.

The respondent in his written submissions associates with the submissions of the interested party/objector and reiterates that the motor vehicle the subject matter of this application belongs to another party Pal-City Grill and Entertainment and not himself. It therefore cannot be subjected to the process of attachment. He therefore prays that the application be dismissed for being an abuse of the process of court.

An analysis of the respective cases of the parties brings out a sad case for the rule of law. It is a scenario where a decree holder is not able to enjoy the fruits of his judgement through the concerted efforts of the judgement debtor to frustrate efforts at execution of the decree. This is sad and spells double jeopardy for decree holders in the circumstances. On the onset, one is forced to bring out a case in court due to denial

of his rights. Even with a successful outcome, the defaulter party insists on making it impossible for the decree holder to appreciate the light of the day. This is unacceptable and should be nixed at the bud in all instances like we have now.

The circumstances of this case and the law bring out a case in favour of the claimant/applicant. The rule of law must be upheld and impunity subdued. I therefore allow the application and order as follows;

1. *That the Respondent/Judgment debtor – David Waiganjo Koinange be and is hereby directed to appear before court to produce and or furnish the motor vehicle KBQ 635U – Volkswagen Double Cabin Pick-up to Nasioki Auctioneers for attachment within the next seven (7) days from the date of the order hereof.*
2. *That the respondent/judgment debtor be and is hereby ordered to comply with the order of production/furnishing of motor vehicle above not later than the 16th December, 2015 at 1000 hours.*
3. *That the exercise of compliance of these orders of court shall be before the Deputy Registrar of this Court.*
4. *That this matter shall be mentioned on 17th December, 2015 for further orders and directions of court.*
5. *That the costs of this Application be borne by the Respondent/Judgment Debtor.*

Delivered, dated and signed this 9th day of december 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kanyi instructed by Kanyi Ngure & Company Advocates for the Claimant/Applicant.
2. Mr. Mongeri instructed by Mongeri & Company Advocates for the Respondent.