



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 130 OF 2013

SHLOME JEROMECLAIMANT

VERSUS

HACIENDA DEVELOPMENT HOLDINGSRESPONDENT

RULING

INTRODUCTION

1. The Objector has brought the Notice of Motion dated 15/9/2014 under Order 22 rule 51(1) (3) and rule 52 of the Civil Procedure Rules. The Motion basically seeks the lifting of warrant of attachment and sale of L.R No. 10279/11/MN issued on 28/8/2014 to Messrs Sure Auctioneers on behalf of the claimant. The Motion also seeks for the vacation of the prohibitory order given on 28/8/2014 against the property title No. LR 10279/11/MN. The grounds upon which the Motion is founded are that the Objector is the registered proprietor of the immovable property title No. LR 10279/11/MN and that the respondent has no attachable interest in the said property because he is a separate legal entity from the Objector. The Objector has produced a copy of the certificate of title to prove ownership and the entries after 2006 and blamed the auctioneer for lack of due diligence in verifying ownership before the execution.
2. The Motion has been opposed by the claimant vide the replying affidavit dated 24/10/2014. In the said replying affidavit, the claimant confirms that the Objector and the respondent are separate legal entities but sharing the same Managing Director Mr. Tuller. The claimant has also exhibited copy of Title No. LR 10279/11/MN as it were in December 2006 when it was registered in favour of the respondent.
3. The respondent and the auctioneer did not file any affidavits in response to the Objector's Motion. The Motion was then disposed by way of written submissions but the claimant who is unrepresented by counsel, never filed any. He however admitted orally in court on 29/10/2014 that the attached property belonged to the objector.

OBJECTOR'S SUBMISSIONS

4. The objector submitted that she has the title and ownership interest in the attached property by dint of a transfer registered as entry number 4 presentation number 285 of 16/7/2010 on the Grant Number CR. 41235. According to the Objector there is no judgment entered in favour of the claimant against the Objector in this suit to justify the attachment against the Objector's said immovable property. She blamed the auctioneer for reckless execution without first asking the claimant to verify the ownership of the attached property. According to the Objector the auctioneer and the claimant ought to have conducted a search at the Land Registry to verify

ownership of the property. In addition the Objector has accused th claimant of deliberate concealment to the auctioneer and the court the fact that a similar attachment on the same property had been stopped by the High Court on 19/6/2014 in HCC NO. 354 OF 2009 PRIORITY DEVELOPMENT COMPANY LTD vs HACIENDA DEVELOPMENT HOLDINGS LTD and (HACIENDA DEVELOPMENT LTD) OBJECTOR after Kasango J, found that the Title property LR No. 10279/11/MN belonged to the Objector and not the respondent herein.

AUCTIONEERS SUBMISSIONS

5. The Auctioneer submitted that she acted within the law in executing the warrant of execution issued by the court. According to the auctioneer he had no legal obligation to exercise due diligence in establishing the ownership of the attached property. In her view it was enough to act only on the copy of title and the warrants issued to her by the claimant and the court. She prayed for her costs of the execution in any event from either the claimant or the Objector.

ANALYSIS AND DETERMINATION

6. It is not disputed that the Title property L.R No. 10279/11/MN is registered in favour of the Objector alone. It is also not in dispute that the claimant was aware of the ownership of the said property and its unavailability for execution against the respondent by virtue of the decision of Kasango J. on 19/6/2014 in HCC 354 of 2009, Supra. It is also not in dispute that the claimant did not reveal that information to the auctioneer and that the auctioneer proceeded with the execution without any due diligence to verify the ownership of the property.
7. The issues for determination are whether the objector's motion has merits and whether the orders sought should issue.

MERITS OF THE MOTION

8. The claimant had admitted before the court that the attached property belongs to the Objector. The court has also perused the copy of the certificate of title exhibited by the Objector and confirmed that the same was registered in her favour by dint of Transfer registered on 16/7/2010. By the said transfer the title interest moved from the respondent to the Objector, a totally separate legal person under the law. It follows therefore that the Objector is entitled and justified as of right to institute the present objection proceedings. The court finds as Kasango J, did in HCC 354 OF 2009 that the title LR No. 10279/11/MN belongs to the Objector and the respondent has at all material times to this suit lacked any attachable interest in it. Consequently the answer to the first question for determination is that the Objectors Motion dated 15/9/2014 has merits and must succeed. As regards the issue of auctioneer's charges, the court finds it secondary to the proceedings before the court and the court will not determine it now and here because execution of the decree is not yet over.

DISPOSITION

9. In view of the findings above the Objector's Notice of motion dated 15/9/2014 is allowed save for the prayer for costs. The court directs each party to bear his or her own costs. In the upshot, the warrant of attachment and sale of L.R No. 10276/11/MN and the prohibitory order given against the said property title on 28/8/2014, are hereby lifted and vacated respectively, as prayed.

Orders accordingly.

Dated signed and delivered this 5th December 2014

O. N. Makau

Judge