



**Organic 4 Orphans International & 3 others v Ogollah & another; Kinara
(Applicant); Makau (Interested Party) (Miscellaneous Application E828 of 2020)
[2024] KEHC 883 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E828 OF 2020
FG MUGAMBI, J
JANUARY 30, 2024**

BETWEEN

**ORGANIC 4 ORPHANS INTERNATIONAL 1ST DECREE HOLDER
DALE PATRICK BOLTON 2ND DECREE HOLDER
LINDA BOLTON 3RD DECREE HOLDER
ORGANIC FOR OPHANS 4TH DECREE HOLDER**

AND

**BOAZ ODUOR OGOLLAH 1ST JUDGMENT DEBTOR
DOUGLAS KINAIBEI 2ND JUDGMENT DEBTOR**

AND

SAMMY RATEMO KINARA APPLICANT

AND

BENSON KIOKO MAKAU INTERESTED PARTY

RULING

Brief Facts

1. The objection proceedings before the Court stem from an application dated 22nd March 2022. In this application, the objector aims, among other things, to prevent the judgment debtors from disrupting his peaceful possession of the property, identified as Kitale Municipality Block15/Koitogo/3147, which is the subject of the execution (hereafter referred to as the suit property).



2. Preceding this application, the decree holders had filed an application dated 10th December 2021, seeking the Court's permission to execute the monetary aspect of the decree issued on July 13, 2020. This decree was issued subsequent to the Court's recognition and adoption of the arbitral award between the involved parties. The objector had initially requested leave to respond to the aforementioned application, but this request was abandoned upon the filing of the current application. Given the circumstances, I have also had the opportunity to consider the application of 10th December in light of the submissions filed by the objector in the present application. Top of Form
3. The objector asserts that he is a bona fide purchaser of the suit property for value and without notice, claiming ignorance of any disputes related to the property prior to and during the transaction. He justifies his position by emphasizing a diligent property search, verifying the interested party as the lawful owner, and confirming the absence of legal claims or liabilities.
4. While acknowledging that the property had been sold to the 1st judgment debtor but not yet transferred, the objector contends that the property was subsequently transferred to his name well before the decree holders registered any interest in it.
5. This assertion faces strong opposition from the decree holders, who argue that the judgment debtors were well aware of the court-issued decree and that the sale of the 1st judgment debtor's property was solely to evade execution.
6. Following the directions issued by this Court on 18th May 2005, the application proceeded by way of oral evidence. The Land Registrar Kitale, Ms. Gerald Sharon, testified virtually. The Court also heard testimonies from the objector, the interested party, and the Chief Executive Officer of the 1st decree holder.
7. The parties involved in the objection proceedings submitted detailed written arguments to address the application. While I won't reiterate the specifics of the testimonies or submissions, I will refer to them as relevant in my analysis. Top of Form

Analysis

8. I have carefully considered the pleadings, evidence and submissions made by rival parties in support of their respective positions. The application is anchored on Order 22 rules 51 and 52 of the Civil Procedure Rules which provide 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.
- (2) 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.
- (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.



52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

9. The law is clear that the onus lies on the objector to establish a legal or equitable interest in the properties which are subject matter of the proclamation and attachment objected to. The nature and extent of enquiry in such proceedings is as was held in *Chotabhai M. Patel V Chaprabhi Patel*, [1958] EA 743 where the Court stated that:

“The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property. Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.”

10. I am further cognizant of the law as stated by Odunga J in *Dubai Bank (K) Ltd V Come-Cons Africa Ltd and Impak Holdings Co Ltd* to the extent that:

“... in the objection proceedings, the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the objector has interest legal or equitable in the attached property”.

11. The Learned Judge further pointed out that for a person to properly bring himself within the ambit of Order 22 rule 51(1) of the Civil Procedure Rules, he has to meet the following conditions:

- i. First, he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof.
- ii. Second, he must prove that execution of his property has been levied in execution of the said decree.
- iii. Third, he must prove that he is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of the decree.
- iv. Fourth, he must prove that no payment out of the proceeds of sale of such property has been made.

12. As to the burden of proof, the Court in *Arun C. Sharma V Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others*, [2014] eKLR correctly held as follows:

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”



13. Where there are serious and credible doubts raised as to the veracity of the objector's allegations, the Court may well be entitled to disregard the objector's claim. This is what the Court stated in the case of *Grace Wanjiru Mbugua V Philip Karumi Matu*, [2009] eKLR where it was observed that:

“The Decree-holder has created sufficient doubt in the mind of the court as to the veracity of the objector's contentions. Because of the glaring omissions on the part of the objector, the court can only infer that such information, if provided by the Objector, would have been prejudicial to her case.”
14. Turning to the evidence and testimony on record, it is not in doubt that sometime around February 2016, the interested party purchased the subject property from one Mary Karai Barno and sold it to the 1st judgment debtor on or about 22nd October 2016. Despite having paid Kshs. 1,800,000/= as purchase price for the parcel of land and being handed the original title deed, executed documents as well as possession of the property, the 1st judgment debtor did not pursue the registration of the property in his name and the Court notes that no explanation has been given for this.
15. In the absence of any logical explanation and taking the circumstances surrounding this case into account, one would reasonably infer that the 1st judgment debtor deliberately avoided disclosing the real ownership of the property in order to avoid any execution against him.
16. The judgment and decree in this matter were issued on 13th July 2020 while the property was still in possession of the 1st judgment debtor. One year later, on 21st April 2021, the 1st judgment debtor entered into a sale agreement with the objector for the sale of the suit property. The decree holders have raised a valid concern, as the sale agreement included a provision for refunding the objector's money in the event of a third-party claim on the property. This provision raises suspicion, especially considering that the property still remained in the name of the interested party, and it is likely that the objector was aware of the circumstances surrounding the sale.
17. At the time of the sale to the objector, the 1st judgment debtor was undoubtedly aware of the decree, even if the decree holders had not yet registered an interest in attaching the subject property. This aligns with the very essence of not transferring the land into his name, seemingly to evade the execution of the decree. With this knowledge, the 1st judgment debtor approached the objector to purchase the property.
18. Notably, in the process of the transaction, the objector testified that he was aware that the property, though being purchased from the 1st judgment debtor, was still registered in someone else's name—the interested party, whom the objector had not met up to that point. Despite this awareness, the objector confirmed in testimony that he proceeded with the agreement, taking on the associated risks, and paid for the property, even executing blank transfer forms for a deal that was extremely attractive.
19. It is undisputed that the 1st judgment debtor acquired the suit property for Kshs. 1,800,000/= in 2016. However, when seeking to dispose of it to the objector five years later, the price was set at Kshs. 2,200,000/= against an open market value of Kshs. 4,000,000/=. The decree holders relied on a valuation report dated March 30, 2022. Even if this was contested which I notice it was not, in another extreme variation, the property was valued at an outrageous Kshs. 500,000/= at the point of transfer, a figure confirmed by the Land Registrar in her oral testimony.
20. Once again, no explanation has been provided for these substantial discrepancies. Absent any evidence to the contrary, one is left to consider that the property was grossly undervalued, potentially as a means to swiftly sell it off in an attempt to evade execution. This places the 1st judgment debtor at the center of the plan, with the objector having full knowledge and cooperation in the matter.



21. Additional complexities surround the transaction. By December 15, 2021, the objector was undoubtedly aware of the challenges regarding the purchased property. He even virtually appeared before the Court, seeking audience with the Court (Justice D.S Majanja), but was denied. The objector struggled to explain how he acquired knowledge of the case number and which Court was handling the matter, despite not being a party in the proceedings at that time. Top of Form
22. Within three months thereafter, as per the objector's account, he hastily proceeded with transferring the property into his name. However, I remain unconvinced that the urgency stemmed from a need to regularize his possession. After all, he had ample time since March 2021 when the sale agreement was executed to expedite the transfer and registration process. The actual transfer took place on March 18, 2022, only to be later revoked as a consequence of this Court's orders.
23. It's worth noting that the interested party was unequivocal in his testimony, asserting that he had never met the objector and that he did not attend the Land Control Board meeting, as claimed in the documentation submitted for registration of the suit property. The objector, in his testimony, corroborated this, stating that he, too, had never met the interested party before the Court hearing and that the interested party was not present at the Land Control Board proceedings. Moreover, the interested party confirmed that he never executed transfer documents containing the objector's details, further casting doubt on the circumstances of the transfer.
24. Once again, in the absence of any alternative explanation or evidence regarding the sudden rush to register the title following the court appearance, I am left to infer that the primary intention was to thwart the execution of the decree in question. Top of Form
25. In *Abdalla Ali Hussein Mohamed V Clement A. Ojiambo & Others*, Civil Appeal No. 118 of 1997 the Court of Appeal appreciated the space that Courts have to make inferences with sufficient reason and stated that:

“...The Court is obliged to investigate the title and make inferences from the material before her ... Where an alleged transfer of a motor vehicle is made when the execution of the decree is about to be made the Court is entitled to assume that the sale was not genuine and was intended to avoid the due process of execution...It remains for the court to decide, in this instance, if the transfer to the objector was genuine or was done with a view to avoid the process of execution and as already stated, the court agrees with the learned Judge in regard to the inferences she drew. She could not have inferred otherwise...It is not for the objector to raise the issue that once a Judgement creditor has taken a particular step in execution he is barred from taking up any other mode of execution as he cannot speak for the Judgment debtor...

Section 8 of the *Traffic Act* simply states that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner; in other words the fact of registration is only prima facie evidence of ownership and contrary facts can show otherwise and in this case there was sufficient material before the learned Judge to conclude that such registration was effected to avoid the execution of the decree.”

26. After careful consideration of all the facts and evidence presented before me, in conjunction with the legal provisions and judicial precedents discussed earlier, the decree-holders have successfully cast doubt on the credibility of the objector's assertions. This doubt is primarily fueled by the conspicuous omissions on the part of the objector. In fact, the present set of circumstances align with the findings of the Court in *Precast Portal Structures V Kenya Pencil Company Ltd & 2 Others*, [1993] eKLR.



27. Specifically, I am inclined to conclude that the purported level of due diligence exercised by the objector does not demonstrate good faith in this transaction. The entire process of purchasing and registering the subject property raises concerns and appears suspicious. Consequently, I am convinced that the transfer of the subject property to the objector lacks authenticity and was undertaken with the intention of circumventing the execution process.

Determination

28. The long and short of this is that the application dated 22nd March 2022 filed by the objector is dismissed with costs to the decree holders. Consequently, I allow the application dated 10th December 2021 filed by the decree holders.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE

