



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL DIVISION MILIMANI

HCCC CIVIL SUIT NO. 134 OF 1999

NYALI CHEMICALS LIMITEDDECREE-HOLDER

VERSUS

THUGI RIVER ESTATE LIMITED1ST JUDGEMENT-DEBTOR

HON. PAUL KIBUGI MUIITE2ND JUDGMENT-DEBTOR

AND

CHATER HOUSE BANK LTDGARNISHEE

RULING

This Ruling relates to an application dated 16.01.2004 brought by way of a Chamber Summons under the provisions of Order XXI rr. 56 and 57 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya) in which Trading Desk International Limited objects to the attachment of all movable assets in a purported execution of the decree against the judgement debtor on the grounds that the said movables are charged to the objector by virtue of a duly registered Chattels Mortgage.

The application was supported by the Affidavit of one Daniel Kabanga, the General Manager of the objector, Trading Desk International Ltd.

Counsel for the Judgement Creditor (the Plaintiff) sought to have the said Daniel Kabanga cross examined on his Supporting Affidavit. However, at the hearing of this application, Mr. Kanjama, learned Counsel for the Decree-holder said – "**come what may, we are prepared to be heard**". I understood this to mean that the Decree-holder's Counsel had abandoned his earlier intention to cross-examine the said Daniel Kabanga on his Supporting Affidavit sworn and filed in Court on 16.01.2004. This being so, the said Affidavit remains unchallenged in terms of the proviso to order XVIII rule (1) and is therefore admissible.

According to this Affidavit, the Chattels attached are part of the goods constituted in a Chattels Mortgage dated 2.11.1998 by which the Defendant/Judgement Debtor granted to the objector by way of

security, the Chattels outlined in the schedule to the said Chattels Mortgage, including several motor vehicles and a large number of household goods, and that these are not attachable to meet the decretal sum because the Defendant was still indebted to the Objector in the sum of Kshs.2.3 million.

Mr. Nyatoti, learned Counsel for the Objector told the Court that the purported attachment was an "**omnibus attachment**" as it did not list the number of goods attached, and is contrary to the provisions of Rule 12 (b) of Auctioneers Rules, that the attaching auctioneers must indicate the condition and value of each item proclaimed. It was a blanket attachment, and is not a proclamation in terms of the said rule.

Counsel submitted that the Objector had an equitable interest in the goods constituted under the Chattels Mortgage, and not any other goods of the Defendant. These goods were assigned and transferred to the Objector, and this interest has priority over the Decree-holder's claim. He denied that the Chattels Mortgage was invalid or otherwise defective. Counsel relied upon various passages in Halsbury's Laws of England, 4th Edn. Vol. 32 –

(1) Paragraph 412 – Mortgage distinguished from a pledge or pawn

.by a mortgage a legal interest in Chattels is assigned;

(2) Paragraph 414 – Personal Chattels

"Personal Chattels may be made security for repayment of a debt by pledge or by mortgage. If a mortgage of personal Chattels is in writing, it is subject to the statutory provisions affecting bills of sale"

(3) Necessity for writing

"A mortgage of an equitable interest subsisting at the time of the mortgage must be in writing signed by the mortgagor or his agent lawfully authorised in writing. This requirement applies to equitable interests in personality as well as equitable interests in land"

(4) Remedies of an Equitable Mortgagee

"An equitable mortgagee is entitled to possession if there is special agreement or the Court so orders. He may appoint a receiver if empowered to do so expressly or by statute, He may obtain an order for foreclosure or sale in lieu of foreclosure and may, instead of proceeding against the security, bring an action on the personal covenant,"

On these grounds, Mr. Nyatoti urged the Court to allow the objector's application. On the other hand, Mr. Kanjama learned Counsel for the decree-holder in the grounds of opposition dated 23.02.2004 contended at the hearing of this application that –

(a) the Chattels Mortgage referred to by Mr. David Kabanga is invalid, defective and/or cannot defeat the Decree-Holder process of execution,

(b) the Objector's interest is not at arm's length because the judgement-debtor is a director of the objector company where assets are sought to be attached.

(c) the application is an abuse of the process of Court."

I have already referred to and admitted the Affidavit of Daniel Kabanga in so far as it introduces the Chattels Mortgage, which is at the centre of the application, and I cannot to that extent say either that it is defective or incompetent.

The essence of Decree-holder's Counsel's submission is however that the Chattels mortgage is itself defective, and invalid. It does not comply with the requirements of Sections 4 –10 of the Chattels Transfer Act. (Chapter 28, Laws of Kenya). The Chattels Mortgage attached to the Supporting Affidavit of Daniel Kabanga is not registered. It has no legal effect unless it is so registered, and the Decree-holder is not required to take any notice of it unless it is so registered (section 4(1)). **Ex facie**, there is no evidence that it is so registered. It has no number attached to it to indicate its registration (Section 7(1)).

A Chattels Mortgage has ordinarily a life of 5 years unless renewed. The said instrument was dated 2.11.2998. Registration thereof ought to have been done within 21 days (Section 6 (1)), and unless renewed, the registration, and therefore the validity thereof expired on or about 21.11.2003 and was at the time of Proclamation on 22.11.2003, of no legal effect (Section 10 (11), (2) and (3)).

Further under Section 38 of the Stamp Duty Act Cap 480, Laws of Kenya no instrument shall be registered under the Chattels Transfer Act unless the original duly stamped, is produced to the Registrar (of Chattels Mortgages).

Under Section 13 (1) (c) of the Chattels Transfer Act an unregistered instrument shall be deemed to be fraudulent and void as against any person seizing the Chattels or any part thereof comprised in the instrument, in execution of the process of any court authorising the seizure of the Chattels of the person by whom or concerning whose Chattel the instrument was made and against every person on whose behalf the process was issued. This being the position in this matter, the grantee of the Chattels Mortgage has no priority over the decree-holder herein.

Mr. Kanjama referred me to the discussion of my brother Mr. Justice Ombija, and my sister Lady Justice Kasango in (1) **John Patrick Macharia –vs- MDC Holding Ltd. & 2 Others** (Milimani Commercial Courts, HCCC No. 1549 of 2001) and (2) **Fidelity Commercial Bank Ltd. –vs- Agritools Limited, Salim Bhanji, S. Bhanji (Ms.) and Hussein Bhanji and Jamnadass Premium Finance Ltd.** – (Objectors), (Milimani Commercial Courts HCCC 1677 of 2000) in which the said judges found in very similar circumstances that the Chattels Mortgages had a life of five (5) years, and at expiration of which it had lost its validity and was deemed to be fraudulent and void, and in the latter case, it was contrary to the provisions of the Stamp Duty Act, and was to that extent void and of no effect as against a decree-holder.

This is exactly the position here, the Chattels Mortgage was not stamped, it was not registered. If it was stamped and registered its life span had expired, and was therefore of no effect. This being the case, the objector's application dated 16.01.2004 fails and the same is dismissed with costs.

Dated and Delivered at Nairobi this 4th day of May 2005.

ANYARA EMUKULE

JUDGE



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