



Mwadumbo & Company Advocates v Rudufu Ltd; Lipesa (Objector) (Miscellaneous Application E085 of 2019) [2023] KEHC 2533 (KLR) (Commercial and Tax) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E085 OF 2019
PN GICHOHI, J
MARCH 28, 2023**

BETWEEN

MWADUMBO & COMPANY ADVOCATES APPLICANT

AND

RUDUFU LTD RESPONDENT

AND

STELLA INGATO LIPESA OBJECTOR

RULING

1. Through Nicholas Mombo Advocate, the Objector filed a notice of motion dated July 13, 2022 under order 22 rules 51 and 52 and order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 3 and 3A of the *Civil Procedure Act*, Article 40 of *the Constitution* 2010, section 44 (1) of the *Civil Procedure Act*. The objector seeks orders;
 1. Spent
 2. Spent.
 3. That this court be pleased to raise the attachment of all Objectors/Applicant's property as proclaimed by the Respondents through Okuku Agencies Auctioneers and specifically as per the proclamation notice dated 7th July 2022, a warrant of attachment of movable property dated 28th June 2022 and warrant of sale of property dated 28th June 2022 as annexed to the supporting affidavit.
 4. The costs of this application be in favour of the Objector/ Applicant .



2. That application is premised on the grounds on the face of it and on the affidavit sworn on 13th July 2022 by Stella Ingato Lipesa. While attaching a lease agreement and copies of cheques, the Objector contends that the proclaimed properties and the properties listed in the Proclamation Notice dated July 12, 2022 belong to her and they were only leased to the 3rd Respondent. That she was a stranger to the suit between the 1st and 3rd Respondent and therefore, the Respondents had no right to proclaim the goods.
3. The Objector states that she has since established that the Applicant (Plaintiff) was attaching the property in pretext of execution of two decrees in Misc. E 127 of 2018 and Misc. Application No. 124 of 2018 yet she does not co-own the property with the Respondent. She terms the actions by the Respondents through the Auctioneers an illegality and likely to cause her loss and damage.
4. The application is opposed by a replying affidavit sworn on July 27, 2022 by Angela N Munga Mwadumbo, Advocate. She states that the application is frivolous, vexatious and meant to delay the course of justice. While annexing the decree and certificate for costs, she depones that the matter emanates from an Advocate/Client Bill of Costs which was taxed at Ksh. 500,176/= as per the Certificate of Taxation. The Certificate of Taxation together with the Certificate in Misc. E 124 of 2018 which was taxed at Ksh. 417,196.50 were jointly converted into a judgment of this Court and a decree issued to that effect.
5. She further states that it was on the basis of that decree that the Advocate appointed M/s Okuku Agencies Auctioneers to execute by way of attachment of movable goods. She contends that the documents annexed by the Objector have been fabricated by the Client to frustrate the efforts of the Advocate to recover the amount due and owing. That the application is an attempt by the Client to use the Court to delay payment. She therefore urges the Court to dismiss the Objector's Application with costs.

Submissions

6. The application was canvassed by written submissions. While maintaining that the Objector/Applicant was a stranger to the proceedings between the 1st and 3rd Respondents in the main suit counsel submits the properties listed in the schedule are properties belonging to the Objector and leased to the 3rd Respondent. Further, counsel submits that at no time was the Objector/Applicant a party to the proceedings that resulted in the attachment and therefore, the firm of Mwadumbo & Co. Advocates has not right to proclaim the goods listed in the schedule of the movable property dated July 7, 2022 and should instead proclaim goods belonging to the Respondent itself being Rudufu Ltd.
7. Counsel therefore submits that this Court has to determine whether the lease agreement together with the cheques attached by the Objector/Applicant attached are sufficient evidence for proof of ownership of the properties attached and proclaimed as required under order 22 rule 51 of the [Civil Procedure Rules](#).
8. On this issue, counsel relies on among others, the case of [Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei \(Objector\)](#) [2019] eKLR and submits that contrary to the replying affidavit of the Applicant (Mwadumbo & Co. Advocates) that the Objector/Applicant has not provided evidence in form of proof of ownership, the Objector/Applicant has indeed demonstrated that she had entered into a legal binding lease agreement on 1st January 2022 and there is evidence of payment for the leased property as is provided in the said lease agreement. Counsel therefore prays that the Objector/ Applicant's Notice of Motion dated July 14, 2022 be allowed as prayed.



9. Reiterating the contents of the replying affidavit, the Applicant /Respondent submits that the Advocate appointed the Auctioneer to execute by way of attachment of goods based on the decree issued by the Court. Citing the case of *Mercy Njambi v Othaya Villas Co. Limited & another* [2020] eKLR, among others, counsel, submits that while the burden of proof lies with the Objector/ Applicant to establish that she is entitled to or has legal or equitable interests in whole or part of the attached assets, she has failed to demonstrate that she was the owner of the attached goods.
10. Counsel further submits that the documents produced by the applicant were fabricated by the Objector and do not bring any evidence that the proclaimed goods belong to her to exclusion of the Client. She urges the court to note that the Objector filed this application after the said order was lifted and therefore, this application is meant to frustrate the efforts by the Advocate to recover the amount owing considering that there is no evidence that the cheques issued have been banked by the Objector/ Applicant.

Determination

11. After considering the arguments by both parties, there is no doubt that the Applicant/Respondent has a decree issued by the Court. The issue for determination by this Court is whether the Objector/ Applicant has demonstrated that she has legal and equitable interest in the proclaimed assets as required under order 22 rule 51 of the *Civil Procedure Rules* which provides: -

“ 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 parties to the decree-holder, of his objection to the attachment of such property.”
12. Pursuant to the above provision, parties have aptly captured the fact that the Objector/ Applicant has to discharge her burden when claiming the goods proclaimed by the Auctioneer on instructions of the Advocate/ Decree holder. The Objector /Applicant has to demonstrate that she has an interest, legal or equitable in the attached goods. In *Stephen Kiprotich Koeh* (supra) ;

“ The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.”
13. It is noted that flowing from above, the Court went on to dismiss the Objector’s application as the Objector had “not demonstrated any direct, indirect or remote relation with the attached properties to justify the objection proceedings.”
14. In the case of *Mercy Njambi* (supra) , the Court had this to say in reference to Order 22 Rule 51 of the Civil Procedure Rules;

“ It is crystal clear from the above provision of the applicable Rule of Procedure and precedent that the threshold for lifting attachment of property in favour of an objector is proof of ownership of the attached property.”



15. However, the circumstances therein were different from the case before this Court as while dismissing the Objector's application, the Court went on to say;

“In this case the Objector / Applicant admitted that it was impossible for her to prove the ownership since the proclamation was no done properly by indicating the registration number of the Motor Vehicles. She produced no documentary evidence to prove ownership of the unspecified vehicles and the other goods she described as tools of trade in her premises. On the other hand, the Claimant maintained that the proclamation was properly done and hat the goods proclaimed belong to the Respondent judgment/Debtor and not the Applicant...Without any documentary evidence to prove ownership or beneficial interest in the attached goods, the Objector's case lacks any legs to stand on and as such it must fail.”

16. In the instant case, the Objector/Applicant has annexed to her affidavit a lease agreement dated 1st January 2022 duly signed. She has also annexed cheques showing payment. There is nothing to show that the same are a fabrication. The fact that this application has been brought after an order for stay of execution had been lifted is not material. The Objector has demonstrated that she has a legal and equitable interest in the property that the Applicant has proclaimed. The Applicant may feel frustrated by the turn of events but as a Decree Holder, it is up to the Applicant to find other means realising the fruits of her judgment.

17. In the premises, I find merit in the Objector's application dated and the same is allowed in the following terms;

1. The attachment of all Objector/Applicant's property as proclaimed by the Respondents through Okuku Agencies Auctioneers and specifically as per the proclamation notice dated July 7, 2022, a warrant of attachment of movable property dated June 28, 2022 and warrant of sale of property dated June 28, 2022 be and is hereby raised.
2. Due to the circumstances of this matter, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 28TH DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Mwadumbo for Applicant

Mr. Mombo for Objector

Isindu, Court Assistant

