



Soleca Developers and Construction Limited v Gems National Academy Limited t/a Regis School, Runda & another (Civil Case E726 of 2021) [2023] KEHC 17781 (KLR) (Civ) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E726 OF 2021

A MABEYA, J

MAY 26, 2023

BETWEEN

SOLECA DEVELOPERS AND CONSTRUCTION LIMITED PLAINTIFF

AND

**GEMS CAMBRIDGE INTERNATIONAL SCHOOL T/A REGIS SCHOOL
RUNDS 1ST DEFENDANT**

**GEMS NATIONAL ACADEMY LIMITED T/A REGIS SCHOOL,
RUNDA 2ND DEFENDANT**

RULING

1. Before Court is the objector's application dated May 2, 2022 which was accompanied by a notice of objection of even date. The application was brought under Articles 40 (1), (2), (3) and (5) and 159 of the *Constitution*, order 22 rule 51(1) and (2), order 40 rule 1, 2, 3, 4, 5 and 10 and order 51 (1) of the *Civil Procedure Rules*.
2. The application sought orders for stay of execution of the decree dated March 22, 2022 and stay of execution of the attachment and sale of motor vehicle registration numbers [Particulars withheld]
3. It also sought orders for release of the aforesaid motor vehicles and the raising of the proclamation notice dated April 19, 2022 by Star Truck Auctioneers. It also sought to have the plaintiff permanently restrained from executing any decree against the objector's properties.
4. The grounds for the application were set out on the face of it and in the supporting affidavit of Ernest Mureithi Waithaka sworn on May 10, 2022. It was contended that the objector was a private company



- registered in Kenya on January 25, 2018 as per the attached CR12. That it owned Regis School which was registered on January 21, 2019. That the defendant was not the owner of Regis School.
5. That on April 19, 2022, the auctioneers proclaimed the objector's assets yet they did not belong to the defendant but to the objector who was the registered and beneficial owner of the vehicles. That the objector was not a party to this suit nor was it indebted to the plaintiff. That therefore, the proclamation notice dated April 19, 2022 was directed against the wrong party.
 6. That if the sale of the vehicles was not restrained, the objector would be greatly prejudiced and suffer substantial loss.
 7. The plaintiff opposed the application vide the replying affidavit sworn by Leon Kimathi on May 13, 2022. It was contended that the plaintiff entered into a construction contract with Regis School Runda (herein RSR) then trading as Gems Cambridge International School and was issued with various LPOs. That upon completion of the works, the plaintiff issued RSR with the invoices but the same were never settled leading to the filing of the suit.
 8. That the parties recorded a consent on November 18, 2021 after negotiations and the same was adopted as an order of the court on March 22, 2022. That RSR paid the first installment of Kshs 2 million but failed to make any other payment as per the consent. The plaintiff thus begun the execution process by attaching motor vehicles xxxx, xxxx and xxxx all belonging to the defendant as per the attached motor vehicle searches by NTSA.
 9. It was thus contended that the defendant and the objector were the same institution which trades under the name Regis School Runda and there was no other entity called Regis School Runda. That all correspondence was done with RSR and the defendant/objector had already made part payment towards settlement of the decree.
 10. That the payment slip issued on April 27, 2022 was executed and authorized by the same Earnest Mureithi Waithaka who now purports to swear the supporting affidavit in the application. That the said Earnest was being dishonest as he was instrumental in the negotiations and part payment of the decretal amount.
 11. That at all times, the plaintiff dealt with RSR and the issue of ownership of the school was never raised at any stage, including when the part payment of Kshs 2 million was made. That the application was thus bad in law and ought to be dismissed.
 12. The application was canvassed by way of written submissions. The objectors' were dated June 11, 2022 whereas those of the plaintiff were dated June 30, 2022. This Court has considered those submissions alongside the rival pleadings.
 13. Order 22 rule 51(1) of the Civil Procedure Rules 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.'
 14. In *[Arun C Sharma versus Ashana Raikundalia T/A A Raikundalia & Co Advocates & 4 others \[2014\] eKLR](#)* the court held: -

' 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. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?’

15. In *Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others* [1993] eKLR, it was held: -

’ The burden is on the objector to prove and establish his right to have attached property released from attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied:

- (1) That the property was not when attached held by the judgment debtor for himself or by some other person in trust for the judgement debtor; or
- (2) That the objector holds that property on his own account. But where the court is satisfied that the property was, at the time of attachment, held by the judgement debtor, as his own and not on account of any other person, or that it was held by some other person in trust for the judgement debtor or that ownership has changed, whereby the judgement debtor has been divested of the property in order to evade execution, on the change is tainted with fraud, the court shall dismiss the objection.’

16. In the present case, the objector claims that it is the owner of Regis School, Runda (RSR) and not the defendant, and that it is also the owner of the attached motor vehicles. From the rival pleadings, it is not in dispute that RSR benefited from the services of the plaintiff, its ownership notwithstanding. From the LPO’s before this Court, it is clear that the buyer of the services was RSR. It is therefore an undisputed fact that there is a valid decree against RSR and the plaintiff is a valid decree holder.

17. It seems to this Court that the real dispute raised by the objector is the ownership of the school and the three attached motor vehicles. Both the plaintiff and objector produced documents indicating that the motor vehicles are on the one part owned by the defendant, and there was also produced log books indication that the three motor vehicles belong to the objector. Both of these documents were obtained from NTSA, the plaintiff’s evidence being motor vehicle searches from NTSA as at May 11, 2022, and the objectors’ evidence being logbook copies from NTSA indicating the objector as the owner of the motor vehicles.

18. Though the objector claims to be the owner of the school, all the documentation relating to the contract between the RSR and the plaintiff were in the defendant’s letter head. The certificate of search produced by the objector indicates that it is the proprietor of an entity known as ‘Regis School’. It is not clear whether this is the same entity as Regis School, Runda. That evidence is inconclusive.

19. In circumstances where it has been established that it is not in dispute that RSR benefited from the services of the plaintiff and declined to settle the invoices, is the plaintiff to be held in abeyance and restrained from enjoying the fruits of its decree which was in the first place obtained by consent? I don’t think so, the feeling I have is that the registration of the defendant and the objector with near same names may have been with ulterior motive. The properties were proclaimed while at RSR.

20. The second and more important point is that though the objector now claims that it has no relation whatsoever with the plaintiff, there is evidence before this Court that RSR made partial payment of Kshs 2 million as per clause 1(a) of the consent dated March 22, 2022.

21. The payment slip issued on April 27, 2022 was executed and authorized by the same Earnest Mureithi Waitaha who now purports to swear the supporting affidavit in the objection application. This in



itself is sufficient proof that the objector is well aware of the contract between the plaintiff and the RSR, the debt owed to the plaintiff, the existence of the instant suit, and even participated in the execution of the consent entered thereof.

22. If indeed the objector is the owner of RSR as claimed, and the objector did not deny that the said RSR benefited from the construction and renovations made on the school, then it has a responsibility to pay the debt, and had indeed begun executing this responsibility by complying with one of the terms of the consent order.
23. To this Court, the application is brought in bad faith, and the existence of two names trading as Regis School Runda is being used to defeat the plaintiff's attempt to execute its lawful decree. Whether or not the school is owned by the defendant or objector is not an issue to be determined by this Court. The fact remains that there is only one entity known as Regis School Runda, it benefited from the plaintiff's services and is indebted, and it is the beneficial owner of the proclaimed motor vehicles. The proclamation of those motor vehicles to settle RSR's debt is therefore legal.
24. In the end, this Court finds no merit in the objector proceedings herein. The application is dismissed with costs to the plaintiff. The interim orders are hereby vacated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

