



Nanda Properties Limited v Mudher & another; Mudher Engineering Works Limited (Objector) (Commercial Case E596 of 2019) [2023] KEHC 22983 (KLR) (Commercial and Tax) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E596 OF 2019
JWW MONG'ARE, J
SEPTEMBER 28, 2023**

BETWEEN

NANDA PROPERTIES LIMITED APPLICANT

AND

AMREEK SINGH MUDHER 1ST RESPONDENT

NILESH JAYANTILAL KOTEDIA 2ND RESPONDENT

AND

MUDHER ENGINEERING WORKS LIMITED OBJECTOR

RULING

1. What is before the court for determination is a notice of motion dated March 1, 2022 filed by the objector and made under order 22 rules 51 and 52 of the *Civil Procedure Rules* and sections 1A and 3A of the *Civil Procedure Act* seeking inter alia a Stay of the Decree issued against the Respondents and dated August 2, 2021. The application is supported by the affidavit of Jasbinder Singh Mudher.
2. The objector also seeks that the court raise the proclamation and/or attachment of property being Motor Vehicle Registration numbers KAG 152E registered in the name of the objector, KBA 292H registered in the name of Narrowe Ann Elizabeth, assorted Engines, assorted chairs and desks, gear box and shaft and assorted engineering reboring machines proclaimed by Icon Auctioneers in execution of Judgment and Decree.
3. The application is opposed by the decree holder/plaintiff through his replying affidavit sworn on May 19, 2022 sworn by Samuel George Okello. Both parties filed written submissions which they fully adopted and highlighted the same orally before the court.



4. The facts giving rise to the instant application are found in the Notice of Motion dated March 1, 2022. The objector contends that the properties proclaimed and risk attachment did not belong to the Judgmentdebtor. In a nutshell the objector has brought this application challenging the proclamation and attachment of its properties and properties some belonging to its clients and others to the objector. The objector averred that pursuant to the decree issued by the court, the judgment creditor/ applicant's Advocates, instructed Messrs. Icon Auctioneers who visited the objector's premises on the April 23, 2021 and proclaimed the following items:-
 - i. Motor vehicles registration numbers KCP 452E, KBA 292H and KAG 152E.
 - ii. Assorted Engines
 - iii. Assorted chairs and desks
 - iv. Assorted Gearbox and shaft
 - v. Assorted engineering reboring Machines
5. The objector contended that amongst the attached properties it owned the following:-
 - i. Motor vehicles registration numbers KAG 152E.
 - ii. Assorted chairs and desks.
 - iii. Assorted engineering reboring Machines.
6. The objector further stated that it carries on the business of motor vehicles repair and services and thus in the course of its business it receives at its premises its clients' motor vehicles in order to carry out repairs and/or service. Consequently, the objector deponed that the motor vehicle registration number KBA 292H belonged to one of its clients namely Narrowe Ann Elizabeth and the assorted engines and assorted gearbox and shaft also belong to its various clients.
7. To support its claim, the above, the objector annexed a copy of log book of motor vehicle registration number KAG 152E and a copy of records from NTSA which confirmed that as at February 25, 2022 the objector was the registered owner of the said vehicle. Further, the objector produced as JSM 2(c) a copy of quotation from Mist International dated September 1, 2016 reference number TMI/01/09/2016/1 for purchase of a reboring machine with electrical accessories.
8. The objector also produced a copy of the log book for motor vehicle registration number KBA 292H confirming that Narrowe Ann Elizabeth was the registered owner of the said vehicle as at February 25, 2022. There were also copies of local purchase orders from different clients confirming that the engines, gearbox and shaft were properties of its clients.
9. The Decree Holder contends that the respondents in utter contempt of court refused to satisfy the decree dated August 2, 2021 which prompted it to make an application for execution of the decree. Subsequently, the respondent has obtained warrants of attachment and proceeded to instruct M/s Icon Auctioneers to conduct the preliminary investigation and execute the warrants against the Respondent.
10. Further, the Decree-Holder argued that the objection proceeds was a strategy to frustrate the Execution process and mislead the court. The Decree-Holder further argued that the objector did not provide to the court the authority to institute objection proceedings on behalf of the owner of Motor Vehicle Registration Number KBA 292H and therefore the evidence by the objector was unsubstantiated. The Decree-Holder urged the court to dismiss the application for being devoid of merit.



Analysis and Determination

11. I have considered carefully the pleadings and submissions by the parties and

I note that the parties agree that the main issue for determination is:-

“whether the objector has made case for lifting the proclamation and attachment on the goods and properties proclaimed by the Decree-Holder pursuant to warrants of attachment issued herein.”

This Application has been filed under order 22 rules 51 and 52 of the *Civil Procedure Rules*. Order 22 rule 51 (1) provides in this regard as follows: -

“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 of the proceeds of sale of such property give notice in writing to the court and to all parties and to the Decree-Holder, of his objection to the attachment of such property.”

1. The above Order 22 places the onus of proof on the objector to satisfy the court that they have a legal or equitable right to the goods or property and the same is in no way the property of the Judgment- Debtor. This was reinforced by the court in the case of Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR, where the court 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. 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?”

13. The burden of proof does not shift in any objection proceedings just as was held in the case of *Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others* [1993] eKLR where the court stated that:-

“The burden is on the objector to prove and establish his right to have the attached property released from the 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 judgment-debtor; or
- (2) that the objector holds that property on his own account.”

14. I note that all the properties that were attached were found at the premises of the objector. Among the goods attached was a motor vehicle belonging to the judgment-debtor. The judgment-debtor is the brother to the director of the objector who produced evidence to establish that the rest of the Motor Vehicles and assorted items attached did not belong to the Judgment Debtor but were the property of the objector and its customers. The objector submitted that it operates a vehicle repair shop and does, in the course of its business, receive motor vehicles for repair belonging to his customers and retains them at his premises during the period of repairs. In proving that the vehicles attached save for one did not belong to the judgment-debtor the objector annexed Copies of Records from NTSA



to demonstrate that these were owned by his customers. I note that the objector further provided as evidence invoices and quotations for the machine parts and tools found at his premises.

15. The objector confirmed that the Judgment Debtor was a brother to the director of the objector but averred that the brother was neither a shareholder nor a director of the objector.
16. I am therefore satisfied that the objector, has on a balance of probability, satisfied the requirement set by order 22 rule 52 in establishing that the vehicles and goods attached did not belong to the judgment-debtor and neither were they held in trust for the Judgment Debtor. From the attached vehicles, the objector did not lay claim to motor vehicle Registration Number KCP 452E which belongs to the judgment-debtor. I am also satisfied by the explanation that the objector, as a business carrying on motor vehicle repair shop, does in the course of the business receive vehicles belonging to third parties and as a business they have a duty to protect and preserve the same as trustees for their customers.
17. The upshot of the above findings is that the application by the objector has merit and I shall allow the same. The Decree-Holder may proceed to dispose the said motor vehicle KCP 452E belonging to the 1st defendant herein. Each Party shall bear their costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Njoroge for the Applicants/Applicants.

Mr. Gakunga for the Respondent/Decree Holder.

Amos - Court Assistant

