



Kahuthu and Kahuthu Advocates v Karuga & another (Miscellaneous Application 133 of 2019) [2023] KEELC 17754 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 133 OF 2019**

**MD MWANGI, J
MAY 30, 2023**

BETWEEN

KAHUTHU AND KAHUTHU ADVOCATES DECREE HOLDER

AND

ROSE WAMBUI KARUGA 1ST JUDGMENT DEBTOR

KENNETH GICHINGA KARUGA 2ND JUDGMENT DEBTOR

RULING

Introduction

1. This application for determination is brought by the Objector under the provisions order 22 rule 51 & 52 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*. The Objector prays for orders;
 - a. That the Proclamation Order dated October 5, 2022 by Jogan Dries Auctioneers was unlawful.
 - b. That items proclaimed on October 5, 2022 by the agents of the Respondent/Decree-holder belong to the Objector.
 - c. That the Judgement-Debtor has no legal or equitable interest in the items proclaimed on the October 5, 2022.
 - d. That the costs of the application be provided for.
2. The application is premised on the grounds that the properties proclaimed on the October 5, 2022 by Jogan Dries Auctioneers belongs to the Objector and that the Judgement-Debtor has no legal or equitable interest in the said properties. The application is further supported by the Supporting Affidavit of Hilda Nyokabi deponed on the October 6, 2022. She avers that she is a Director of Dekings Traders Limited. She states that the Auctioneers, Jogan Dries Auctioneers visited her home



and proceeded to proclaim all the companies' movable goods in the house to recover a sum of Kshs. 1,065, 645 pursuant to the Decree issued by this court. The sum is owed by the Respondents who are the legal representatives of the estate of the late Dedan Karuga Gichinga.

3. The deponent further avers that the items proclaimed by the Auctioneers are registered in the names of Dekings Traders Limited which is a separate legal entity distinct from the Respondents. Yet the Company is neither a party nor was it aware of the matter herein. As such the company's property should not be attached. That the attachment was therefore wrongful, irregular and improper.

Replying Affidavits

4. The Decree-Holder opposed the application by way of three Replying Affidavits. The first Replying Affidavit is deponed by G. J. Kahuthu Advocate deponed on the 17th October, 2022. He avers that the deponent, Hilda Nyokabi is a daughter of the 1st Respondent debtor and a sister to the 2nd Respondent. He further states that he reaffirms the averments as contained in the Replying Affidavit of the Auctioneer.
5. The second Replying Affidavit was sworn by Joseph Nderitu, the Auctioneer. He avers that he visited the Respondent Judgement-Debtors home and proclaimed the goods as shown in the Proclamation Notice, the Photographs he took and the search of the Objector. The proclamation was done in the presence of Hilda Nyokabi at their premises Number 195/195 Karen. That the proclaimed Motor Vehicle was in the name of the Judgement –Debtor, a fact that was confirmed by Hilda Nyokabi.
6. He states that the deponent of the supporting affidavit, Hilda Nyokabi is neither a director nor a shareholder of the Objector company. The application is just an effort to frustrate the execution of the decree of this court.
7. The third Further Replying Affidavit was deponed by the Advocate, G. J. Kahuthu sworn on the 24th October, 2022 after being served with the substantive application. He states that Hilda Nyokabi signed the proclamation notice as Hilda Nyokabi Gichinga and is a daughter of the 1st Respondent.
8. Further, that Family Bank has no interest in the Proclaimed Motor Vehicle KBD 560K as alleged. He attaches a Letter dated October 22, 2022 from Family Bank confirming the position.

Supplementary Affidavit

9. The Objector, through Hilda Nyokabi, filed a Supplementary Affidavit dated the 2nd November, 2022. She avers that the Motor Vehicle KBD 560K belongs to the Objector company. Further the Logbook had been charged /transferred to the Family Bank to secure a loan and she is in the process of transferring it back to the Objector.
10. She alleged that the Auctioneers did not verify ownership of the property they were proclaiming and only assumed that all the property belonged to the Judgement Debtors. The Applicant has a duty to ascertain the ownership of the goods that he intends to attach. That some furniture proclaimed is old furniture which she has sentimental attachment to having personally purchased them. She prays that the application be allowed.

Court's directions

11. On the hearing date of the application, the Objector's Counsel requested the court to rely on what had been filed in court and make a determination on that basis. The Decree-Holder equally relied on the responses filed thereto.



Issues for Determination

12. I have given due and careful consideration of the application, and the rival affidavits, I am of the considered view that the following are the issues for determination:
 - a. Whether the supporting affidavit is defective and incompetent for want of authority and capacity by the deponent.
 - b. Whether the proclamation was defective, null and void;
 - c) What orders to issue and who to bear costs of the application?

Analysis and Determination

A. Whether the supporting affidavit is defective and incompetent for want of authority and capacity by the deponent.

13. The deponent of the affidavit in support of the Objector's application, Hilda Nyokabi, avers that she is Director in the Objector hence the authority to swear on its behalf. The Decree-Holder/ Applicant on the other hand contends that the Supporting Affidavit and the entire application said to be filed on behalf of the Objector be struck out on grounds that the deponent is not a director of the company and has not demonstrated the authority to swear the affidavit on its behalf. The Decree-Holder attached a copy of the records from the Registrar of Companies which shows that the Directors of Dekings Traders Limited are Rose Wambui Karuga and Dedan Karuga Gichinga as at October 17, 2022.
14. The Objector describes itself as a limited liability company and therefore the deponent of the affidavit must have authority to swear on its behalf. It is however evident that the Hilda Nyokabi is neither a director nor a secretary nor a principal officer of the Objector company. She does not hold a position of authority or decision-making in the Objector company such as to purport act for it. The Decree-Holder having adduced evidence proving that she is not a director, she ought to have annexed the authority from the company authorizing her to act on its behalf as required under order 4 rule 1 (4) of the *Civil Procedure Rules*.
15. The Court of Appeal in the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR also stated as follows: -

“...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
16. The deponent having no authority and capacity to act on behalf of the Objector Company, she is a stranger to the Objector. The Application is therefore defective and should therefore be struck-out.



17. Assuming that the failure to adduce the authority is a procedural technicality, would the application still be merited? In response thereof I will address the second issue stated above.

B. Whether the proclamation was defective, null and void;

18. The Objector contends that the proclaimed Motor Vehicle is registered in its name and that the household items proclaimed were purchased by the deponent. That the proclaimed goods therefore do not belong to the Judgment-Debtor and are incapable of being attached in execution of a decree against the judgment-debtors.

19. As held by Kasango J in *Harley's Limited vs Wockaine (K) Limited* (HCCC No 1753 of 2001) order 22 rule 51 of the Civil Procedure Rules places the burden on the Objector to prove that it has a legal and equitable interest in the goods being attached.

20. In support of its application, the Objector produced a Logbook purporting that the proclaimed Motor Vehicle belonged to the Objector and was charged to Family Bank. She further stated that she was in the process of discharging the same. She did not however adduce any evidence to that effect. In rebuttal, the Decree-Holder produced a Letter dated 22nd October, 2022 from Family Bank which confirms that Family Bank has no interest in the said Motor Vehicle.

21. As for some proclaimed furniture, the deponent avers that they are old furniture which she has sentimental attachment to having personally purchased them. She produced receipts confirming the alleged purchase. Clearly, the said furniture is not owned by the Objector. The deponent is a different legal entity from the objector company, she ought to have commenced the Objection Proceedings in her own name and capacity as the owner if at all.

22. It is my finding that the Objector has not established a definite interest in the attached goods.

23. In light of the foregoing, the Objector's application dated October 6, 2022 would still have been dismissed with costs to the Decree-Holder to be borne by the Objector.

24. The conclusion is that the objector's application is dismissed in its entirety with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kosgei for the Objector/Applicant & Judgment debtor.

Mr. Kahuthu for the Advocate.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

