



**Premier Daffodil Limited v Speedbird Travel and Safaris Limited (Environment & Land Case 53 of 2020) [2023] KEELC 18426 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 18426 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 53 OF 2020**

**JO MBOYA, J**

**MAY 23, 2023**

**BETWEEN**

**PREMIER DAFFODIL LIMITED ..... PLAINTIFF**

**AND**

**SPEEDBIRD TRAVEL AND SAFARIS LIMITED ..... DEFENDANT**

**RULING**

**Introduction & Background**

1. Pursuant to a decree issued on the July 19, 2021, the Plaintiff-decree holder herein commenced the process of execution and in this regard same instructed and engaged a nominated auctioneer, namely, Beyond Vision Auctioneers, to levy execution for purposes of recovering of the decretal sum amounting to Kshs 27,929,516.67/= only.
2. Arising from the warrants of attachments and sale, issued to and in favour of the nominated auctioneer, the auctioneer proceeded to and effected a proclamation on the Defendant-Judgment debtor. For clarity, it is the issuance and service of the impugned proclamation that has provoked the filing of the current Application.
3. For good measure, the Application mounted by the Defendant/Applicant and which is dated April 14, 2023, seeks the following Reliefs;
  - i. THAT this Application be certified urgent, service be dispensed with and the same be heard ex parte in the first instance.
  - ii. THAT pending hearing and determination of this Application Inter-parties, this Honourable Court be pleased to order a stay of the execution of warrants of attachment dated March 20, 2023 and Proclamation of Attachment and call upon the Plaintiff/Applicant to intimate to the court by notice in writing and



to all parties in writing whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

- iii. THAT this Honorable Court be pleased to issue an order barring the removal and/or seizure of the listed items, a stay of the Sale, further sale, Completion of Sale and any transfer and or dealing in any manner with all of the (14) listed items pending the hearing and determination of this application.
  - iv. THAT this Honorable Court be pleased to grant any other orders that it may deem fit, just and expedient in the interest of justice.
  - v. THAT the costs of this Application be in the cause.
4. That the instant Application is premised and anchored on various grounds, which have been enumerated at the foot of the Application. Besides, the Application is further supported by the affidavit of one Dave Munya Mwangi, who avers that same is a Director of the Defendant/Applicant.
  5. Upon being served with the instant Application, the Plaintiff/Respondent responded thereto vide a Replying affidavit sworn on the May 5, 2023 and to which the Respondent has attached a total of seven (7) documents in furtherance of the opposition.
  6. Instructively, the Application came up for hearing on the May 23, 2023, whereupon the counsel for the respective Parties agreed to canvass and dispose of the Application by way of oral submissions. For good measure, the Application was thereafter canvassed and thus culminating into the current ruling.

## **Submission By The Parties**

### **A. Applicant's Submissions**

7. Learned counsel for the Applicant submitted that the instant application has been filed in opposition to the execution that has been commenced by and at the instance of the Plaintiff/Respondent. Furthermore, learned counsel has contended that the Application is primarily objecting to the attachment of the various properties, whose details have been alluded to and particularized in terms of Paragraph 4 of the supporting affidavit.
8. In addition Learned counsel contended that the various properties, which have since been proclaimed at the instance of the Plaintiff/Respondent, do not belong to the Defendant/Applicant. In any event, Learned counsel has contended that the said properties belong to 3<sup>rd</sup> parties and in this respect, counsel invited the Honourable court to take cognizance of paragraph 5 of the supporting affidavit.
9. Furthermore, Learned counsel submitted that a Defendant, like the Defendant herein, against whom a Judgment and a decree has been issued, can mount and/or file Objection proceedings pursuant to the provisions of Order 22, Rules 51, 52 and 53 of the *Civil Procedure Rules*.
10. Thirdly, Learned counsel submitted that the current Application has also been filed pursuant to the provisions of Section 34, of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, which essentially deals with execution. In this respect counsel pointed out that the dispute beforehand touches on and relates to execution and hence the Application is well founded.
11. Fourthly, Learned counsel submitted that the various properties which have been proclaimed and are on the verge of attachment by and at the instance of the Plaintiff/Respondent, comprise of and constitute tools of trade for the Defendant/Applicant. Consequently, counsel pointed out that those properties that constitute tools of trade cannot be attached and/or executed against in the manner proposed by the Plaintiff/Respondent herein.



12. Lastly, learned counsel contended that the current Application is separate and distinct from the reference, which the Defendant/Applicant is also pursuing. For clarity, counsel intimated that the current Application is challenging the execution process and not otherwise.

**B. Respondent's Submissions:**

13. Learned counsel for the Respondent adopted the contents of the Replying affidavit sworn on the May 5, 2023 and thereafter raised, highlighted and amplified three (3) pertinent issues for consideration by the court.
14. Firstly, Learned counsel submitted that the Applicant herein has previously filed a similar application seeking for stay of execution, but which Application was heard and disposed of by the Honourable court at the foot of the Ruling dated October 31, 2022. Furthermore, learned counsel has added that in the said Ruling, the court granted orders of stay albeit conditions, which the Applicant herein failed and refused to comply with.
15. Owing to the foregoing, Learned counsel has thus pointed out that the current Application, which equally seeks orders of stay of execution, is therefore an abuse of the court process and hence should not be entertained by the court.
16. Secondly, Learned counsel has submitted that the current Application, which is premised on the provisions of Order 22, Rules 51, 52 and 53 of the Civil Procedure Rules, constitutes Objection proceedings and not otherwise. Invariably, Learned counsel has added that a Defendant to a suit and against whom Judgment has since been issued, cannot file/mount Objection proceedings in the same matter or at all.
17. As a result of the foregoing, Learned counsel for the Plaintiff/Respondent has therefore contended that to the extent that the Objection proceedings herein have been taken by a Defendant, same are therefore mis-conceived and legally untenable.
18. Thirdly, Learned counsel for the Plaintiff/Respondent has further submitted that the properties which have since been proclaimed belong to the Defendant/Applicant and not otherwise. In this respect, counsel has pointed out that the same properties were the subject of a previous attachment and wherein the deponent of the current affidavit swore a supporting affidavit on the 30<sup>th</sup> July 2022 and wherein same admitted that the properties belong to the defendant/Applicant.
19. Premised on the foregoing, Learned counsel for the Plaintiff/Respondent has therefore submitted that the contents of the current supporting affidavit are at variance with and contradictory to the previous affidavit sworn the July 30, 2022. Consequently, counsel has therefore contended that the contents of the current supporting affidavit constitute and amount to perjury.
20. In any event, Learned counsel has further contended that the Defendant/Applicant herein is approbating and reprobating, at the same time, which essentially constitutes an abuse of the court process.
21. Lastly, Learned counsel for the Plaintiff/Respondent has submitted that the properties which have since been proclaimed in execution of the decree of the court, do not constitute tools of trade, as envisaged by the provision of Section 44 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya. In this regard, counsel for the Respondent has thus invited the court to find and hold that the impugned application is premature, mis-conceived and bad in law.



### **Issues For Determination:**

22. Having reviewed the Application dated April 14, 2023, the supporting affidavit and the response thereto and upon consideration of the oral submissions ventilated by the respective advocates for the Parties; the following issues do arise and are thus worthy of consideration;
  - i. Whether a Defendant against whom a Judgment has since been issued can take out Objection proceedings in respect of the same matter.
  - ii. Whether the current Application is Legally tenable.

### **Analysis And Determination**

#### **Issue Number 1**

Whether a Defendant against whom a Judgment has since been issued can take out Objection Proceedings in respect of the same matter.

23. It is common ground that the instant suit was filed and lodged against the Defendant/Applicant herein and thereafter the suit was heard and determined culminating into a decree being issued against the Defendant/Applicant. In addition, the Plaintiff/Respondent herein was also awarded costs of the suit.
24. Subsequently the costs were taxed and certified by the Taxing Officer of the Court culminating into the issuance of a certificate of costs. However, upon the issuance of the certificate of costs, the Defendant/Applicant herein (sic) felt aggrieved and sought to file a reference, with a view to challenging the certificate of taxation.
25. Arising out of an application filed by the Defendant/Applicant, the court rendered a Ruling on the October 31, 2022, wherein the Application was allowed albeit on terms. For clarity, one of the terms included that the Defendant/Applicant was to pay a certain amount to the Plaintiff/Respondent as security pending the hearing and determination of the reference.
26. Be that as it may, the Defendant/Applicant herein failed and/or neglected to comply and thereafter the Plaintiff/Respondent has since taken out warrants of attachment and sale against the defendant/Applicant. In this regard, the nominated auctioneer has since issued and served the requisite proclamation upon the defendant/Applicant, enumerating the various properties under execution.
27. It is the said execution process that has culminated into the filing of the instant Application by the Defendant/Applicant and who has since invoked the provisions of Order 22, Rules 51, 52 and 53 of the Civil Procedure Rules.
28. Having invoked the foregoing provisions, the Defendant/Applicant now contends that the properties which have since been proclaimed and which are the subject of execution, do not belong to the Defendant/Applicant, but the same belong to some Third Parties. In this respect, the Defendant/applicant thus contends that in so far as the said properties do not belong to her, same therefore has the capacity to take out and issue Objection proceedings.
29. Before venturing to determine whether a Defendant in a matter can take out and lodge Objection proceedings in the same cause, it is imperative to take cognizance of the provisions of Order 22, Rules 51, 52 and 53 of the Civil Procedure Rules, 2010.
30. For ease of reference the provisions (supra), are reproduced as hereunder;

51.



- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property.
- (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
- (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties. [Order 22, rule 52.] Stay of execution.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

[Order 22, rule 53.] Raising of attachment.

53. Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.'

31. My reading and understanding of the foregoing provisions, drives to the conclusion that the Objection proceedings can only be taken or mounted by a person who was hitherto not a party to the proceedings, but who has an interest and/or stake in the property which is the subject of execution, arising out of a decree, in a matter wherein the third party namely, the Objector, was not one of the Parties.
32. Furthermore, Objection proceedings are meant to protect and vindicate the rights of Third parties, whose properties are being executed and attached, arising out of proceedings for which same are not parties. Instructively, a Plaintiff or a Defendant, who was privy to and bound by the proceedings, cannot himself purport to issue and take out Objection proceedings.



33. To my mind, the Objection proceedings which have been taken out by and at the instance of the Defendant herein are clearly mis-conceived and mis-advised. Inevitably, the Defendant cannot constitute himself as an Objector in the same cause and/or matter.
34. Further and in any event, it is not lost on me that whenever Objection proceedings are being taken, it behooves the Objector to serve the requisite notice of objection on both the Plaintiff and the Defendant, respectively, and such requirement is informed by the need to avert collusion between a losing party and a third party, merely calculated to defeat or defraud the cause of justice
35. Without belaboring the point, I come to the conclusion that a Defendant cannot take out and/or mount Objection proceedings in the same matter or at all. In any event, the provisions of the Order 22, Rules 51, 52, and 53 of the Civil Procedure Rules do not envisage a situation where a Plaintiff/ Defendant can constitute him/herself as an Objector.
36. In a nutshell, the subject Application which has been mounted by the Defendant, albeit disguised as an Objector, is certainly still borne.

## Issue Number 2

Whether the current Application is Legally tenable.

37. The current Application seeks various albeit numerous reliefs. However, it is instructive to note that all the reliefs that have been alluded to in the body of the Application, especially prayers 2 and 3, are prayers which are being sought pending the hearing and determination of the Application. For clarity, it is evident and apparent that the moment the Application is heard, the entire reliefs sought becomes spent and are rendered redundant.
38. Premised on the foregoing, the question that I must grapple with is what happens ex post facto, the hearing and determination of the Application. Would the court be amenable to grant any order, whose legal import and tenor lapses and ends the moment the Application is heard and determined?
39. Surely, courts are never called upon to issue orders in futility and vanity. However, despite the established principles to that effect, the Defendant/Applicant herein is keen to invite the court to grant an order whose net effect is to serve zero purpose.
40. Notably and in addition, the Defendant/Applicant has contended that the various properties, which have since been proclaimed and or on the verge of execution/attachment, forms the Defendant's tools of trade. In this respect, the Applicant has invited the court to take cognizance of the provisions of Section 44 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
41. Having been invited to take note of the provisions of Section 44 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, it is thus imperative that the said provisions be reproduced for ease of reference.
42. The said provisions provides as hereunder;-

- ' (1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

Provided that the following shall not be liable to attachment or sale— (i) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-



debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;

(ii) The tools and implements of a person necessary for the performance by him of his trade or profession;'

43. Even though the Defendant/Applicant contends that the properties which have been attached constitute tools of trade, it is my humble albeit considered view that the impugned properties do not fall within the purview of what constitutes and comprises of tools of trade.
44. In any event, prior to and before I pronounce that a particular item constitutes tools of trade, it would be incumbent upon the Applicant to establish that the same belong to a particular trade or profession. For good measure, the items which are used for purposes of business do not fall within the purview of tools of trade.
45. Other than the foregoing, the Applicant herein has also contended that what has been proclaimed and attached also belong to some Third Parties, namely, Michael Gachiru Muriithi and Phylis Wanjiru, respectively. In this respect, counsel has then contended that to the extent that the said properties belong to third parties, same cannot be attached and sold in execution of a decree against the Defendant.
46. Nevertheless, it is instructive to note that the purported third parties, who are contended to be the owners of the impugned properties, as alluded in terms of paragraph 5 of the supporting affidavit, have neither taken out nor filed any proceedings, whatsoever.
47. Suffice to state that the Defendant/applicant herein cannot purport to speak for and on behalf of third parties, who have neither instructed nor retained him, to act for same. For clarity, it is imperative to state and underscore that the deponent of the supporting affidavit, has neither annexed nor displayed any power of attorney or at all, to signify any authority to speak on behalf of the purported Third Parties.
48. In the absence of any power of attorney, what becomes evident is that the Defendant/Applicant is using the names of the purported Third Parties merely to achieve some mileage and essentially to defraud the cause of justice.
49. Furthermore, it is not lost on the court that the nominated auctioneer has since filed a report and in respect of which same has explained that the impugned properties, which the Defendant/Applicant purports to belong to Third Parties, were actually being transferred to the purported Third Parties, long after the proclamation and attachment.
50. In this respect, I beg to state that where a property has been proclaimed and attached, such a property is placed under the custody of the law and thus cannot be sold, disposed of and/or otherwise transferred to a Third Party, during the pendency of the attachment. Consequently and in this regard, if there was any such attempt to alienate a property that is already the subject of attachment, then such a process is a nullity and thus invalid.
51. In vindication of the foregoing position, it is instructive to adopt and reiterate the provisions of Rule 14 of the [Auctioneers Rules 1997](#). For good measure, the said rules prohibit any alienation and/or disposal of goods which are the subject of attachment.
52. Invariably, the said provisions stipulate as hereunder;

' 14. Non-removal or alteration of attached goods A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation,



before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.'

53. Based on the explicit provisions of Rule 14 of the Auctioneers Rules, supra it is my finding and holding that the Defendant/Applicant herein cannot seek to alienate or dispose of a property which has since been proclaimed and thereafter resort to such act, with a view to persuading the court to grant favorable orders.

### **Final Disposition**

54. Arising from the foregoing and in conclusion, I have pointed out that a Defendant, against whom a Judgment / decree has since issued, cannot purport to be an Objector in the same cause. Clearly, such an endeavor constitutes or amounts to an abuse of the court process. In this respect, it is instructive to adopt and apply the ratio decidendi, in the case of *Muchanga Investments Limited Vs Safaris Africa (Unlimited), Limited, 2009, eKLR*.
55. In the circumstances, it is evident and apparent that the entire Application, which in any event suffers several lapses; and which becomes otiose immediately upon the hearing thereof; is not only misconceived but legally untenable.
56. In a nutshell, the Application dated the April 14, 2023; be and is hereby Dismissed with costs, assessed and certified in the sum of Kshs 20,000/= only, payable to the Plaintiff/Respondent.
57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2023.**

**OGUTTU MBOYA**

**JUDGE**

***In the presence of:***

***Benson – court Assistant.***

***Mr. D. Kimani for the the Plaintiff/Respondent.***

***Mr. Kiptoo for the Defendant/Applicant.***

