



Al-Sabah v East Africa Fitness Limited; Trm Holdings Limited & 2 others (Objector) (Commercial Case E484 of 2020) [2022] KEHC 2975 (KLR) (Commercial and Tax) (20 June 2022) (Ruling)

Neutral citation: [2022] KEHC 2975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E484 OF 2020**

DAS MAJANJA, J

JUNE 20, 2022

BETWEEN

MOHAMED JABER AL-SABAH PLAINTIFF

AND

EAST AFRICA FITNESS LIMITED DEFENDANT

AND

TRM HOLDINGS LIMITED OBJECTOR

THIKA ROAD GYM LIMITED OBJECTOR

FORE FITNESS FRANCHISE (KENYA) LIMITED OBJECTOR

RULING

1. Before the court are three objection applications made under Order 22 rule 51 of the *Civil Procedure Rules*. The applications arise out of execution of the judgment entered in favour of the Plaintiff/ Decree-Holder for an aggregate of USD 510,000/00, with costs and interest by ruling delivered on the 11th December 2021. Upon instructions to proceed with execution by way of attachment and sale of the Defendant's property, Fantasy Auctioneers ("the Auctioneers") affixed a proclamation on Units 60 – 69 at Thika Road Mall on 13th May 2022 thus precipitating three applications by objectors; TRM Holdings Limited ("TRM Holdings"), Thika Road Gym Limited ("Thika Road Gym") and Fore Fitness Franchise (Kenya) Limited ("Fore Fitness"), claiming proprietary interest in gym equipment listed in the proclamation ("the equipment").
2. The first application is the Notice of Motion dated 10th May 2022 made by TRM Holdings. It is supported by the affidavit of its Chief Executive Officer, Anaid Gankipati, sworn on the same date and a further affidavit sworn on 10th June 2022.



3. The substance of the application is that TRM Holdings is the proprietor of Thika Road Mall where the Auctioneers affixed the proclamation notice on the premises Nos. 60-69 leased by Thika Road Gym as a tenant as shown in an undated lease agreement for a term of 10 years from 1st July 2018. TRM Holdings states that Thika Road Gym Limited fell into significant rent arrears whereupon it proceeded to levy distress.
4. In order to resist the distress, Thika Road Gym filed a suit; Milimani CMCC No. 1925 of 2020, Thika Road Gym Limited v TRM Holdings Limited seeking injunctive relief pending hearing and determination of the suit. On 13th October, 2020, the court issued a conditional injunction order directing Thika Road Gym to deposit KES. 7,707,921.00 in a joint account in the Advocate's name and to continue paying rent. Following an application, the court allowed TRM Holdings access to the premises to sell the attached equipment on site.
5. Thika Road Gym lodged an appeal and applied for a stay pending appeal in Milimani HCCA No. E540 of 2021, Thika Road Gym Limited v TRM Holdings. On 30th August 2021, the court issued an interim order of stay. TRM Holdings filed an application to discharge the ex-parte orders while the Thika Road Gym filed an application for contempt. The court directed that the applications be heard together.
6. In the meantime, in Milimani CMCC No. 1925 of 2020, Fore Fitness filed objection proceedings claiming an interest in the attached equipment. It claimed that Thika Road Gym and the Defendant/Judgment Debtor had sold to it the equipment through a loan agreement dated 2nd December 2020 and it was indebted to Fore Fitness in the sum of GBP 75,072.73. The court dismissed the objection by Fore Fitness on 9th November 2021. The court concluded that it was not an innocent buyer for value and that TRM Holdings had proclaimed the equipment before Fore Fitness bought it.
7. TRM Holdings therefore avers that the Plaintiff cannot attach the equipment as there are pending proceedings relating to the objection in Milimani CMCC No. 1925 of 2020 in the High Court. It further states that it proclaimed the equipment on 21st March 2020 before the Plaintiff issued the proclamation for the judgment debt in this suit.
8. Thika Road Gym filed the Notice of Motion dated 20th May 2022 supported by the affidavit of its Managing Director, James Holden, sworn on 20th May 2022. It contends that the proclamation was served at its premises and not upon the Judgment Debtor's premises. It further states that the equipment does not belong to the Judgment Debtor but to Fore Fitness purchased through a sale and lease back agreement dated 2nd December 2020, where Fore Fitness purchased the equipment and leased them back to Thika Road Gym.
9. Thika Road Gym admits that following the proceedings in Milimani CMCC No. 1925 of 2020, TRM Holdings obtained an order to break into its premises, attach and sell its equipment on account of distress for rent. It also agrees that there is an order in HCCA No. 540 of 2021 dated 27th August 2021 restraining TRM Holdings from selling the proclaimed equipment.
10. The third application is a Notice of Motion dated 26th May, 2022 by Fore Fitness. It is supported by the affidavit of its Director and Chief Executive, Paul Lonnier-Weng, sworn on 26th May 2022. He states that Fore Fitness is a company incorporated in England and Wales and is involved in the health and fitness industry under the brand name "easy Gym". It entered into a Master Franchise Agreement dated 20th July 2019 with the Judgment Debtor represented by James Holden. Following the Covid-19 pandemic and its effects on indoor activities, the Judgment Debtor accumulated substantial debts with Fore Fitness which debts were acknowledged in a loan agreement dated 2nd December 2020.



11. Further under the sale agreement dated 2nd December 2020, Thika Road Gym sold its equipment to Fore Fitness under which all the equipment was vested in Fore Fitness. The equipment was then leased back the Judgment Debtor for an initial period of 3 years. Fore Fitness therefore asserts that as the lessor, it has a proprietary interest in the equipment. It adds in the event the Plaintiff is allowed to seize the equipment, it will take away the substratum of the proceedings in HCCA No. 540 of 2021.
12. The Plaintiff objects to the applications and intends to proceed with the execution. It has filed a replying affidavit sworn by its Advocate on record, Brian Onyango, sworn on 8th June 2022.
13. It asserts that Fore Fitness does not have a legal or equitable interest as its objection was dismissed in Milimani CMCC No. 1925 of 2020 where the court noted that the sale was improper and Fore Fitness was not a bona fide purchase and was privy to the fraud. It adds that Thika Road Gym admits that it does not own the equipment as it sold them to Fore Fitness hence it does not have a legal or equitable interest. The Plaintiff therefore submits unless the court finding in Milimani CMCC No. 1925 of 2022 is set aside, their claim of ownership cannot be sustained.
14. The Plaintiff also states that the Judgment Debtor, Thika Road Gym and Daluga Investments Limited (“Daluga”) are similar entities that have been used by James Holden to perpetrate a fraud which can be gleaned from the following facts: Mr Otieno depones that Plaintiff signed loan agreements with the Defendant but the said James Holden directed him deposit funds with Daluga which is a wholly owned subsidiary of the Defendant and which James Holden is the director. Further, Thika Road Gym is a wholly owned subsidiary of Daluga with James Holden as its sole director. That the purpose of the loan agreements was to fund working capital of the gym in Kenya or as purchase price for shares to be subscribed for by the Defendant in the capital of Thika Road Gym. That the buyer of the equipment was in reality the Defendant who owns the equipment as stated by Paul Lorimer Wing in his deposition that, “East African Fitness Limited (the Defendant) agreed to the sale of its equipment which was held through its Kenya registered entity Thika Road Gym Limited.” That James Holden has retained the same firm of advocates representing the Defendant to represent Thika Road Gym. That the Statement of Account furnished by Equity Bank produced in evidence during the Garnishee proceedings shows that all funds sent to Daluga were remitted to Thika Road Gym.
15. As concerns TRM Holdings, the Plaintiff points out that although TRM distrained for KES. 14,272,321.27 it ought to give credit for the deposit for KES. 9,451,335.00 paid under the lease which means that TRM Holdings is owed less than the Plaintiff is. The Plaintiff states that it should be allowed to sell the equipment with reasonable provision made for TRM Holdings which already has a deposit. It therefore submits that TRM Holdings will not suffer any prejudice if the Plaintiff proceeds with attachment and sale of the equipment.
16. The Plaintiff states that it is not party to the dispute in HCCA No. E540 of 2021 and should be allowed to proceed with the sale on the ground that its debt from a loan takes precedent to rent arrears. Further, that TRM Holdings legal and equitable rights over the equipment has been restrained by the court in HCCA No. E540 of 2021 and will only crystallize once the case is determined hence it cannot validly object to the attachment.
17. In an objection application under Order 22 Rule 51 of the Rules, the applicant must demonstrate that it has a legal or equitable interest in the whole of or part of any property attached in execution of a decree. The onus is squarely on the objector to demonstrate a legal or equitable interest in the whole or part of any of the attached property and it is not for the decree-holder to prove that the goods belong to the judgment debtor.



18. As regards the objections by Thika Road Gym and Fore Fitness, the parties agree that the issue of ownership of the equipment was the subject of an adjudication in Milimani CMCC No. E540 of 2021 where the claims by Thika Road Gym and Fore Fitness were dismissed. The issue of the objectors' proprietary interests having been adjudicated upon constitutes an estoppel by record and unless it is set aside by an appellate court, the objection cannot stand. It is also an abuse of the court process to seek a further determination on a matter that has already been determined where, in fact, the parties have move the appellat court for relief. I would therefore dismiss the objections by Thika Road Gym and Fore Fitness.
19. TRM Holdings' case is that it proclaimed the equipment on 21st March 2022 on account of distress of rent and was given liberty by the Subordinate court to proceed with attachment and sale of the equipment in situ when Thika Road Gym challenged the distress. At the time the parties urged the application, there was a stay of execution and proceedings issued by the court in HCCA No. E540 of 2021 affecting the equipment.
20. The Plaintiff suggests that the right to the equipment by TRM Holdings had not crystallized due to the pending stay. Once the proclamation was issued by TRM Holdings and affixed to the property, Thika Gym Limited or another person of was dispossessed of any right to the attached property. This is what the Court of Appeal stated on the effect of proclamation in *National Industrial Credit Limited v S. K. Ndegwa Auctioneer* NRB CA Civil Appeal No. 195 of 2004 [2005] eKLR;

The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to Order 21 Rule 43 of the Indian rule which is in pari materia to Order 21 Rule 38, the authors of Mulla, The Code of Civil Procedure 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods. [Emphasis mine]

21. Since Thika Road Gym lost the right to equipment once the equipment was proclaimed, the Plaintiff cannot assert its right to the same equipment which has since been attached by TRM Holdings. In this instance, therefore the objection by TRM Holdings succeeds since it has established its legal right to the equipment based on its earlier proclamation. Finally, the court in HCCA No. E540 of 2021 delivered the ruling on 31st May 2022 granting the appellant, Thika Road Gym, a stay of execution on condition that it deposit KES. 14,272,321.27 within 30 days of the ruling failure to which TRM Holdings is at liberty to advertise and put the proclaimed assets on sale. This affirms its right to immediate possession of the equipment.



22. Having considered the application, I now order as follows:

a. The Notices of Motion dated 20th May 2022 and 26th May 2022 by Thika Road Gym Limited and Fore Fitness Franchise (Kenya) Limited are hereby dismissed. The Applicants shall bear the Plaintiffs costs assessed at KES. 40,000.00 each.

b. The Notice of Motion dated 10th May 2022 by TRM Holdings Limited is allowed to the extent the attachment in force is now raised. The Plaintiff shall bear the costs of the application assessed at KES. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 20 TH DAY OF JUNE 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Onyango instructed by LJA Advocates LLP for the Plaintiff/Decree-holder.

Ms Akong'a instructed by Macharia Mwangi and Njeru Advocates for the 1st Objector.

Mr Nyaburi instructed by Iseme Kamau and Maema Advocates for the 2nd Objector.

Mr Ochola instructed by G & A Advocates LLP for the 3rd Objector.

