



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 16 OF 2017

BOLEYN MAGIC WALL PANEL LTD.....PLAINTIFF/RESPONDENT

VERSUS

NESCO SERVICES LIMITED.....DEFENDANT/APPLICANT

AND

BOLEYN INTERNATIONAL (K) LIMITED.....OBJECTOR

RULING

1. On 7th December, 2020, the Objector herein filed a Notice of Objection to the attachment of the following vehicles;

- (i) Motor Vehicle Reg. No. KCE 997Y.
- (ii) Motor Vehicle Reg. No. KCE 994Y.
- (iii) Motor Vehicle Reg. No. KCE 998Y.
- (iv) Motor Vehicle Reg. No. KCE 987Y.
- (v) Motor Vehicle Reg. No. KCED 912J.
- (vi) Trailer Reg. No. ZE 5219.
- (vii) Trailer Reg. No. ZF 2664.
- (viii) Trailer Reg. No. ZF 2665.
- (ix) Trailer Reg. No. ZF 2200.
- (x) Trailer Reg. No. ZF 2667.
- (xi) Trailer Reg. No. ZF 2668.
- (xii) Crane Reg. No. KMHA 695A (75 TNS).
- (xiii) Crane Reg. No. KMHA 695A (25 TNS).
- (xiv) Assorted Metals.
- (xv) KBQ 958K.

2. According to the Notice, the Objector claims to be entitled to and has legal and equitable title and beneficial interest in the said properties

hence the same cannot be sold in execution of warrants against the Judgement debtor. The same day, the Objector filed a Notice of Motion dated 7th December, 2020 seeking the following orders:

1) Spent.

2) Spent.

3) **THAT this honourable court be pleased to order that the warrants of attachment and warrants of execution and proclamation of attachment issued against the Objectors on 1st December, 2020 is null and void.**

4) **THAT this court be pleased to issue an order of permanent injunction restraining the Judgement Creditor or any other person acting on their behalf, with their instructions or otherwise through the Judgement Creditor from attaching any other property belonging to the Objector in purported execution of the Decree dated 20th November, 2020.**

5) **THAT costs of this application be awarded to the Objector.**

3. According to the Objector, following the delivery of the judgement herein by the Defendant on 18th November, 2020, the Defendant instructed Clear Real Auctioneers to execute the said decree and the said Auctioneers proceeded to unlawfully attach the Objector's properties listed hereinabove. In proof of ownership thereof, the Objector exhibited copies of the title documents and averred that it was neither a party to the present case nor was it afforded any opportunity to present its case before this Court.

4. According to the Objector, it is a stranger to any debts owed by the Plaintiff in this suit and it is against the rules of natural justice for its properties to be sold in purported execution of a decree for recovery of a debt it does not owe. It was therefore its position that the proclamation is wrong, unreasonable and unlawful and unless the application is allowed, it stands to suffer irreparable harm hence it is in the interest of justice that the application be allowed.

5. The Defendant/Respondent in response to the said Notice and the Application filed a Notice of Intention to proceed with the execution as well as a relying affidavit.

6. In the replying affidavit it was deposed that all the attached movable goods are in possession and control of the Plaintiff/judgment-debtor and are kept in its yard at Kitengela within Kajiado County. It was therefore its position that this objection has no merit at all and it is meant to shield the judgment-debtor from execution process and further that the Objector's claim of ownership of all the attached motor vehicles, equipment and other goods is false and is meant to mislead the Court and further amounts to Perjury.

7. According to the Respondent, the objector has deliberately avoided to demonstrate any legal or equitable possessory rights in the attached goods and has instead lied under oath by deposing that the objector owns all the properties listed in the proclamation yet evidence tendered is to the contrary. According to the Respondent, the certificates from NTSA are not conclusive evidence of ownership of the attached motor vehicles and equipment hence its claim is without merit.

8. It was submitted on behalf of the Objector that in the Supporting Affidavit, the deponent annexed the title documents to all the vehicles attached and all the current searches for the vehicles showing that all the proclaimed properties and vehicles belong to it and not to the Judgment debtor. In support of its submissions, the Objector relied on Section 8 of the *Traffic Act*, and contended that the register of motor vehicles kept by the National Transport Safety Authority is conclusive proof of ownership of a motor vehicle and the registered proprietor is the prima facie owner. It also relied on **Benard Muia Kilovoo vs. Kenya Fresh Produce Exporters [2020] eKLR** and **JRS Group Limited vs. Kennedy Odhiambo Andwak [2016] eKLR**, and submitted that unless the Decree Holder can supply any evidence to the contrary, it is prima facie proof from the said annexures that at the time of attachment, all the motor vehicles belonged to the Objector.

9. The Objector further relied on **New Kenya Co-operative Creameries Ltd vs. Omari Mzee Segal; Kenya Co-operative Creameries Ltd (Defendant) [2020] eKLR** that where the objector had discharged the burden that the attached property belongs to it, the same shall be discharged and cannot be sold in execution of Warrants against the Judgment-debtor as the property belongs to the Objector.

10. According to the Objector, while it may be argued that the Judgment Debtor and Objector are related and/or share some directors, it is trite law that a company is separate from its directors and as such, the Decree Holder cannot purport to attach the property of Directors in execution of a debt owed by the company. Furthermore, the Decree Holder proceeded to the Objector's premises and purported to proclaim and attach goods thereon rather than proceeding to the Judgment Debtors premises.

11. Having demonstrated that the motor vehicles belong to the Objector, it was submitted that it follows that the assorted metals, which do not possess any title documents, but which were found together with the vehicles on the objector's premises, equally belong to the objector since it is not possible to isolate one item only when the rest have been sufficiently demonstrated to belong to the Objector. Reliance was placed on **Omondi vs. National Bank of Kenya Ltd & Others [2001] 1 EA**, and it was submitted that it is trite law that a company is, in law, a separate legal entity distinct from its members based on the case of *Salmon and Salmon and Co. Ltd* (1897) A.C. 22 HL. The Objector also relied on the case of **Chai Trading Co. Limited vs. Muli Mwanzia & 2 others [2019] eKLR**, where the court found that a Decree Holder could not purport to execute against a company merely because it is related to another or it is a subsidiary to the other. Also cited was the decision of the Court of Appeal in **Hannah Maina T/A TAA Flower vs. Rift Valley Bottlers Limited [2016] eKLR**.

12. Based on the foregoing, the Objector asserted that it had demonstrated to the required standard of proof and discharged its burden that what is attached is its property and not that of the Judgment Debtor.

13. According to the Objector, the Decree Holder should be condemned to bear the costs of this application to restore the Objector as it was

not its desire to be part of these proceedings but for the actions of the Decree holder.

14. On behalf of the Respondent it was submitted that pursuant to the provisions of Order 22 Rule 53 of the **Civil Procedure Rules**, the Court has power to either allow the objection by raising the attachment in whole or a portion and/or dismissing the same. However, the court exercising its power under the said rule cannot declare warrants of attachment and execution null and void. Further the court cannot issue a permanent injunction against the judgment-creditor who is executing a valid decree passed by the same court.

15. According to the Respondent, the Objector pursuant to the provisions of Rule 51 is required to demonstrate either he/she/it has equitable interest in the whole or part of any property attached in execution of a decree. In the present objection, the Objector claims to own all the attached motor vehicles, equipment and assorted metals. However, the evidence of ownership produced by the objector is contrary to the said averment since the Objector has not tendered any evidence of ownership on Motor vehicle registration No. KCE 997Y, Motor vehicle registration No. KCE 994Y and Motor vehicle registration No. KCE 998Y and assorted metals.

16. It was submitted that all the above mentioned three (3) vehicles are owned by **Boleyn Magic Wall Panel Limited & African Banking Corporation Limited** and since **Magic Wall Panel Limited** is the judgment-debtor herein, the claim of ownership by the Objector is baseless and unfounded since there is no objection filed by **African Banking Corporation Limited**.

17. It was further submitted that the Objector has not produced any evidence of ownership of a trailer registration No. ZE2200 owned by **Gorta-Kenya (Freedom from Hunger)** and that in absence of any objection filed by the said owner, the trailer is deemed to be the property of the Judgment-Debtor. The Objector has further failed to produce any evidence at all of ownership of assorted metals worth Kshs. 2,000,000/=.

18. The Respondent submitted that while the Objector is required to demonstrate legal or equitable interest in whole or part of any attached property, in the present Objection, the bare and falsehood assertion by the Objector cannot hold in respect of the above mentioned attached vehicles and assorted metals and consequently the attachment of the same is valid and lawful.

19. The Respondent's case was that since the Objector has failed to give an account as to why the attached vehicles, equipment and assorted metals are in possession of the Judgment-Debtor, the Objector has failed to demonstrate the nature of its claim in the attached properties by demonstrating the nature of its ownership.

20. The Respondent believed that this objection is meant to frustrate the process of execution and ought not be allowed on the strength of the averments by the Objector. It was submitted that it is possible that the attached properties are held by the Judgment-debtor after being sold to it and transfers have not been effected. The question which remain unanswered by the Objector is why its purported properties are being in control and possession of the Judgment-Debtor and further has not explained its relationship with the Judgment-Debtor to warrant such vehicles, equipment and assorted metals to be in the custody of the Judgment-Debtor. According to the Respondent, the answer(s) are well within the knowledge of the directors of the Objector and the court has been denied the same to enable it make a just and fair decision.

21. In support of its submissions, the Respondent relied on the case of **Grace Wanjiru Mbugua vs. Philip Karumi Matu [2009] eKLR** and the case of **Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 Others [1993] eKLR**.

“The burden is on the objector to prove and establish his right to have 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.

i) 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.

ii) That the objector holds that property on his own account.

22. The court continued to observe that:-

“But where the court is satisfied that the property was, at the time of attachment, held by the Judgment 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 judgment-Debtor or that ownership has changed whereby the Judgment-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”

“The court takes into account the grounds of objections raised and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.”

23. The Court was therefore urged to dismiss the Objection with costs by finding that:

- a) The Objector failed and/or neglected to provide sufficient evidence to prove that all the attached properties belongs to it.
- b) The Objector provided scanty information in support of its objection proceedings.
- c) The Objector has committed perjury by swearing a false affidavit
- d) The Objector failed to discharge its burden of proof that all the attached properties belongs to it.

e) The objection proceedings filed herein is meant to frustrate execution of a valid court decree.

Determination

24. I have considered the foregoing. The Respondent has taken issue with the manner in which the reliefs sought in these objection proceedings was crafted. Order 22 rule 51(1) of the **Civil Procedure Rules** provides 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 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.

25. Under the said provision, what the court is to determine is whether the Objector has an interest, legal or equitable in the attached property. In **Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR** 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.”

26. Once the Objector proves that then the Court makes an order raising the attachment as to the whole or a portion of the property subject to the attachment. However, in this application the Objector seeks orders that this court be pleased to order that the warrants of attachment and warrants of execution and proclamation of attachment issued against the Objectors on 1st December, 2020 is null and void and then proceeds to issue an order of permanent injunction restraining the Judgement Creditor or any other person acting on their behalf, with their instructions or otherwise through the Judgement Creditor from attaching any other property belonging to the Objector in purported execution of the Decree dated 20th November, 2020.

27. With due respect to the Objector the said reliefs are not what is contemplated under the said provisions. This cannot when determining objection proceedings declare that the warrants of attachment and warrants of execution and proclamation of attachment is null and void. It also cannot issue permanent injunction restraining the Judgement Creditor or any other person acting on their behalf, with their instructions or otherwise through the Judgement Creditor from attaching any other property belonging to the Objector.

28. Parties ought to bring themselves within the parameters of the legal reliefs prescribed under the rules and ought not to “tweak” the same to suit their circumstances.

29. For a person to properly bring himself within the ambit of Order 22 rule 51(1) of the **Civil Procedure Rules**, he has to meet certain conditions. First he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Second, he must prove that execution of his property has been levied in execution of the said decree. Third, he must prove that he is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of the decree. Fourth, he must prove that no payment out of the proceeds of sale of such property has been made.

30. In this case, the Objector’s case is that it is a stranger to the proceedings the subject of the execution proceedings herein, yet its properties have been attached. In determining these proceedings, it is important for the court to make a finding that the Objector is not the same person as the Judgement Debtor. In other words, it is important that the Objector sufficiently discloses its identification in order to prove that it is a separate and distinct entity from the Judgement Debtor. Where the Objector is a legal person, as the Objector herein contends, it is prudent that the certificate of incorporation be exhibited so as to prove that the Objector is in fact a different person and not the Judgement Debtor trading under a different name. Nothing however turns upon that issue in light of the documents exhibited and the Respondent has not alleged that the Objector is the same person as the Judgement Debtor.

31. From the documents exhibited it is not in doubt that the Objector herein was not a party to these proceedings and no order has been made against it in these proceedings. It claims that its properties were attached in execution against the Defendant herein. The Respondent however contends that all the attached movable goods are in possession and control of the Plaintiff/judgment-debtor and are kept in its yard at Kitengela within Kajiado County. The Objector has not denied this and has not also explained how the said properties found themselves at the Judgement Debtor’s premises. I agree with the decision of the Court of Appeal in **Hannah Maina T/A TAA Flower vs. Rift Valley Bottlers Limited [2016] eKLR** where the court held that:-

“In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned judge. The authority that she cited, RE: SOUTHARD LIMITED [1979] 3 ALL ER 565 is quite apt:

“ ... a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.”

32. However, it is the duty of the Objector to disclose all material facts including how its goods found themselves in the Judgement Debtor’s premises since section 109 of the **Evidence Act**, Cap 80, Laws of Kenya, places the burden of proof on him by providing that: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.

33. Where there serious and credible doubts raised as to the veracity of the Objector's allegations, the Court may well be entitled to disregard the Objector's claim. I therefore associate myself with the holding in the case of Grace Wanjiru Mbugua –vs- Philip Karumi Matu [2009] eKLR where it was observed as follows:-

“The Decree-holder has created sufficient doubt in the mind of the court as to the veracity of the objector's contentions. Because of the glaring omissions on the part of the objector, the court can only infer that such information, if provided by the Objector, would have been prejudicial to her case”

34. As was appreciated by the Court of Appeal in Abdalla Ali Hussein Mohamed vs. Clement A. Ojiambo & Others Civil Appeal No. 118 of 1997:

“Where the Decree holder does not intimate his intention to proceed with the attachment the objector may request by way of a letter for the attachment to be lifted but where he instead files an application then the Court is obliged to investigate the title and make inferences from the material before her...Where an alleged transfer of a motor vehicle is made when the execution of the decree is about to be made the Court is entitled to assume that the sale was not genuine and was intended to avoid the due process of execution...It remains for the court to decide, in this instance, if the transfer to the objector was genuine or was done with a view to avoid the process of execution and as already stated, the court agrees with the learned Judge in regard to the inferences she drew. She could not have inferred otherwise...It is not for the objector to raise the issue that once a Judgement creditor has taken a particular step in execution he is barred from taking up any other mode of execution as he cannot speak for the Judgement debtor...Section 8 of the Traffic Act simply states that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner; in other words the fact of registration is only *prima facie* evidence of ownership and contrary facts can show otherwise and in this case there was sufficient material before the learned Judge to conclude that such registration was effected to avoid the execution of the decree.”

35. The Objector has however exhibited documents of registration which show that some of the vehicles are registered in its name. According to Section 8 of the *Traffic Act*;

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

36. Therefore, *prima facie*, the Objector is deemed as the owner of the said vehicle. However, that presumption is rebuttable. That the burden of proving interest legal or otherwise, in the attached property, lies on the objector is not in doubt and this was clearly held in Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others [2014] eKLR.

37. Similarly, in Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others [1993] eKLR the court expressed itself thus:

‘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.”

38. The court continued to observe:-

“But where the court is satisfied that the property was, at the time of attachment, held by the Judgment 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 judgment-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...The court takes into account the grounds of objections raised and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.”

39. In this case the Objector having produced the logbooks which disclose it as the registered owner of some of the vehicles in question and the legal presumption being in its favour, the onus shifts onto the Respondent to prove the contrary as stated in Section 8 of the *Traffic Act*. In those circumstances, the legal burden still remains on the Objector but the evidential burden shifts to the Respondent to show that despite the *prima facie* registration of the vehicles in the name of the Objector, the Objector does not have any interest, legal or equitable in the same.

40. In this case, however, the only properties listed as having been proclaimed and whose ownership evidence indicates that the Objector has an interest in them are Trailer Reg. No. ZE 5219; Trailer Reg. No. ZF 2664; Trailer Reg. No. ZF 2665; Trailer Reg. No. ZF 2667; Trailer Reg. No. ZF 2668; Crane Reg. No. KMHA 695A (75 TNS); Crane Reg. No. KMHA 695A (25 TNS); and KBQ 958K. The rest are either registered in the names of the judgement debtor herein with entities other than the Objector or no evidence of the Objector's interests therein has been disclosed.

41. In these kind of proceedings, the Court does not and cannot make findings as to ownership of the property the subject of the objection proceedings but simply decides whether or not the objector has interest, legal or equitable, in the attached property. Based on the material placed before me I am satisfied that the Objector's *prima facie* interest in Trailer Reg. No. ZE 5219; Trailer Reg. No. ZF 2664; Trailer Reg. No. ZF 2665; Trailer Reg. No. ZF 2667; Trailer Reg. No. ZF 2668; Crane Reg. No. KMHA 695A (75 TNS); Crane Reg. No. KMHA 695A

(25 TNS); and KBQ 958K has been proved and it has not been displaced by any credible evidence from the Respondent herein. Therefore, I find the Notice of Motion dated 7th December, 2020 merited in so far as the said vehicles are concerned and I partially raise the attachment by directing that the attachment and/or proclamation against Trailer Reg. No. ZE 5219; Trailer Reg. No. ZF 2664; Trailer Reg. No. ZF 2665; Trailer Reg. No. ZF 2667; Trailer Reg. No. ZF 2668; Crane Reg. No. KMHA 695A (75 TNS); Crane Reg. No. KMHA 695A (25 TNS); and KBQ 958K be and is hereby lifted and set aside. Only to that extent does these proceedings succeed.

42. In light of what I have stated about the nature of the reliefs sought and failure to make a full disclosure on the part of the Objector, each party will bear own costs of these objection proceedings.

43. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF MARCH, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Eredi for the Applicant

CA Geoffrey