



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E134 OF 2018**

**RANDON S. A. IMPLEMENTORS EPARTICIPACOES.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**RT (EAST AFRICA) LIMITED.....DEFENDANT/RESPONDENT**

**-AND-**

**JOVAN H. KARIUKI.....APPLICANT**

**AND**

**MULTIPLE HAULIERS (E.A) LIMITED.....1<sup>st</sup> OBJECTOR**

**FOXDEAN LIMITED.....2<sup>nd</sup> OBJECTOR**

**RULING**

1. This ruling is in respect to two applications, namely; -

a) The Objectors Application dated **12<sup>th</sup> October 2020** (hereinafter the “**1<sup>st</sup> Application**”) and,

b) The Applicant’s Application dated **26<sup>th</sup> October 2020** (hereinafter “**the 2<sup>nd</sup> Application**”).

2. Through the 1<sup>st</sup> application, the Objectors seek the lifting of the attachment of their alleged movable property described in the proclamation dated 1<sup>st</sup> October 2020 and a stay of execution the attachment pending the hearing and determination of the objection proceedings.

3. The application is supported by the affidavit of the 2<sup>nd</sup> Objector’s General Manager, **Mr. Peter Mwangi Jimnah**, and is premised on the main ground that the proclamation is illegal as it purports to execute the movable goods legally owned by the objectors who are not parties to the case. The applicant also states that the intended execution is ill motivated as it was made without establishing the real ownership of the property. The objectors’ case is that they solely own the properties proclaimed in the notice dated 1<sup>st</sup> October 2020 and that the said properties valued at Kshs. 95,000,000 are therefore not available for proclamation.

4. The Judgment Creditor opposed the application through the replying affidavit of its Director **Mr. Alexandre Alberti Henrichs** who avers that warrants of attachment were duly issued and the defendant's property proclaimed before the execution was halted by Multiple Hauliers (EA.) Limited who filed objection proceedings alleging ownership of the attached goods. He states that when the objection came up for hearing on 4<sup>th</sup> July 2019 the objector’s advocate undertook to ensure that the proclaimed goods would not be moved pending the determination of the Application.

5. **Mr. Henrichs** states that contrary to the undertaking, the attached goods were moved and that in a Ruling delivered on 30<sup>th</sup> January 2020, this court allowed the 3<sup>rd</sup> Respondent to proceed with execution in respect to the goods over which Multiple Hauliers did not establish

ownership/title documents. He avers that the auctioneers proceeded to execute the Warrants of Attachment but discovered that the 2<sup>nd</sup> Respondent had since moved some of the proclaimed goods to an unknown place.

6. It is the Judgment Creditor's case that the actions of the 2<sup>nd</sup> Respondent and 1<sup>st</sup> Objector contravene Rule 14 of the Auctioneers Rules, 1997 and are contemptuous of the Court's Orders. The judgment Creditor's contends that the application is a deliberate attempt by the 2<sup>nd</sup> Respondent and its sister companies to defeat the settlement of the decree issued by this Court and that the Judgment Creditor will be gravely prejudiced if the court grants the orders sought in the application.

### **The 2<sup>nd</sup> Application**

7. The Auctioneer filed the 2nd application seeking orders directed to the Officer Commanding Industrial Area Police Station to accompany him to the Defendant's premises for purposes of keeping peace and to witness the execution of the warrants of attachment and sale.

8. The application is supported by the auctioneer's affidavit and is premised on the grounds that the Judgment Debtor has not settled the decretal sum and has obstructed the execution of the warrants of attachment by denying the auctioneer access to the proclaimed goods. It is the auctioneer's case that the recovery of the decretal sum will be defeated unless the police assist and/or supervise the attachment process.

9. The Objectors opposed the application through the identical replying affidavits of **Mr. Dave Shreyesh** and **Mr. Peter Mwangi Jimnah** who aver that the proclaimed goods belong to the objectors who protested against the irregular proclamation before instituting the objection proceedings herein.

### **Analysis and Determination.**

10. Parties canvassed the applications by way of written submissions which I have considered. The main issues for determination are as follows: -

***1. Whether the objectors have established legal and/or equitable interests over the proclaimed goods.***

***2. Whether the Objectors have met the conditions for grant of an injunctive relief.***

***3. Whether the Auctioneer has made out a case for the granting of the orders requiring police assistance in the execution of the warrants of attachment and sale.***

11. Order 22 Rule 51 (1) of the Civil Procedure Rules stipulates as follows on the steps to be taken by a party claiming interest over proclaimed goods: -

***A 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.***

12. Under the above cited provision, the court the court is required to determine is whether an objector has an interest, legal or equitable in the attached property. In **Arun C. Sharma vs Ashana**

14. The principle that emerges from the above cited decisions is that once the Objector proves his interest in the attached property, the Court then makes an order raising the attachment as to the whole or a portion of the property subject to the attachment.

15. In the present case, I note that the 1<sup>st</sup> Objectors produced various invoices and a log book as proof of its alleged legal and equitable interest over the attached property that they claim.

16. The Judgment Creditor, on the other hand, argued that invoices do not constitute evidence of legal or equitable interest in the proclaimed/attached goods as they were to be settled in November 2020. According to the Judgment Creditor, this means that as at the time of the filing of the Application, the Judgment Debtor was the owner of the attached goods. It was the Judgment Creditor's case that the proclamation/attachment is therefore valid and that the proclaimed goods are subject to Rule 14 of the Auctioneers Rules. The Judgment Creditor further observed that the attached goods were in the possession of the Judgment Debtor at the time of the proclamation which, according to respondent, meant that the Judgment Debtor still owned the said goods.

17. Section 44(1) of the Civil Procedure Act provides that in execution proceedings, only property of the judgment debtor is liable to attachment. The said section stipulates that: -

***“All property belonging to a Judgment Debtor including property over which or over the profits of which he has 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.”***

18. The Judgment Creditor maintained that an invoice is not proof of ownership. For this argument, reliance was placed on the decision in *Duncan Kabui v Samuel Bede Igembo & Another* [2014] eKLR where it was held that: -

***“It is my finding that the objector has not brought any evidence of any title or document of ownership to the motor vehicles that are the subject of the proclamation of attachment, and that she has not discharged her onus of proving her legal interest in the said motor vehicles. The sale agreement produced as evidence by the objector of the purchase of the said motor vehicles cannot on its own be evidence of any legal interest in the said motor vehicles. In addition, a sale agreement without any proof of consideration paid is only proof of an intention to sell and not of a binding contract....an equitable interest in the said property can only arise upon proof of payment made pursuant to the said sale agreement, and the objector did not provide proof of any such payments made or consideration she had given pursuant to the said sale agreement.”***

19. Reference was also made to the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others* where the court held that: -

***“I note also that the invoice from Hotpoint is not accompanied by an ETR receipt which is an important document ownership. One other thing; the judgment-debtors live in the house where the items were attached and in law as a general rule, ownership of the house does not necessarily extend to ownership of the domestic goods therein because they could as well belong to the tenant.”***

20. From the above cited authorities, I find that the law is clear on the probative value of invoices in as far as objections to proclaimed/attached properties are concerned and I do not intend to reinvent the wheel on the said subject. The 2<sup>nd</sup> objector listed at least 12 items supported by various invoices in its affidavit in support of the objection to the attachment of the said items. I am not satisfied that the invoices presented by the 2<sup>nd</sup> Objector constitute sufficient proof of legal/equitable interest in the attached goods save for the invoice at page 19 of the annexures that has an ETR receipt attached to the top left corner. I therefore lift the attachment of the proclaimed goods only in respect to the goods specified in the invoice dated 3<sup>rd</sup> August 2020 (at page 19 of the Objector's annexures). For the avoidance of doubt, I decline to lift the attachment of the goods listed by the 2<sup>nd</sup> objector save for the goods in the said annexure dated 3<sup>rd</sup> August 2020.

21. I similarly decline to lift the attachment in respect to the 1<sup>st</sup> Objector alleged goods and find that proof of ownership was not established save for the attachment in respect to the Motor Vehicle “New VW Bus Model 9.150 for which the 1<sup>st</sup> Objector produced a copy of the log book as proof of ownership.

22. Turning to the issue of whether the Objectors have made out a case for the granting of an injunctive relief, I find that save the motor vehicle and the items on the invoice at page 19 as stated hereinabove, the Objectors have not demonstrated that they are entitled to the injunctive orders sought. I find that the Objection in respect to the rest of the attached goods does not meet the conditions set in *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 case for the granting of orders of injunction.

23. Having found that the objectors did not establish legal and equitable interest over all the attached properties, I find that nothing stands in the way of the auctioneer in obtaining the orders sought in the application for police assistance in the execution of the Warrants of attachment and sale of the attached goods except the motor vehicle and goods in the invoice at page 19 of the 2<sup>nd</sup> objector's annexures.

24. For the reasons that I have stated in this ruling, I grant the following final orders: -

***a) Orders are hereby issued directing the Officer Commanding Industrial Area Police Station to accompany Auctioneer to the Defendant's premises for purposes of keeping peace and to witness the execution of the warrants of attachment and sale save for the Motor Vehicle “New VW Bus Model 9.150 and the goods specified in the invoice dated 3<sup>rd</sup> August 2020 (at page 19 of the Objector's annexures).***

*b) I award the costs of the application to the judgment creditor.*

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29<sup>th</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nkarichia for the 3<sup>rd</sup> Respondent- Judgement Creditor

Ms Samba for 1<sup>st</sup> and 2<sup>nd</sup> Interested Party.

Court Assistant: Sylvia.