



REPUBLIC OF KENYA

IN THE HIGH COURT

AT SIAYA

MISCELLANEOUS CIVIL SUIT NOS. 3, 8 AND 9 OF 2019

ODHIAMBO OWITI & COMPANY ADVOCATES.....APPLICANT

VERSUS

DOMINION FARMS LIMITED.....RESPONDENT

AND

SUKARI INDUSTRIES LIMITED.....OBJECTOR

RULING

Introduction

1. This matter has been pending before this court for quite a while. It is all about the applicant/ advocate Odhiambo Owiti & Company Advocates trying to execute for recovery of their Advocate/Client costs that were assessed by the Taxing Master. This ruling determines objection to execution/attachment proceedings initiated by the objector herein SUKARI INDUSTRIES LIMITED vide Notice of Motion dated 18.5.2021 in which the objector seeks the following orders:

i. *Spent*

ii. *Spent*

iii. *That this Honourable Court be pleased to raise the proclamation and attachment in whole of Motor Vehicles Registration Number KCL 042P and KCW 315E as proclaimed and attached by ODONGO INVESTMENT AUCTIONEERS acting under the instructions of ODHIAMBO OWITI & CO ADVOCATES in execution of the judgement and/or Decree and/or Certificate of Taxation issued herein;*

iv. *That the Honourable Court be pleased to order ODHIAMBO OWITI & CO ADVOCATES through its agent ODONGO INVESTMENT AUCTIONEERS or any other agent duly authorized by ODHIAMBO OWITI & CO ADVOCATES to unconditionally release Motor Vehicles Registration Number KCL 042P and KCW 315E to SUKARI INDUSTRIES LIMITED, the Objector herein.*

v. *That the orders sought in prayer (4) and (5) above do apply to SIAYA HCCC MISC. APPLICATION NOS. 4,5,6,7,8,9,11 & 12 OF 2019 - ODHIAMBO OWITI & CO ADVOCATES VS DOMINION FARMS LIMITED.*

vi. *That the Honourable Court be pleased to issue any such and/or further orders as it may deem fit in the interest of justice: and*

vii. *That the costs of this application be awarded to the Objector.*

2. The application is supported by an affidavit sworn by DAVID NOEL OKOTH and was premised on the grounds that the Objector was not a party to the suit between the applicant decree holder and the respondent judgment debtor and further that the goods, specifically motor vehicles registration Nos. KCL 042P and KCW 315E, which had been proclaimed and advertised for sale in the Star newspaper of the 17.5.2021 by ODONGO INVESTMENTS AUCTIONEERS did not belong to the respondent DOMINIOMN FARMS LIMITED but to the objector herein.

3. With the leave of the Court, David Noel Okoth swore a further affidavit on the 7th July 2021 and filed in court on the 8th July 2021 in

which the objector asserted that it owned the suit motor vehicles and further reiterated that the Objector and the respondent are distinct companies independent from each other.

4. The applicant/ advocate decree holder filed a Notice to Cross-Examine dated 29th June 2021 and was granted the opportunity to cross-examine Mr. David Noel Okoth, who had sworn both the supporting affidavit to the objection proceedings as well as the further affidavit sworn on the 7th July 2021.

5. I observe that that prior to the testimony of David Noel Okoth, the applicant raised the issue of Mr. David Noel Okoth not being an authorised officer of the Objector. This issue was settled by this Court vide its ruling delivered on the 27.9.2021 and subsequently the objector was granted leave and time to file and serve the authorization which it did vide an Authority to Swear Court Process dated 4.10.2021.

6. In cross examination, Mr. Okoth testified as DW1 and stated that he was the General Manager of the objector. It was his testimony that the objector sought to have the 2 vehicles, registration number KCC 042P and KCW 315E, attached by the auctioneers to be released to the objectors as they were its properties and further that KCW 315E was jointly owned with NCBA Bank on loan.

7. It was his testimony that the objector and the respondent judgment debtor were distinct companies and that there was nothing to show that the vehicles belonged to the respondent judgment debtor.

8. In further cross-examination, DW1 reiterated that he was the objector's employee having started as an accountant and risen to his current position as the General Manager. It was his testimony that the objector and West Kenya Sugar Company have common directorship and common shareholding. He further stated that the two companies had different General Managers who reported to the same individuals. He further stated that he was not aware that West Kenya Sugar had filed objection proceedings claiming ownership to the 2 suit vehicles herein and further that the objector had no relationship with Dominion Farms Ltd, the respondent/ judgment debtor herein. He further stated that he was aware that the suit motor vehicles had been seized but did not know that they would be sold. He stated that he was not aware of the date the 2 vehicles were proclaimed as he received no Notice of attachment by the auctioneers. In re-examination, DW1 reiterated that the 2 vehicles belonged to the objector who had over 300 vehicles.

9. Each of the parties to the objection proceedings herein filed very elaborate and lengthy written submissions to canvass the application dated 18.5.2021.

The Objector's Submissions

10. It was submitted that this Court ought to make its determination on a balance of probability as was held in the case of **K-Rep Bank Ltd v Basilio Pascal Kiseli & 2 Others [2012] eKLR** where the court held *inter alia* that it is a well settled principle that the objector must prove on a balance of probabilities that he is entitled to or has legal or equitable interest in the whole or part of the property attached.

11. It was submitted that the objector herein had discharged its burden of proof to the required standard as it had annexed a copy of logbooks and NTSA search results of the suit motor vehicles that showed that the attached vehicles were owned by the objector and that motor vehicle registration no. KCW 315E was charged to NCBA Bank. The objector submitted that as a result, the applicant had no legal interest in the aforementioned suit vehicles.

12. The objector further submitted that even if the court were to find that the objector had not proved ownership over the attached assets, the Court's role in objection proceedings is to satisfy itself not only as to the ownership of the attached assets but also to decide whether the objector has legal or equitable interest over the attached property as was held in the case of **Dubai Bank Kenya Ltd v Come-Cons Africa Ltd & Another [2012] eKLR**.

13. It was further submitted that as the objector had established on a balance of probabilities its interests in the attached vehicles, the burden of proof shifted to the auctioneer and decree holder to establish that the attached motor vehicles belonged to the judgement debtor as was held in the case of **Patrick Kingori Warugongo v James Nderitu & Another [2014] eKLR**.

14. It was submitted that the applicant/decreed holder was bound by its pleadings and that since they did not sue the objector, the fruits of the applicant's judgement should only be realized against the respondent and that therefore the applicant was estopped from executing against any other party. Reliance was placed on the Nigerian case of **Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where the Nigerian Supreme Court reiterated that a party is bound by its pleadings.

15. Regarding the position of General Manager allegedly held by Mr. Okoth, it was submitted that the applicant had not provided any evidence to suggest the contrary whereas the objector had annexed a letter marked DNO1 in his further affidavit dated 7.7.2021 to prove that he was the objector's General Manager.

The Applicant/Decree Holder's Submissions

16. It was submitted that Mr. Okoth, the Objector's alleged General Manager was not authorized by the Objector's board to swear the affidavit in support of its application and that therefore this Court ought to strike out the affidavit in support of the objection proceedings that had been brought under Order 22 Rule 51 (2) of the Civil Procedure Rules with the effect of dismissing the objection proceedings dated 18.5.2021.

17. The applicant further submitted that the objector was wrong in shifting the burden of proof of Mr. Okoth's authorization to represent the Objector to the applicant as this was in violation of Section 107 of the Evidence Act.

18. It was further submitted that contrary to the submissions by the objector's counsel, the logbooks annexed on the affidavit of DAVID NOEL OKOTH to prove that the objector was the owner of the attached motor vehicles was not sufficient. Reliance was placed on Section 8 of the Traffic Act which provides that ***the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.***

19. The applicant further submitted that it was allowed to proceed with attachment on the basis of the dismissal of objection proceedings filed by West Kenya Sugar Company Ltd, a sister company to the objector, who objected to the attachment on the grounds that some of the goods attached belonged to it. It was thus submitted that the objector was engaged in an abuse and misuse of court process as its directorship and that of West Kenya Sugar Company Ltd were the same.

20. It was submitted that despite the objector's insistence that it was a separate entity from West Kenya Sugar Company Ltd, the Companies Act places legal obligations on directors and other officers in line with the overriding objective and Article 159 of the Constitution. Reliance was placed on the case of **Robert Ngande Kathathi v Francis Kivuva Kitonde** where the Court cited the Court of Appeal decision in **Stephen Boro Gitiha v Family Finance Building Society 7 3 Others Civil Application No. Nai. 263 of 2009** where it was held *inter alia* that the Court must always be on the driving seat of litigation and thus must not allow a litigant to conduct itself and use the legal process the way the Objector herein had conducted itself.

21. It was further submitted that the separation between the objector herein and West Kenya Sugar Company Ltd was only on paper which was thus one of the cobwebs that a Court exercising civil jurisdiction was required to weed out. The applicant relied on the explanation of the overriding objective as was stated by Nyamu JA in the case of **Kenya Commercial Bank Ltd v Kenya Planters Co-operative Union [2013] EA 136** and in the case of **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR** where the Court had to decide whether the objector had carried and conducted itself in a manner that paints it in good light in the eyes of the oxygen principle.

22. It was submitted that the objector was using substantive law to try and frustrate execution as the ownership of the properties was something that had been claimed using the name of a different company. He further submitted that despite the objector stating that there was no relationship between it and the respondent herein, it had not explained what its properties were doing in the respondent's/judgment debtor's premises.

23. The applicant further submitted that the instant proceedings were defective as Order 22 Rule 51 (3) enjoins the objector to serve the notice of objection on all parties yet the objector had failed to serve the notice on the respondent and therefore the Court ought to dismiss the objection proceedings.

Analysis & Determination

24. I have carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The Objector's application is brought under Order 22 Rules 51 and 52 of the Civil Procedure Rules which provide as follows:

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.

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."

25. The law is clear that the onus lies on the Objector to establish its legal or equitable interest in the properties which are subject matter of the proclamation and attachment objected to, and not for the decree holder to prove that the goods belong to the Defendant. This position was affirmed in the case of **Simba Colt Motors Ltd v Lustman & Co. (1990), HCCC No. 729 of 2002** that:

"The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgment-Debtor."

26. Further in the case of **Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743**, it was stated that:

a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment, the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.

b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.

c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own

account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.

d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.”

27. In the case of **Akiba Bank Ltd v Jetha & Sons Ltd (2005) eKLR**, Waweru J. held that for an objector to succeed in his objection, he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.

28. The issue for determination by this Court therefore is whether the Objector has shown a legal or equitable interest in the proclaimed and attached properties to be entitled to the orders it seeks. The objectors have annexed logbooks showing the registration of motor vehicles registration numbers KCC 042P and KCW 315E, which vehicles were attached by the auctioneers on instructions of the applicant decree holder herein.

29. From copies of logbooks and the NTSA records provided, the attached motor vehicles are registered in the objector’s name with motor vehicle registration number KCW 315E jointly registered between the objector and NCBA Bank. The objector explanation for this joint registration was that the said motor vehicle was bought on loan from the bank.

30. Odunga J in **Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd**. Stated as follows:

“Although the law is that in the objection proceedings, the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the objector has interest legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see CHATABHAI M. PATEL & ANOTHER HCCC NO. 544 OF 1957 (Lewis) on 8/12/58 HCU (1958) 743.” *emphasis added*

31. The question is whether the objector in this case has established on a balance of probability its interest in the attached good. From the documentary evidence of copies of log books and NTSA records or registration certificates of the two attached motor vehicles tendered before this Court, it is clear that the objector has established its interest its legal interest in the attached motor vehicles specifically motor vehicle registration numbers KCC 042P and KCW 315E and therefore the fact that the attached motor vehicles were in the premises of the Respondent judgment debtor does not rebut the objectors legal interest in the said motor vehicles.

32. What then remains to be settled is whether the Respondent judgment debtor has or had any equitable interest in the said motor vehicles since they were found at its premises at the time of proclamation and attachment, in view of the provisions of section 8 of the Traffic Act which stipulates that apart from registration, there could be other evidence proving ownership of a motor vehicle. The section provides that:

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

33. It is the applicant/ decree holder’s case that the objector is misusing and abusing the Court and trying to frustrate him from enjoying the fruits of his judgement because despite the objector’s insistence that it was a separate entity from West Kenya Sugar Company Ltd which had its objection proceedings dismissed, both companies are run by the same directors. This fact of directorship of the two companies being the same was admitted by Mr. David Noel Okoth, the deponent to the affidavit in support of the objection proceedings herein who stated in cross examination that that both the objector, SUKARI INDUSTRIES LIMITED and WEST KENYA SUGAR COMPANY LIMITED have common directorship and common shareholding but different General Managers.

34. 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.”

35. Odunga J dealt with the same issue and cited the above case in..... and stated as follows concerning objection to attachment proceedings and I concur:

“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.”

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.”

36. From the log books for the two attached motor vehicles 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/Judgment debtor herein. The applicant decree holder however contends that the attached motor vehicles were found in possession and control of the judgment-debtor and were kept in its yard at Dominion Farms premises within Siaya County. The objector did not give any sufficient explanation as to how its vehicles were to be found at Dominion Farms premises. It only stated through David Noel Okoth that it has over 300 vehicles. The Objector has therefore not denied this fact of the attached motor vehicles being found at the premises owned by Dominion Farms Limited and has also not explained how the said motor vehicles 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.”

37. However, it is the duty of the Objector to disclose all material facts including how its properties 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 he who alleges 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.”

38. Where there are 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. This is what the Court stated in the case of **Grace Wanjiru Mbugua v Philip Karumi Matu [2009] eKLR** where it was observed that:

“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.”

39. Further, as was appreciated by the Court of Appeal in **Abdalla Ali Hussein Mohamed v 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.”

40. The Objector has however exhibited documents of registration which show that the attached 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”.

41. Therefore, *prima facie*, the Objector is deemed to be the owner of the said vehicles. However, that presumption is rebuttable in 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 stated in **Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others [2014] eKLR**. Similarly, in **Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others [1993] eKLR** the Court stated that:

“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."

42. The Court further observed 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 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."

43. In the instant case the Objector having produced the logbooks which disclose it as the registered owner of the vehicles in question and the legal presumption being in its favour, the onus shifts onto the applicant decree holder 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 applicant decree holder 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. This is what Odunga J aptly stated in **Boleyn Magic Wall Panel Ltd v Nesco Services Limited; Boleyn International (K) Limited (Objector) [2021] eKLR**.

44. As was correctly stated by Odunga J in the above Boleyn Magic Wall Panel Ltd case, 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.***

45. In the circumstances of this case, it is clear that despite sharing the same directorship and shareholding, the objector and West Kenya Sugar Company Ltd are different entities. In addition, I have perused the objection proceedings initiated by West Kenya Sugar Company Ltd and note that in the supporting affidavit of Sohat Sharma for West Kenya Sugar Company Limited, their claim to the attached motor vehicles was that it had advanced the respondent Kshs. 135,000,000 vide a loan agreement dated 14.9.2018 secured by a debenture registered on 12.11.2018 and as such it had a legal and equitable interest in the properties attached and also a priority security over the applicant's & other 3rd party creditors.

46. In my view, this claim by West Kenya Sugar Company Ltd is distinct from that by the objector herein and does not in any way negate the claim by the objector herein for the reasons herein aforementioned not the least, the separation of corporate legal entity as was espoused in **Salomon v Salomon [1897] AC 78**, that:

"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

47. This long established legal principle is until today true and has been adopted in national legislation and a great number of judicial pronouncements within the common law tradition including Kenya. In the case of **Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR**, the Court held that a company

"...as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

48. In the view of this court, either the objector herein of West Kenya Sugar Company Limited could elect to object to the attachment of the subject motor vehicles where each of them had different interests. I observe that the dismissal of the objection proceedings filed by West Kenya Sugar Company was not on merit but on the failure by the deponent of the affidavits in support of the objection application to appear for cross examination. This Court has not been shown, on a balance of probabilities that the judgment debtor has a legal or equitable interest in the attached motor vehicles for it to make a determination that these objection proceedings are a mirage.

49. Finally regarding the status of Mr. Okoth as the authorized representative of the Objector, the same was settled by this Court in its earlier ruling and further by the Authorization to Act filed by the objector. Although the applicant decree holder urged this court to hold that Mr. Okoth was an impostor on account that he had no letter of employment from the objector, I find no material to support the assertion that Mr. Okoth is an impostor or that he was fished from elsewhere to advance the interests of the objector which is a going concern and a legally incorporated company. In **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR**, the Court of Appeal appreciated the requirement for authorization of a deponent where the party to proceedings was an incorporated company but observed that where a person swears an affidavit that they are authorised, then burden of proving otherwise lies on the party claiming that that other person is not authorised and stated at length as follows:

"Clarifying the position on the question of authorization in the case of Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR this Court stated thus;

"In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that "they were duly authorized." It was then up to the appellants to demonstrate by evidence that they were not so authorized."

"So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint

that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient.[emphasis mine]"

As such for a preliminary objection to be successful it must be based on a pure point of law, and further, it cannot be a requirement of its foundation that evidence be produced in its support. In other words the objection does not lie if the objector requires to demonstrate that a party is unauthorized or if in response a resolution or other document under seal requires to be produced as proof of its existence. This effectively defeats the principles behind a preliminary objection, in which case, it ought not to succeed.

Returning to the instant case, in her Verifying Affidavit of 5th March 2017, Josephine Musembi deponed that;

"I am an adult of sound mind and the Applicant's Corporation Secretary and therefore I am competent and authorized to make and swear this Affidavit on behalf of the Exparte Applicant".

But despite this, the learned judge found that there was no evidence that demonstrated that Josephine Musembi, the Corporation Secretary had been authorized by a resolution under the seal of the appellant to institute the judicial review proceedings. The judge took the view that it was not sufficient to state that, because she was the Corporation Secretary, she was authorized and competent to swear it; that the seal of the company required to be produced to show that she was appropriately authorized. Yet, no evidence was produced by the respondent to show that she was not.

Given the circumstances, we would adopt the position taken by Odunga, J, in the case of The Presbyterian Foundation & Another vs East Africa Partnership Limited & Another [2012] eKLR thus;

"The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word "authorize" which is defined by Oxford Dictionary as "sanction"; "give authority"; "commission". That being the position, whether or not the 2nd Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted."

"Indeed, the pleadings do not show that the respondent was concerned with whether or not the Corporation Secretary had the necessary authority to institute the suit, and the court was not told that she was an imposter who brought the proceedings on behalf of the appellant. And no evidence was produced before the court in support of this contestation. It is evident that the preliminary objection was not for the purposes of genuinely ascertaining whether the suit was brought with the appellant's authority; its intent and purpose was to bring the appellant's suit to a screeching halt on a mere procedural technicality which is contrary to the tenor behind Article 159 of the Constitution."

Whether or not an officer is authorized to institute the proceedings is a matter of evidence, which requires to be canvassed before the court. In concluding that Ms. Musembi was unauthorized to bring the proceedings on behalf of the appellant because there was no document produced under seal showing that she was authorized, we find that the learned judge misdirected himself. The learned judge ought to have ordered that such authorization be produced before the commencement of the trial."

50. Therefore, on the material placed before this court by the objector, I am satisfied that the Objector's prima facie legal interest in motor vehicle registration Nos KCC 042P and KCW 315E has been established and it has not been displaced by any evidence from the applicant decree holder herein. For that reason, I find the Notice of Motion dated 18.5.2021 merited in so far as the said vehicles are concerned. I therefore make the following orders:

(a) I hereby raise the attachment levied by ODONGO INVESTMENT AUCTIONEERS on instructions of the applicant decree holder by directing that the attachment and/or proclamation against motor vehicle registration Nos KCC 042P and KCW 315E be and is hereby lifted and set aside.

(b) The orders raising the attachment and proclamation against motor vehicle registration Nos KCC 042P and KCW 315E shall apply to SIAYA HCCC MISC. APPLICATION NOS. 4,5,6,7,8,9,11 & 12 OF 2019 - ODHIAMBO OWITI & CO ADVOCATES VS DOMINION FARMS LIMITED.

(c) Each party to bear their own costs of these objection proceedings.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF NOVEMBER, 2021

R.E. ABURILI

JUDGE