



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E134 OF 2018**

**RANDON S.A. IMPLEMENTORS EPARTICIPCOES.....PLAINTIFF**

**VERSUS**

**R.T. (EAST AFRICA) LIMITED.....DEFENDANT**

**AND**

**MULTIPLE HAULIERS (E.A.) LIMITED.....OBJECTOR/APPLICANT**

**RULING**

**( To the objectors applications dated 20<sup>th</sup> May 2019 and 1<sup>st</sup> July 2019)**

1. Through the application dated 20<sup>th</sup> May 2019, the objector/applicant seeks, inter, alia, orders for stay of execution by attachment and sale of all the movable properties described by the Moran Auctioneers in the proclamation dated 10<sup>th</sup> May 2019 and for an order to raise and/or lift the attachment of the objector's properties described in the said proclamation.
2. The application is brought under Order 22 Rules 51(1) (2) and 3 of the Civil Procedure Rules (CPR) and is premised on the grounds that the proclamation is illegal and unlawful as it purports to execute the movable goods owned by the objector who is not a party to the proceedings. The application is supported by the affidavit of the objector's General Manager **Mr. Dave Shreyesh** who avers that the objector stands to be gravely prejudiced by the proclamation and consequent attachment of its assets as it stands to lose over Kshs 458,370,000.
3. In the objector's supplementary affidavit sworn on 28<sup>th</sup> May 2019, its General Manager states that annexures marked "**DS-1**" are proof of ownership of the attached property. He further states that a number of stocks and items belonging to the objector were stored in the defendant's premises which premises were previously occupied by the objector. He adds that the objector and the defendant are two separate and distinct legal entities and that the objector cannot therefore be held responsible for the defendant's debts.
4. In the application dated 1<sup>st</sup> July 2019, the same objector/applicant seeks orders to stop the intended advertisement and sale of the attached property and further that the attached goods be returned to the objector. The application is supported by the affidavit of the objector's Operations Manager **Mr. Clive Critchlow** who avers that the plaintiff instructed the auctioneers to put up a sale notification of the attached goods which are solely owned by the objector despite the fact that the application dated 20<sup>th</sup> May 2019 is still pending determination by this court.
5. The plaintiff/respondent opposed the applications through the replying affidavit of its Director **Mr. Alexander Alberti Henrichs** who avers that he is aware of the court order of 22<sup>nd</sup> May 2019 staying execution by attachment only in respect to goods for which title documents have been filed by the objector. He avers that it is therefore inaccurate for the objector to suggest that there was a blanket order of stay of execution for all the attached property.
6. He further states that the objector has interfered with and moved some of the goods that are the subject of the proclamation against the express undertaking made by the objector's advocate in court on 4<sup>th</sup> June 2019. He further states that the conduct of interfering with the goods that are subject to the proclamation is a criminal offence under the Auctioneers Act. It is the respondent's contention that the objector has colluded with the defendant to frustrate its recovery efforts.

7. The respondent opposed the application dated 20<sup>th</sup> May 2019 through the replying affidavit of its Area Sales Manager **Mr. Alexander Alberti Henrichs** dated 24<sup>th</sup> May 2019. He avers that upon obtaining judgment against the defendant, the plaintiff instructed M/S Moran Auctioneers to execute the decree in order to recover the decretal sum amounting to USD 3,432,596.57 together with costs whereupon the said auctioneers moved to the defendant's known business premises where they carried out the proclamation of the various assets listed in the proclamation.

8. He states there is no basis for the objector's allegation that the said proclamation is illegal or unlawful as it was levied in the defendant's premises, He further states that he is aware that the objector and the defendant are sister companies who share the same directors and shareholders as shown in the annexure marked "**AAH-1**" being the true copies of company searches.

9. He further states that the alleged documents of ownership attached to the objectors supporting affidavit do not demonstrate the objector's legal or equitable ownership in the attached goods and that no documents of ownership have been shown for most of the goods listed in the proclamation.

10. He contends that given the common ownership/directorship of the objector and defendant and the fact that the attached goods were found in the defendant's premises, there is a clear collusion between the objector and the defendant to defeat the execution of the court's decree.

11. Parties canvassed the two applications by way of written submissions which I have carefully considered .

### **Analysis and determination**

12. I have considered the application the respondents replying affidavits, the submissions by counsel and the authorities that were cited, I note that the main issue for determination is whether the applicant/objector has made out a case for the granting of the orders to raise/lift the attachment of the proclaimed property. Objection to execution is governed by Order 22 Rule 51 (1) of the Civil Procedure Rules which stipulates as follows:

***“(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.”***

13. The onus is on the objector to establish that it has a legal or equitable interest in the whole of or part of the goods attached in execution of the decree. This was the position taken in **Kennedy Njuguna Mwangi v Collins Kiprono Bett & 3 Others** [2018] eKLR where it was held:

***“it is clear therefore that the objectors must produce evidence of the legal and/or equitable interest in the whole or part of any property attached in execution of decree (see Akiba Bank Ltd V. Jetha & Sons Ltd [2005] e KLR). Basically, therefore the burden of proof is on the applicants to establish ownership (see also Chatabhai M. Patel & Another HCCC No. 544 of 1957 (Lewis) on 8/12/58 HCU (1958) 743)”***

14. In The present case, it was not disputed that the objector produced documents of ownership of some of the proclaimed property. In his oral submissions **Mr. Imende**, learned counsel for the respondent conceded that to the extent that the objector has filed documents evincing title to some of the property, the respondent cannot and will not proceed with execution in respect to such property. Counsel submitted that there were however a number of goods for which no evidence of title, equitable or otherwise, had been produced for which the execution should be allowed to proceed.

15. Guided by the dictum in the above cited case of **Kennedy Njuguna Mwangi** (supra) I find and hold that to the extent that the objector exhibited documents of ownership of some of the proclaimed properties, the said properties ought to be excluded from further attachment in execution of this court's decree. This court finds that the respondent is however at liberty to proceed with the execution in respect to the property for which no documents of title/ownership were produced.

16. I further find that the objector's claim that it previously occupied the premises in which the proclaimed goods were attached does not hold any water in this case as no documents of such occupation was tendered before the court, and further, even if that was the case, mere allegation of previous occupation of premises cannot be construed to be proof of ownership of attached goods within the meaning of the provisions of Order 22 Rule 52 of Civil Procedure Rules.

17. Furthermore, it was not disputed that the defendant and the objector are sister companies that share both the directors and shareholders. My take is that under such circumstances, there may be a very thin line between what is owned by each company and this calls for even more specific proof of ownership by the objector through production of title documents.

18. The respondent claimed that some of the proclaimed goods had been carted away by the objector in conjunction with the defendant in a bid to frustrate the recovery of the decretal sum. The respondent stated that the said goods were listed in an annexure marked "**AAH-3**". This claim was not denied by the objector. Rule 14 of the Auctioneers Rules 1997 stipulates as follows:

***“No person shall remove, alter, damage, substitute or alienate any goods comprised in the proclamation until they are reclaimed by payment in full of the amount in the court warrant or letter of instruction or such lesser amount as the creditor or his Advocate shall agree in writing.”***

19. From the wording of the above provision, it is clear that attachment is complete upon proclamation and that no party, no matter how much he feels entitled to the proclaimed goods should tamper or interfere with the said property and this explains why there is a provision in law, for objection proceedings to take care of the rare instances where the attached property does not belong to the judgment debtor.

20. This court is however not able to make any conclusive findings regarding the issue of the proclaimed goods that were allegedly carted away as the annexure “AAH-3” to the respondent’s replying affidavit containing the particulars of the said goods was not actually attached to the said replying affidavit.

21. Turning to the prayers contained in the application dated 1<sup>st</sup> July 2019 to stop the intended sale of the attached property, I find that Section 44(1) of the Civil Procedure Act entitles the respondent to attach and sell the judgment debtors property in execution of a court’s decree. The said section stipulates as follows:

***All properties 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 attachments and sale in execution of a decree.***

22. From the provisions of the foregoing section and having found that the objector did not establish that he holds ownership/title documents in respect of all of the attached property, I find that the prayers sought in the application dated 1<sup>st</sup> July 2019 are not merited.

23. For the above reasons and having regard to the findings that I have made in this ruling, I dismiss the application dated 1<sup>st</sup> July 2019 with costs to the respondent/plaintiff. The application dated 20<sup>th</sup> May 2019 is allowed albeit only in respect to the lifting of attachment in respect to the property that the objector has specifically proved ownership through documentation.

It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of January 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wakhisi for Imende for plaintiff/respondent

Mr. Samba for the 1<sup>st</sup> and 2<sup>nd</sup> Third party.

Mr. Kokebe for the objector/applicant

Court Assistant – Sylvia