



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 441 OF 2011

CHRISTIAN GEYSEMANS.....1ST PLAINTIFF

DYNATEC UGANDA LIMITED.....2ND PLAINTIFF

VERSUS

GEORGE NJOROGE KAMAU.....1ST DEFENDANT

WILFRED LUKOBA OYEYO.....2ND DEFENDANT

EAST AFRICA DATA HANDLERS LIMITED.....3RD DEFENDANT

EAST AFRICA DATA HANDLERS.....4TH DEFENDANT

AND

ALTERNATIVE PULSE PLC.....OBJECTOR

RULING

1. There is a Judgment in favour of the 1st Plaintiff against the 3rd Defendant for a sum of Kshs.3,500,000/= with interest thereon at Court rates from the date of filing suit until payment in full. In addition costs in favour of the 1st Plaintiff were assessed at Kshs.517,604/= on 6th June 2019 by the Taxing officer.

2. An attempt by the Decree Holder to execute the Judgment, through Nextgen Auctioneers, has been met by resistance from Alternative Pulse PLC by way of objection proceedings. This decision determines those proceedings which are brought to Court in a Notice of Motion dated 11th November 2019 for the following prayers:-

1. That there be a stay of execution of decree dated 30th September 2019 and/or a stay of execution of the Judgment and decree in this matter including a stay of attachment, advertisement for sale and sale of goods proclaimed by Nextgen Auctioneers on 5th November 2019, pending *inter partes* hearing and determination of this application.

2. That the proclamation or attachment of 5th November 2019 by Nextgen Auctioneers in execution of the decree dated 30th September 2019 and any subsequent action by the auctioneer or Decree-Holder be declared illegal, irregular and unlawful as against the objector.

3. That costs of this application be provided for.

3. The Application is said to be brought under the provisions of Order 22 Rule 51(1) & (2) of the Civil Procedure Rules which provides:-

(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.

4. Whilst the Application was brought prior to the attaching creditor giving the Notice of Vacation to proceed under Order 22 Rule 54 and would ordinarily be premature, this Court will nevertheless consider the application because the attaching creditor has, in responding to the Application, expressly stated its intention to proceed with execution.

5. The contention by the objector is that it is the legal and equitable owner of all the proclaimed furniture and ICT accessories by dint of purchase. The onus is therefore on the objector to provide proof that it is entitled to or has an equitable interest in all items proclaimed.

6. As to the threshold of proof to be attained it is ordinarily proof on a balance of probabilities. However, this Court takes the view that where the objector and the Judgment Debtor are related parties then the objector must provide cogent proof of entitlement to or legal or equitable interest in the attached property. Such proof overcomes any suspicion that the objector and Judgment Debtor have colluded to set up the objection proceedings only as a way of frustrating execution.

7. In the matter before Court the objector is a party related to the Judgment Debtor (East Africa Data Handlers Limited) in that the Judgment Debtor is the majority shareholder in the objector Company. It holds 7,700,000 shares therein with one other shareholder George Kariuki Njoroge holding 2,300,000 shares. But that relationship does not stop there. George Kariuki Njoroge who is a shareholder and director of the objector is also a director of the Judgment Debtor.

8. Before considering the proof provided for ownership of furniture and ICT accessories I consider the ownership of Motor Vehicle KBW 472K and KBU 699S both of which were also attached. The Decree Holder also produced copies of records regarding both vehicles issued by the National Transport and Safety Authority (NTSA). The records show that as at 28th November 2019 Motor Vehicle KBW 472K was owned by Equity Bank Limited and East African Data Handlers (perhaps the 4th Defendant?) while motor vehicle KBU 699S was owned by Standard Chartered Bank (k) Ltd and George Kariuki Njoroge. The objector has not produced evidence to the contrary and has failed to establish entitlement or legal or equitable interest.

9. As regards the furniture and ICT accessories, all were found in the premises of the Judgment Debtor but the objector explains that it is its property but were in the possession of the Judgement Debtor as they were on lease from the Objector to the Judgment Debtor. The Objector states that it is equipment leasing Company and showed the Court a master operating lease Agreement dated 20th December 2017 with the Judgment Debtor in regard of furniture said to be in the schedule to the lease. As regards the ICT equipment there is a Rental Agreement of 20th December 2017.

10. As further proof of ownership the Objector displayed various invoices for various ICT equipment all stamped "paid". Mr. Muli who swore the affidavit on behalf of the objector explains.

[5] That subsequently, the company entered into Rental Agreements for the office furniture and ICT accessories with the Judgment debtor. (*Exhibit CM – 3 & 4 are copies of the Rental Agreements*).

11. What is to be made of this evidence? Starting with that of office equipment. The lease agreement does not have a schedule of the property said to have been leased to Judgment Debtor. For that reason there is no knowing whether the attached property was amongst the furniture leased out.

12. Further in respect to the lease and Rental Agreement, this Court was shown transfer of money from the Judgment Debtor to the Objector for payment of lease fees. These are dated 4th July 2019, 5th September 2019 and 13th September 2019. To be observed is that the lease Agreements are said to have been entered on 20th December 2017, this Court must wonder why proof of payment for the entire lease/rental period was not shown to Court so as to defeat any allegation that this was simply made up to defeat the Judgment of 19th April 2018 and assessment of costs of 6th June 2019.

13. As regards the invoices marked "paid", it is trite that a party who asserts trade practice or custom must prove it. See for example, the decision in C. A Harilal & Co. –vs- Standard Bank [1967] E.A 512.

14. There is no proof that there is a trade practice or custom that payment in respect of invoices are acknowledged by regenerating the same invoice and marking it settled. The old law that invoices are not proof of payment therefore prevails.

15. Ultimately, I reach a decision that the Objector has not provided proof that it is either entitled to or has an equitable or legal interest in the attached property. The Notice of Motion dated 11th November 2019 is hereby dismissed.

Dated, Signed and Delivered in Court at Nairobi this 28th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Mutinda for Singh for Objector

Omere for Wanda for 1st and 2nd Plaintiffs

Court Assistant: Nixon