



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISCELLANEOUS CAUSE NO. E132 OF 2018**

**BETWEEN**

**MONICA KARIUNGI TIBWITTA.....DECREE-HOLDER**

**AND**

**BELLEVUE DEVELOPMENT COMPANY LIMITED...JUDGMENT DEBTOR**

**AND**

**SPECIALIZED TOWEL MANUFACTURERS LIMITED.....OBJECTOR**

**RULING**

1. On 28<sup>th</sup> February 2018, the decree-holder as applicant and the judgment debtor entered into a consent in which the court recognised and adopted an Arbitral award dated 28<sup>th</sup> May 2018 issued by the Arbitrator, Gichinga Ndirangu. Thereafter, the decree-holder applied for execution whereupon warrants for attachment and sale were issued to *Integra Auctioneers* to proceed with execution of the judgment debt amounting to Kshs. 6,562,839.25 with costs and interest thereon.

2. The auctioneer, went to the Judgment-debtor's premises and proclaimed 10 old wooden office desks, 12 old office chairs and specialized machines for towel making thus precipitating an objection to the execution by Specialized Towel Manufacturers Limited ("the Objector").

3. The Objector has brought the Notice of Motion dated 5<sup>th</sup> February 2020 under the provisions of **Order 22 rules 51(1)** of the **Civil Procedure Rules** ("the **Rules**") and in the main, it seeks the following order:

*[3] The Decree Holder through his agents Integra Auctioneering (K) Company or any other Auctioneers be precluded from proclaiming or having proclaimed, from attaching, or selling the Objector's goods in answer of the Decree of this Honourable Court between the Decree Holder and Judgment Debtor.*

4. The facts upon which the Objector's case is based are set out in the supporting affidavit of Douglas Muraguri Mutugi, a director of the Objector, sworn on 6<sup>th</sup> February 2020. He deponed that the Objector had never been party to the suit and the goods proclaimed belonged to the objector as evidenced by photographs of the furniture with tags showing that it owned the property and a renewal endorsement for a burglary insurance cover issued by ICEA Lion General Insurance dated 13<sup>th</sup> December 2018 showing that the property attached was part of the property owned and insured by it. Ms Mumbi, counsel for the Objector, submitted that on the basis of the evidence provided, the Objector had proved that it was the legal owner of the property attached.

5. The Decree-holder opposed the application through the affidavit of Nimrod Matunda, an advocate in the firm of Simba and Simba Advocates acting for Decree holder and sworn on 20<sup>th</sup> February 2020. The thrust of the affidavit and the submission of counsel, Mr Matunda, is that the Objector has failed to prove that the proclaimed goods belong to it and the proceedings have been brought to defeat the judgment.

6. Mr Matunda deponed that the Judgment Debtor and the Objector are one and the same person and are acting in bad faith with the objective of defeating the attachment. He stated that the attached goods were found in the premises of the Judgment-debtor. That Mr Douglas Mutugi admitted that the debt was owed by the Judgment-debtor and he undertook to settle it and also that Mr Mutugi and his co-director were witnesses for the judgment debtor during the arbitral proceedings. Counsel pointed out that the Judgment-debtor and Objector are represented the same advocates.

7. The duty of the court in objection proceedings is to determine whether the objector is a legal or equitable owner of the property attached

(see *Akiba Bank Limited v Jetha and Sons Limited* ML NRB HCCC No. 919 of 1999 [2005] eKLR). In *Dubai Bank (K) Limited v Come-Cons Africa Limited and Impak Holdings Co. Ltd* NRB HCCC No. 68 of 2003 [2012] eKLR, the court held that the onus of proof in objection proceedings is on the objector to establish ownership on the balance of probabilities.

8. The Objector presented evidence that it insured its moveable properties which were the subject of attachment. It presented a Renewal Endorsement issued by ICEA Lion General Insurance issued on 13<sup>th</sup> December 2018 for a burglary policy for the policy tenable from 15<sup>th</sup> December 2019 to 14<sup>th</sup> December 2019 and another Renewal Endorsement issued by the same company for an All Risks policy for the same period. The endorsement had attached to it an itemised list of office equipment which belonged to the objector. As I understand, the Objector's position is that since it insured the attached items, it was the legal owner thereof. It is trite law that a person can only insure property if it has an insurable interest in the property hence the Objector was the legal owner of the attached properties. The Decree-holder did not contest or controvert this evidence.

9. In addition, the Objector produced photographs to show that the attached items had been tagged to identify them and prove that they belonged to the Objector. This evidence was also not controverted.

10. Mr Matunda also argued that the Objector and the Judgment-debtor were one and the same, they had common directors and in light of the totality of the evidence, both parties were intent of depriving the Decree-holder of the fruits of its judgment. This submission ignores the principle of corporate personality where the law recognizes that a company is a separate legal entity distinct from its shareholders (see *Salomon v. Salomon & Co. Ltd* [1897] AC 22). There may be instances where the court may lift the corporate veil to impose liability on directors and shareholders where the corporate body is being used as a vehicle for fraud (see *Mugenyi & Company Advocates v The Attorney General* [1999] 2 EA 199).

11. In this case, the Objector and Judgment Debtor are two distinct companies. Although there is evidence that they occupied the same premises, the evidence also shows that the Objector is a company engaged in manufacturing towels which is also a distinct business from that of the Judgment-debtor. I cannot say that based on this alone, that it is evidence of fraud.

12. The Objector has to prove on the balance of probabilities that it has a legal and equitable interest in the attached properties. It has discharged that burden. I allow the application dated 5<sup>th</sup> February 2020 with costs to the Objector. The attachment is accordingly raised.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of MARCH 2020.**

**DAVID S. MAJANJA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

Ms Mumbi instructed by Muturi Mwangi and Associates Advocates for the Objector.

Mr Matunda instructed by Simba and Simba Advocates for the Decree-holder.