



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

MISCELLANEOUS CASE NO. E112 OF 2018

BETWEEN

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED....JUDGMENT DEBTOR

AND

QUALITY INSPECTORS LIMITED.....DECREE HOLDER

AND

ZAKHEM CONSTRUCTION (K) LIMITED.....OBJECTOR

RULING

1. On 12th July 2019, this court granted leave to the Quality Inspectors Limited (“the Decree-holder”) to execute a final arbitration award issued by Mr John M. Ohaga, Esq in an arbitration between Quality Inspectors Limited and Zakhem International Construction Limited (“the Judgment-debtor”). Thereafter, the Decree-holder applied for execution. It instructed *Kinyua and Co., Auctioneers* to proceed with execution of the judgment debt amount of USD 1,662,109.59, costs and interest thereon. The auctioneer, went to the Judgment-debtor’s premises and proclaimed vehicles and assorted construction equipment thus precipitating an objection to the execution by Zakhem Construction (K) Limited (“the Objector”).

2. The Objector has brought the Notice of Motion dated 3rd February 2020 under the provisions of **Order 22 rules 51, 52, 53 and 54** of the **Civil Procedure Rules** (“the **Rules**”) and in the main, it seeks the following order:

[5] THAT this Honourable Court be pleased to set aside and/or lift the proclamation of 17th January 2020 and attachment of the Objector’s motor vehicles registration numbers KHMA 523A, KHMA 029H, KCF 879N, KHMA 524 and KHMA 476 H and equipment effected on 29th January 2020 and 30th January 2020 be set aside unconditionally.

3. The facts upon which the Objector’s case is based is set out in the supporting affidavit of Ermanno Rabbiosi, its Chief Quantity Surveyor and Contract Manager, sworn on 3rd February 2020. He depones that the Objector is a separate corporate entity from the Judgment-debtor. That it was not party to the arbitration proceedings and award adopted by this court which led to execution proceedings against the Judgment-debtor. He further states that the Objector is the legal owner of LR No. 29174 where it operates a workshop and a yard for the construction business in Kenya. He deponed that the auctioneer attached it vehicles, as evidenced by the logbooks, namely; KHMA 523A, KHMA 029H, KCF 879N, KHMA 524H and KHMA 476H. In addition, he stated that it owned the following equipment which were also attached; 4 generators, 2 Grove cranes, 2 Ingersoll compressors, 35 shipping containers, Gate valve, metal pipes and 11 Water tanks. He also deponed that apart from the aforementioned properties, the auctioneer also attached a fuel tank belonging to Kobil. In the circumstances, the Objector contends that it is the legal owner of the properties itemized in the application and as such execution should be lifted.

4. The Decree-holder opposed the application through the replying affidavit of Consolater Wambuku Kiragu, its director, sworn on 14th February 2020. In answer to the contention that the Decree-holder and Objector are separate companies, she deponed that the Objector was a branch company of the Judgment-debtor, an international company, carrying on business in Kenya on its behalf in Kenya. She contended that the Objector was incorporated by the directors of the Judgment debtor to act on its behalf in Kenya as there is evidence that both companies share directors. They also operate from the same office along Outering Road, Nairobi and in fact, all correspondence to the Judgment-debtor was received and acted upon by the Objector. Ms Kiragu also deponed that the Objector’s directors participated in the arbitration proceedings between the Judgment-debtor and Decree-holder.

5. Ms Kiragu further depones that during the subsistence of the Sub-Contract agreement between the Decree-holder and the Judgment-debtor, the Objector received payment certificates and invoices from the Judgment-debtor and authorised payment to the Judgment-debtor under the Sub-Contract it now alleges it was not party to.

6. As regards the properties attached, the Decree-holder contended that the Objector has not presented any document to show that it has any legal or equitable interest in the equipment attached.

7. In response to the affidavit of Ms Kiragu, the Objector through Mr Rabbiosi filed a further affidavit sworn on 18th February 2020. He reiterated the contents of his replying affidavit and further deponed that the Objector and Judgment-debtor were separate and distinct legal entities and for all intents and purposes distinct from their respective shareholders, directors and agents. He admitted that the Objector made some payments on behalf of the Judgment-debtor in 2015 but that these were on account of separate financial arrangements between the two companies. He complained that despite the existence of orders of stay, the auctioneers went to the Objector's premises on 12th February 2020 and attached the following items; Volvo Penta Generator Serial No. 5310582163, CAT Generator Serial Number catooc15vlxt02244, Grove Crane 700 Chassis Number 225836, Grove Crane 530 Chassis Number 228425, KHMA 002H, KHMA 935G, 2 Allied Rammers. He stated that the two vehicles attached were not subject of the proclamation and ought not to have been attached.

8. Counsel for the Objector and Decree-holder made oral submissions to support their respective positions along the lines set out in the depositions. It is common ground that 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 [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.

9. The Objector produced copies of logbooks in its name for the following vehicles; KHMA 523A, KHMA 029H, KCF 879N, KHMA 524 and KHMA 476 H. This evidence is not controverted hence attachment in respect of the said vehicles is lifted as the Objector has established that it is the legal owner.

10. Apart from the vehicles, the Objector claims the other equipment listed at paragraph 15 of the supporting affidavit of Mr Rabbiosi; 4 generators, 2 Grove cranes, 2 ingresoll compressors, 35 shipping containers, Gate valve, metal pipes and 11 Water tanks. In respect of these items, the Decree-holder argued that there was no proof the Objector owned them.

11. In the supporting affidavit at para.11, Mr Rabbiosi attached annexure ER-06 which was a copy of the inventory of items collected on 29th January 2020 and at para, 12 which refers to annexure ER-07 which is a copy of the inventory of the items collected on 30th January 2020. The documents attached were titled, “*Integrated Management System, Transfer/Loading Note*” dated 29th January 2020 and 30th January 2020 respectively. As the deponent pointed out, this was an inventory of items collected, he did not however explain how items of equipment and materials belonged to it. For example, he did not provide an assets register, invoices and receipts supporting purchase or those items or any other evidence.

12. In the further affidavit, Mr Rabbiosi referred to other equipment that was collected on 12th February 2020; Volvo Penta Generator Serial No. 5310582163, CAT Generator Serial Number catooc15vlxt02244, Grove Crane 700 Chassis Number 225836, Grove Crane 530 Chassis Number 228425, KHMA 002H, KHMA 935G, 2 Allied Rammers. It is not clear that these items were the ones referred to at para. 15 of the supporting affidavit or were different items.

13. The objection proceedings were commenced by the Notice of Motion dated 3rd February 2020 and the properties subject of the objection were set out in para. 14 and 15 of Mr Rabbiosi's supporting affidavit. It is on the basis of the **Notice of Intention to Proceed with Execution** issued under **Order 22 rule 53** of the **Rules** that the Decree-Holder intimates that it contests the objection against the items which the objector claims and has listed. The Objector cannot bring other items within the purview of the objection other than those set out in the proclamation and the application. Further, the Objector alleged that one of the items attached, a fuel tank, belonged to Kenol. I do not understand the provisions of the **Order 22 rule 53** of the **Rules** to provide for the Objector filing an application on behalf of another person. It is the legal or equitable owner who must make its claim.

14. The Objector has to prove on the balance of probabilities that it has a legal and equitable interest in the properties set out in para. 15 of the supporting affidavit. It has not discharged that burden. The Objector has also not established that the items in the further affidavit are the same ones that were attached earlier as nothing would have been easier than to give the full particulars of the equipment in the first instance.

15. In the absence of proof of a legal or equitable interest in the equipment, it is not necessary to consider the relationship between the Judgment-debtor and Objector.

16. For the reasons I have set out above, I allow the Notice of Motion dated 3rd February 2020 only to the extent that the attachment in respect of KHMA 523A, KHMA 029H, KCF 879N, KHMA 524 and KHMA 476 H is hereby raised. The Decree-holder shall pay half the cost of the application.

17. Save for the order I have made and for avoidance of doubt, the stay order in force is now discharged.

DATED and DELIVERED at NAIROBI this 9th day of MARCH 2020.

DAVID S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Ms. Osman instructed by Ahmednasir, Abdikadir and Company Advocates for the Objector.

Mr. Muturi with him Ms. Mugi instructed by Mwaniki Gachoka and Company Advocates for the Decree-holder.