



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. APPLICATION NO 55 of 2019

BETWEEN

ALICE NYOMENDA OERI t/a A.N. OERI & CO.

ADVOCATES.....ADVOCATE/JUDGMENT CREDITOR

AND

SILVANUS OSORO ONYIEGO.....CLIENT/JUDGMENT DEBTOR

AND

IN THE MATTER OF OBJECTION BY

BOOKER HOMES LTD.....OBJECTOR/APPLICANT

RULING

Background

1. On the 17.10.19, this court entered judgment in favour of the judgment/creditor absent the judgment debtor for Kshs. 4,058,501.80.
2. On 25.11.19, **Kiriiyu Merchants Limited** under the instructions of the judgment issued a proclamation of attachment of the judgment creditors property in execution of decree.

Application

3. Subsequently on 29.01.2020, the Objector filed a chamber summons dated 28.01.2020 under Order 22 Rule 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders **THAT**: -

- a. The proclamation dated 25.11.19 by Kiriiyu Merchants Limited is unlawful**
- b. The items proclaimed on 25.11.19 belong to the Objector**
- c. The client/Judgment Debtor has no legal or equitable interest in the proclaimed goods**
- d. Costs of this application be provided for**

4. The application is based on the ground that items proclaimed on 25.11.19 belong to the Objector.

5. The application is supported by an affidavit sworn by the **Mercy Osukuku Mundu** who describes herself as the Chief Executive Officer/Director of the Objector. Annexed to the affidavit is certificate of incorporation of the Objector company, receipt for purchase of electronic goods, sofasets and recliner, dining table, chairs, coffee table and bookshelf marked MOM1 and 3 respectively. MOM 4 is a bailment agreement between the Objector and the judgment debtor in which the Judgment debtor agreed to keep and maintain the Objector's household goods at the rate of Kshs. 1,000,000/- which the judgment debtor paid in 4 instalments as evidenced by receipts marked MOM 5. The deponent additionally avers that no transfer of title of the goods was intended and that the proclaimed goods belong to the Objector.

6. The application is opposed on the basis of a replying affidavit sworn by the Advocate on 06.02.2020 in which she avers that the annexures by the Objector were tailored for purposes of this application and that the Objector has failed to prove ownership of the goods.

Analysis and determination

7. I have considered the application in the light of the supporting affidavit, the replying affidavit and written submissions filed on behalf of both parties and I have deduced the issues for determination as follows:

1) Whether the firm of Muriuki Njagagua & Company Advocates and the Mercy Osukuku Mundu have authority to act for the Objector

2) Whether the Objector has established its claim over the proclaimed goods

1. Do the firm of Muriuki Njagagua & Company Advocates and Mercy Osukuku Mundu have authority to act for the Objector?

8. The Advocate asserts that this application is incompetent for the reason that the filing of the same by the firm of Muriuki Njagagua & Company Advocates had not been sanctioned by the Objector's board's resolution and further that Mercy Osukuku Mundu has not demonstrated that she is a director or officer of the Objector with authority to act for the Objector.

9. In the case of **Bugerere Coffee Growers Limited vs. Sebaduka & Another [1970] EA 147** it was held:

“when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors; meeting and recorded in the minutes.....”

10. Further to the foregoing, the provisions of Order 4 Rule 1(4) it is provided that;

‘Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so’.

11. With reference to the affidavit in support of the objection proceedings, it is of course trite law that so far as a corporation is concerned, its agent for purposes of litigation is an officer authorized under its seal.

12. Where the authority of an agent and an advocate is challenged like in this application, it behoves the corporation to show such authority.

13. The firm of Muriuki Njagagua & Company Advocates has not demonstrated that indeed the Objector authorized the filing of this application nor has Mercy Osukuku Mundu adduced evidence that she is a duly authorized official of the Objector company.

2. Has the Objector established its claim over the proclaimed goods?

14. Under Order 22 rule 51(1) of the Civil Procedure Rules, it is trite that:

Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 parties to the decree-holder, of his objection to the attachment of such property.

15. To begin with, the Objector has not laid any claim over M/V KCT 099P and M/V KCC 801Y which were also proclaimed and it must have been for that reason that the *ex parte* order issued on 29.01.2020 staying execution in respect of the two vehicles was lifted by a consent dated 13.02.2020.

16. Concerning the proclaimed household goods, the Objector heavily relies on an agreement for bailment marked MOM 4 between it and the judgment debtor. I have considered ***Chitty on Contracts*** cited by the Objector which states that: -

“...any person is to be considered a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person. (Chitty on Contracts, Volume II para 33).

17. To constitute a contract of bailment, the actual or constructive possession of a specific chattel must be transferred ***by its owner or his agent duly authorised for that purpose to another person (the bailee)*** in order that the latter may keep the same or perform some act in connection therewith for which such actual or constructive possession of the chattel is necessary. (***emphasis added***).

18. The bailment agreement marked MOM 4 is between the Judgment Debtor and Mercy Osukuku Mundu who purports to be acting for the Objector. Of interest to note is that the said agreement does bear the Objector's seal and it was signed by Mercy Osukuku Mundu who as stated hereinabove has not adduced evidence that she is a duly authorized official of the Objector company.

19. Consequently, without evidence that the bailment agreement is valid, it is difficult to see why the Advocate should be denied its right to

execute for judgment issued in its favour.

DISPOSITION

20. From the foregoing, I have come to the conclusion that;

a. The Objector has failed to prove that it owns the items proclaimed on 25.11.19

b. The Objector has similarly not established that the Judgment Debtor has no legal or equitable interest in the proclaimed goods

c. The chamber summons dated 28.01.2020 and filed on 29.01.2020 is thus found to have no merit and it is dismissed d. The Objector shall bear the costs of this application

DELIVERED THIS 30th DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant - Ms. Amondi/Ms. Okodoi

For the Advocate - Wesley Gichaba & Co Advocates

For the Judgment Debtor - Zablou Mokua & Co. Advocates

For the Objector - Muriuki Njagagua & Co. Advocates

Order

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice vide Gazette Notice no. 3137 of 17th April, 2020.