



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

ELECTION PETITION NO. 1 OF 2017

JEREMIAH NYANGWARA MATOKE PETITIONER/RESPONDENT

VERSUS

INDEPENDENT ELECTROL AND

BOUNDARIES COMMISSION.....1STRESPONDENT

THE RETURNING OFFICER.....2NDRESPONDENT

ALFAH MIRUKA ONDIEKI.....3RDRESPONDENT

AND

FLORENCE NYANGWARA 1ST OBJECTOR/ APPLICANT

SUNRISE PRODUCE KENYA LIMITED 2ND OBJECTOR/APPLICANT

RULING

1. The objectors have moved this court by their application filed on 18th December 2019 which is premised on **Order 22 Rule 51** of the **Civil Procedure Rules** for the following orders;

a. Spent ...

b. That this Honorable Court be pleased to issue an Order staying execution against the Objector's/Applicant's goods and properties;

c. That the attachment/proclamation done on the Objector's /Applicant's goods and properties on 30th November be raised; and

d. That cost of this application be provided for.

2. The 1st objector swore an affidavit in support of the application on 18th December 2019. She deposed that on 30th November 2019, auctioneers by the name Hegeons Auctioneers visited her home and proceeded to proclaim the properties in the homestead despite her insistence that the home was hers and not the judgment debtor's. She claimed that the auctioneers also proclaimed motor vehicles belonging to M/s Sunrise Produce Kenya Limited which were in her compound. She avers that she was not a party to the suit and stands to suffer loss if the attachment against her is not raised.

3. The 3rd respondent swore an affidavit on 15th January 2020 in opposition to the application. First, he averred that application was null and void for the reason that his advocates had been served with the application on 15th January 2020 contrary to the mandatory stipulated timeline of seven (7) days. He also claimed that since the objectors had failed to follow the process laid out under **Order 22 Rule 51** and 52 of the **Civil Procedure Rules**, the stay granted to them should be deemed discharged and the proclamation allowed to proceed.

4. The respondent also deposes that the objectors have not produced any evidence to demonstrate that the proclaimed goods belong to them. He avers that the 1st objector lives with the Petitioner in the same premises and they are directors and shareholders of the 2nd objector. He also claims that the copy of records annexed to the 1st objector's affidavit shows that the previous owner of the proclaimed motor vehicles is

the Petitioner. He avers that he instructed his advocates to conduct a search and it was discovered that the transfer of Motor Vehicle registration number KCC 076G was done on 1st October 2019. He deposes that when the Petitioner lost the petition and the appeal he filed before the Court of Appeal, he started transferring assets from the jurisdiction of the court by conniving with the 1st objector and the 2nd objector. The respondent states that the objection proceedings herein are a red herring intended to deceive this court to aid the judgment debtor escape justice.

5. The Petitioner also swore an affidavit on 19th February 2020 claiming that he did not reside with the 1st objector at the premises where Hegeons Auctioneers had made the proclamation. He also denied that the goods attached by the Auctioneers belonged to him.

6. Directions were taken to dispose of the application by way of written submissions. The 3rd respondent's counsel filed his on 26th February 2020 but none were filed for the objectors despite being given ample time to do so.

7. I have had regard to the parties' submissions and depositions. The issues arising for determination are;

- a. Whether the documents attached to the objector's affidavit should be expunged from the record for failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules and section 106 B of the Evidence Act;
- b. Whether the objection proceedings are null and void for failure to follow the process laid out under Order 22 Rule 51 and 52 of the Civil Procedure Rules; and
- c. Whether the objectors have a legal or equitable interest over the household goods and motor vehicle registration numbers KCC 076G and KCE 951U proclaimed on 30th November 2019.

8. In the course of the proceedings, the 3rd respondent's counsel several raised preliminary objections which he canvassed in his written submissions. The first issue point of objection concerns the objectors' failure to properly mark and seal their annexure contrary to the provisions of **Rule 9** of the **Oaths and Statutory Declarations Rules**. He relied on the cases of *Jeremiah Nyangwara Matoke v I.E.B.C. & 2 Others [2017]eKLR*, *Chris Munga N. Bichage & 2 Others v I.E.B.C. & 2 Others [2017]eKLR* and *Zaheer Jhanda & Another v I.E.B.C. & 3 Others [2018]eKLR*, *Francis A. Mbalanya v Cecilia N. Waema [2017]eKLR* and *Abraham Mwangivs S.O. Omboo, Joseph Lijulu, Gorge Oko, Daniel Bongoko [2003]eKLR* in support of the argument that annexure that are not marked and securely sealed by a Commissioner for Oaths should be expunged from the court record.

9. **Rule 9** of the **Oaths and Statutory Declarations Rules** provides that

All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.

10. The obligation to seal and serialize exhibits annexed to an affidavit has been emphasized in a myriad of judicial authorities including the case of in *Zaheer Jhanda & another (supra)* where the Court of Appeal held that;

"... Rule 9 of the Oaths and Statutory Declarations Act, is intended to prevent various kinds of mischief and to ensure that a deponent owns and secures all the exhibits annexed to his affidavit. The rule further aims to prevent litigant from sneaking into the record documents that were not part of the affidavit, thus prejudicing their opponents. We therefore cannot fault the learned judge for expunging the annexures to the affidavit of PWII that were not marked as required by law."

11. A cursory glance at the exhibits annexed to the 2nd objector's affidavit shows that none of them are marked or sealed. There is no probative value in the documents which openly flout the mandatory provisions of Rule 9 of the Oaths and Statutory Declaration Rules. Consequently, the documents attached to the 1st objector's affidavit are hereby expunged from the record.

12. Secondly, the 3rd respondent contends that the annexure referred to as "FN-3" are screen shots and they ought to be struck out from the record for failure to comply with section **106 B** of the **Evidence Act**. The relevant provisions stipulate as follows;

106 B (1) *Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.*

106 B (4) *In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—*

- (a) *identifying the electronic record containing the statement and describing the manner in which it was produced;*
- (b) *giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*
- (c) *dealing with any matters to which conditions mentioned in subsection(2) relate; and*

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

13. The 3rd respondent referred this court to the case of **London Distillers (K) Limited v Mavoko Water & Sewerage Company & 2 Others [2019]eKLR** where Angote J. expunged from the record screen shots annexed to the applicant's affidavit. The learned Judge held that a certificate contemplated under Section 106 B (4) is required even for evidence sought to be adduced by way of Affidavit. I agree with the 3rd respondent that the screen shots annexed to the 2nd objector's affidavit are inadmissible as no certificate of production of the documents has been placed before this court.

14. The third objection relates to compliance with **Order 22 Rule 51 and 52** of the **Civil Procedure Rules** which provide as follows;

51 (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.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

15. It is the respondent's contention that the Notice of Objection and the Application were filed on 18th December 2019 and served upon his advocates on 15th January 2020 outside the mandatory stipulated timeline of seven days. He referred the court to **Order 50 Rule 4** of the **Civil Procedure Rules** which provides that;

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.

16. It is apparent from the wording of **Order 50 Rule 4** above that the Objection Proceedings were served upon the 3rd respondent's advocate within the stipulated time. According to the above provision, the computation of time stopped on 20th December 2019 and resumed on 14th January 2020. By the time the 3rd respondent's advocate was served on 15th January 2020, only 5 days had passed and service was well within time. The 3rd respondent's argument that the application was served out of time is therefore dismissed.

17. With the foregoing analysis on issues of preliminary significance, I now turn to the substantive issues. In determining whether the objection proceedings are merited, it must be remembered that the burden of proof rests on the objector to prove that he is entitled or has a legal or equitable interest in whole or part of the property attached in execution of a decree. The case of **Dubai Bank (K) Ltd v. Come- Cons Africa Ltd and Impak Holdings Co Ltd (2012) eKLR** was cited with approval by the Court of Appeal in **Zingo Investment Limited v Miema Enterprises Limited [2015]eKLR** thus;

“Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings, but simply decide whether or not the objector has interest legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see Chatabhai M. Patel & Another HCCC No. 544 Of 1957 (Lewis) On 8/12/58 Hcu (1958) 743. (Emphasis added).

18. The objectors claim that the goods proclaimed in execution of the decree of this court belong to them. The 1st objector averred that the household good proclaimed on 30th November 2019 belonged to her while the proclaimed motor vehicles registration numbers KCC 076G and KCE 951U belonged to the 2nd objector. For the household goods, the 1st objector attached a lease agreement and utility bills to show that she was the owner of the premises in which the auctioneers proclaimed the goods.

19. Although proof of ownership of premises may be considered prima facie evidence of the goods contained therein, more is required from the objector to ascertain ownership of the goods contained therein. In **Zingo Investment Limited (Supra)** the Court of Appeal observed;

It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant's goods are proclaimed and this cannot be the law. (See Nairobi HC Misc. Civil App. No 802 of 2010 Arun C. Sharma -v- Ashana Raikundalia t/a A.R. Raikundalia & Co. Advocates & others). For the foregoing reasons, it is our finding that the appellant's contention that the trial court ignored its title document and further ignored that the goods were proclaimed on its premises are not valid grounds to sustain objection proceedings. We find this appeal has no merit and is hereby dismissed with costs.

20. As held in the foregoing authority, proof of ownership of premises is not sufficient. The 1st objector was required to provide evidence of ownership of the proclaimed goods to discharge her burden of proof. Other than the impugned copies of the lease agreement and the utility bills, the 1st objector failed to give other cogent evidence that the household goods were hers. Her objection to their proclamation is therefore dismissed.

21. The objection to the proclamation of motor vehicle registration number KCE 951E is equally rejected for the reason that the objectors failed to prove that the 2nd objector was the owner of the vehicle. The unsealed copy of the log book annexed to the 1st objector's affidavit shows that the vehicle belongs to one Eric Botha Ongayo. No effort was made to demonstrate the 2nd objector's interest in the property.

22. The objectors also opposed the proclamation of motor vehicle registration KCC 076G on the grounds that the vehicle belonged to the 2nd objector. An unsealed copy of a log book for motor vehicle registration KCC 076G was attached to the 1st objector's affidavit to support her claim that the vehicle belonged to the 2nd objector at the time of attachment.

23. The 3rd respondent avers that when this Petition and Election Petition Appeal No. 34 of 2018 which had been filed against the decision of this court were determined in his favour, he filed a party and party bill of costs. He claims that when he began the proclamation process, the Petitioner began transferring his assets with the aid of the 1st and 2nd objectors to defeat the ends of justice. He avers that the 1st objector and the Petitioner are directors and shareholders of the 2nd objector. In his view, the transfer of the vehicle from the Petitioner to the 2nd objector shows that the company is an alter ego used by the Petitioner to defeat the ends of justice and the objection should therefore be disallowed.

24. I am in agreement with the persuasive exposition of Namuye J. (as she then was) in **Michael Kwena v Raza Properties Limited & Another Civil Case 1914 Of 2000 [2008] eKLR** where she cited Ringera J. in **Kenya Oil Company Ltd. Versus Fuad Mahmoud Mohamed and Fuel Mogulls' Services Ltd. and Abdul Rehman Abdalla Saleem and Marivan Rashid and Mariam Fuad Mahmoud** thus;

*“As for the second objector the learned Judge as he then was ruled that “the log book of motor vehicle KAJ 285 M showed prima facie that he was deemed to be the legal owner and the decree-holder judgement creditor had to prove otherwise which had not been done”. Further that “it mattered not that the first judgment debtor had been the first owner and it was attached while being driven by him. Further that it had not been the subject of attachment in March 20002 and as such nothing prevented the first judgment debtor from transferring it to another 3rd party. There was nothing to show that the transfer was a match on the execution process”. The learned Judge as he then was went on to hold that “**even if the transfer was a match against the execution, until such a transfer was set aside, the transferee remained the prima facie owner of the vehicle**”. [Emphasis added]*

25. The learned Judge deduced the following principles to be applied in the circumstances described in the foregoing authority;

- a. There has to be proof that the transfer was calculated to defeat the execution.
- b. There should be an order upsetting the transfer.
- c. Where a transfer to the objector is completed and has not been upset, it is as good as any other and should be protected.

26. In the instant case, vehicle registration number KCC 076G was proclaimed by the auctioneer on 30th November 2019. According to the copy of transfer movement attached to the 3rd respondent's affidavit, the vehicle was transferred from the Petitioner to the 2nd Objector on 1st October 2019. Evidently, the vehicle had not been proclaimed at the point of transfer. It does appear that the transfer of the vehicle from the Petitioner to the 2nd objector where he was a director and shareholder was calculated to frustrate execution of the decree of the court which had been issued on 3rd April 2019. Be that as it may, it was upon the 3rd respondent to make a cross application to upset the transfer.

27. The facts in this case are distinguishable from a case where the judgment debtor transfers proclaimed goods contrary to **Rule 14 of the Auctioneers Rules**. Since a copy of a log book is prima facie evidence of ownership of a vehicle, the 2nd objector would be have succeeded in showing that it has legal interest in vehicle registration number KCC.076G. As it is, the copy of log book for the vehicle is neither marked nor sealed as required under **Rule 9 the Oaths and Statutory Declarations Rules** and cannot be relied upon for reasons expounded elsewhere in this decision.

28. The upshot of all the foregoing is that the application dated 18th December 2019 is found lacking in merit. Accordingly, the application is dismissed with costs to the 3rd respondent.

Dated, Signed and Delivered at Kisii this 3rd day of August, 2020.

A. K. NDUNG'U

JUDGE