



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 243 OF 2016

BAKEHOUSE INVESTMENT LTD.....PLAINTIFF

VERSUS

BAKE N BITE (NAIROBI) LTD.....1ST DEFENDANT

SEIF MOHAMMED SEIF.....2ND DEFENDANT

ANTONIO LIONETTI.....OBJECTOR/APPLICANT

RULING

(1) Before Court are the Objection proceedings instituted by way of a Notice of Motion dated **4th October 2019** by which **ANTONIO LIONETTI** (the Objector/Applicant) seeks the following Orders: -

“(a) SPENT

(b) SPENT

(c) SPENT

(d) **THAT the Respondents be permanently restrained from further proclaiming the Applicant’s property.**

(e) **THAT costs of this Application be borne by the Plaintiff/Respondent.**

(2) The application was premised upon **Article 50 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A & 3B of the Civil Procedure Act, Cap 21, laws of Kenya, Order 22 Rule 51(2) of the Civil Procedure Rules 2010** and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Objector/Applicant.

(3) **BAKE HOUSE INVESTMENTS LIMITED**, the Plaintiff/Respondent opposed the application through the Replying Affidavit dated **15th October 2019** sworn by **SAVAN SHAH**, the Managing Director of the Plaintiff Company.

(4) Following a consent entered into on **27th November 2019**, the 2nd Interested party **SEIF MOHAMED SEIF** indicated through his Advocate **Ms Guserwa** that he had no objection to the application. Likewise **Mr MUNYASIA** Counsel for **BAKE ‘N’ BITE (NAIROBI) LTD**, the Interested Party indicated that this his client would not be participating in the present application.

(5) The application was canvassed by way of written submissions. The Objector/Applicant filed its written submissions on **2nd December 2019**, whilst the Plaintiff/Respondent filed its submission on **7th February 2020**.

BACKGROUND

(6) In a Ruling delivered on **26th October 2016**, **Hon Lady Justice Olga Sewe** allowed the Plaintiff’s application for summary Judgment and accordingly entered judgment in favour of the Plaintiff for the Principal sum of **Kshs.27,267,520** together with interest and costs.

(7) Subsequent to the delivery of that judgment the 2nd Defendant **SEIF MOHAMED SEIF** filed an application dated **9th February 2018** seeking to have the judgment of **26th October 2016** and all consequential orders thereto set aside on the basis that the 2nd Defendant had never been served with summons to Enter Appearance or the Plaintiff; and that the Plaintiff/Respondent had obtained the Decree/Judgment through misrepresentation and false information to the effect that all parties had been duly served with the requisite court documents.

(8) In a Ruling dated **15th October 2018**, the Court dismissed the 2nd Defendants application and declined to vary and/or set aside its judgment of **26th October 2016**. Thereafter the Plaintiffs Party and Party Bill of costs dated **3rd February 2019** was taxed by the Taxing Officer in the amount of **Kshs.797,046.60** vide a ruling delivered on **19th June 2019**. The Plaintiff/Respondent states that the Defendants have since failed and/or refused to pay the decretal sum of **Kshs.38,663,249/=** owed to the Plaintiff.

(9) In an effort to recover the decretal sum due to it, the Plaintiff sought and obtained Warrants of Attachment and Sale dated **15th August 2019** and instructed an Auctioneer to proclaim the moveable property in the home of the 2nd Defendant located at **South "C" Estate in Nairobi**. The auctioneer was however denied access to the residence by the guards who were manning the premises.

(10) The Plaintiff/Applicant then filed an application dated **3rd October 2019** seeking police assistance in executing the decree whereupon the Objector/Applicant filed the present application claiming that the Apartment in question as well as the goods and furniture contained therein belonged to him.

(11) The Objector/Applicant's objection is premised upon the following grounds inter alia:-

"2. THAT surprisingly, the property listed thereunder belongs to the objector herein while the proclamation notice indicates the debtor as Bake n Bite (Nairobi) Ltd, the 1st Defendant herein.

3. THAT the Objector is not a party to the above proceedings and as such the listed property is not available for attachment and/or sale for recovery of the civil debt herein.

4. THAT the Objector is the proprietor of Apartment No.5 Five Star (2) erected on the property known as LR NO.1411-00485 where the proclamation was done and the same is sub-let to the 2nd Defendant herein, a director of the debtor.

5. THAT the proclamation was done indiscriminately without establishing whether indeed the items and the property listed on the proclamation notice actually belongs to the Defendants.

6. THAT the apartment was sub-let and possession handed over to the current tenants while fully furnished and as such, all the household items and furniture belong to the Objector herein and there is therefore no justifiable and/or legal basis upon which the Objector's property should be attached and/or sold to recover a civil debt owed by the Defendants.

7. THAT the proclaimed properties are the Applicant's household goods and attachment or disposal of the same would be an infringement of the Applicant/Objector's right to property under Article 40 of the Constitution."

The Objector/Applicant therefore submits that unless the Orders sought are granted, his property will be unfairly attached and he will be unjustly deprived of the same.

ANALYSIS AND DETERMINATION

(12) I have carefully considered the submissions filed by both the Objector/Applicant and the Plaintiff/Respondent as well as the relevant law. **Order 22 Rule 51(1)** of the **Civil Procedure Rules 2010** provides 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 the parties to the decree-holder of his objection to the attachment of such property."

(13) The only question for determination in this application is whether the Objector has satisfactorily demonstrated that the items listed in the Proclamation Notice belong to him. In the case of **DUBAI BANK (K) LTD -VS- COME-CONS AFRICA LTD & IMPAK HOLDINGS CO. LTD [2012] eKLR, Hon Justice George Odunga**, observed as follows:-

"Although the law is that in the objection proceedings the Court does not and cannot make findings as to ownership of the property the subject of the objection proceedings but simply decides 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 Chotabhai M Patel Vs Chaturbhai M Patel and Another HCCC No.544 of 1957 (Lewis J on 8/12/58) (HCU) [1958] E.A 743 and Michal A. Mashere Vs Samson Asatsa Civil Appeal No.76 of 1987...."[own emphasis]

(14) The Proclamation Notice issued on **22nd August 2019** by **HIGH CLASS AUCTIONEERS** (Annexure **AL-1** to the supporting Affidavit dated **4th October 2019**) proclaimed for purposes of attachment and sale the following items:-

- One old round table + 8 seats.

- One old TV coloured
- One set of sofa seats
- 2 old wooden wall units
- Decoder machine
- One old Wall clock
- 2 old carpets
- Fridge
- Water dispenser
- Any other moveable items and/or motor vehicle capable of satisfying the Decree.

(15) The Objector raises two main issues with the proclamation of **22nd august 2019**. Firstly the Objector claims that he is the Proprietor of the **Apartment No.5, Five Star 2 Estate, on LR No.1411/00485 Nairobi, South “C”** and asserts that the Apartment in question does not belong to the judgment debtor. I note that the Objector has not presented to Court any documentary proof that he is the proprietor of said Apartment. No title document has been produced. All the Objector has shown the Court is a Tenancy Agreement in which he is named as the landlord. A Tenancy Agreement does not amount to proof of ownership.

(16) In any event the question of ownership of the Apartment is not an issue before this Court. There has been no proclamation of this **Apartment No.5** nor is there any intention by the Plaintiff/Respondent to auction that Apartment in Order to recover its debt.

(17) The Objector/Applicant further claims that he sub-let this **Apartment No.5** to the 2nd Defendant who is a director of the Debtor. It is claimed that the Apartment was let in a furnished state, thus all the furniture therein actually belong to the Objector/Applicant. In support of this claim over all the proclaimed goods the Objector has presented a Tenancy Agreement dated **10th November 2018** (annexture “AL-2” to the Supporting Affidavit). The said Tenancy Agreement indicates that:-

“The premises being the former residence of the landlord, the same is sublet in its current form; i.e furnished and the payment herein shall be inclusive of the consideration for the use of the landlords furniture.”

(18) This Tenancy Agreement only talks of **“furniture”**. There is no description and/or itemization of the alleged furniture. It is not indicated exactly what was contained in the said Apartment when it was sub-let to the tenant. Even where a dwelling is let as furnished the Tenant ordinarily brings in some of his own personal items. The Objector has not tendered any evidence that he was the owner of the proclaimed items of furniture. In my view a Tenancy Agreement which refers broadly to **“furniture”** will not suffice as proof of ownership.

(19) In **RUN C SHARMA –VS- ASHANA RAILUNDAGA t/a RAIKUNDALA & COMPANY ADVOCATES [2010]eKLR**, it was held as follows:-

“...the judgment-debtors live in the house where the items are attached and in law as a general rule, ownership of the house does not necessarily extend to ownership of the domestic goods therein.. Title documents for the premises alone are not enough, therefore there must be ample documentation on ownership of the attached items.”[own emphasis]

(20) Further in the case of **Asharaf A. Dadar Versus Kavoi Muinde** (suing as personal representative of **Boniface Kyalo Kavoi**) (2016) **eKLR Honourable Justice Njuguna** stated as follows:-

“Even assuming that this court was to give him the benefit of doubt and find that he was in occupation of the premises at the material time, he has not exhibited any evidence that the proclaimed household goods belong to him. He ought to have annexed receipts that he obtained upon purchase of the goods or any other form of evidence of ownership.” [own emphasis]

(21) Based on the foregoing, I find that the Objector/Applicant has not proved that he holds a legal and/or equitable interest in either the Apartment or the property/furniture contained therein. I find no merit in this objection. Accordingly, I dismiss in its entirety the Notice of Motion dated **4th October 2019** and award the costs to the Plaintiff/Respondent.

Dated in Nairobi this 29th day of September 2020.

.....

Justice Maureen A. Odera