



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 488 OF 2008

MHW.....APPELLANT

VERSUS

THOMAS OGUTTA ONGORI.....RESPONDENT

AND

AHH.....OBJECTOR

RULING

1. The objector, *AHH* approached this court through a Notice of Motion dated 16th December 2017 seeking two substantive orders. She prayed for an order raising the attachment of what she alleged was her moveable property proclaimed on 11th December 2017 and an order restraining *Tigwood Auctioneers*, their agents or servants from attaching or selling her property.
2. The application is premised on *Order 22 Rule 51, Order 51 Rule 1 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act* and all enabling provisions of the law. It is anchored on the grounds stated on its face and the supporting and further affidavits sworn by the applicant on 16th December 2017 and 29th May 2018 respectively together with the annexures thereto.
3. In her pleadings, the applicant contends that she is the legal owner of the moveable property which was proclaimed by *Tigwoods Auctioneers* on 11th December 2017 in execution of the decree for costs issued by this court on 10th August 2015 in favour of the decree holder, *Thomas Ogutta Ongori* against the judgment debtor, *MHW*.
4. As proof of her claim of ownership of the proclaimed goods, the applicant annexed to her further affidavit several receipts evidencing purchase of most of the proclaimed goods. She averred that the goods formed part of her stock in trade in a shop she was operating on Plot No. [particulars withheld] along Kimathi River Bank Road. She exhibited a business permit issued in her name by the Nairobi City Council allowing her to operate a mini market in the aforesaid address in the year 2017.
5. Further, the applicant deposed that the proclamation and intended attachment of the goods was unprocedural and illegal since she was a stranger to the proceedings; that though there is a time that she was married to the judgment debtor, they separated in November 2011 when he allegedly deserted their matrimonial home which was in the same building as her business premises and he thereafter petitioned for divorce. She maintained that the proclaimed goods are her personal property as opposed to matrimonial property and should not have been proclaimed in execution of a decree which had not been issued against her.
6. The application is opposed through a replying affidavit sworn on 23rd May 2018 by *Kelvin Mogeni*, learned counsel for the judgment debtor. Counsel deposed that the proclamation and intended attachment was lawful as in his view, the applicant and the judgment debtor were still husband and wife as there was no evidence that their marriage had been dissolved and the applicant had not availed evidence to show that the proclaimed goods belonged to her and that they were not part of their matrimonial property.
7. By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered. In their written submissions, learned counsel for the parties expounded on the positions taken by their respective clients in support and in opposition to the application.
8. The law is that in objection proceedings such as the ones before this court, the objector has the burden of proving ownership of the proclaimed goods or a legal or equitable interest in the said goods. This burden must be discharged before the court can exercise its power donated by *Order 22 Rule 53 of the Civil Procedure Rules* (the Rules) of raising the attachment subject matter of the proceedings.
9. In this case, the applicant has claimed that though she was married to the judgment debtor, they separated in the year 2011 and since that time, they no longer lived as husband and wife; that the proclaimed goods constituted property she had acquired on her own after the

judgment debtor allegedly deserted their matrimonial home. In my view, she exhibited the petition for divorce filed against her by the judgment debtor as proof of the fact that their marriage had broken down and they were no longer living together as husband and wife not as evidence of dissolution of their marriage as submitted by the decree holder. The applicant actually conceded that the petition for divorce is still pending hearing.

10. In her further affidavit, the applicant annexed evidence which proved that she operates a mini market and that she had purchased prior to the proclamation commodities for sale in her shop similar to those that were proclaimed by *Tigwoods Auctioneers* on instructions by the decree holder. A look at the list of the proclaimed goods shows clearly that apart from the TV set, sofa set, coffee table, gas cooker/cylinder, Hot Point fridge and floor carpet which can be classified as household goods, the rest of the items were commodities for trade given the number of pieces of the items listed and the amount of sugar, maize and wheat flour involved.

11. The applicant also produced receipts to prove that she had actually purchased a Hot Point fridge, assorted gas cylinders, an LG 21" TV set and assorted shop commodities including bales of wheat and maize flour. Even though she did not avail any evidence to prove that she had purchased the sofa set, coffee table, gas cooker/cylinder and floor carpet listed in the proclamation, I am prepared to find, which I hereby do, that these were her household goods since her averment that she had stopped living in the same house with the judgment debtor since year 2011 was not controverted by the respondent.

12. In view of the foregoing, I am satisfied that the applicant has proved on a balance of probabilities that she had both a legal and equitable interest in the proclaimed goods. It is also common knowledge that she was not party to the proceedings in which the decree was issued.

13. Consequently, it is my finding that the application dated 16th December 2017 is merited and it is hereby allowed with costs to the applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Gachomba for the applicant

Ms Nzioka holding brief for Ms Makori for the respondent

Mr. Kibet: Court Assistant