



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 844 of 2010

K-REP BANK LTD.....PLAINTIFF

-VERSUS-

BASILIO PASCAL KISELI AND

JANE MWIKALI KISELI T/A KANGAROO SHOES KENYA.....DEFENDANT

ATTIC ENTERPRISES LTD.....OBJECTOR

RULING

1. Before the Court is a Chamber Summons dated 19th April 2012. It is filed under Order 22 Rule 51(2) and Section 3A and Section 2(a) of the Civil Procedure Act. The application seeks the following substantive prayers:-
 - 1) That the attachment of the Objector's goods in execution of the Decree be set aside/lifted or raised.
 - 2) That the costs of this suit be borne by the decree holder.
2. The application is based on grounds that the attached goods belong to the Objector and that the Objector is not the same person as the Judgment-Debtor. It is further based on grounds that, it is unjust and illegal to attach the Objector's goods in execution of a Decree where the Objector is not a party to the Suit and has nothing to do with the Decree holder's claim against the Judgement-Debtor herein.
3. The application is supported by the affidavit of IRENE MBINYA KIOKO dated 19th April 2012 with its annexures. It is further supported by the Supplementary affidavit of the same person dated 29th June 2012. The supporting affidavit essentially reiterates the grounds of the application.
4. The application is opposed vide the Replying affidavit of JOSEPHINE MUSEMBI, who is described as the Assistant Manager, in charge of legal affairs of the plaintiff and is dated 9th May 2012.
5. The plaintiff, who is the Decree holder, contends that the application herein is fatally and/or incurably defective and hence warrants dismissal with costs for amounting to an abuse of the process of Court. The plaintiff alleges that the affidavit sworn by IRENE MBINYA KIOKO is full of falsehoods. The plaintiff claims that the said deponent and BASILIO PASCAL KISELI, one of the defendants herein, are equal shareholders in Attic Enterprises Ltd, the Objector herein. It is also the plaintiff's contention

that the objector/applicant has failed to furnish the Court with sufficient proof of ownership of the proclaimed items as required by law and hence attachment should proceed.

6. At the hearing of the application, Mr. Masafu appeared for the plaintiff/decreed-holder, while Mr. Murage appeared for the Objector. In his submissions, Mr. Murage relied on the supporting affidavit and supplementary affidavit of IRENE MBINYA KIOKO. He argued that the Judgment was against the Judgment-Debtor and not the Objector. Therefore, the objection against the objector was illegal. He also submitted that the Objector, being a Company, was a distinct entity from the debtors.

7. In opposing the application, Mr. Masafu submitted that the Judgment was entered against the Defendants jointly and severally. He stated that Attic Enterprises, the Objector herein, was owned by Irene Mbinya Kioko and Basilio Pascal Kiseli as equal shareholders and that there was an unofficial search to that effect. He argued that there was no evidence in support of the ownership of goods by the Objector. He further submitted that the goods proclaimed are chattels under Cap. 28, and that under the said Act, the goods are required to be registered. He stated that in the absence of an instrument of registration, the Objector could not claim the goods. He cited the case of **KENYA OIL COMPANY LIMITED VS MOHAMMED AND OTHERS**, Where Ringera J. held that the burden of proof is on the Objector to establish that they own the goods or have a legal interest on the goods proclaimed.

8. I have considered the application in light of the submissions by both Counsels.

9. It is the plaintiff's contention that one of the defendants and Irene Mbinya Kioko, who is described as the managing director of the objector, are equal shareholders of the objector. The plaintiff's claim is based on an unofficial search carried out by Muhatia Pala Auctioneers. Although the unofficial search is of no significant persuasive value to this Court, I note that the objector did not bring any evidence to rebut the same. Nevertheless, I am also aware of the principle in Company law which states that a Company is a legal personality with a separate legal entity distinct from its shareholders or directors. Therefore I identify with the Objector's submission that, the Objector being a company is distinct from its directors.

10. The above brings me to the main question that this court needs to consider, which is whether the Objector has proved to this Court that it has a legal and equitable interest over the goods proclaimed. It is a well settled principle that the objector must prove on a balance of probabilities that he is entitled to or has legal or equitable interest in the whole or part of the property attached. In the case of **AKIBA BANK LTD VS JETHA & SONS LTD (2005) eKLR**, Waweru J. held that for an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree. To that end the Objector has exhibited receipts which show, inter alia, that it owns the concrete mixer machine. There is a receipt attached bearing the name of the Objector as the purchaser. The said property should therefore be released forthwith to the Objector.

11. As regards the other items proclaimed, the Objector claims that the bulk of the said items consist of products made by cement, concrete and sand, which materials are manufactured at the site and receipts are only issued to the purchasers. This explanation is not rebutted by the Plaintiff/decreed holder, save for the assertion in the replying affidavit that no sufficient proof of ownership of the attached goods was placed before the court. Given that the Objector is a company and the only bearing it has to this case is that it is co-owned by one of the defendants, I am persuaded that the said proclaimed goods ought not to be ascribed to the ownership of the said defendant personally and should in the circumstances not be proclaimed.

12. For these reasons, I am inclined to allow the application dated 19th April 2012 with costs to the Applicant.

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED THIS 20TH DAY OF SEPTEMBER 2012

J.M MUTAVA
JUDGE