



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 781 OF 2009

JACQUELINE MUTURI.....PLAINTIFF

VERSUS

CARRIBEAN SOLUTION FINDERS LTD.....DEFENDANT

RULING

By way of Chamber Summons dated 20th April, 2011 and expressed to be made pursuant to Sections 1A 1B and 3A of the Civil Procedure Act; Order 21 Rules 56 and 57 and Order 45 Rule 9 of the Civil Procedure Rules, the objector, Copesa Limited seeks orders for stay and lifting of attachment of movable property proclaimed or 18th April, 2011 by M/s Lifeline Traders auctioneers in execution of the plaintiff's decree against the judgment debtor. The application is made on the grounds that the attached movable property belongs to the Objector and that the defendant/judgment debtor does not have any property rights or other legal claims in the attached property. The application is supported by the affidavits of Bernard Ngugi sworn on the 26th April, 2011 and 31st May, 2011.

The application is opposed. There is a replying affidavit sworn on 19th May, 2011 and a supplementary affidavit sworn on 22nd June, 2011 both by Jacqueline Muturi, the plaintiff.

The application was first heard ex-parte on 26th April, 2011 and a temporary stay of execution granted by the Court. The temporary orders for stay having subsequently expired, the plaintiff/decree holder revived execution of the decree prompting the objector to move the court under certificate of urgency on 3rd August, 2011 for orders to stay execution of the decree and sale of the attached goods by Lifeline Auctioneers pending inter partes hearing of the objection proceedings. The court granted interim orders staying execution of the decree which orders have subsisted until this ruling.

When the objection proceedings came before me for inter partes hearing on 10th October, 2011 Mr Ogal learned Counsel holding brief for Mr Keega Counsel for the Objector, told the court that the Objector would rely on the Objector's written submissions filed in court on 8th July, 2011. On his part Mr Thurania, learned Counsel for the plaintiff told the court that the plaintiff would allow the court to determine the matter on the basis of the affidavits sworn by the plaintiff on the 19th May, 2011 and 22nd June, 2011.

Under the Civil Procedure Rules 2010 Objection proceedings now fall under Order 22 Rule 51. In such proceedings the sole issue before the court is whether the Objector has on a balance of probability shown that he has a legal or equitable interest in the whole or part of any property attached in execution of the decree. In that regard, the case of the Objector from the affidavits of Mr Bernard Ngugi is that the attachment was carried out in an office on the 2nd floor of Nyaku House Hurlingham in premises that were previously owned by the defendant but which the defendant had on 15th December, 2010 sold to the Objector. The movable property attached from such premises was therefore property belonging to the Objector and not the defendant. There is exhibited in the affidavit an agreement dated 15th December, 2010 entered into between the objector and the defendant for the transfer of interest in the property stated to have been attached from the premises aforesaid. It is further deponed that Mr John Wanyoike Gitau, the Managing Director of the defendant company is a shareholder of the Objector but that his shareholding is in trust for Bernard Ngugi a director of the Objector. Exhibit 'B2' of Mr Ngugi's further affidavit is a declaration of Trust dated 15th October, 2010 indicating that the 500 shares held by Mr Wanyoike Gitau in the Objector company are held for the benefit of Mr Bernard Ngugi. In that respect, the Objector has deponed that Mr Gitau's interest in the Objector is only notional hence he has no legal or equitable interest in the property belonging to the Objector. Further the Objector's submissions filed on 8th July, 2011 reiterate the foregoing .

In reply, the plaintiff through the affidavits of Jacqueline Muturi sworn on 19th May, 2011 and 22nd June, 2011 argues that John Wanyoike Gitau, the person she dealt with in the Investment Facilitation Agreement forming the subject matter of the main suit, is the real face behind both the defendant and the Objector. She exhibits an official search showing Mr Gitau as the main shareholder in the Objector company. She states further that when this suit was filed and an application for summary judgment lodged, it is Mr Gitau who swore the replying affidavit.

Pertinently, the plaintiff asserts that judgment in this matter was made on 22nd October, 2010 while the Objector company was incorporated on 17th November, 2010 pointing to an intent to offload the assets of the defendant into the new company so as to defeat execution of the decree. The Asset Transfer Agreement was executed on 15th December, 2010 and so was the declaration of trust between Mr Gitau and Mr Ngugi again in furtherance of the same scheme. The plaintiff doubts the date of the latter indicating that the year '2010' is superimposed on what ought to have been year '2011' which casts doubt as to the authenticity of the document. Lastly, the plaintiff contends that the genuinity of the Asset Transfer Agreement and Declaration of Trust should be examined given that the Registrar of Companies in a letter dated 7th June 2011 declares that the defendant company does not appear in the data base of registered companies.

I have now considered the record, the objection proceedings , the affidavits filed and the Objector's submissions. On the onset and as already indicated above, the burden of proof lies with the Objector to establish a legal or equitable interest in the property the subject matter of the objection proceedings. This burden has to be discharged under the evidential test of balance of probability. In that regard, I find it appropriate to approach this matter from the very basics - the place of proclamation and attachment of the goods by the auctioneer. From the supporting affidavit of Bernard Ngugi sworn on 26th April, 2011, the attachment was carried out at an office on 2nd Floor, Nyaku House, Hurlingham, Nairobi. Mr Ngugi further confirms that the defendant was previously the owner of the premises. This ownership of the premises where attachment took place is corroborated by the address given in the Investment Facilitation Agreement entered into between the defendant and the plaintiff and in particular in the customer details form attached thereto. **Prima facie** therefore, the property was attached from premises that were owned by the defendant.

In an attempt to rebut the above **prima facie** position, Mr Ngugi has deponed that the defendant had as at the time of attachment, sold the premises to the Objector. To that end, he has exhibited the Asset Transfer Agreement dated 15th December, 2010. However, a *juxtaposition* between the value of goods attached and the price purportedly paid by the objector to the defendant under the Agreement reveals a glaring

disparity that casts doubts as to whether the agreement related to the attached items. From the proclamation by Lifeline Traders Auctioneers the attached goods were accorded an approximate value of less than Kshs 150,000/= and could not possibly have been the subject matter of the Asset Transfer Agreement dated 15th December, 2010. Secondly, in the further affidavit sworn by Mr Ngugi on 31st May, 2011 it is admitted that Mr John Wanyoike Gitau, the main shareholder of the defendant is also a shareholder in the Objector, and from the replying affidavit of Jacqueline Muturi sworn on 19th May, 2011, the ownership structure of the Objector company as provided by the Registrar of Companies (exhibit 'JM 2') reveals that Mr Wanyoike Gitau is indeed the main shareholder in the Objector company. This revelation brings to forth two conclusions, firstly, that Mr Wanyoike Gitau is the main person behind the corporate veils of both the defendant and the Objector, and secondly, and more pertinently, that the Declaration of Trust exhibited in the further affidavit of Mr Ngugi (Exh BN 2) in which Mr Gitau is stated to hold shares in the Objector in trust for Mr Bernard Ngugi is an afterthought. The coincidence of dates in the date of the Asset Transfer Agreement and that of Declaration of Trust (both given on 15th December, 2010) connote a scheme by Mr Gitau to disguise the ownership of the goods belonging to the defendant. This is compounded by the fact that neither the defendant nor the objector have gone a step further to produce any documents of ownership of the attached goods to support the fact of the alleged ownership by the Objector. The objector has further not found it necessary to call for evidence of Mr Gitau who is a central player in this matter. This position is not helped by the generalized nature of the Asset Transfer Agreement which fails to specify the items under transfer. And as stated above, the incognizance between the value of the goods attached and the consideration set out in the Asset Transfer Agreement raises genuine doubts as to whether the Agreement related to the transfer of ownership of such goods. In the end, this court finds that the Objector has failed to prove ownership of the goods, whether legal or equitable.

On the other hand, the plaintiff has provided a consistent factual rendition of the close relationship between the attached goods and Mr John Wanyoike Gitau, the common figure in the ownership of both the defendant and the Objector companies. This has largely overshadowed Mr Bernard Ngugi's alleged ownership of the Objector and restricted him to the periphery of the affairs of the company.

Finally, the court does not find it necessary to delve into the conduct of the defendant and its director, Mr Gitau from the date judgment was delivered until the date of proclamation of the goods as deponed of the plaintiff. Such conduct, including the complaint of loss of the court file to frustrate execution is of persuasive value to the matter before court. Suffice it to say that the court is disturbed by the letter of 7th June, 2011 from the Registrar of Companies (Exhibit J.M.3 of the plaintiff's supplementary affidavit) which shows that the defendant company was no longer listed in the Register of Companies as at that date. This letter alone connotes the extent to which the defendant has gone to avoid responsibility or liability for commercial commitments entered into with third parties. In the court's view, if indeed the directors of the defendant went to the extent of having the company de-registered, then a clear scheme of avoiding liability is unmasked.

The upshot of the foregoing is that the objection by the Objector is dismissed with costs and the plaintiff allowed to proceed with execution.

Orders accordingly.

DATED and DELIVERED in open court in NAIROBI this 19th day of OCTOBER, 2011.

J. M. MUTAVA
JUDGE

In the presence of

Plaintiff

Defendant