



Fortress Engineering Limited v Jinsing Enterprises Company Limited; Mhasibu Properties Limited (Garnishee); Mhasibu Housing Company Limited (Objector) (Miscellaneous Application E293 of 2023) [2025] KEHC 2274 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E293 OF 2023
JWW MONG'ARE, J
FEBRUARY 13, 2025**

BETWEEN

FORTRESS ENGINEERING LIMITED APPLICANT

AND

JINSING ENTERPRISES COMPANY LIMITED RESPONDENT

AND

MHASIBU PROPERTIES LIMITED GARNISHEE

AND

MHASIBU HOUSING COMPANY LIMITED OBJECTOR

RULING

Introduction and Background

1. Before the court for determination is the Objector's Notice of Motion dated 22nd November 2023 made under section 3A and 63(e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 22 Rule 51 & 52 and Order 51 Rule 1 of the Civil Procedure Rules that seeks orders lifting the attachment and sale of the office goods assigned for attachment and sale and that the said proclamation be declared null and void. This application is supported by grounds set out on its face and the supporting affidavit of Morris Njagi, the Objector's Chief Executive Officer, sworn on 22nd November 2023. It is opposed by the Applicant/Decreeholder through the replying affidavit of its director, Martin Kibe Ng'ang'a sworn on 26th February 2024. The application was canvassed by way of written and oral submissions by the parties' respective counsel.



2. It is common ground that the Decree Holder obtained judgment against the Judgement Debtor on 30th January 2020 and a decree was subsequently issued on 20th December 2021. The Decreeholder, in an application dated 5th April 2023 stated that the decree remains unsatisfied to date but that the Judgment Debtor was successful in arbitration proceedings with the Garnishee and that proceeds from the said arbitral award, that is, Kshs.16,442,201.50/= are sufficient to wholly satisfy the decree. The Decreeholder thus sought and was granted an order nisi to the Garnishee to show cause why the said proceeds to be remitted by the Garnishee should not be attached in satisfaction of the Decree Holder's Decree.
3. The Decreeholder commenced the process of executing the decree by attaching office goods at the Objector's premises which prompted the Objector to file the present application. It avers that it is a separate entity from the Garnishee and that they are therefore bound to experience loss and damage occasioned by the said office goods as it is not a party to this suit and therefore the wrong entity to proclaim from. In response, the Decreeholder states that at the point of initiating the Garnishee proceedings, it prepared the necessary application which was received by the Objector without any objection and it never gave any indication either to the court or the Decreeholder that they were in fact a different institution from the Garnishee. That they implied in their conduct and made both the Decreeholder as well as its auctioneers believe that they are the Objector herein and that it is this conduct that led to the proclamation of goods and that the Objector should be estopped by the court from asserting that its goods have wrongly been proclaimed. The Decreeholder thus terms the Objector's conduct as "suspicious and questionable"

Analysis and Determination

4. Having gone through the pleadings and the submissions, the main issue for the court's determination is whether the attachment and sale of the Objector's office goods ought to be lifted and set aside. The Objector rightly relies on inter alia Order 22 Rule 51 of the Civil Procedure Rules which provides for objection to attachment of property as follows:-
 1. 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 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.
5. A reading of Order 22 Rule 51 above places the Objector with the burden of proving that it is entitled to or has a legal or equitable interest on the whole or part of the proclaimed/attached goods. This position has been buttressed by the court in a plethora of decisions including that of Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743, where it was held that:-
 - a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.



- b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
 - c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.
 - d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.
6. The Objector stated that it is a different entity from the Garnishee as the Objector is Mhasibu Housing Company Limited incorporated in 2009 whereas the Garnishee is Mhasibu Properties Limited incorporated in 2012. This position has not been rebutted by the Decreeholder who only state that they were led to believe from the conduct of the Objector that it was the Garnishee as they received the pleadings of this matter without protest. However, a look at the face of the said pleadings received by the Objector and annexed by the Decreeholder indicates that the stamp therein bears the name Mhasibu Housing Company Limited and not Mhasibu Properties Limited, which ought to have immediately informed the Decreeholder and served as an indicator that they might have served the wrong entity. In its deposition, I can tell that the Decreeholder is also not that confident or authoritative that the Objector and the Garnishee are one and the same entity. I am therefore satisfied that the Objector and the Garnishee are two different and separate entities.
7. In any case, I note that the Objector has demonstrated, through the receipts it has annexed that the said proclaimed goods belong to it and not the Garnishee. Once an Objector demonstrates ability to acquire goods, the burden shifts to the Judgment Creditor to demonstrate otherwise (see Nambuye J.,(as she was then)], in Michael Kwena v Raza Properties Limited & Park View Auctioneers [2008] KEHC 1088 (KLR). In the foregoing, it is my opinion that the Objector has demonstrated its ability to acquire the attached goods and that this is prima facie proof of ownership of those items which grants it a legal and equitable interest over the same.

Conclusion and Disposition

8. As such, I find merit in the Objector’s application dated 22nd November 2023 and as a consequence, the proclamation notice dated 22nd November 2023 and attachment against the Objector’s office goods is hereby lifted and the same is declared a nullity. The Decreeholder shall bear the costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2025

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J.W.W. MONGARE

JUDGE

In the Presence of:-

- 1. N/A for the Plaintiffs /Applicants.
- 2. Mr. Ogendo for the Defendants/Respondents.
- 3. N/A for the Garnishee.



4. N/A for the Objector.
5. Amos - Court Assistant

