



Long Island Limited (Tapas Cielo Bar and Restaurant) v Mediamax Network Limited & another; Tapas Gold Limited (Objector) (Civil Suit E079 of 2022) [2025] KEHC 2307 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E079 OF 2022
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

LONG ISLAND LIMITED (TAPAS CIELO BAR AND RESTAURANT) PLAINTIFF

AND

MEDIAMAX NETWORK LIMITED 1ST DEFENDANT

SOPHIE NJOKA 2ND DEFENDANT

AND

TAPAS GOLD LIMITED OBJECTOR

RULING

1. The Objector filed a Notice of Motion application dated 6th May 2024 under Certificate of Urgency pursuant to Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 22 Rule 51 (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules, Article 50 of the Constitution of Kenya, and all other enabling provisions of the law.
2. The Objector seeks for orders that this court do grant orders restraining the decree holder through Autoland Auctioneers from attaching the property belonging to the Objector which is indicated in the Proclamation of Attachment dated 25th March 2024, that this court sets aside the said Proclamation of Attachment, and that costs of this application be paid to the Objector by the decree holder.
3. The application is premised on grounds on its face and the Supporting Affidavit of Grace Litunya Masasa that Tapas Gold Limited, the Objector herein, has leased premises at Nyali Center situated along Links Road where it operates a bar and restaurant under the name Tapas Gold Bar and Restaurant. That Tapas Gold Limited has leased the premises from Tropical Veterinary Services



Limited who are the landlord. That Tapas Gold Limited has no relationship or affiliation with Long Island Limited (Tapas Cielo Bar and Restaurant) as it is a separate and distinct legal entity. That Autoland Auctioneers has proclaimed and attached property belonging to Tapas Gold Limited for reasons unknown to Tapas Gold Limited and which appear on the face of the proclamation of attachment pursuant to the suit filed herein. That the Objector is apprehensive that Tapas Gold Limited is at risk of having its property attached for reasons unknown to it unless restrained by this court. That the decree holder will not suffer any prejudice if the orders prayed for by the Objector are granted since the auctioneer will be proclaiming and attaching property of the wrong entity. That on the other hand, the Objector stands to suffer great prejudice and loss if its property is wrongly attached as the wrong entity.

4. The Defendants filed a Replying Affidavit sworn on 18th July 2024 by D. Muyaa that the Plaintiff/Judgment Debtor sued for purported defamation as the owner also trading as Tapas Cielo Bar & Restaurant and until 14th December 2023 when judgment was delivered, there was no allegation of change of ownership or management of the establishment. That the Objector, Tapas Gold Limited and Tapas Cielo Bar and Restaurant have a common name Tapas, and that the registration of names of entities in Kenya is such that you cannot acquire a name that already exists and is in use by another to run a similar trade unless both entities are linked or are under similar ownership or management. That Tapas Gold Limited and Tapas Gold Bar & Restaurant occupy the same premises as Long Island T/A Tapas Bar & Restaurant. That there is no indication whether and when Tapas Cielo Bar & Restaurant vacated those premises.
5. The Defendants state that the document exhibited as a lease agreement for the premises dated 2.12.2023 pre dates the delivery of judgment in this matter for reasons that the lease is for an undisclosed term, its commencement date is not disclosed, it bears no date on the certificate for its execution by the landlord, the guarantor's identity details are not captured on the certificate for her execution of that document as guarantor, the guarantor's passport size photograph is not affixed thereto, and that the document is one that ought in law to be registered but is unregistered. That it is not binding as against the Defendants/Attaching creditors and does not in the totality of its wording amount to a lease over the premises referred to in the pleadings herein. That the Objector has failed to prove ownership of the items proclaimed by auctioneers acting on the Defendants/attaching creditor's instructions. That without proof of ownership, the items are presumed to be the Plaintiff/Judgment Debtor's items attachable in execution of the Defendants/attaching creditors' costs.
6. The Plaintiff filed Grounds of Opposition dated 15th August 2024 that the decree of the court issued on 14th December 2024 is against Long Island Limited but the goods attached belong to Tapas Gold Ltd. That the judgment debtor and the Objector are unrelated, they are distinct legal entities and do not share the same directors. That the remedy for recovery by the Defendants is to move against the actual judgment debtor whose directors are known.
7. The Objector filed submissions dated 24th September 2024 and argued that the law is clear that the onus lies on the Objector to establish its legal or equitable interest in the properties which are the subject matter of the proclamation and attachment objected. The Objector relied on the holdings in the cases of Odhiambo Owiti & Company Advocates v Dominion Farms Limited: Sukari Industries Limited (Objector) (2021) eKLR which cited with authority the case of Simba Colt Motors Ltd v Lustman & Co. (1990), HCCC No. 729 of 2002, Chotabhai M. Patel v Chaprabhi Patel (1958) EA 734, Akiba Bank Ltd v Jetha & Sons Ltd (2005) eKLR, and Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others (2014) eKLR.
8. The Objector submitted that the separation of corporate legal entities was espoused in Salomon v Salomon (1897) AC 78 and that this legal principle was also established in the case of Victor Mabachi



& Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 (2013) eKLR. That since the Plaintiff and the Objector are separate distinct legal entities, and further do not have similar directors nor shareholders, the Objector cannot be compelled to settle the debts of the Judgment Debtor. The Objector further cited the case of Boleyn Magic Wall Panel Ltd v Nesco Services Limited: Boleyn International (K) Limited (Objector) (2021) eKLR where it was held that in these kinds of 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. The Objector argued that on the basis of the evidence adduced and the express averments by the Plaintiff as not being the owner of the goods, the Objector has dispelled any doubt on its interest both legal and equitable with respect to the attached property.

9. On who is entitled to costs, the Objector cited Section 27 of the *Civil Procedure Act* and the holding in the case of DGM v EWG (2021) eKLR cited in the case of Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Cooperative Society Ltd, Judicial Review Application No. 6 of 2004. The Objector submitted that although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act*. That as such a successful party should normally be awarded costs of an action unless the court directs otherwise.
10. I have considered the Notice of Motion application dated 6th May 2024, the Replying Affidavit sworn on 18th July 2024 and the Objector's submissions dated 24th September 2024. The issue for determination is whether the application is merited for grant of the orders sought.
11. This court has perused the annexures to the application and established that the suit herein was filed on 19th July 2019. Judgment was delivered on 14th December 2023 where the suit was dismissed for lack of merit and the Plaintiff ordered to pay Kshs. 195,000 in costs to the Defendants. Beside a copy of the judgment, the Objector has annexed copies of records relating to Tapas Gold Ltd held by the Companies Registry as at 1st December 2023 which also shows the names of its directors and shareholders, copies of records relating to Long Island Limited held by the Companies Registry as at 7th December 2023 which includes the names of its directors and shareholders, and a copy of the lease agreement dated 2nd December 2023 between Tropical Veterinary Services Limited and Tapas Gold Limited.
12. The Objector states that Tapas Gold Limited has leased premises at Nyali Center situated along Links Road where it operates a bar and restaurant, and that it has no relationship or affiliation with Long Island Limited (Tapas Cielo Bar and Restaurant) which is a separate and distinct legal entity. That Autoland Auctioneers has proclaimed and attached property belonging to Tapas Gold Limited for unknown reasons.
13. The Defendants state that Tapas Gold Limited and Tapas Gold Bar & Restaurant occupy the same premises as Long Island t/a Tapas Cielo Bar & Restaurant. That there is no indication whether and when Tapas Cielo Bar & Restaurant vacated those premises.
14. Documentary evidence on record shows that the two entities, Tapas Gold Limited operating Tapas Gold Bar & Restaurant and Long Island Limited operating Tapas Cielo Bar & Restaurant though with different directors and shareholders are housed in the same premises and therefore inseparable.
15. Order 22 Rule 51(1) of the Civil Procedure Rules 2010 provides: -
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 parties to the decree-holder, of his objection to the attachment of such property

16. Further, in *Arun C. Sharma v Raikundalia T/A A. Raikundalia & Co. Advocates and 4 others* (2014) eKLR the court held: -

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”

17. The objector is claiming interest, both legal and equitable in the attached property and this is evidenced by a copy of few pages of the lease agreement that allowed them to carry on business at the premises. The Plaintiff came out in their Grounds of Opposition to state that the attached goods belong to Tapas Gold Limited.

18. However, it has not been shown whether and when the Plaintiff vacated the premises. The copy of lease agreement furnished to this court is unregistered which casts doubt on its authenticity. I find that the Objector has failed to establish on a balance of probability the legal and equitable interest in the attached property.

19. This court relies on the holding in the case of *Miema Enterprises Ltd v Njoka Tanners Ltd* (2007) eKLR that the court should not shut its eyes, ears and mind and fail to see through a deceit and mischief aimed at obstructing the cause of justice.

20. In the upshot, the Notice of Motion application dated 6th May 2024 lacks merit and is dismissed with costs to the Defendants.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff

..... Advocate for the Defendants

..... Advocate for the Objector

Court Assistant – Shitemi

J.K. NG'ARNG'AR, J.

