



**Midco Textiles (East Africa) Limited v Millbrook Garments Limited;
Millbrook Garments (Objector) (Commercial Case E013 of 2024)
[2025] KEHC 2038 (KLR) (Commercial & Admiralty) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E013 OF 2024
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

MIDCO TEXTILES (EAST AFRICA) LIMITED PLAINTIFF

AND

MILLBROOK GARMENTS LIMITED DEFENDANT

AND

MILLBROOK GARMENTS OBJECTOR

RULING

1. The Objector filed a Notice of Motion application dated 1st October 2024 under Certificate of Urgency pursuant to Section 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 22 Rule 51 & 52, Order 40 & 51 of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The Objector seeks for orders that the Plaintiff/Decree holder by way of execution of attachment and intended sale of the Objector/Applicant's motor vehicles registration numbers KBG 495L, KCA 864B, 11 office desks, 35 office chairs, 8 computers, 1 photocopy machine, 1000 pieces of overalls, 1000 pieces of dustcoats, 400 pairs of safety boots, 700 pieces of reflector jackets, 6 electric fans, 27 metal cabinets, 25 wooden cabinets, 400 pairs of gloves, 400 pieces of helmets, 800 pieces of assorted safety gears, 100 cups, 7 work tables, 4 branding machines, 6 knitting machines, 3 embossing machines, 4 commercial printers, 3 office printers, 6 logo branding machines, 8 commercial trolleys (hereinafter referred to as 'the items') as set out in the proclamation notice issued by M/S Moran Auctioneers on 26th September 2024 or any other auctioneers, be set aside, and an order be issued prohibiting any such subsequent mode of execution in enforcement of the decree herein by way of attachment of the said items, and that the Plaintiff/Decree holder be ordered to bear costs of this application.



3. The application is premised on grounds on its face and the attached affidavit of Vasantray Mohanlal Makwana sworn on 1st October 2024 that the Plaintiff/Decree holder obtained a decree herein dated 25th April 2024 and warrants of attachment and sale were issued thereto to M/S Moran Auctioneers against the Defendant/Judgment debtor, to recover a sum of Kshs. 26,850,716.60. That the said auctioneers in the process of execution of the warrants of attachment and sale, went to the Objector's place of business along Haile Selasie Road and proclaimed the Objector's items stated above as per the proclamation notice dated 26th September 2024 and are undoubtedly going to take actual possession of the items with a view of selling the same by public auction. The Objector stated that they have both legal and equitable interest in the items that have been proclaimed, on the ground that the same are solely owned by the Objector. That the Objector retains possession of the movable property/items with exclusive use, control and management.
4. The objector further stated that they have never been a party to proceedings in the suit giving rise to the decree of this court on the face of the warrant of attachment of movable property in execution, and neither has the objector been named in the said warrants of attachment and sale as a party, from whom the decretal sum as an award can be recovered. That in the circumstances, no money emanating therefrom owned by the Defendant/Judgment Debtor to the Plaintiff/Decree Holder can be recovered from the Objector's movable property/items that have been proclaimed. That the Defendant/Judgment Debtor has no proprietary interest in the Objector's movable property/items that have been proclaimed, by virtue of the same belonging to the Objector herein and as such the Defendant/Judgment Debtor do not have any interest thereon capable of being attached and/or sold in satisfaction of the decretal sum herein or any other debt payable by them. That unless the orders are granted, the Objector stands to suffer immense loss.
5. The Plaintiff filed a Replying Affidavit sworn by Tejal Navinchandra Shah on 15th October 2024 that there is no difference between the Defendant/Judgment Debtor and the Objector as the two trade in and use the two names interchangeably, therefore, the objection is not only aimed at delaying the matter but denying the decree holder fruits of his judgment. That a copy of the CR12 in respect of the Judgment Debtor and the partnership deed filed by the Objector not only confirm that indeed the directors/shareholders are the same but further they hold the shares in similar percentages. That in the transaction giving rise to this suit, which was transacted and signed between the Plaintiff/Decree Holder and the Defendant/Judgment Debtor, the only payment received were done under the name of the Objector, and that one of the signatories on the said cheques is the same person who has sworn the affidavit in support of the application herein.
6. The Plaintiff stated that when their advocates on record wrote a demand letter dated 22nd February 2024, it was the Objector who appointed an advocate who replied on 1st March 2024 proposing settlement of the claim which proposal was never honoured. That the deponent of the affidavit in support to the application herein also signed an irrevocable undertaking on behalf of the Judgment Debtor for the settlement of the debt. That throughout the transaction giving rise to this suit, the Decree Holder has been in communication with the Objector and the said correspondence have been filed as part of the documents in support of the Decree Holder's claim. That the same venue where the goods were proclaimed is the registered offices of the Judgment Debtor and the same cannot be said not to belong to them. That though the Objector has listed all the goods proclaimed, it has only annexed ownership documents of two motor vehicles. That the Objector has made no attempts to provide ownership documents of the other properties proclaimed which shows that the other properties do not belong to them and should not have been part of the current application.
7. The Plaintiff further claimed that this court should not be made to rely on a certificate issued in 1989, more than 35 years ago and that the Objector should have provided a current search certificate to



properly depict the current status of the Objector. That the application is bad in law for want of authority of the Deponent to swear the affidavit on behalf of the Objector for reasons that he has not annexed any CR12 to confirm his position as a director of the Objector and that the authority he purports to have been given is a nullity having passed on 31st September 2024, a date that does not exist in the calendar.

8. The Objector filed a Supplementary Affidavit sworn on 23rd October 2024 by Vasantray Mohanlal Makwana that the Objector is a different entity from the Judgment Debtor as while the Judgment Debtor is an incorporation and a legal person under the law, the Objector is a partnership, and that at no time has the Objector used the Judgment Debtor's name interchangeably. That the Objector has provided its registration documents which cannot be wished away because they were taken out long ago, and that it is upon the Respondent to provide contrary documents to prove otherwise. That the items and goods proclaimed by the Auctioneers all belong to the Objector as it can clearly be seen from the annexed documents showing different registered office locations between the Respondent and the Objector. That the Objector's physical location is Plot No. 466 Sec. XVIII while the Respondent is located on Plot No. 507 Section XVIII.
9. The application was canvassed by way of written submissions. The Objector filed submissions dated 24th October 2024 and relied on Order 22 Rule 51 (1) of the Civil Procedure Rules by arguing that the Objector is the registered owner of the motor vehicles attached and the owner of the items and goods manufactured at his factory. That despite the two entities sharing directors, they are two separate legal entities and cannot share each other's liabilities. That it is a mistake for the decree holder to purport to execute as against the Objector who was not party to the suit. The Objector cited the holding by Lord Denning in *Macfoy v United Africa Ltd* [1961] 3 ALL ER 1169, *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Ano.* [2014] eKLR, *Multichoice Kenya Ltd v Mainakam Ltd & Ano.* [2013] eKLR, *Abdalla Ali Hassan v Clement A. Ojimbo & Others, CA No. 118/1997,* and *K-Rep Bank Ltd v Basilico Pascal Kiseli & 2 Others* [2012] eKLR.
10. The Objector submitted that some of the attached items being manufactured goods, they could not provide ownership documents save for the fact that the proclamation was carried out at his factory. That the Objector provided logbooks in his name which has proved ownership of the motor vehicles and that applies to the manufactured goods and other attached items. That the Plaintiff has also stated that the Objector and the Judgment Debtor ordinarily use the name interchangeably but from the evidence on record, no such proof has been produced. That it is trite law that he who alleges must prove as provided for under Section 107, 108 and 109 of the Evidence Act.
11. The Plaintiff filed submissions dated 19th November 2024 on whether the Defendant/Judgment Debtor and the Objector/Applicant should be treated as one and the same entity for the purpose of this suit, and who owns the property proclaimed, by reiterating contents of the Replying Affidavit sworn on 15th October 2024.
12. I have considered Notice of Motion application dated 1st October 2024, the Replying Affidavit sworn on 15th October 2024, the Supplementary Affidavit sworn on 23rd October 2024, and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
13. The objector on the one hand stated that the auctioneers went to the Objector's place of business and proclaimed the Objector's items and are undoubtedly going to take actual possession of the items with a view of selling the same by public auction. That the Objector has both legal and equitable interest in the proclaimed items on grounds that the same were solely owned by the Objector. The Objector states that they have never been a party to the proceedings giving rise to the decree of this court. That the



annexed documents show different registered office locations as while the Objector's physical location is Plot No. 466 Sec. XVIII, the Defendant is located on Plot No. 507 Sec. XVIII.

14. The Plaintiff on the other hand stated that there is no difference between the Defendant/Judgment Debtor and the Objector as the two trade and use the two names interchangeably. That the copy of CR12 in respect of the Judgment Debtor and the Partnership Deed filed by the Objector confirms that the directors and shareholders are the same and that they hold shares in similar percentages. That the only payment received were done under the name of the Objector and one of the signatories of the said cheques is the deponent of the affidavit in support of the application herein.
15. The Plaintiff also stated that it was the Objector who appointed an advocate who replied on 1st March 2024 proposing settlement and that the deponent of the affidavit in support of the application herein also signed an irrevocable undertaking on behalf of the Judgment Debtor for settlement of the debt. That throughout the transaction giving rise to the suit, the Decree Holder has been in communication with the Objector which correspondences have been filed herein. That the same place where the goods were proclaimed is the registered office of the Judgment Debtor and the same cannot be said not to belong to them.
16. The Plaintiff further stated that the Objector has listed all the goods proclaimed but only annexed ownership documents of two motor vehicles which show that the other properties do not belong to them. That the application is bad in law for want of authority of the deponent to swear the affidavit on behalf of the objector as he has not annexed any CR12 to confirm his position as a director of the Objector and that the authority he purports to have been given is a nullity having passed on 31st September 2024, a date that does not exist in the calendar.
17. 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.
18. Further, the court in *Arun C. Sharma v Raikundalia T/A A. Raikundalia & Co. Advocates and 4 others* [2014] eKLR stated that: -

“The Objector bears the burden of proving that he is entitled to or has a legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or have a legal or equitable interest in the whole or part of the property. Has the Objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”
19. This court notes that of the proclaimed items, the Objector only annexed ownership documents of the two motor vehicles and submitted that they could not provide ownership documents for the other items which were manufactured goods. However, upon perusal of the proclamation of attachment annexed to the application herein shows that the other proclaimed items included motor vehicles, and office furniture and equipment which could not have been manufactured by the Objector.
20. This court is guided by the holding in *Freight Forwarders Kenya Limited v Elsek & Elsek (K) Limited & another* [2015] eKLR that: -

“The proclaimed items consisted of machinery, air conditioners and furniture. Companies are known to maintain proper documentation and records. This is especially because



companies are subject to certain procedures such as auditing, filing of annual returns and preparation of balance sheet and profit and loss account. These procedures require a company to keep its records and documents such as receipts and inventory of assets in a safe and accountable way as to be available when required. While it is excusable that a company may not have receipts or records of its furniture especially if the furniture were acquired in the distant past, I find it unrealistic and nearly unacceptable that the Objector did not produce a single receipt to demonstrate ownership of the proclaimed machinery. The Objector did not even produce an inventory to show that the proclaimed items are part of its assets.”

21. This court has further perused annexures to the Plaintiff’s affidavit in reply and established that the payments made to the Plaintiff as evidenced by the copies of cheques were done by the Objector, and one of the signatories in the cheques is the deponent of the affidavit in support of the Objector’s application. Additionally, correspondences on the outstanding arrears owed to the Plaintiff were between the Plaintiff’s advocate and the objector. This court is therefore not convinced that the Defendant and the Objector did not use their names interchangeably in dealing with the Plaintiff.
22. The objector has the duty of providing sufficient information as proof that the premises for operation of the business was separate from the Defendant. Section 109 of the *Evidence Act* provides that: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person
23. The Objector has therefore not furnished this court with sufficient evidence on the contrary that same venue where the goods were proclaimed is the registered offices of the Judgment Debtor and the same cannot be said not to belong to them.
24. In consideration of the above, I find that the Notice of Motion application dated 1st October 2024 lacks merit and is dismissed with costs to the Plaintiff.

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

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff/Respondent

..... Advocate for the Defendant/Respondent

..... Advocate for the Objector/Applicant

Court Assistant – Shitemi

