



Mupeki Hauliers Limited v Dooba Enterprises Limited (Civil Suit 51 of 2015) [2024] KEHC 1380 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 51 OF 2015
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

MUPEKI HAULIERS LIMITED PLAINTIFF

AND

DOOBA ENTERPRISES LIMITED DEFENDANT

RULING

1. This is a Ruling in respect of the Plaintiff's Amended Application dated 10th January 2024.
2. The Application dated 10th January 2024 sought the following prayers:
 - a. Spent
 - b. Spent
 - c. The Court be pleased to Order and direct in the interim the Defendant to deposit in the joint interest earning account in the name of both advocates of the parties the sum of Kshs. 179,483,381/= in lieu of the goods and containers attached pending the hearing and determination of this Application.
 - d. The Court be pleased to Order and direct that the goods and containers as listed in the proclamation notice dated 10th January 2024 be detained in the jurisdiction of the country pending the necessary application for conversion, auction or sale of the containers and goods to settle the decretal amount of Kshs. 179,483,381/= or the money be deposited in the Joint Advocate's Account be released to the Plaintiff's Account in full settlement of the decretal sum.
 - e. The Officer Commanding Port Police Station to ensure compliance with these Orders.
 - f. Costs be provided for.



3. In the Further Affidavit, it was stated that the Applicant invoked the correct USD exchange rates as advised by the Deputy Registrar of Court and the challenge on the decretal amount was unfounded.
4. The Respondent filed a Replying Affidavit sworn on 15th January 2024.
5. It was stated that the Respondent had lodged the Notice of Appeal against the whole Judgment.
6. They also opposed the Application on the basis that
7. They had lodged an Application for stay of execution in the Court of Appeal and the same had been given directions and was pending ruling.
8. It was deponed that the Application was thus brought in bad faith and would undermine the proceedings before the Court of Appeal.
9. Further, that the Applicant was guilty of failure to disclose the Respondent's Application in the Court of Appeal.
10. It was also contended that the proclaimed goods were not goods of the Respondent.
11. Further, that any orders would not be capable of execution as has to be cleared by the said institutions.

Submissions

12. The Applicant filed submissions dated 19th January 2024.
13. It was submitted that it was necessary in the interest of justice to detain the containers and goods pending conversion. Reliance was placed on Sections 1,1A and 3 of the [Civil Procedure Act](#) and Order 22 of the [Civil Procedure Rules](#).
14. It was submitted that the Respondent had not offered the mode of settlement but instead challenged as supposed to be Kshs. 65,000,000/= which was incorrect.
15. The Applicant also submitted that there was no stay of execution as to stop execution and the existence of the appeal at the court of appeal was not an order staying execution.
16. It was submitted that substantial loss would occur to the Applicant as stipulated under Order 42 Rule 6 of the [Civil Procedure Rules](#) of execution were to be levied in the absence of stay order and as such the Application ought to be allowed.
17. It was urged to allow the Application.
18. The Respondent filed submissions dated 19th January 2024. It was submitted that the Applicant had not adduced any evidence to conform that the proclaimed goods belonged to the Respondent.
19. In this regard, it was submitted that the screenshots attached to the Affidavit were not evidence of ownership and failed admissibility test under Section 106B of the [Evidence Act](#).
20. It was further submitted that the Application was brought in bad faith and nondisclosure owing to the Appeal and Application for stay of execution that is pending at the Court of Appeal.
21. Reliance was placed on the case of [Kenya Electricity Transmitting Co v Kibotu Ltd](#) (2019) eKLR to canvass the argument that nondisclosure was serious and would entitle the court to set aside interlocutory injunctive orders.
22. I was urged to disallow the Application.



Analysis

23. This Court already allowed prayer 2 in the notice of motion relating to temporary injunction against the Respondent his agents, servants and or transporters, Kenya Ports Authority, Kenya Revenue Authority's (Custom & Border Control Department) from transporting, clearing and removing out of this court's jurisdiction container numbers HPCU4259525, CAIU7102325, DFSU7600504, PCIU8788060 and TSSU5023868.
24. The issue before me is whether the Court should order for the deposit of the decretal sum and detention of the goods pending payment thereof.
25. The courts are enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
26. Section 1A(2) of the *Civil Procedure Act* provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."
27. I note from the contentions of both parties that there is a Judgement of Court which has not been stayed. Consequently, Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:
 - "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
28. The issue for stay of execution is not before this court for determination. It is said to be at the Court of Appeal pending. However, the net total is that there is presently no stay of execution.
29. The Applicant contends that upon learning that the containers in subject were at the verge of being released, it had to file this Application. The reason is that the containers will depart to Uganda outside the jurisdiction of this court. That this will defeat the execution. It is also averred that containers and their contents are the only known property of the Respondent.
30. I understand the Respondent to contest ownership of the containers. However, as far as the law is concerned, the presumption is in favour of the Applicant that the goods belong to the Respondent. It is the Respondent to lead evidence to prove otherwise. This is the essence of Objection proceedings anticipated under Order 22 of the *Civil Procedure Rules*.
31. In *K-Rep Bank Ltd v Basilio Pascal Kiseli & 2 Others* [2012] eKLR where the court held inter alia that 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.



32. This position was affirmed in the case of *Simba Colt Motors Ltd v Lustman & Co.* (1990), HCCC No. 729 of 2002 that:

“The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgement-Debtor.”

33. Further in the case of *Chotabhai M. Patel v Chaprabhi Patel* [1958] EA 743, it was stated 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.”

34. Under Order 22 Rules 51 and 52 of the [Civil Procedure Rules](#) which provide as follows:

51.

- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”



35. In *Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR the court held as follows:

“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.”

36. Odunga J (as he then was) dealt with the same issue in *Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd.* (2012) eKLR as follows:

“Once the Objector proves that then the Court makes an order raising the attachment as to the whole or a portion of the property subject to the attachment.”

29. For a person to properly bring himself within the ambit of Order 22 rule 51(1) of the Civil Procedure Rules, he has to meet certain conditions. First he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Second, he must prove that execution of his property has been levied in execution of the said decree. Third, he must prove that he is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of the decree. Fourth, he must prove that no payment out of the proceeds of sale of such property has been made.

30. In this case, the Objector’s case is that it is a stranger to the proceedings the subject of the execution proceedings herein, yet its properties have been attached. In determining these proceedings, it is important for the court to make a finding that the Objector is not the same person as the Judgement Debtor. In other words, it is important that the Objector sufficiently discloses its identification in order to prove that it is a separate and distinct entity from the Judgement Debtor. Where the Objector is a legal person, as the Objector herein contends, it is prudent that the certificate of incorporation be exhibited so as to prove that the Objector is in fact a different person and not the Judgement Debtor trading under a different name. Nothing however turns upon that issue in light of the documents exhibited and the Respondent has not alleged that the Objector is the same person as the Judgement Debtor.”

37. Therefore, what I gather from the authorities is that the Respondent herein is not the proper person to object to the ownership of the goods in dispute. It is a third party known as the Objector and none has emerged. The claim by the Respondent that the goods belong to another person thus remains a wish without substance to this court and I decline it.

38. The main prayers in the Application before this Court are in the nature of the enforcement of the Judgement of this Court. The Judgement of Court is valid and wanting implementation as there is no stay order in place. There is no doubt that the Respondent is acrimonious and highly likely not to cooperate with the Applicant. Even these proceedings are evidence. The court in *Re Estate of Wilfred Munene Ngumi (deceased)(supra)* while allowing the application for the Deputy Registrar of the court to execute completion documents thus held as follows:

“...It is evident from the Applicant’s affidavit in support of the application and oral arguments by her Advocate, Mr. Kahiga, that the Respondents have refused to sign the necessary documents to facilitate execution of the court’s judgment/decree. To prevent



abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find and hold that the petitioner's summons dated 23/9/2019 and filed on 25/9/2019 to be merited..."

39. I am unable to find basis for the dispute on the decretal sum. The USD Exchange rates are available.

40. I find basis to allow the Application.

Determination

41. In the circumstances I make the following orders: -

- a. An Order is issued directing that the goods and containers as listed in the proclamation notice dated 10th January 2024 be detained in the jurisdiction of the country pending the necessary application to the relevant parties for conversion into local imports or forceful transfer, auction or sale of the containers and goods to settle the decretal amount of USD 434,968, costs, and interest therein
- b. The defendant is at liberty, upon payment of the entire decretal sum and auctioneers costs and any expenses incurred but before auction to have the goods released subject to providing full indemnity on all taxes paid or payable as a result of the attachment.
- c. The Respondent to bear the costs, execution costs, other that may accrue together with taxes, port and shipping charges and incidental costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Matheka for Applicant

No appearance for the Respondent

Court Assistant - Brian

KIZITO MAGARE J

