



Madhavji v Puroshotam Enterprises Limited; Estate of Raithatha Virendra Govindji Popatlal (Objector) (Commercial Miscellaneous Application 419 of 2016) [2024] KEHC 2722 (KLR) (Commercial and Tax) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 419 OF 2016
AA VISRAM, J
MARCH 13, 2024**

BETWEEN

POPATLAL MADHAVJI JUDGMENT DEBTOR

AND

PUROSHOTAM ENTERPRISES LIMITED DECREE HOLDER

AND

**THE ESTATE OF RAITHATHA VIRENDRA GOVINDJI
POPATLAL OBJECTOR**

RULING

1. I have considered the Notice of Motion application dated 2nd May, 2023, together with the supporting affidavit sworn on even date, the replying affidavit in opposition to the same sworn on 24th October, 2023, and the submission of counsel, and the relevant law.
2. The Applicant submitted that it w-as seeking to set aside warrants of attachment relating to certain proclaimed goods based on its legal or equitable interest in the said property. Counsel submitted that the Judgment Debtor, trading as Kenya Comfort Hotel & Suites (“the Hotel”), does not own any of the items listed at numbers 1-35 in the Proclamation Attachment dated 20th April, 2023.
3. In particular, the Applicant claims legal and equitable interest in the said items on the basis that they were owned by the late Virendra Govinda Raithatha (deceased), in his personal capacity, and accordingly, the same are now the property of his estate. As evidence of this, the Applicant annexed a License Agreement marked as Exhibit CR2 and dated 22nd December, 2022 (“the License Agreement”) between the deceased and the Hotel in support of the argument that the deceased owned the premises



erected on Land Reference Number 209/324/1/2, and all equipment and assets within the said premises, including the items listed in the warrant of attachment.

4. The Applicant submitted that notwithstanding the fact that the deceased may have been a director in the Hotel, the company trading as a hotel is an independent legal entity, and did not own the items listed in the proclamation. Rather, the Hotel merely had access to the said proclaimed items pursuant to the terms of the License Agreement.
5. As further evidence of its legal and or equitable interest in the proclaimed items, the Applicant annexed at Exhibit CR2, several tax invoices dated 31.01.23; 28.02.23; and 28.04.23 with corresponding receipts, as proof that it had paid tax on rent collected from the License of the Hotel in the sum of Kshs. 100,000/= per month.
6. The Decree Holder in opposition to the application submitted that the present proceedings are being used as a ruse to prevent the Decree Holder from benefitting from the fruits of its judgment. This had been ongoing for several years now, almost an entire decade. Counsel submitted that there are six similar applications seeking to prevent the Decree Holder from executing its judgment. All of which are without merit.
7. Counsel submitted that the objector has not shown that they have a legal right to the properties that are being proclaimed. Mere receipts of payment from the Hotel and the License are not proof that the estate is the owner of the proclaimed goods. No confirmation of grant has been produced to show that the License is still in force and valid, and the set up has been created to avoid execution proceedings.
8. At paragraph 3 on page 2, counsel submitted the License was to run for a period of 11 months. There is no evidence of extension of the lease. As such, in the absence of the same, the moveable properties therefore belong to the Judgment Debtor. Further, the Judgment Debtor has stated at paragraph 39 of the supporting affidavit dated 26 July, 2021, and marked as Exhibit RK1, that it owns the said hotel, and the same is a going concern.
9. I have considered the above submissions together with the evidence on record. I am not persuaded that the License is sufficient proof of ownership by the deceased of the said property, and all the equipment and assets found therein. No explanation has been provided for the submission that an admission relating to ownership by the Judgment Debtor of the subject property was provided by the Applicant.
10. To my mind, proof of ownership ought to have been evidenced in accordance with Section 26 of the *Land Registration Act*. The same provides that a certificate of title is *prima facie* evidence of land ownership. Had the Applicant wished to prove that the deceased owned the property and all assets within, nothing would have been easier than to provide the court with a copy of the certificate of title. This was not done. In the absence of the same, I find that the evidence provided by the Applicant is insufficient to support its claim of legal or equitable ownership in the said property and the assets found within.
11. Additionally, the Respondent submitted that the Applicant failed to provide this court with evidence that it has locus to file the present objection, on the basis that it has not annexed a certificate of confirmation of grant. No explanation has been provided by the Applicant to the said allegation, and I note that there is no such document in the record. The oversight is fatal at worst, and at best, I am inclined to draw adverse inferences in respect of the Applicant's said failure.



12. I am guided by the decision of the High Court in *Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR, where the court stated that:-

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached”

13. Moreover, to my mind, the burden of proof lies on the objector to prove the above. Based on the reasons above, and the evidence tendered by the Applicant, I do not think the threshold has been satisfied on a balance of probability.

14. The upshot is that the application is without merit and the same is dismissed with costs.

15. The file is marked as closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH 2024.

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

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For the Judgment Debtor

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For the Decree Holder

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For the Objector

