



Mupeki Hauliers Limited v Dooba Enterprises Limited; Ningbo Ningshing Trading Group Incorporated & 4 others (Objector) (Civil Suit 51 of 2015) [2024] KEHC 3229 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 51 OF 2015
DKN MAGARE, J
APRIL 4, 2024**

BETWEEN

MUPEKI HAULIERS LIMITED PLAINTIFF

AND

DOOBA ENTERPRISES LIMITED DEFENDANT

AND

NINGBO NINGSHING TRADING GROUP INCORPORATED OBJECTOR

TOP ANCHOR INDUSTRIES OBJECTOR

**NINGBO JIAJE WATER-METER MANUFACTURE COMPANY LIMITED
INCORPORATED OBJECTOR**

NINGBO TEXILONG PIPE INDUSTRY COMPANY LIMITED OBJECTOR

QUANZHOU DATOUYI TECHNOLOGY COMPANY LIMITED OBJECTOR

RULING

1. This is a Ruling in respect of 5 Objections to execution. They raise the similar issues and as such, I shall deal with them in one ruling.
2. All the Objectors filed objection to what they indicate as orders made on 13/3/2024. This covered Notices of Motion filed under Certificate of Urgency dated 19/2/2024, 23/1/2024, 26/2/2024 and 1/3/2024.
3. In all, the Applications sought an interim injunction to restrain the Plaintiff, the Kenya Ports Authority, the Kenya Revenue Authority their respective transporters, servants and/or agents from clearing, transporting and or otherwise removing all or any portion of the assorted goods held in



container numbers TSSU5023868, DFSU7600504, HPCU4259525 and PCIU8788060 respectively from the port of Mombasa, declarations that the property and risk in the goods that are the subject of their respective applications had not passed to the Defendant/Judgement Debtor and therefore could not be lawfully Proclaimed/attached by the Plaintiff/Respondent, an Order for all the goods that are the subject of their respective applications be released to the Applicants/Objectors and Orders condemning the Plaintiff/Respondent to pay costs of the applications, demurrage and port charges from the date when the goods were wrongfully proclaimed until payment in full.

4. These Applications are primarily premised on the fact that the property and the risk in the aforesaid goods, that they had dispatched following conclusion of individual contracts with the Defendant/Judgement Debtor that were to be undertaken through bills of lading, had not passed to the Defendant/Judgement Debtor who was merely designated as consignee since it was yet to pay for the same.
5. The Applications were opposed by the Judgement Debtor's Replying Affidavit dated 1/3/2024.

Submissions

6. The Objectors submitted that Article 40 (1) as read with Clause 2 (a) of *the Constitution* of Kenya provide inter alia that every person has a right to acquire and own property which he should not be deprived of arbitrarily.
7. They state that those rights are protected under Order 40 rule 1 of the *Civil Procedure Rules 2010* empowers Courts which allows the court to grant a myriad of reliefs including but not limited to a temporary injunction against the disposal of property that is in danger of being wrongfully sold.
8. They stated that there is precedent by Courts on these particular issues. They relied on the case of *Kenya National Union of Nurses v County Government of Mombasa & 2 others* [2015] eKLR, where Justice Makau cited with approval the *locus classicus* decision on the matter viz *Giella v Cassman Brown & Company Limited* (1973) EA 358 that elucidated the grounds that had to be satisfied by an Applicant before an interlocutory injunction could be issued to include:
 - a) Applicant establishing a *prima facie case*;
 - b) Inadequacy of damages as a remedy for the loss that the Applicant is likely to suffer; &
 - c) Balance of convenience being in the Applicant's favour.
9. They further relied on the case of *Eric Kipngeno Koech v Joseph Cheruiyot Mesis & another* [2018] eKLR the Court cited with approval the principle enunciated in *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, that enjoins Courts upon being satisfied that an Applicant seeking an interlocutory injunction had met the foregoing requirements to always opt for a course of action that will result in a lower rather than the higher risk of injustice being suffered should it turn out to be wrong.
10. They relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the court addressed what constitutes a *prima facie case*, by stating as follows: -

“A *prima facie case* in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



11. They stated that from paragraphs 4 (b), 5, 6 and 8 (c) of their Supporting Affidavits and in particular annexures marked as “ZW 1”, “ZW 2” and “HST 2” and all the bills of lading which will make it apparent at least on the face of it that: -
 - a. Property in the assorted goods would only pass to the Defendant/Judgement Debtor upon their delivery, tendering the original bills of lading and receiving full payment for all the attendant costs;
 - b. The Plaintiff/Respondent had vide a Proclamation Notice issued on 9th January 2024, without any colour of right, purported to seize the aforesaid consignment of goods belonging to the Applicants/Objectors with a cumulative value of approximately Kshs. 145,000,000/=.
12. It was their case that terms and conditions appearing on the face of the Applicants/Objectors bills of lading, that the Plaintiff/Respondent’s decision to proclaim the consignment of goods that are the subject of these applications ostensibly in an attempt to recover sums that stem from a dispute pitting it (the Plaintiff/Respondent) against the Defendant/Judgement Debtor is clearly unlawful and unjust since the property and risk in the assorted goods had not passed to the Defendant/Judgement Debtor primarily as a result of the fact that it was yet to pay for them.
13. They stated that the veracity of the foregoing assertion is given credence by the Court’s decision in *Coventry v Gladstone* (1867), where Lord Justice Blackburn defined a bill of lading *inter alia* as follows: -

“A writing signed on behalf of the owner of ship in which goods are embarked, acknowledging the receipt of the Goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading.”
14. They prayed for costs relying on the Section 27 (1) of *Civil Procedure Act*. They also rely on the case of *Juma Abdalla Munyao Kathenge & Another v James Kibet Chichir & another* [2018] eKLR that unless the Court has good reason to order otherwise, the successful party will always have costs of his success.
15. On the part of the Respondent, it was submitted that the Objectors had not placed sufficient material before the court to show that they are the owners of the goods as claimed.
16. They submitted that Section 21 (3) of the *Sale of Goods Act* Chapter 31 of the Laws of Kenya which regulates contracts for the sale of goods through bills of lading, which explicitly provides *inter alia* that where goods are shipped, by an order bill of lading, the seller is *prima facie* deemed to reserve the right of disposal.
17. Therefore, it was their submission that the Objectors had not proved on a balance of probabilities that they were the owner of the proclaimed goods.

Analysis

18. I have considered the Applications, response as well as the submissions and authorities relied on by the parties in support and opposition to their respective cases.
19. The issue is whether the Objections raised by the Applicants on the execution are merited.
20. The jurisdiction of the court to handle an objection is grounded in Order 22 Rule 51 which provides as doth: -

“ 51. Objection to attachment



- (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.”

21. The court shall therefore be satisfied that:

- a. The objectors have some legal or equitable interest on the attached property or part thereof.
- b. The judgment debtor has no interest in the attached property.

22. From my analysis, I note that the basis for the objections is that the goods as proclaimed were not property if the Judgement Debtor. I understand the burden is on the Objector to establish by way of evidence that they have a legal or equitable right to the proclaimed goods. They should also demonstrate that the Judgement Debtor has no interest in the goods. On this subject, Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. In the Kenjab Motors Limited v Wanjala t/a Zeki Motors; Awili (Objector) (Civil Appeal 74 of 2016) [2023] KEHC 20184 (KLR) (5 July 2023) (Ruling), Justice TA Odera, stated as follows: -

“The objector must therefore adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. In the case of Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR the Court held that:- The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

- (1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
- (2) that the objector holds that property on his own account.

24. Also in the case of Arun C. Sharma versus Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 others [2014] eKLR where 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.”



25. The legal effect of a bill of lading was also discussed in the case of *Societe Miniere Delest v Afrika Invest Limited & 2 others* [2015] eKLR as doth:

The contract of Sale (the first contract) is clearly between the plaintiff (Societe Miniere Delest), and the first defendant (Africa Invest Limited) to the exclusion of all other parties. That contract was signed on behalf of the seller by one Ali Rashid Birindwa while one Emmanuel Mutaharugamba signed on behalf of Africa Invest limited (the buyer). The shipping contract on the other hand is between the third defendant and Marua Group Limited of Kampala Uganda, and was signed by the same Ali Rashid Birindwa and another person. That contract is in the form of the Bill of Lading. In addition to its other legal attributes already referred to above, according to “Lexis Navigator Dictionary” –

“A Bill of Lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship.

The signed Bill of Lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of Lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the Bill of Lading operates as a symbolic delivery of the goods. This person may be named in the Bill of Lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of Lading, he is usually known as the holder or endorsee of the Bill of Lading.

The holder of the Bill of Lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A Bill of Lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.”

Halsbury’s Laws of England Volume 7 paragraph 314, says *inter alia*:-

“...although a bill of lading has often been described as a negotiable instrument, it is not in the strict sense of the words. The principal points of resemblance of a bill of lading to a negotiable instrument are that:-

the right to demand delivery of the goods from the carrier is transferred by the delivery to the lawful holder of the Bill of Lading, no distinct contract of assignment and no notice to the carrier being necessary for the transfer to take effect;

in some cases the transferee may acquire, by virtue of the transfer, rights over the goods which are greater than those of the transferor;

the transferee of the bill may in certain cases sue and be sued on the contract contained in the Bill of Lading;

the transferee, even if his title is defective may give a good discharge to the carrier who delivers the goods to him, and

the consideration provide by the transferee may be a past consideration.”



26. The Objectors posit that the property and the risk in the aforesaid goods, that they had dispatched following conclusion of individual contracts with the Defendant/Judgement Debtor that were to be undertaken through bills of lading, had not passed to the Defendant/Judgement Debtor who was merely designated as consignee since it was yet to pay for the same.
27. I have scrupulously perused the annexures to the Objection Application and I note that indeed the Objectors base their Applications on the fact that the property and the risk in the proclaimed goods dispatched following conclusion of individual contracts with the Defendant/Judgement Debtor were to be undertaken through bills of lading and had not passed to the Defendant/Judgement Debtor who was merely designated as consignee since it was yet to pay for the same.
28. However, the Objectors have failed to prove two crucial parameters requisite for an Objection to succeed: that they have a legal or equitable interest in the goods and that the Judgment Debtor has no interest in the goods.
29. I agree with the submission by the Respondent that whereas the Objectors placed material to demonstrate that they were previous owners, no evidence is provided in these Objections proceedings to show that they are the current owners of the proclaimed goods.
30. In the circumstances, the Objectors have all failed to prove that they have a legal or equitable interest in the proclaimed goods capable of stopping the ensuing execution process. As it stands, the proclaimed goods are goods of the Judgement Debtor.
31. On costs, the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

32. In the circumstances, I am inclined to grant costs in favor of the Respondent.

Determination

33. In the upshot I make the following Orders:-
- a. The Notice of Motion Applications dated 19th February 2024, 23rd January 2024, 26th February 2024 and 1st March 2024 are dismissed.



b. Each of the Objectors shall bear costs assessed at Kshs. 40,000/- payable to the Respondent.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Matheka for the Plaintiff

No appearance for the Defendant

Liyaya for 1st – 5th Objectors

