



REPUBLIC OF KENYA



**Stackelberg v Obst; Boko Boko Investments Limited (Objector) (Civil Case 133 of 2007) [2023] KEHC 1999 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1999 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 133 OF 2007  
OA SEWE, J  
MARCH 8, 2023**

**BETWEEN**

**JOACHIM VON STACKELBERG ..... PLAINTIFF**

**AND**

**SYLKE OBST ..... DEFENDANT**

**AND**

**BOKO BOKO INVESTMENTS LIMITED ..... OBJECTOR**

**RULING**

- 1 The notice of motion dated March 3, 2022 was filed by the Objector pursuant to sections 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as order 22 rules 51, 52 and 53 of the *Civil Procedure Rules*, among other provisions of the law. The objector sought the following orders:
- (a) Spent
  - (b) That warrants of attachment and sale issued on February 18, 2022 by the Court to Ndutumi Auctioneers be recalled and set aside;
  - (c) That the Court be pleased to order stay of execution in respect of goods attached by Ndutumi Auctioneers pending inter partes hearing of the application and/or further orders from the Court;
  - (d) That all the property whatsoever of the objector and/or other persons seized under execution pursuant to the said warrants by the defendant be released to the objector;
  - (e) That the Court be pleased to make such orders as may appear to be fit and convenient to meet the ends of justice;
  - (f) That the costs of the application be provided for.



2. On his part, the objector contended that the application is the only avenue available for the Court to order the release of its attached property; and that, unless the orders sought are granted, it stands to not only lose its investment but also risks suffering embarrassment, disrepute, loss of business as well as loss of employment to its staff. It added that, on the other hand, neither the plaintiff nor the defendant will suffer any prejudice if the orders sought are granted.
3. The objector relied on the Supporting Affidavit sworn by Cynthia Patricia Sicobo, sworn on March 3, 2022 to which she annexed copies of the Decree, Warrants of Attachment and Sale, and the Proclamation dated March 3, 2022, which provoked the instant objection application. The objector also exhibited photographs of the attached property, among other documents, to support its application for the lifting of the impugned attachment.
4. The defendant herein, Sylke Obst, responded by filing a grounds of opposition dated March 16, 2022, contending that:
  - (a) The objector has not established any legal or equitable interest in the goods proclaimed *vide* the Proclamation dated February 24, 2022;
  - (b) The objection application is not supported by any valid affidavit since Cynthia Patricia Sicobo, the deponent to the Supporting Affidavit, is not a recognized agent in law with authority to plead for and on behalf of the objector.
5. On behalf of the plaintiff, a Replying Affidavit was sworn and filed by the 2<sup>nd</sup> plaintiff, Ms. Yolanda Firth, on June 9, 2022. Ms. Firth averred that the objector and the plaintiffs are distinct entities; and that the items listed in the Proclamation Notice dated February 24, 2022 do not belong to either of them as plaintiffs; and as such were wrongly targeted for execution. Thus the plaintiffs supported the objection application and the averments of the objector as to the true position of the proclaimed items.
6. The objector thereafter filed a Supplementary Affidavit and reiterated its stance that there is no nexus between the plaintiff and the proclaimed goods to prove that it is the *bona fide* owner thereof; and that the goods were all proclaimed at its business premises, thereby occasioning it great embarrassment. Ms. Sicobo annexed additional documents to the Supplementary Affidavit to prove the objector's assertions.
7. Pursuant to the direction that the application be canvassed by way of written submissions, Mr. Wasuna for the objector filed his written submissions on 10<sup>th</sup> June 2022. He relied on order 22 rule 51 of the *Civil Procedure Act* and the cases of *Arun v Sharma Astana Raikundalia & Company Advocates & others* [2014] eKLR to buttress his submission that, once the objector discharges the burden of proof on ownership of the attached property, the attachment ought to be lifted. He urged the Court to find that the objector has placed sufficient evidence before it to demonstrate that it is the legal and beneficial owner of the proclaimed goods.
8. Mr. Wasuna underscored the principle of separate corporate personality and relied on Civil Appeal No. 66 of 2017: *Chai Trading Co. Limited v Muli Mwanzia & 2 others* in urging the Court to find that the objector is a separate entity from the plaintiffs and as such the proclamation of attachment cannot stand. He consequently prayed that the objection application dated 3<sup>rd</sup> March 2022 be allowed as prayed.
9. Counsel for the defendant, Mr. Karina, was of a different view. In his submissions filed herein on June 24, 2022, he submitted that the objection application is unmerited as it not only relies on inadmissible evidence, but also fails to meet the required standard of proof. According to him, the objector failed to tender any admissible evidence to establish any legal or equitable interest over the proclaimed goods.



He relied on the notice of intention to proceed with attachment dated March 16, 2022, the grounds of objection dated March 16, 2022, the replying affidavit sworn by Sylke Obst on March 16, 2022 and the list and bundle of authorities dated June 22, 2022.

10. Mr. Karina proposed two issues for determination, namely whether the photographs annexed to the objector's Supporting and Supplementary Affidavits are admissible in evidence; and whether the objector has proved by way of admissible evidence that it has legal or beneficial interest in the whole or part of the attached property. Counsel cited section 106B of the Evidence Act, Chapter 80 of the Laws of Kenya, which governs the admissibility of electronic evidence and submitted that it was mandatory for the objector to produce a certificate vouching for the authenticity of the electronic evidence; which was not done. In support of this assertion counsel relied on County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR and Julius Makau Malombe v Charity Kaluki Ngilu & 2 others [2018] eKLR.
11. Mr. Karina further submitted that the burden of proof was on the objector to demonstrate legal or equitable interest in the attached property; and that the objector utterly failed to discharge that burden. The cases of Arun C. Sharma v Ashana Rainkundalia (*supra*) and Charles Oburu Nyamboye & another v Campus Hostels Limited [2015] eKLR were cited by him in this regard and to support his posturing that the objector needed to avail proof in the form of purchase receipts or log book, or otherwise show by way of lease documents or certificate of title or business permit or license that the attached property belong to it and were proclaimed at its business premises.
12. Counsel also took issue with the affidavit sworn by the 2<sup>nd</sup> plaintiff contending that a judgment debtor has no role to play in objection proceedings as envisaged by rules 51 to 54 of order 22 and that the obligation of a judgment debtor is to pay the debt to preempt execution in the first place. Thus, Mr. Karina urged the Court to find that, by such association, the Court is at liberty to draw the inference that the proclaimed goods in fact belong to the plaintiffs. He prayed for the dismissal of the objection application with costs.
13. I have given due consideration to the application, the responses thereto as well as the written submissions filed herein by learned counsel. I have likewise perused the court record from which it is discernible that, on the November 6, 2014, judgment was delivered herein by Hon. Kasango, J. in favour of the defendant and among the orders granted by the Court was an order for the payment by the plaintiffs to the defendant of interest on the sum of Kshs. 23,000,000/= pending transfer of the suit property into the defendant's name. The defendant thereafter had her costs taxed and a Certificate of Costs issued dated September 10, 2020. In a bid to recover the sums due to her as the judgment creditor herein, the defendant made an application for execution, whereupon warrants of attachment and sale were issued against the defendant on February 18, 2022.
14. In execution of the warrants a Proclamation was made on February 24, 2022 by \*Ndutumi Auctioneers. The proclaimed property included Motor Vehicle Registration No. KBT 33F as well as movable property, as more particularly set out in the Proclamation. It was that Proclamation that provoked the instant application. The application was filed under order 22 rule 51 of the Civil Procedure Rules, which provides: -
  - (1) 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.



- (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.
15. Thus, the objector’s Notice of Objection dated March 3, 2022 was accompanied by the instant objection application of even date. Needless to say that, in an application of this sort, the burden of proof is on the objector to satisfy the Court as to its legal or equitable interest in the proclaimed property. This was succinctly stated in *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others*\* (*supra*) thus: -
- ...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...”
16. Likewise, in the case of *Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR, it was held: -
- ...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. For this purpose, he may raise an objection on the ground, *inter alia*, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached...”
17. In the premises, the single issue for consideration, in my view, is whether the objector has proved its legal or equitable interest in the proclaimed goods. To this end, the objector indicated it owns and runs a hotel and restaurant business; an enterprise it has run for over twenty (20) years. It was averred on its behalf that the proclaimed goods belong to it and that they were proclaimed at the said business premises; and therefore that it has no nexus at all with the plaintiffs.
18. There can be no contestation as to the concept of separate corporate personality as enunciated in *Salomon v Salomon & Company Ltd* [1987] A.C. 22 H.L. The rationale therefor was aptly captured in *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & another* [2014] eKLR thus:
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law...that a company is a different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”
19. Accordingly, there is no denying that the objector is a separate entity from the plaintiffs. In fact, it was not the contention of the objector that the appellants are its directors or members. Hence the argument of separate corporate entity is a side issue. The central issue is whether the objector has discharged the burden of proving its legal or beneficial interest to the attached property. In this regard, the objector chose to rely on photographs of the goods. It explained that it lost the purchase receipts



for the items and contended that the goods were proclaimed at its business premises known as Boko Boko Investment Limited. The photographs were marked as “CPS – 2” to the objector’s Supporting Affidavit.

20. An issue was however raised as to admissibility of the photographs in the absence of a certificate as their authenticity. Indeed, section 106 B (1) of the Evidence Act provides: -

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

21. In the same vein, section 106B (4) of the Evidence Act provides: -

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection(2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

22. No such certificate was annexed to the objector’s supporting affidavit along with the photographs as contemplated under Section 106 B(4) of the Evidence Act. In the case of John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR the Court of Appeal had occasion to deliberate on the import of the above provision. Here is what it had to say: -

“ 54. Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer’s hard disk and finally printing the documents via a printer connected to the computer.

55. It is at this juncture that the provisions of section 106B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have



this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. This Court in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR stated that:

Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...”

56. In this case, the election court found these forms inadmissible as there was no certificate produced as required by section 106(1) of the *Evidence Act*. We agree with the observations of the election court that various factors come into play when proceeding to admit such evidence as electronic evidence due to the vulnerability and easy manipulation of electronic evidence and the ease with which such evidence can be modified during the collection of the evidence. The evidence may also be easily tampered with making it more difficult to detect any signs of manipulation of documents. We therefore find that the election court did not err in finding the electronic evidence inadmissible, and therefore this ground of appeal must fail...”

23. Similarly, in the case of *Samwel Kazungu Kambi v Nelly Ilongo the Returning Officer, Kilifi County & 2 others* [2017] eKLR, it was held:

...21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

24. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed...”

25. The same scenario obtains herein. There is no certificate to indicate what device was used to capture the images or the person who took and processed the images. There is no indication that the deponent, Cynthia Patricia Sicobo, was present when the photographs were taken. She did not, in her affidavit, aver that the photographs were a true reflection of the story they are intended to tell. Accordingly, I have no hesitation in holding that the photographs annexed as “CPS -2” in the Supporting Affidavit are inadmissible.

26. In the Supplementary Affidavit, the objector annexed additional documents by way of receipts and vouchers to demonstrate its legal interest in the proclaimed goods. It is significant that these documents were filed after the objector had initially indicated, at paragraph 4 of its Supporting Affidavit that it



had lost the purchase receipts. That, in itself suggests that the receipts and vouchers may have been contrived to bolster the objection application. In addition, it is noteworthy that a good number of those receipts bear dates subsequent to the February 24, 2022 when attachment was proclaimed; an indication that the products were purchased thereafter. Some of the other documents annexed to the Supplementary Affidavit have no relevance at all to the instant application or the proclaimed goods. Hence, they are of no probative value in terms of demonstrating the objector's legal or equitable interest to the proclaimed goods.

27. The upshot is that the application dated March 3, 2022 lacks merit and is hereby dismissed with costs to the defendant/deedee holder.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF MARCH 2023**

**OLGA SEWE**

**JUDGE**

