



Bossman International Limited & 2 others v Gachukia & another (Miscellaneous Civil Application E881 of 2022) [2023] KEHC 3306 (KLR) (Commercial and Tax) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E881 OF 2022**

JWW MONG'ARE, J

APRIL 18, 2023

BETWEEN

**BOSSMAN INTERNATIONAL LIMITED 1ST JUDGMENT DEBTOR
BENSON BETHWEL KARANJA 2ND JUDGMENT DEBTOR
CECELIA WAIRIMU KARANJA 3RD JUDGMENT DEBTOR**

AND

**PATRICK MUIRU GACHUKIA 1ST RESPONDENT
GLADSOM AUCTIONEERS LIMITED 2ND RESPONDENT**

RULING

1. The application before this court is dated December 5, 2022 brought by way of notice of motion under order 22 rule 51 of the Civil Procedure Rules, 2010 seeking the following orders: -
 1. Spent
 2. Granted
 3. That this Honourable court be pleased to set aside the proclamation attachment and/or sale of the applicant's tools of trade as outlined in the Respondent's proclamation dated December 9, 2022
 4. That this Honourable Court be pleased to permanently restrain the respondents by themselves, or their agents from proclaiming, attaching, and/or selling the applicant's tools of trade as listed in the proclamation dated December 9, 2022 namely; office furniture, computers and or any other items/tools of trade to be found in the applicant's office.



5. Costs of this application be provided for.
2. The application is supported by the grounds set out on the face of it and a supporting affidavit sworn Benson Bethwell Karanja, the 2nd Judgement-debtor/applicant. The application is opposed grounds of opposition dated January 31, 2023 and a replying affidavit sworn by Patrick Muiruri Gachukia, the 1st Respondent/Decree-holder on February 14, 2023. The Respondents further filed a Preliminary Objection dated February 14, 2023. Both parties written submissions and list of authorities to support the same.
3. Before delving into the substance and merit of the Applicant’s application this court must first address the issues raised by the respondents in the Notice of Preliminary objection dated February 14, 2023. The preliminary objection against the Judgment debtors’/applicants’ notice of motion is misconceived and frivolous and should be dismissed with costs on the grounds that;
 1. It is a non-starter and has been brought in contravention of the law on objector proceedings and specifically Order 22 Rule 51 of the [Civil Procedure Rules](#).
 2. The Affidavit in support of the Application offends section 4 of the [Oaths and Statutory Declarations Act](#).
4. The Notice of Preliminary objection is premised on two points of law to wit;
 - a. That the Applicant’s application brought under Order 22 Rule 51 of the [Civil Procedure Rules](#) incompetent as the Judgement Debtor has no right to bring an objection proceeding against an attachment of his goods to satisfy a judgment debt.
 - b. That the supporting affidavit to the Notice of Motion herein has been commissioned by the Advocate acting and representing the Applicant in the proceedings before the court in contravention of section 4 of the [Oaths and Statutory Declarations Act](#), Cap 16, Laws of Kenya.
5. Order 22 rule 51 of the [Civil Procedure Rules](#) provides as follows;

“Any person claiming to be entitled to or to have a

 1. 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.”
6. The Notice motion before this court has been brought by the Judgement-debtor. To my mind, objection proceedings in an attachment to satisfy a judgment debt can only be brought by a third party who alleges that his goods have been co-mingled with those of judgment debtor and provides sufficient proof of ownership for their release. The application herein is incompetent and an abuse of the court process.
7. Proceeding from the above, the firm of Omurwa and Company Advocates have drawn the pleadings herein on behalf of the Applicants. The Affidavit sworn by Bethwell Karanja has been commissioned



by Arnold Omurwa Advocate and Commissioner for Oaths. Section 4(1) of the [Oaths and Statutory declarations Act](#), Cap 15 laws of Kenya provide as follows;

“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

8. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

9. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
10. The application before this court is an objection proceedings brought under Order 22 Rule 51 of the [Civil Procedure Rules](#). The same has been brought by the Judgement Debtors. Objection proceedings are by law the preserve of third parties who are strangers to the judgment debt and not the judgment debtors. The law envisions an innocent third party whose property has come mingled with that of a judgment debtor or whose property has been wrongly proclaimed on the mistaken belief that it belongs to the judgment debtor to satisfy a decree. On this point I find that the preliminary objection raises a valid point of law.
11. The second point is the contravention of section 4 of [Oaths and Statutory Declarations Act](#), Cap 15, Laws of Kenya which clearly prohibits an advocate who is appearing for a party in court proceedings also commissioning the affidavits of his clients. Omurwa & Company Advocates are on record for the Applicants and have drawn the documents filed before this court. Subsequently the Affidavit of the second Applicant/Judgement debtor Benson Bethwell Karanja has been commissioned by Arnold Omurwa Advocate and Commissioner for Oaths in blatant violations of the law.



12. Section 3A of the *civil Procedure Act*, Cap 21, Laws of Kenya vests the courts with inherent powers to prevent abuse of the court process. The said section provides as follows; “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
13. Flowing the above analysis, I am satisfied that the Preliminary objection raised herein is merited and I will allow it. From the foregoing I hold and find that the application herein is incompetent, frivolous and an abuse of the court process and I will dismiss it. I will therefore not delve into the merits of the same.
14. The upshot of the above finding is that the Notice of Motion dated December 5, 2022 is struck out. Costs of the application shall be borne by the Applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF APRIL 2023.

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J. W. W. MONGARE

JUDGE

In the presence of: -

1. Mr. Odhoc for the Applicant
2. Mr. Gitau for the Respondent
3. Sylvia- court Assistant

