



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 205 OF 2012**

**ISAAC KIMANI KANYINGI.....PLAINTIFF**

**VERSUS**

**HELLEN WANJIRU RUKANGA.....DEFENDANT**

**BEATRICE WANGUI MAINA.....OBJECTOR**

**RULING**

1. The objector filed a notice of motion application under certificate of urgency and premised on **Order 22 Rule 51, rule 52 and order 51 rule 2 of the Civil Procedure Rules** and sought for orders interlia;

**a) THAT pending the hearing and determination of this application inter partes the court be pleased to issue interim orders of stay for the attachment, proclamation and/or sale of Assorted Timber of all Type, Assorted wood cutting Machines, and/or any other attached assets and or equipment legally belonging to the objector herein as per the warrants of attachment and Proclamation dated 28<sup>th</sup> May, 2021 and 7<sup>th</sup> June 2021 respectively.**

**b) THAT the proclamation of Assorted Timber of all Type, Assorted wood cutting Machines, and/or any other attached assets and or equipments legally belonging to the objector herein by the Plaintiffs/decree holders through Messrs LEGACY AUCTIONEERING SERVICES be declared illegal, null and void.**

**c) THAT the plaintiff's/ decree holders acting by themselves or through their agents be permanently restrained from attaching the objectors' goods and/or property in satisfaction of the judgment and decree entered by the Honourable court in the suit herein and/or execution against the objectors for recovery of the sums thereunder.**

**d) THAT cost of this application be provided for.**

2. The application is premised on the grounds on the face of the record and the supporting affidavit of the objector.

3. In her affidavit the objector averred that the honorable court made a judgement in favour of the plaintiff against the defendant herein on 31<sup>st</sup> day of July 2014, and a decree was subsequently issued.

4. On 7<sup>th</sup> day of June 2021, Legacy Auctioneering Services issued a proclamation of attachment, warrant of attachment and warrants of sale of property in execution of the aforesaid decree against the defendant. In the said proclamation of attachment, assorted timber of all type, assorted wood cutting machines were cited for attachment in execution of decree against the defendant.

5. The deponent averred that the said attachment was done at a timber yard belonging to the objector located in Ruiru. The timber stored in the said timber yard as well as the assorted wood cutting machines do not belong to the defendant but they belong to the objector.

6. The objector averred that proclamation and/or attachment cannot proceed on assets which do not form part of properties of a judgment debtor. Hence, the said attachment is therefore irregular, illegal, null and void and it should be stopped by the Honourable Court.

7. The objector averred that this court should allow the application herein to prevent further perpetration of an illegality.

8. The plaintiff filed a replying affidavit and asserted that the application herein is a non-starter, frivolous, vexatious and an abuse of the court process. The application is replete with falsehoods and half-truths and is aimed at denying the plaintiff the fruits of the judgment.

9. The plaintiff further averred that contrary to the Objector's assertion, both the goods and the saw mill from which the above mentioned

goods were proclaimed belong to the judgement debtor and not the objector herein. The foregoing is evidenced by the fact that the Trade License relied upon by the objector was procured on **8<sup>th</sup> June 2021** the day after **MS LEGACY AUCTIONEERS** visited the saw mill and proclaimed the goods. This demonstrates that the same was done specifically for purposes of defeating the execution of the decree and Certificate of Costs against the defendant.

10. Further that the receipts relied upon by the objector are ambiguous for they do not show the specific machines purchased, they do not show the purchaser and the vendor thereof and they seem to have been drawn on the same day by the same person. The foregoing notwithstanding, the cutting machines referred to in the said receipts are valued at Kshs. 100,000 whereas M/S LEGACY AUCTIONEERS proclaimed cutting machines worth Kshs. 2,000,000. Therefore, the said receipts were procured solely for the purpose of frustrating the enjoyment of the fruits of the judgment delivered in the plaintiff's favour.

11. The objector's application does not demonstrate proprietary rights over the attached goods as by law required. If indeed the Objector was the owner of the attached goods, nothing would have been easier than for her to avail documentary evidence of the same. If the objector's conduct is anything to go by, there is a very high likelihood that this application is meant to buy time for the judgment debtor to figure out a way of circumventing the execution of the decree and certificate of costs. The application is therefore brought in utmost bad faith and with unclean hands.

11. A successful litigant is entitled to the fruits of his judgement, the judgement having delivered on **10<sup>th</sup> July 2020**, it is now almost a year since and the defendant has had multiple chances to satisfy the terms of the judgment and the certificate of costs. Therefore, it is in the best interest of justice that this application be dismissed at the earliest possible instance with costs to the plaintiff.

12. Parties were directed to canvass the application by way of written submissions.

### **Objector's Submissions**

13. The objector submitted that the business permit attached clearly indicates that she operates the business of selling timber as well as poles and the receipts are in proof of the fact that she had indeed purchased the machineries proclaimed. Being that the said proclamation was done within the objector's premises in the absence of the defendant, the timber so proclaimed as well as the machinery found therein belong to the objector unless contrary evidence is given.

14. The objector submitted that it will be prejudicial to her if the plaintiff is allowed to execute the assets of a person who was never a part of the suit nor involved in the proceedings. It is the duty of the plaintiff to ensure that sufficient investigations are conducted as to the properties owned by the defendant. **Article 40 of the Constitution** guarantees a person a right to property and it is an obligation of this court to ensure that right is not arbitrarily taken away unless it is strictly proved that that particular right should be limited in a lawful manner.

15. The plaintiff/decree holder other than allegations of communication between the defendant's advocate and her advocate, has not in any way demonstrated that the proclaimed properties belong to the defendant and the only evidence that is available is that adduced by the objector herein. Without any contrary evidence, the evidence of the applicant ought to stand and the balance of probabilities ought to lean towards allowing the objection and restraining the decree holder from attaching the applicant's properties.

16. The objector submitted that she has legal and or equitable interest in the whole or part of the property in accordance to **Order 22 rule 51 (1), (2)** and she has attached a copy of a trade license as annexure No.3 to her affidavit in support of the application which permit shows that she operates a timber yard where the proclamation was done. She also annexed copies of receipts showing that she purchased the machines on 13<sup>th</sup> May 2020 and 4<sup>th</sup> day of January 2021, which are the machines that the auctioneers purported to attach.

17. The objector further submitted that the proclamation issued by the auctioneers purportedly issued to one Hellen Wanjiru Rukanga who declined to sign were actually issued to the objector herein who declined to sign due to the fact that she was not the defendant herein thereby prompting her to file this application. The same were issued at the objector's timber yard which contains the assorted timber proclaimed herein and it therefore goes without saying that the timber also belongs to the objector.

18. The objector in her final submissions indicated that she has proved that the proclaimed goods belong to her and the decree holder has no color of right to proclaim, attach and/or in any way interfere with the objector's business.

### **The plaintiff's/ decree holder's submissions**

19. The plaintiff relied on the case of **Stephen Kiprotich Koech v Edwin K Barchilei; Joel Sitienei (objector) [2019] eKLR cited with approval in the case of Arun C Sharma v Ashana Raikundalia T/A A. Raikundalia & Co Advocates & 4 others [2014] eKLR** where it was held that 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 and submitted that the objector bears the burden of demonstrating that she has a legal or equitable interest in the whole or part of the proclaimed goods. However, the objector has failed to discharge that burden as she failed to demonstrate any interest whatsoever in the proclaimed goods.

20. The plaintiff relied on the case of **Asharaf A. Dadar v Kavoi Muinde (suing as the personal representative of Boniface Kyalo Kavoi) (2016) eKLR as cited in the case of Bakehouse Investment Ltd v Bake N Bite (Nairobi) ltd & Another; Antonio Lionetti (Objector/applicant) [2020] eKLR** and submitted that to prove ownership, one is required to produce documentary evidence to demonstrate property in the proclaimed goods. The plaintiff submitted that the trade license which was obtained a day after the auctioneers visited the judgement debtor's sawmill does not demonstrate any connection whatsoever between the objector herein and the proclaimed goods and cannot be taken to signify ownership of the proclaimed goods.

21. Further the two receipts relied upon by the objector are wanting and do not demonstrate ownership of the proclaimed goods. This is owing to the fact that they do not disclose the vendor and the purchaser and the specifics of the cutting machines allegedly purchased. To that end, they cannot be held to disclose any relationship between the proclaimed goods and the objector herein. A keen inspection of the receipts also reveals that they are generic in nature and seem to have been authored by the same person at the same time despite the difference in dates.

22. The plaintiff submitted that the objector has failed to discharge the burden of proof set out in the case of **Arun C Sharma (supra)** and as such has no ascertainable proprietary rights over the proclaimed goods. Hence, the objection proceedings herein are a sham and are aimed at denying the plaintiff/ decree holder the fruits of the judgment. It is therefore in the interest of justice that the application be dismissed with costs to the decree holder. In any event execution of a decree is a lawful process and litigation must come to an end.

### **Analysis and determination**

24. The court has perused carefully the objector's application, the supporting affidavit, the replying affidavit by the plaintiff and both parties' submissions. There is only one question for determination namely **whether the proclaimed goods belonged to the objector.**

25. A perusal of the Objector's application reveals that the same was made pursuant to the provisions of **Order 22 Rules 51 and 52 of the Civil Procedure Rules. Order 22 Rule 51 (1)** provides in this regard as follows: -

**“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 of the proceeds of sale of such property give notice in writing to the Court and to all parties and to the decree-holder, of his objection to the attachment of such property.”**

26. Considering the provisions of the said section in **Arun C. Sharma –vs- Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others (2014) eKLR** the Court observed that in such a case: -

**“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.”**

27. That was the same finding in the earlier case of **Precast Portal Structures –vs- Kenya Pencil Company Ltd & 2 Others (1993) eKLR** where the Court observed 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.”**

28. 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.”**

29. The core of objection proceedings is that the objector must adduce evidence to show that at the date of the attachment she had a legal or equitable interest in the property(s) attached. The single business permit exhibited was issued a day after the Auctioneers had proclaimed the properties. The single permit does not establish or ascertain the rightful owner of the saw mill at the date and/or time of attachment of the properties. Neither does it establish that the goods proclaimed from the premises belonged to the objector, and, not the respondent in the suit.

30. On the other hand, the receipts adduced does not show the name of the person who purchased the machines. It is therefore difficult for the court to conclude that the machines belonged to the objector herein. I have considered the evidence adduced by the objector and I find that the objector has failed to provide reasonable evidence to show that the assorted timber and the machines belonged to the objector. The objector has not demonstrated any direct, indirect or remote relation with the attached properties to justify the objection proceedings herein. The averments in the affidavit and in the application are bare.

31. Based on the **Precast Portal Structures Vs Kenya Pencil Company Limited and 2 others (supra)** the burden of establishing the attached goods belong to the objector lies on the objector. Since the objector herein failed to establish ownership of the attached goods the court does not find any merit in the application and the same is hereby dismissed with costs.

32. The earlier orders of stay of execution are hereby set aside.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF OCTOBER 2021.**

**H. K. CHEMITEI**

**JUDGE**