



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. 4 OF 2017

SARAH AMBROSE ACHIENG T/A BONDO RAFIKI HARDWARE...APPELLANT

VERSUS

DENNIS AMBROSE ACHIENG.....1ST RESPONDENT

NYAGUDA DISPENSARY.....2ND RESPONDENT

AND

ROBINA NG'WONO ONYANGO.....OBJECTOR/APPLICANT

RULING

1. The applicant/objector filed Chamber Summons dated 18th December 2019 under Order 22 Rule 51 (2) of the Civil Procedure Rules 2010 seeking:

1. THAT the honourable court do make a declaration that the proclaimed items by IKIMWANYA AUCTIONEERS belong to the objector as the legal and /or equitable interest in the proclaimed goods being: assorted bags of cement; assorted spades; 6 wooden doors ; assorted paints cans, Assorted nails and all hardware items found during execution;

2. That the honorable court do issue a permanent injunction to protect the declared legal and or equitable interests of the objector;

3. That the proclamation made by IKIMWANYA AUCTIONEERS be raised and the execution stopped;

4. That the cost of this application be provided for.

2. Grounds upon which the application is brought are that the named proclaimed assorted and that they were wrongly proclaimed as the objector has the legal/equitable interest in them; that the objector is an innocent inheritor; that the advocate has intimated that he wishes to proceed with the execution; that the items proclaimed are wholly owned by the objector herein and that the decree holder has no interest and or claim whatsoever over the same; and that justice in this case necessitates grant of the orders sought.

3. The Chamber Summons is further predicated on the supporting affidavit sworn by Robina Ng'wono Onyango wherein she deposes being the owner of the items that were proclaimed by IKIMWANYA AUCTIONEERS in execution of decree in this case. She annexed copies of Single Business Permit, invoices, official receipts and cash sale receipt of New Bondo Rafiki Hardware and urging the court to

exercise unfettered discretion and raise the attachment over what she alleges to be her goods reiterating the grounds and asserting that the items or goods as attached belong to the objector.

4. The Respondents filed their replying affidavit sworn by Dennis Ambrose Achieng, the First Respondent herein deposing that the objector had not placed before this court any shred of evidence to persuade this court that she was the legal owner of the proclaimed goods. Further, that the Auctioneers inform him that they proclaimed against the Judgment Debtor personally at the **Bondo Rafiki Hardware** and that the Single Business Permit does not bear the Objector's name. The 1st Respondent further deposed that the Invoice for Registration dated 15/11/2019 does not demonstrate in any way that the objector is the owner of the proclaimed goods. That the objector and the Judgment Debtor share the same postal Address an indication that they are colluding to frustrate the 1st Respondent from realizing his costs.

5. The Chamber Summons was canvassed orally with Mr. Okello Advocate submitting on behalf of the objector whereas the 1st Respondent was represented by Mr. Odongo Advocate.

6. Mr. Okello reiterated the objector's prayers and grounds in support of the Chamber summons adding that the objector took over the running of the business from the Judgment debtor after the business went down and she changed the name from **Bondo Rafiki Hardware** to **New Bondo Rafiki Hardware** as shown by the purchases, registration and the Single Business Permit documents annexed to the supporting affidavit. That the Judgment debtor was her mother who has no interest in the proclaimed goods and that the objector only inherited the business premises not the goods of the judgment debtor.

7. Opposing the Chamber Summons, Mr. Odongo submitted relying on his client's replying affidavit sworn on 10/12/2019. He submitted that inheritance has consequences which include inheriting liabilities as stipulated in the Transfer of Business Act. On ownership of the proclaimed items, counsel submitted that a Single Business Permit is not evidence of ownership of property. He maintained that there was no proof of ownership and urged the court to dismiss the objection and allow the decree holder to proceed with execution of decree. He further submitted that the supporting affidavit does not reveal anything to do with the objector taking over a business which was going down.

8. In a brief rejoinder, Mr. Okello Counsel for the objector submitted that the objector only inherited the premises not the property and that no property was transferred. He reiterated that the objector had annexed copies of documents as proof of ownership of the property proclaimed which business had been operating before the decree was issued in this matter.

DETERMINATION

9. From my analysis of the application, grounds, supporting affidavit and replying affidavit as well as the oral submissions canvassing the objector's chamber summons, two issues arise for determination. First whether the goods were attached from the premises of the objector or the premises of the judgment debtor appellant whose appeal herein was dismissed for want of prosecution with costs to the Respondents/decree holders, and therefore whether proof of ownership established. Secondly, whether the business **New Bondo Rafiki Hardware** and **Bondo Rafiki Hardware**.

10. In the proclamation annexed to the supporting affidavit it gave an inventory of goods proclaimed. However the place of attachment was not disclosed. The objector deposed that she does the business in the name of **New Bondo Rafiki Hardware** and she annexed copy of invoice for registration of the business and Single Business permit in the said name. She also annexed copies of receipts for purchase of hardware items in the name of **New Bondo Rafiki Hardware**. She therefore claims that the goods which were attached from the Hardware belonged to her as she took over the business premises from her mother who used to carry out similar business in the same premises but trading in the name of **Bondo Rafiki Hardware**, not **New Bondo Rafiki Hardware** are one and the same business.

11. The items attached by Ikimwanya Auctioneers on 2.12.2019 included those listed in the supporting affidavit as per the annexed proclamation including all hardware items found during execution. The

proclamation and auctioneers bill of costs were allegedly served upon the Judgment Debtor who refused to sign. The Judgment Debtor is Sarah Anyango Onyango.

12. Although the details for the building is not disclosed, the items attached are tandem with the business of the objector as per the Single Business Permit annexed.

13. The respondents in reply deposed that the objector had not adduced any evidence of ownership of the business and that inheritance of the premises meant that the business was transferred to her hence she took over all liabilities and assets as required by the Transfer of Business Act. Further, that the Auctioneer informed him that the Judgment debtor was in the Hardware shop. In addition, it was deposed that the postal address for the objector and J/D are the same and finally that the Single Business Permit is not evidence of ownership of the items in the hardware shop.

14. It is not in dispute that the objector and the J/D are related as daughter and mother. It is also not in doubt that the attachment was carried out at New Bondo Rafiki Hardware. The Auctioneer did not swear any affidavit to show that to the best of his knowledge and belief he proclaimed the goods belonging to the Judgment debtor. In addition, there was no evidence from the Auctioneer that the JD owned the **New Bondo Rafiki Hardware**. Further, the JD was sued in her personal capacity and trading as **Bondo Rafiki Hardware, NOT New Bondo Rafiki Hardware**.

15. The applicant for the Single Business Permit dated 15/11/2019 is **Robina Onyango Ng'wono** and the name of the business is **New Bondo Rafiki Hardware** and the business description is Mpesa and Hardware. A similar Single Business Permit dated 15/03/2018 shows the same business name and the receipt for Kshs 11,300 shows that the payee is **Robina Onyango** the objector herein. Another invoice dated 21/2/2019 was in the said business name and the applicant is the objector herein.

16. The objector deposed and explained that she inherited the premises from her mother who used to carry out similar business from therein and trading as Bondo Rafiki Hardware then she changed it to read **New Bondo Rafiki Hardware**.

17. If the 1st Respondent was of the view that the documents in support of the objection were doubtful, it was upon him to show that he made any attempts of undertaking a search to take this line of submissions challenging the objector's business, since it was not proved that the JD was trading in the same business name as the objector.

18. A single Business permit is usually issued to the trader applicant showing the business name by which the applicant trades. There is no evidence to show that the objector's business is fictitious or that the name was created with a view to defeating any decree of this court.

19. On whether the Objector and the JD are one and the same person, it is clear both the objector and JD are distinct persons and the objector deposed that the JD was her mother who previously traded in the same premises under a different name. There was no evidence of transfer of business. The objector was clear and there was no contrary evidence that there was no such transfer of business hence the question of her inheriting liabilities does not arise. Business names may be similar but there was no evidence that the business in the name of New Bondo Rafiki Hardware belonged to the Appellant JD.

20. There was no evidence that the objection proceedings may have been brought to defeat the execution process. Sharing the same postal address by mother and daughter cannot in itself be evidence of attempts to frustrate the respondents from realizing fruits of their judgment.

21. In the end, I find and hold that the objector has proved on a balance of probabilities that goods attached did belong to her, trading as New Bondo Rafiki Hardware. She demonstrated that she is doing business in the subject premises, and had paid for the licenses in her name as the applicant. I find the objection to the attachment proved. For the reasons given, I allow the Chamber Summons dated 18 December 2019 and order that the attachment undertaken against the objector's property as per the proclamation dated 2/12/2019 by Ikimwanya Auctioneers be and is hereby raised, vacated and set aside.

22. Each party to bear their own costs of these objection proceedings.

Dated, Signed and delivered at Siaya this 12th day of February 2020

R.E.ABURILI

JUDGE

In the presence of:

Appellant Present in person

The applicant Objector

Advocates for Applicant and Respondents absent

CA: Modestar and Ishmael