



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 341 OF 2012

SWILA RESORTS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

UNIVERSAL FREIGHT & LOGISTICS (K).....DEFENDANT/RESPONDENT

JOHN NTHIW'A MUEMA.....1ST OBJECTOR/APPLICANT

ELIZABETH MINGOO MUNGUTI.....2ND RESPONDENT/APPLICANT

RULING

1. This ruling relates to a notice of motion application (herein “the application”) dated 27th May 2019, brought under the provisions of Order 22 Rule 51 of .the Civil Procedure Rules 2010, Section 63(e) of the Civil Procedure Act (Cap 21) and all the enabling provisions of the law.
2. The Objectors (herein “the applicants”) are seeking for orders that there be a temporary stay of execution against the goods pending the hearing and determination of the application; the Honourable court be pleased to set aside/raise the attachment and proclamation of their movable goods by Messrs Kindest Auctioneers done on the 22nd May 2019 as per the schedule of attachment attached herewith and the costs be provided for.
3. The Application is supported by an affidavit dated 28th May 2019, sworn by John Nthiwa Muema, the 1st applicant with the authority of the 2nd applicant. He avers that, on 22nd May 2019, he informed by the 2nd Applicant’s wife that people had gone to their family house in Syokimau Estate Mavoko whom he later learnt were Auctioneers and had forcefully entered the house, purported to proclaim household goods and a vehicle in execution of a decree against the defendant herein.
4. That the applicants are strangers to the suit herein and have never been party to the same which is herein between the decree holder and the judgment debtor, is a limited liability company. The matter was reported to the Mlolongo Police station and the Auctioneers Licensing Board for further action against the auctioneer herein.
5. The attachment is termed to be not only grossly irregular, but it is illegal in that the attached goods belong to the applicants only and the defendant/Judgment debtor does not have legal or equitable ownership over the proclaimed goods. Therefore the court should grant the stay of execution order and declare the proclamation as illegal, null and void.
6. However, the Plaintiff (herein “the Respondent”), filed a replying affidavit dated 13th June 2019, sworn by Hon. Samuel Arthur Weya, the Plaintiff director who deposed that, the application is bad in law, vexatious, an abuse of the court process and without any merit whatsoever. That the Applicants shall not suffer any irreparable loss since the value of the movable assets can be ascertained by a certified valuer prior to the sale. It has been over two years and seven months as the 2nd Applicant continues to prolong the execution process, despite of her discretionary acknowledgment of individual liability to the Respondent.
7. That the court in the Judgment dated, signed and delivered by the Honourable court on 19th July 2016, directed that the Defendant to pay the Plaintiff a liquidated amount of Kshs. 1,479,898.35 and USD 18,093 plus interest on the aforesaid, as well as costs of the suit. The Respondent has made efforts to execute the decree through Messrs Kindest Auctioneers without success.
8. The Respondent stated that the accusations of the events alleged to have occurred on 22nd May 2019 with respect to Messrs Kindest Auctioneers are baseless and unsubstantiated by material evidence nor a completed investigation report. That the 2nd Applicant is misleading

the Honourable court when she states that she is a stranger to this suit and this is perplexing in view of her directorship of the Defendant as well as her instructions to Messrs Morara Ngisa & Co. Advocates.

9. Further the 2nd Applicant continues to actuate schemes to frustrate and unduly delay the execution process and that the 2nd Applicant and her co-director have previously resorted to changing the directors of the Defendant/Judgment-debtor in a clear effort to folly efforts to actualize the decree. This is a clear manifestation of fraud propagated by the Defendant and the 2nd Applicant.

10. The Respondent averred that the court in a ruling dated, signed and delivered by the Hon. Court on 12th October 2018, directed the Defendant to pay the Plaintiff an initial lump sum of Kshs. 1,000,000 within thirty (30) days from the date of the order, and pay the Plaintiff Kshs. 100,000 per month, with effect from the first day of the following month after the first installment until the said sum has been paid on the first day of each subsequent month for a period of twelve months and to liquidate the balance of the decretal sum in a six monthly installment for full payment, as well as interest at court rates accrued on any unpaid sum until payment is made in full. That has not been done.

11. It was averred that, there is evidence that the corporate veil is being used to shield the improper purposes of the 2nd Applicant and/or of the co-director, as the Defendant continues to act in bad faith by failing to adhere to orders of the Honourable court. To ascertain whether the assets proclaimed on L.R. No. 12715/8153 and 8154 can satisfy the decree of the court, the 2nd Applicant should be examined as there is suspicion that the Defendant's movable assets have been transferred to one of its known directors and also to other unknown people.

12. In the circumstances, the Applicants have not come to the court with clean hands and the 2nd Applicant's conduct should not merit the court exercising its discretion in favour of the Applicants. Further the Applicants have not demonstrated that they have legal or equitable interest in the attached motor vehicle or other movable property attached in the execution of the decree granted by this court and neither have they declared the proclaimed assets to be matrimonial property nor have not adduced materials to suggest otherwise.

13. The Applicants however, filed a further affidavit dated 19th July 2019, sworn by John Nthiwa Muema, the 1st Applicant, in response to the replying affidavit by the Respondent and averred that the Replying affidavit is totally irrelevant and does not address the issues raised by Applicants' affidavit in.

14. The Applicants further argued that Universal Freight and Logistics (K) Limited is a separate legal entity which has no legal or equitable ownership interest on the proclaimed goods which solely belong to the Applicants and found at their matrimonial home and have no relation whatsoever to the Defendant Company.

15. The parties agreed to dispose of the application through written submissions. The Respondent filed the submissions but the Applicants did not. The Respondent submitted that on 19th July 2016, judgment was entered for the Plaintiff, for a liquidated amount of Kshs. 1,479, 898.35 and USD 18, 093, plus interest at court rates 14%, as well as costs of the suit. Thereafter, the decree was issued on 1st November 2016 prescribing the aforesaid.

16. On 12th October 2018, the Honourable Court directed the Defendant to pay the Plaintiff an initial lump sum of Kshs. 1,000,000 within 30 days from the date of its Order issued on 19th October 2018, and to pay the Plaintiff Kshs. 100,000 per month with effect from the first day of the following month after the first installment until the said sum is paid on the first day of each subsequent month for a period of twelve months and also to liquidate the balance of the decretal sum in six monthly installments for full payment, as well as interest at Court rates accrued on any unpaid sum until payment is made in full. The aforesaid terms of the decree and the order of this court have not been adhered to nor has any amount of the decretal sum been paid by the Judgment-Debtor.

32. Therefore the Application herein proposes to prolong the execution process by objecting to the attachment of assets purportedly belonging to the Applicants. It is devoid of good faith, merit, and will surely prejudice the Decree-Holder from enjoying the fruits of this Honourable Court's Judgment.

17. That the Defendant neither appealed against the said Judgment of 19th July 2019 or the Ruling of 12th October 2018, nor made any immediate proposal to the Plaintiff/Decree-Holder to pay the Decretal sum by way of installments but instead only arose to the occasion nearing the close of 2 years. Thereafter, the 2nd Applicant who is a director of the Defendant now seeks to blindfold the assets of the Defendant by disguising realizable movable property as distinct from the Defendant and/or matrimonial.

18. Moreover, upon scrutiny of Article 45 (3) of the Constitution, as read with Sections 2, 6, and 10 of the Matrimonial Property Act No. 49 of 2013, it is apparent that there is no distinction of ownership of property in marriage thus the Applicants can be subjected to legal action accrued by either of them. At this juncture, it is reasonable to surmise that there is no legal separation between the assets of the Defendant and the property of the Applicants.

19. The Respondent submitted that Application is another knee jerk reaction to the execution proceedings and the underhand manner in which the supporting affidavit is crafted speaks volumes of the 2nd Applicant's intention to hinder the execution process.

20. That to date, the Defendant has only demonstrated bad faith and appears to be actively abusing the Court process. The case of; *Tarpo Industries Ltd v Picasso Products Limited* cited in *Swila Resorts Limited v Universal Freight & Logistics (K)* [2018] eKLR was cited where the court held; the Judgment debtor's bona fides (good faith) is the most important consideration when the court considers whether some indulgence can be fairly given to the judgment debtor without unreasonably prejudicing the decree holder.

21. The Respondent reiterated that there is no material evidence necessary to demonstrate legal or equitable interest in the attached movable property. That the Applicants have not provided any title documents to prove ownership of L.R. No. 12715/8153 & 8154 and therefore,

Messrs Kindest Auctioneers had reasonable grounds to arrive at the conclusion that the assets on the premises belonged to the Defendant. Further, the Applicants have not produced a copy of an official search from the Registrar of Motor Vehicles to support their claim of proprietorship and/or any invoices or receipts to prove ownership of other moveable property attached in execution of decree.

22. The Respondent referred to the case of; Kennedy Njuguna Mwangi v Collins Kiprono Bett & 3 others [2018] eKLR where this court observed the following with respect to Order 22 Rule 51;

“51. It is clear therefore that the Objectors must produce evidence of the legal and/or equitable interest in the whole or part of any property attached in execution of decree (see, Akiba Bank Ltd v. Jetha & Sons Ltd (2005) eKLR). Basically, therefore the burden of proof is on the Applicants to establish ownership (see also Chatabhai M. Patel & Another HCCC No. 544 Of 1957 (Lewis) On 8/12/58 HCU (1958) 743).”

23. Further reference was laid on case of; Zingo Investment Limited v Miema Enterprises Limited [2015] eKLR where the Court noted that;

23. It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant's goods are proclaimed and this cannot be the law.

24. I have considered the application, the grounds and affidavit in support, the replying affidavit and the submissions by the Respondent, and I find that there is no dispute that Judgment was entered in this matter in favour of the Plaintiff as against the Defendant and the same has not been satisfied. Indeed, the Judgment is against a Defendant which is a limited liability company and in normal circumstances, a company is liable for its own debts and can sue and be sued in its own name. The directors and the shareholders of a company will not generally be liable for its debts unless the veil of incorporation is lifted.

25. It is alleged that, the 2nd Applicant herein is a director of the Defendant/Judgment debtor, and that she is hiding the assets of the company under the guise that they are personal assets. The Respondent believes that the same belong to the company. The Applicants state otherwise. Therefore this is a pure matter of establishing who has a legal title to the proclaimed goods as between the Defendant/Judgment debtor and the Applicants.

26. It suffices to note that the application has been brought under the provisions of Order 22 Rule 51 which provides as follows;-

“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.

27. As stated earlier on by this court, in the case of; Kennedy Njuguna Mwangi v Collins Kiprono Bett & 3 others [2018] eKLR, the burden of proof lies on the claimant. In that regard, I note that there are only two (2) documents annexed to the affidavit sworn by John Nthiw'a the 1st Applicant herein. These are; a copy of the proclamation served on the Judgment debtor on 22nd May 2019, and an entry of the OB made 27th May 2019 at 09.22 hours. It is not quite legible although it shows that the report was made at Mlolongo police station.

28. It is therefore clear that, there is no evidence to support the Applicant's ownership of the proclaimed goods which include inter alia a motor vehicle registration No. KBJ 122 Prado, sofa set, television, wall unit, coffee table, dining table and seats, water dispenser, fridge, microwave, cooker, meko and stools. In the given circumstances, I am inclined to agree with the submissions made by the Respondent that, the Applicants have not discharged their evidential burden to proof legal or equitable interest in the attached movable property.

29. The upshot of all this is that I find the application dated 27th May 2019 has no merit and I dismiss it with costs to the Respondent.

30. Those then are the orders of the court.

Dated, delivered and signed in an open court this 8th day of October 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Ituuza for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Dennis -----Court Assisnat