



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 817 OF 2007

ISAAC OKECH OSIPLAINTIFF

VERSUS

QUEENS CLEANERS AND DRIERS LTDDEFENDANT

RULING

1. On 6/11/14, a judgment was entered against the Defendant, Queens Cleaners & DRIERS Limited for Kshs.1,500,000/=. On 29/1/2015 and 27/2/15, respectively Eshikhoni Agency and Hebros Auctioneers proclaimed several items from some premises within Nairobi in execution of the decree herein. Pursuant thereto, Queens Drycleaners Ltd (hereinafter: “the Objector”) took out a Motion on Notice dated 12th March, 2015 challenging the said proclamation. That motion was not certified as urgent but was listed for hearing on 10/6/15. That application was filed by the firm of Mwangambo & Okonji, Advocates.
2. Since there was no stay of execution, the auctioneers once again visited the subject premises on 27/05/15 attached and carried away various items as per the Notification of Sale dated 27/5/15. On 29/5/15 the objector once again took out another Motion on notice through the firm of Wambugu & Muriuki Advocates challenging the said execution. The application was certified as urgent and was ordered to be heard on 10/6/15. Accordingly, both motions dated 12/3/15 and 29/5/15 objecting to the execution of the decree herein were heard together on 10/6/15 and this is a ruling in respect thereof.
3. In the motion of 12/3/15, the objector contended that it was not party to this suit yet its property had been proclaimed; that the objector was not the judgment debtor herein. Mr. Walusala, Advocate who held brief for the firm of Mwangambo & Okonjo for the objector submitted that as at the time the application was filed, the proclamation had led to the closure of the objectors business leading to losses. Counsel urged that the application be allowed. He indicated that he was not opposed to the subsequent motion dated 29/5/15.
4. In the motion dated 29/5/15, the objector sought that the proclamation of 27/05/15 be lifted and the items taken away by the auctioneers be returned. The grounds for the motion were set out in the Supporting Affidavit of Caroline Nyokabi Gichuru sworn on 29/5/12. The objector contended that the items were taken without proclamation; that the objector was different from the judgment-debtor and a certificate of incorporation dated 01/02/2013 was produced in support of that contention. The Objector contended that the only time it dealt with the judgment debtor was on 1/2/13 when the objector entered into a sale of lease and goodwill transaction on the premises at National House, Koinange Street (market Branch).
5. The objector further contended that the attachment was wrongful as the items attached belong to its customers and not the objector; that the objector had legal title to the items attached; that the items were valued at Kshs. 5 million and not Kshs.200,000/- as shown in the Notification of Sale. Ms Ouko learned Counsel for the objector submitted that the objector was a different and distinct legal entity from the Judgment-debtor; that the decree was against a different entity from the

- Objector; that the commonality of the directorship of Dan Awindo did not transfer or extend the liability of the Judgment debtor to the objector; Counsel urged that the application be allowed.
6. The applications were opposed vide the Grounds of Opposition dated 3rd and 4th June, 2015 and the Replying Affidavit of Isaack Oketch Osi sworn on 5/6/15. The Plaintiff contended that the objector and judgment debtor are one and the same entity; that the Judgment debtor and objector occupy the same premises; that the Affidavits in support of the applications although sworn by Caroline N. Gichuru, they were in conflict with each other; that due to the commonality of the directorship of Dan Awendo, the Objector was in cohort with the Judgment debtor to defeat the decree herein. That the Plaintiff had worked for the Judgment-debtor for two (2) years in the same premises where the attachment took place. That the details from the Nairobi City County show that the entity with the licence for the premises where attachment took place was the Judgment-Debtor.
 7. Mr. Nyawara, Learned counsel for the Plaintiff submitted that the averments in the Replying Affidavit of the Plaintiff had not been denied. That the objector could not be represented by two law firms at the same time. Counsel took issue with the Agreement produced by the Objector for the sale of the lease interest in the premises occupied by the Judgment-Debtor to the Objector for want of stamping. Counsel also doubted the authenticity of the signatures in the Affidavits of Caroline Nyokabi Gichuru because of the different signatures. He therefore urged that the application be dismissed.
 8. Before me are objection proceedings. Objection proceedings by their very nature are akin to separate proceedings by an objector against a Decree/holder in respect of execution proceedings. Such proceedings are meant to bar execution on the basis that the goods proclaimed or attached belong to the objector and not the judgment debtor. Since the proceedings are of a final nature, as the court is called upon to declare ownership rights over the subject goods, the objector must proffer strong evidence to rebut or disprove the judgment of the decree holder and auctioneer that the goods belong to the Judgment debtor. Ordinarily goods are proclaimed and/or attached on the presumption that they belong to the Judgment debtor. It is the objector to proffer strong evidence to rebut that presumption. This is in line with the burden of proof under Sections 107 and 108 of the Evidence Act, Cap 80 that he who alleges must prove.
 9. In view of the foregoing, it is expected that an objector who commences objection proceedings will produce strong evidence of ownership of the subject goods to rebut the prima facie presumption of the ownership of the goods by the Judgment debtor. It is therefore expected that an objector will produce title documents or evidence that go towards establishing the objector's claim to ownership of the subject goods. The issue of title to the goods cannot be left to speculation. In my view therefore, it is only after such strong evidence has been produced by an objector that the evidentiary burden shifts to the decree-holder to show otherwise.
 10. In the present case, I have looked at the Proclamations and Notification of Sale produced by the objector. Most, if not all, the items proclaimed and subsequently attached are office equipment such as office chairs, cabinets etc. It is most unlikely that one will be expected to have receipts for purchase of such items to establish ownership. However, if the premises is a rented one such as in the present case, a properly executed lease over the office/premises might be prima facie evidence of ownership of the items therein. In this case, what was produced was a Sale and Purchase Agreement dated 1st February, 2013. The Agreement is between the Judgment debtor and the objector. The same is for sale of a motor vehicle and transfer of rights as lessee in the premises. The relevant recital provides:-

“B. The Vendor has agreed to sell and the purchaser (and their associates or a vehicle controlled by it) has agreed to purchase the vendor’s company vehicle Registration Number KAJ 118X and the vendor further agrees to transfer its rights as lessee of its office premises to the purchaser for the consideration and or and subject to the terms and conditions hereinafter appearing.

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5. **Leases and Lease Agreement**

The landlord will not be informed of the transaction and the transfer of the business until the tenancy terms created by the current leases expires. It will be a term of warranty that the Managing Director of Old Queens ensures the leases are renewed.

.....
.....”

11. The agreement showed that the purchase price was Kshs.13 million. Out of this sum Kshs.1million was payable on 8/2/13 and Kshs. 5 million was payable after 21 days of Equity Bank of Kenya Ltd releasing the same as loan to one Caroline Nyokabi Gichuru. The balance of Kshs.7million was payable in ten (10) equal monthly instalments from 1st April, 2013.
12. Looking at the agreement, several questions arise. There is no evidence at all that the sum of Kshs.13 million or any part thereof changed hands. It is curious that the agreement executed on 1st February, 2013 would indicate in its recitals that the instalments of Kshs. 1million and Kshs.5 million payable on 8/2/13 and 21 days after release of some loan by Equity Bank had been received. Clause 3 of the Agreement provides:-

“3. Purchase Consideration

.....

- ***An initial deposit. Deposit of Kenya Shillings one Million (Kshs.1,000,000.00) shall be paid to Queens Cleaners and Dyers Limited (company Number C. 1361) on or before the 8th day of February, 2013 or by the time of execution of this Agreement (receipt of which is hereby acknowledged) after which Queens Drycleaners Limited shall take possession of the premises and Assets contemplated for transfer.***
 - ***Kenya shillings five million (Kshs.5,000,000.00) shall be payable to Queens Cleaners and Dyers Limited (Company Number C.1361) upon release of loan to CAROLYNE NYOKABI GICHURU by EQUITY BANK OF KENYA LIMITED or within Twenty one (21) days from the date of the execution of the term sheet whichever comes first (receipt of which is hereby acknowledged).”***
13. How can there be an acknowledgement of receipt of a future payment? There was no evidence produced to show payment and receipt of the alleged sum. My view is that there may be more to it than what appears in that agreement. In other words the agreement is not convincing.
 14. The other issue is the secretive nature of the agreement. It expressly states that the Landlords of the premises will not be notified of the change of possession. In the circumstances, the question that arises is whether there was any lawful or complete transfer of ownership of the leases of the subject premises to the objector. To my mind, if there was any lawful transaction regarding change of ownership of premises and/or occupation of the same, either, a licence approved by the Landlords or a transfer of Leases to the objector should have been produced. Can a court of law sanction a clandestine and irregular transaction such as the one sought to be relied by the Objector? I entertain doubts.
 15. The third issue is that which was raised by Mr. Nyawara. This is that the agreement produced by the objector cannot be admitted in evidence for being in breach of Section 19 of the Stamp Duty Act. The same is not stamped. Apart from the date appearing at page 1 of the agreement, there is nothing to show that that agreement was actually entered into or executed in February, 2013. It may as well have been prepared specifically for these proceedings. If the same was executed in February, 2013 and was in existence in February, 2015, why was it not pleaded or produced in the first application by the Objector of 12th March, 2015? Its veracity is doubtful.
 16. I have also considered the averments in the Plaintiff’s Replying affidavit that the entity licensed to operate from the subject premises is the Judgment debtor and that the attachment took place from the premises which the Plaintiff knows to be occupied by the judgment debtor. These averments were not denied or controverted although made on oath. I am satisfied on my part that the Objector has not made a case to establish that the attached goods belong to it.

17. Further to the foregoing, there is the question of the existence of the two objection proceedings at the same time. As earlier on stated, an objection proceeding is akin to a suit which is commenced by an objector against the decree-holder to establish ownership of the attached goods. In this case, once the Objector had filed the original application of 12th March, 2015, it was not open to it to file a subsequent objection application. The latter application is caught up by the provisions of Section 6 of the Civil Procedure Act. In addition, the Objector having filed the application dated 12th March, 2015 through the firm of Mwagambo & Okonji Advocates, the latter application could not be filed by a different law firm i.e. Wambugu & Muriuki Advocates without the latter firm filing a Notice of Change of Advocates. The latter application was filed in breach of both Sections 6 of the Civil Procedure Act and Order 9 Rule 7 of the Civil Procedure rules.

18. Accordingly, the applications dated 12th March, 2015 and 29th May, 2015 are without merit. The same are hereby dismissed with costs to the Judgment-Creditor.

It is so ordered.

Dated and Delivered at Nairobi this 11th day of June, 2015.

A. MABEYA

JUDGE