



Luvayi v Director, Option Lounge; Famous Wines and Spirits Limited (Objector); Anfield Auctioneers (Interested Party) (Cause 615 of 2016) [2024] KEELRC 1850 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1850 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 615 OF 2016
NJ ABUODHA, J
JULY 12, 2024**

BETWEEN

JAMES ALUVISIA LUVAYI CLAIMANT

AND

THE DIRECTOR, OPTION LOUNGE RESPONDENT

AND

FAMOUS WINES AND SPIRITS LIMITED OBJECTOR

AND

ANFIELD AUCTIONEERS INTERESTED PARTY

RULING

1. The Objector/Applicant filed application and Notice of Objection both dated 3rd November, 2023 brought under Sections 1,3,3A and 44 of the Civil Procedure Act and Order 40 Rule 1, Order 22 Rule 51 and Order 51 Rule1 of the Civil Procedure Rules.
2. The Objector sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. This Honourable court be pleased to permanently restrain the decree holder by herself or acting through his agents Anfield Auctioneers or any other auctioneer from proclaiming, attaching and /or selling the Objectors Fridge, computer and alcoholic beverages as enlisted in the proclamation notice dated 31st October,2023.



- d. This Honourable court be pleased to left, raise, recall, vacate, cancel and/or quash the warrant of attachment dated 24th October,2023 and the proclamation notice dated 31st October,2023 for listing property that do not belong to the Judgment debtor.
- e. Costs of the Application.
3. The application was supported by the grounds set therein and the Affidavit of Edna Morumbasi Morande the Director of the Objector herein who averred that the Objector was the legal owner of the Fridge, computer and alcohol beverages being held by the Interested Party.
 4. The Applicant averred that the Decree Holder obtained Judgment in her favour against the Respondent/Judgment Debtor in the suit and consequently an execution of a decree was issued in the matter, and warrant of attachment issued on 24th October, 2023 to the Interested Party who subsequently issued a notice of proclamation dated 31st October,2023.
 5. The Applicant averred that on 31st October,2023 the Interested Party under the instructions of the Decree Holder attached the Objector's Fridge, Computer and Alcohol beverages which is the property of the Objector in an attempt to realize the decree whilst the Objector was not party to the suit.
 6. The Applicant averred that the Objector was neither party or associated with any party in this case hence its property herein should not be attached.
 7. The Applicant averred that section 44 of the Civil Procedure Act provides for property liable to attachment and sale in execution of a decree and the Objector's property does not meet that criteria as it was not property belonging to a Judgment Debtor, including property over which or over profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf.
 8. The Applicant averred that its property was attached and proclaimed without legal basis which is held by the Interested Party. That the property is at risk of being disposed off and /or wasted and continues to waste away as they cannot be sold by deed of being attached and hence causing the Objector a great financial loss.
 9. The Applicant further averred that unless the orders sought herein are granted its property will be disposed of whereas it is neither the Judgment Debtor nor a party to the proceedings. That it would be in the interest of justice and fairness that the objection be admitted and prayers sought be granted.
 10. In reply the Claimant/Decree Holder filed his Replying Affidavit sworn on 26th January,2024 and averred that he obtained a decree in his favour in this matter against the Respondent on 10th March,2022 for Kshs 286,601.04/=
 11. The Claimant averred that the Respondent failed to settle the decretal amount as ordered by court. That accordingly he instructed the Interested Party herein through his advocates on record to apply for warrants for attachment and sale of Respondent's assets in a bid to execute against the Respondent.
 12. The Claimant averred that the Auctioneers carried out a proclamation of assets present at the Respondent's premises on 31st October,2023.
 13. The Claimant averred that there was no legal or equitable interest established by the objector with regard to proclaimed property. That there was no nexus between the objector and attached property as alleged nor has the objector adduced any evidence of ownership of any of the proclaimed properties.
 14. The Claimant averred that the objector did not adduce any evidence to prove that the Respondent held any of the proclaimed properties on the account of objector at the time of proclamation. That the



Respondent was holding the attached property on its own account and not on account of the objector herein having duly executed the proclamation Notice without any protests whatsoever.

15. The Claimant averred that the Application was a nullity as it failed to meet the provisions of order 22 Rule 51 of Civil Procedure Rules 2010. That the Objector did not demonstrate any direct, indirect or remote relation with the attached properties to justify the objection proceedings herein.
16. The respondent further stated that the averments in the Objectors affidavit and application were bare and that the instant application was an attempt to deny and delay the Claimant's enjoyment of fruits of his judgment.
17. The Application was dispensed of by written submissions.

Determination

18. Order 22 Rule 51 (1) and (2) is the starting point in this determination which provides as follows;
51.
 - (1) 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.
 - (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.
19. The key word in the above provision is the objector to have a legal or equitable interest in the attached property. The Objector alleges that the property in question was attached at its business premises where it was carrying out its daily business activities. The Claimant on the other hand alleged that the proclaimed properties were attached at the Respondent's premises. The court notes that the objector and the Respondent are two separate entities with distinct legal status being corporate persons; it is therefore interesting how the two were in the same physical location.
20. In the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR the court had this to say;

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. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.
21. The Objector has not attached any evidence like receipts of the ownership of the Fridge, the Computer and the alcoholic beverages. Whereas the Objector stated that there was no relationship between it and the Respondent who was a party to these proceedings, the Objector did not satisfactorily explain to the court how its property used for daily running of its business was found in the same premises as that of the Respondent.
22. In the case of *Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR, the court held: -

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For



this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.”

23. The Objector has not adduced any evidence before this court to illustrate that the proclaimed properties belonged to it. In addition, apart from claiming that the two entities are separate and the court should not concentrate on who the Directors and shareholders of the two entities were; this court reads some trickery on the part of the Objector where the directors may be the same operating two distinct businesses on the same premises in order to defeat execution of any decree against either entity.
24. In the case of *Chotabhai M. Patel v Chaprabhi Patel* [1958] EA 743 quoted in the case of *Invesco Assurance Co Ltd v Kinyanjui Njuguna & Co Adv & another* [2020] eKLR 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.
25. This court notes that from the above holding the Objector has not demonstrated if the Respondent was holding the proclaimed properties on its behalf. The Court therefore is of the view that the same property was held on the Respondent’s account and not that of the Objector.
26. In the upshot the Objector’s application is found to have failed to meet the conditions set out under Order 22 Rule 51 of the *Civil Procedure Rules*. The Objector’s application is simply bent on delaying the Claimant from realizing his fruits of judgment which was delivered early in 2022.
27. In conclusion the Objector’s Application dated 3rd November, 2023 is found unmerited and is hereby dismissed with costs to the Claimant.
28. It is so ordered

DATED AT NAIROBI THIS 12TH DAY JULY, 2024

DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

