

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 104 OF 2006

KENYA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

ZUWENYA LIMITED.....1ST DEFENDANT

JANE WANGUI GACHOKA.....2ND DEFENDANT

AND

MEDIA ANALYSIS RESEARCH SERVICES LTD (MARS).....OBJECTOR

RULING

Pursuant to warrant of attachment issued by this court, Keysian Auctioneers proclaimed properties at a residence in Nyari Estate. After the said proclamation, the objector, pursuant to the provisions of Order XXI Rules 53, 54 and 56 of the Civil Procedure Rules, objected to the said attachment. The objector alleged that the attached properties belonged to it rather than the 2nd defendant. On 11th November 2008, the plaintiff/decreed holder notified the objector that it would proceed with the attachment. On 25th November 2008, the objector filed an application pursuant to the provisions of Order XXI Rules 56 and 57 of the Civil Procedure Rules seeking the lifting and setting aside of the said attachment. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Mwalimu Mati, a director of the objector. The objector contends that the goods that were attached belonged to it and were not the property of the 2nd defendant. In support of its application, the objector annexed a copy of lease agreement in a bid to establish that the premises where the properties were proclaimed was leased by the objector and not the defendants. Mwalimu Mati swore an affidavit in further support of the objector's case.

The application is opposed. Issac Njoroge, the legal manager of the plaintiff swore a replying affidavit in opposition to the application. Muganda Wasulwa, the auctioneer who proclaimed the suit properties swore another replying affidavit in opposition to the application. I have carefully read the said pleadings filed by the parties in support of their respective opposing positions. I have also considered the rival submissions made by Mr. Kimathi for the objector and Mr. Mutua for the plaintiff. The issue for determination by this court is whether the objector established ownership of the proclaimed goods to entitle this court lift the attachment and set aside the execution process against it.

Certain facts are not in dispute in this application. It is not disputed that the deponent on behalf of the objector, Mwalimu Mati and the 2nd defendant, Jayne Wangui Gachoka are husband and wife. The two are also directors of the objector. The plaintiff has a decree against the defendants for the sum of Kshs.22,178,888.93 which is yet to be satisfied. From the record, it appears that the plaintiff's attempt to execute the decree against the defendants has been frustrated. On 14th May 2008, the plaintiff instructed an investigator going by the name Mistan Insurance Investigators to investigate whether the defendants had any property that could be attached to satisfy the decree. By a report dated 5th June 2008, the said

investigators identified the residence of the 2nd defendant at Nyari Estate. They also identified the place where the 2nd defendant conducted business under another business name. On receipt of the report, the plaintiff instructed the auctioneers to proceed to the residence of the 2nd defendant with a view to attaching properties in the said premises. The auctioneers visited the residence of the 2nd defendant and proclaimed goods that they found in the house. It was upon the proclamation of the goods that the objector moved to court and commenced these objection proceedings.

Apart from the lease and the notification of change of directors, the objector did not attach any document in the affidavit in support of the application to establish its ownership of the proclaimed properties. My understanding of the provisions of **Order XXI Rule 56** of the **Civil Procedure Rules** is that where a decree-holder intimates his intention to proceed with the attachment, the objector is required to *“take proceedings to establish his claim within 10 days of service upon him of such intimation.”* The objector is required to provide proof of his ownership of the proclaimed goods. In my experience, establishment of ownership of a particular property requires ownership of documents to be availed to the court for the court to appreciate whether or not the proclaimed properties belong to the objector.

In the present application, it was clear that the objector placed no such evidence before this court. The issue for determination by this court is not whether the objector leased the premises in which the goods were attached. There many corporations which lease residential premises for its employees. Although the objector claimed that the proclaimed goods were its property, from the nature of the attached goods, it was apparent that the said goods were domestic goods rather than furniture normally found in an office. I was persuaded by the report prepared by the investigator that indeed the premise in which the goods were attached was the residential house of the 2nd defendant and not the offices of the objector. From the records kept at the Companies Registry, it was clear that the registered offices of the objector is not the premises where the goods were attached.

I therefore hold that the objector failed to establish ownership of the proclaimed goods. The objector therefore fails in its application lift or set aside the attachment of the proclaimed goods. In conclusion, I would like to state that this court considered the merits of the objector’s application despite the fact that the application was incompetent having been filed outside the ten (10) day period contemplated under **Order XXI Rule 56** of the **Civil Procedure Rules**. The objector was required to commence objection proceedings within ten (10) days after being served with the notice by the decree holder of its intention to proceed with the attachment. The objector filed the application three days after the expiry of the ten (10) day period it was required to have filed the application. The objector did not make any application for extension of time to enable this court have jurisdiction to proceed with the said objection proceedings.

For the reasons stated above, the application by the objector dated 25th November 2008 is for dismissal. It is hereby dismissed with costs to the plaintiff. The plaintiff is at liberty to proceed with the attachment.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE