

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMM NO. 353 OF 2017

AFVEST LIMITED.....PLAINTIFF

-VERSUS-

MICROMOBILE LIMITED.....DEFENDANT

STERLING CAPITAL LIMITED.....OBJECTOR

RULING

1. The objector filed a Notice of Motion application dated 10th January 2025 pursuant to the provisions of Article 40 of the Constitution of Kenya 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 22 Rules 51, 52 & 53 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law, seeking an order that this Honourable Court lifts the attachment of the movable property listed in the Proclamation Notice dated 20th December 2024 issued by Messrs Moran Auctioneers.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. David Ngaine, a Director of the objector company. He averred that vide a Certificate of Taxation dated 15th December 2023, the defendant was awarded costs against the plaintiff in the sum of Kshs.418,295.00. That consequently, Moran Auctioneers acting on the defendant's instructions proclaimed the objector's movable property located at Delta Corner Annex in Westlands, in execution of the said Certificate of Taxation.

3. Mr. Ngaine asserted that the proclaimed assets belong exclusively to the objector not the plaintiff and are covered by a Service Level Agreement with the plaintiff for shared office space and resources. He contended that since the objector is not a party to these proceedings, execution against its property would be unlawful and unjust. Mr. Ngaine urged this Court to intervene urgently to prevent the objector's property from being illegally sold in execution of the decree.
4. In opposition to the application, the defendant filed a replying affidavit sworn on 30th January 2025 by Mr. Robert Masinde, a Director of the defendant company. He averred that a Certificate of Taxation for Kshs.415,295 was issued in favour of the defendant against the plaintiff on 19th June 2024, but despite demand, the plaintiff failed to settle the costs, leading to execution by Moran Auctioneers vide a Proclamation of Attachment dated 20th December 2024. Mr. Masinde contended that though the objector in support of its application relies on a Service and License Agreement, an Asset Register and a Lease Agreement, these documents do not prove ownership of the attached movable property as the Service Agreement relates only to office space and services, the Asset Register does not confer ownership, and the Lease Agreement concerns office space and fixtures, not movables.
5. In view of the above, Mr. Masinde asserted that the objector has failed to demonstrate its legal or equitable interest in the movable property which is the subject matter of the Proclamation of Attachment. Mr. Masinde averred that the plaintiff and the objector companies are intertwined by virtue of their common directorship, thus the instant application is a collusive attempt to frustrate recovery of costs by the defendant. He further averred that in the event that the orders being sought herein are granted, the defendant will be

greatly prejudiced as it will amount to being blocked from recovery of costs duly awarded.

6. The instant application was canvassed by way of written submissions. The objector's submissions were filed on 3rd March 2025 by the law firm of Nabisino & Company Advocates, whereas the defendant's submissions were filed by the law firm of Oraro & Company Advocates on 19th March 2025. On 12th March 2025, Mr. Kabugu, learned Counsel for the plaintiff indicated that the plaintiff did not wish to participate in the application herein.
7. Ms Nabisino, learned Counsel for the objector cited the provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010, and submitted that the objector has demonstrated that it has a legal and equitable interest in the proclaimed property. She argued that the Lease Agreement with Garden Properties Ltd over the 5th floor, Delta Corner Annex, shows that the premises belong to the objector and not to the plaintiff, the Asset Register demonstrates ownership of the office assets used in its business and the Service Level Agreement shows that the plaintiff pays the objector Kshs.120,000/= monthly to use its office premises and resources, proof that the assets do not belong to the plaintiff. Counsel stated that even though the objector acknowledges a relationship with the plaintiff through shared directorship, corporate separateness must be respected, hence the objector cannot be held liable for the plaintiff's obligations.
8. Ms Nabisino relied on the cases of **Electrowatts Limited v Countryside Suppliers Limited & another; Mary W. Kamau (Objector)** [2021] KEHC 7917 (KLR) and **Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others** [2014] KEHC 1412 (KLR), and urged this Court to grant the orders being sought herein having demonstrated

its legal and beneficial interest in the proclaimed assets by producing the Lease Agreement and Service Level Agreement. Counsel noted that the objector deposited Kshs.440,000/= in Court as security, which money rightfully belongs to it and it should be released back. She contended that to release the funds to the defendant would amount to unfairly compelling the objector to satisfy a decree not issued against it.

9. Mr. J. Mbaluto, learned Counsel for the defendant submitted that although the objector claims its property was wrongly attached to recover party-and-party costs, it has failed to prove any legal or equitable interest in the proclaimed assets as required under Order 22 Rules 51 to 53 of the Civil Procedure Rules, 2010. He argued that the central issue is whether the objector demonstrated ownership at the date of attachment. Counsel cited the decisions made in **Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)** [2019] KEELRC 2572 (KLR) and **Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others** (supra), and asserted that the burden of proof lies on the objector to prove entitlement, with the applicable test as the one outlined in the case of **Chotabhai M. Patel v Chaprabhi Patel** [1958] EA 743.
10. Mr. J. Mbaluto challenged the objector's reliance on the Lease Agreement, the Service Level Agreement and the Asset Register, to assert that they fail to establish ownership of the proclaimed assets. He contended that the Service and License Agreement relates only to provision of office space, fixtures, fittings and services, not the proclaimed assets, whereas the Asset Register is merely a list without proof of ownership. He submitted that the objector has not discharged its burden of proving a legal or equitable interest in the proclaimed assets. Counsel highlighted that the objector's deponent in the

objector's supporting affidavit is a Director of both the plaintiff and objector companies, exposing collusion and duplicity aimed at frustrating lawful recovery of costs. To this end, Counsel relied on the case of **Paul Otieno Mungla t/a Paul Mungla & Co. Advocates v Anne Achieng Ajanja** [2015] KEHC 4565 (KLR).

ANALYSIS AND DETERMINATION.

11. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant and the written submissions by Counsel for the objector and the defendant, the issue that arises for determination is whether the instant application is merited.
12. Objection proceedings are provided for under the provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010, which states that -
 - 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.*
 - 3) *Such notice of objection and application shall be served within seven days from the date of filing on all the parties.*

13. In objection proceedings, the burden of proof lies with the objector to establish the material facts underpinning the objection. The objector is required to prove the contested issues of fact before the Court can be persuaded to exercise its discretion in his favour. This was the Court's holding in the oft cited case of **Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others** (supra) where it was held that -

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 or to have a legal or equitable interest in the whole or part of the property.

14. In addition, an objector is required to establish and demonstrate specific elements in order to discharge his burden of proof. These elements were outlined by the Court in the case of **Grace Wanjiru Mbugua V Philip Karumi Matu** [2009] KEHC 1714 (KLR), as follows-

The burden is on the objector to prove and establish his right to have attached property released from attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied:

- 1) That the property was not when attached held by the judgement debtor for himself or by some other person in trust for the judgement debtor; or*
- 2) That the objector holds that property on his own account. But where the Court is satisfied that the property was, at the time of attachment, held by the judgement debtor, as his own and not on account of any other person, or that it was held by some other person in trust for the judgement debtor or that ownership has*

changed, whereby the judgement debtor has been divested of the property in order to evade execution, on the change is tainted with fraud, the Court shall dismiss the objection.

15. In the instant application, the Taxing Master issued a Certificate of Taxation in favour of the defendant against the plaintiff in the sum of Kshs.415,295.00. The defendant averred that despite demand, the plaintiff has failed to settle the said costs, necessitating execution through Moran Auctioneers by way of the Proclamation of Attachment dated 20th December 2024. The objector however contends that the proclaimed movable assets belong solely to it and not to the plaintiff, and that they were subject to a Service Level Agreement with the plaintiff for provision of shared office space and resources. The objector maintained that since it is not a party to these proceedings, execution against its property would be irregular, unlawful and unjust.
16. The defendant on the other hand asserted that although the objector relies on a Service and License Agreement, an Asset Register, and a Lease Agreement in support of its application, none of these documents establish ownership of the attached movable property. The Service and License Agreement relates solely to office space and ancillary services, the Asset Register does not of itself confer ownership, and the Lease Agreement relates only to office space together with fixtures, and not to movable assets
17. This Court has carefully reviewed the Service & License Agreement, the Lease Agreement and the Asset Register relied upon by the objector in support of the instant application, and I am inclined to agree with the defendant that none of these documents sufficiently demonstrate the objector's ownership of the proclaimed assets. The said documents do not demonstrate the objector's legal or equitable interest in them to the required standard. The Service & License

Agreement relates solely to office space, members of staff and administrative matters including finance and technical support, for which the plaintiff pays a monthly fee to the objector.

18. Similarly, the Lease Agreement relates only to office space and fixtures, not movable property. It is noteworthy that by an offer letter dated 24th June 2024, the plaintiff proposed amendments to the terms governing the use of the objector's resources under the Agreement of 12th September 2022. It was agreed that the plaintiff would be granted access to office space for meetings and deliveries, as well as human resource support to handle general administrative duties, particularly in assisting the investment committee with its workload, at a monthly fee of Kshs.375,000/=.
19. This Court notes that just as the Service & License Agreement expressly provides that the name 'STERLING', its logo and other derivative intellectual property shall remain exclusive property of the objector, it would likewise have included a similar provision in respect to the proclaimed assets if they belonged to the objector. However, no such clause exists. Further, upon examining the Asset Register, I agree with the defendant that the said document on its own is insufficient to establish the objector's ownership of the proclaimed assets. At the very least, the said Register ought to have been accompanied by receipts filed in Court, in the objector's name, to demonstrate its interest in the items. As already noted, in objection proceedings, the objector bears the burden of proving ownership of the disputed items and/or goods. In the case of **Paul M. Munyao & 2 others v Civicon Limited (Judgment Debtor); AEA Limited & another (Objectors)** [2021] KEHC 5063 (KLR), the Court held 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.

20. In concurring with the above decision, this Court is of the finding that the evidence adduced by the objector as proof of ownership of the proclaimed and attached goods leaves a lot to be desired as it gives room for speculation, which is discouraged when it comes to objection proceedings.
21. In the circumstances, this Court finds that the objector has failed to discharge its burden of proving ownership and/or demonstrating any legal or equitable rights in the proclaimed goods, to warrant being granted the orders being sought herein. In the absence of such proof, this Court finds that the objector does not stand to suffer any loss and/or damage in the event that the instant application is not allowed and if the defendant is allowed to proceed with the attachment and sale of the proclaimed goods.
22. The upshot is that the application herein is devoid of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 7th day of November 2025. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of;-

No appearance for the objector/applicant

Ms Buluma h/b for Mr. Kabugu for the plaintiff

Ms Obego h/b for Mr. John Mbaluto for the defendant/respondent

Ms B. Wokabi – Court Assistant.