



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 257 OF 2014**

**CHARLES OHURU NYAMBOYE**

**JANICE KEMUNTO NYANCHOKA.....PLAINTIFFS**

**VERSUS**

**CAMPUS HOSTELS LIMITED.....DEFENDANT**

**AND**

**CAMPUS PLACE LIMITED.....OBJECTOR**

**RULING**

1. The applicant/objector filed Chamber Summons dated 29th April, 2015 under Order 22 Rule 51 (2) of the Civil Procedure Rules 2010 seeking

**1. THAT the attachment and proclamation of the objector's goods as set out in the proclamation of Attachment by Tip Auctioneers dated 24.04.2015 be lifted.**

**2. THAT the cost of this application be borne by the Plaintiffs.**

The application is supported by 3 grounds on the face thereof and a supporting affidavit of Jafari Kiraga. He deposes that he is the Administrative Manager of the objector and duly authorized to swear the affidavit. He stated that on 20th April 2015, Tip Top Auctioneers went to the objector's premises and undertook an inventory of all goods at their premises, which they were informed by the auctioneers was intended to recover a debt due from the defendant to the plaintiffs. He further deposes the objector is not a party to this suit, and does not owe the plaintiffs any money yet all the goods proclaimed belongs to the objector. He deposes that the objector is totally different entity from defendant and that the visit by the auctioneers has negatively impacted on the objector's business occasioning losses.

2. The Plaintiffs/Respondents filed their grounds of opposition dated 8th May, 2015 which raises 5 grounds in opposing the proceedings. He averred that Jafari Kiraga is not qualified to swear the affidavit dated 29th April, 2014 since he did not produce any document to illustrate the position he holds in the Objector's company. Further that there were no minutes by the board of directors granting him mandate to swear the affidavit on behalf of the company. Thirdly that the objector did not produce any documentary evidence to show that the purported proclaimed goods belonged to it. That directors of Campus Place Limited and Campus Hotel Limited are one and the same

- who are Moses Waweru Ndungu 400 shares, Jasper Oduor Omondi 400 shares and Dalmas Omondi Ohungo 200 shares. Lastly, that according to the law, lands means and includes the land itself and anything erected or standing thereon hence Campus Place is on the same land and their interests are fused.
3. The Plaintiffs/Respondents also filed replying affidavit dated 8th May 2015 sworn by Charles Ohuru Nyambone, the 1<sup>st</sup> plaintiff. He deposes that Campus Place Limited is a figment of imagination created by the defendant as he has conducted a personal search with the registrar of Companies which reveals Campus Place Limited (objector) does not exist. The purported certificate marked as annexure 'JK2' is a forgery and meant to confuse the court. He deposed that he knows the directors of the defendant's company as named above with their respective shares and they operate a bar and restaurant business. That the goods attached belong to the defendant and not a 3rd party. He also annexed a sale agreement dated 14th May 2014, to show that the defendant is playing a game of cat and mouse in order to deny the plaintiffs enjoyment of their judgment entered by consent on the 28th February, 2015.
  4. Mr. Omondi for the objector in his oral submission reiterated the facts above and said that the attached goods belong to the objector and were used for their business. He submits that there is no dispute that the attachment took place in the objector's premises. The question before court is whose goods were attached. He relied on the case of **Aroni Sure V Gesare Nyamaiko (1988) eKLR** at page 2, 5. That the questions of premises of attachment is key. He urged the court to allow the objection in absence of contrary evidence on place of attachment.
  5. From my analysis of the pleadings and the submissions rendered, two issues arise for determination. First whether the goods were attached from the premises of the objector or the premises of the defendant and therefore proof of ownership established. Secondly, whether the defendant and the objector is one and the same body. In the proclamation annexed to the supporting affidavit as 'JK 1', it gave an inventory of goods proclaimed. However the place of attachment was not disclosed. The objector deposed that it does the business of bar and restaurant and the goods were attached from restaurant. Some of the goods attached included inter alia; deep freezers, gas cylinders, gas cookers, electrical cookers, beds, mattresses, stock in fridge (beers, sodas) and generators and office furniture and T.V's. Although the details fo the building is not disclosed, the items attached are tandem with the business of the objector.
  6. The plaintiffs/respondents in reply deposed that the objector does not exist and the certificate of its incorporation annexed is a forgery. The 1<sup>st</sup> plaintiff went ahead to disclose names of persons who he deposed are directors of the defendant. The plaintiff's main challenge to the evidence that the goods were proclaimed in the objector's premises is the fact that the objector does not exist. However the plaintiffs did not annexed any document to show they conducted a search with the companies' Registrar or the Registrar's letter confirming the objector is non – existent. The objector annexed a certificate of incorporation showing it was incorporated on 13th February 2012. Mr Gichana submitted this certificate is a forgery and a search cannot be done on a non – existent company. He was under a duty to show he made any attempts of undertaking such a search to take this line of submissions challenging the objector's certificate.
  7. The plaintiffs contended that the objector failed to show documentary evidence such as receipts or delivery notes to prove the goods attached belonged to it. The objector in their answer referred this court to the case of **Aroni Sure and 9 others vs Gesare Nyamaiko (1988) eKLR** where the Court of Appeal held that finding the place where the attachment took place was key to resolving the conflict of ownership. In that case it was an attachment of cows in a village that was different from the defendant is said to have come from. While here it is attachment of furniture and household goods from a known building. The two cases to a certain extent are distinguishable and in my view for the objector to rely on the defence of location of where the goods were attached to show the goods were attached elsewhere other than the objector's premises, this court expected the objector to demonstrate the following :
    - i. Receipts that the attached goods belong to the applicant; **OR**
    - ii. The premises were either owned or leased to the objector/applicant and not to the defendant by production of a lease document or certificate of title; **ALTERNATIVELY**
    - iii. In the absence of a lease/title of ownership of the premises, avail any documentary evidence of it carrying business in the premises such as business permit from the County government or any

licence issued to it by the relevant bodies such as the liquor licensing board.

I take this view because the burden of proof was upon the applicant since it is the one who alleged the goods did not belong to the defendant/judgement debtor. The objector had a burden to prove on a balance of probabilities his legal or equitable interests in the whole or part of the property attached in execution of the decree. Section 107 and 108 of the Evidence Act provides that “**he who alleges must prove an averment**”. This view was taken in the case of **Isaac Okech Osi vs Greens Cleaners and Driers Ltd (2015) eKLR** at page 3 and I am persuaded to agree with this finding. In this instance, the objector has not discharged that burden.

8. On the issue whether the Objector and the defendant are one and the same person, it is clear both the objector and defendant are distinct companies limited by shares. Whether the directors of both companies are the same, in law they are two legal entities capable of suing and being sued in their names. However what struck me is that the inventory left by the auctioneer was signed by one **Bruno Lemashon**. The same person swore a replying affidavit filed in court on 16<sup>th</sup> December 2014 in which he described himself as the general manager of the defendant. This creates an inference that there could be some relationship between the defendant and the objector/applicant. In the absence of proof of the issues pointed out in paragraph 7 above, anyone can easily conclude that the objection proceedings may have been brought to defeat the execution process.
9. In conclusion, it is my finding that the Objector has failed to show that goods attached did not belong to the defendant as it did not bring to this court any evidence of the lease or title of ownership to the premises proving it is was the one in occupation of the premises where the goods proclaimed were. Further in the absence of proof of who is doing business in the subject premises, I find the objection to the attachment as not proved. For the reasons given, I dismiss the objection proceedings with costs to the Plaintiff/decree holder.

**Ruling dated and delivered at Mombasa this 30th day of October 2015.**

**A. OMOLLO**

**JUDGE**