



**Nyamai v Naivasha Rocky Eco-Lodge aka Rocky Resort; Elimia Art Depot Limited (Objector) (Employment and Labour Relations Cause E003 of 2023) [2024] KEELRC 203 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 203 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2023**  
**HS WASILWA, J**  
**FEBRUARY 13, 2024**

**BETWEEN**

**DANIEL NZIOKA NYAMAI ..... CLAIMANT**

**AND**

**NAIVASHA ROCKY ECO-LODGE AKA ROCKY RESORT ..... RESPONDENT**

**AND**

**ELIMA ART DEPOT LIMITED ..... OBJECTOR**

**RULING**

1. Before me for determination is the Objector's Application dated 18<sup>th</sup> October, 2023, filed under certificate of Urgency by the firm of Gitonga Muthee and Company Advocates, pursuant to order 22 rule 51 & 52 and order 51 rule 1 of the [Civil Procedure Rules](#), seeking for the following Orders; -
  1. Spent.
  2. That pending the hearing and determination of this application inter partes the court be pleased to issue interim orders of stay of execution of the judgment herein and specifically of the attachment, proclamation and/or sale of objectors moveable assets including Electric Cookers, Gas cookers, wifi servers, Furniture, Tv, office desks, water pumps, computers and laptops, commercial beds and beddings, in execution of a decree against the respondent and/or any other attached assets and or equipment legally belonging to the objector herein as per the Proclamation dated October 5, 2023.
  3. That the proclamation of objector's moveable assets including Electric Cookers, Gas cookers, wifi servers, Furniture, Tvs, office desks, water pumps, computers, laptops, commercial beds and beddings and/or any other attached assets and or equipment legally belonging to the



objector herein by the plaintiff/s/decree holders through Messrs Direct 'O' Auctioneers be declared illegal, null and void.

4. That the claimant/decree holders acting by themselves or through their agents be permanently restrained from attaching the objector goods and/or property in satisfaction of the judgment and decree entered by the Honourable court in the suit herein and/or execution against the objectors for recovery of the sums thereunder.
5. That cost of this application be provided for.
2. The Application is premised on the grounds on the face of the Application and the supporting affidavit of Edith Wanjiku Waititu, one of the Objector's Director, sworn on the October 18, 2023.
3. She stated that the Objector's Company was incorporated in 2015 and it undertook to develop and equip their premises which is located in Naivasha South Lake Road Block 18/846, but that they have not been in operation from 2020 when Covid-19 Pandemic hit the country.
4. The Affiant stated that the claimant through Direct 'O' Auctioneers has issued illegal proclamation on the objector's moveable assets including Electric Cookers, Gas cookers, wifi servers, Furniture, Tvs, office desks, water pumps, computers and laptops, commercial beds and beddings, in execution of a decree against the defendant herein with an intend to sell the said assets.
5. She stated that the said proclamation has been illegally and irregularly issued for reasons that the said proclaimed goods do not belong to the Respondent but to the objector herein. She added that the Objector was not a party to the suit and neither was it involved in the proceedings in the suit but that they risk losing control and/or ownership of the said assets and its operation will be brought to a halt if the execution is allowed to proceed.
6. The affiant urged this Court to allow the Application and stop the proclamation of the Objector's goods for the reason that the goods being attached herein do not belong to the Judgement debtor but to the Objector and annexed several documents in support of their Applications.
7. The Application is opposed by the claimant/ Respondent herein who filed two Affidavits, one sworn by the Auctioneer and another sworn by the Claimant.
8. The Affidavit by the Auctioneer, was sworn by Geoffrey Ishua Kariuki, on the 3<sup>rd</sup> November, 2023. In his affidavit the Auctioneer stated that he received warrants of attachment and sale dated 5<sup>th</sup> October, 2023 from this court for execution and on the same day he travelled to Naivasha in the company of two employees and the claimant who pointed out the Respondent's place of business which was a resort, located at Maili Mbili, along Naivasha - Maai Mahiu Highway at the junction of Moi Southlake Road, two kilometers from Naivasha town.
9. Upon arrival, he was introduced to the Respondent's manager Madam Brenda Maina, by the receptionist, in turn he introduced himself and the purpose of their visit and presented the copies of the warrants, proclamations and fee note which the said manager accepted service confirming that she understood the import of the said documents and assured the auctioneer that she will forward the aforementioned documents to the relevant director one Mr. Eliud Waititu Kimeria.
10. He added that the said Ms. Maina clarified that the proclaimed properties belonged to the respondent herein though, she indicated that the kitchen section was Closed and turned to a workshop but that they were still in operation.
11. In order to ensure the documents reach the Director, the auctioneer herein instructed one of its employees Mr. Muraguri Daniel to scan and send the aforementioned documents to the said director,



- Mr. Eliud Kimeria Waititu, via WhatsApp mobile phone number 07xxx, which he was given by the claimant.
12. After proclamation, they returned back and on October 13, 2023, they went back to the Respondent's premises in order to do further investigation and even had some coffee of Kshs 450 which they paid via Mpesa ref number RIDBEKWI72 through till number 560825 with returning message reading Eliud Waititu Kimeria as beneficiary, the same director of the Respondent.
  13. The Auctioneer stated that to ascertain the ownership of the Hotel, they carried out a search of respondent Company from the registrar of companies where he found that the said Eliud Waititu Kimeria, was one of directors and the majority shareholder as evidenced by search done on 13<sup>th</sup> October, 2023.
  14. On the objection application before Court, the Auctioneer stated that the minutes of the meeting where a resolution was arrived at to object the execution proceedings of this case, were done by three Directors including, Eliud Waititu Kimeria, a director that owns both Respondent and Objector as Majority shareholder. He added that the claimant informed him that one of the Company deals with hospitality and the other deals with furniture designs.
  15. The Auctioneer stated that, in their website, the Respondent have put up a customer care no. 07xxx, which he called and the recipient confirmed that they are still in operation, a further affirmation that the Respondent is in business.
  16. The Auctioneer also stated that the objector alleged that it has not been in operation but confirmed receiving the objection proceedings, the subject of this Application, a fact that beat logic. He added that, it is evident that there is a collusion of courses between the Respondent and the objector in effort to defeat lawful execution of warrants.
  17. Further that the inordinate delay in filing this Application is suspicious, because all the previous pleadings were served the same way and the Respondent did not enter Appearance or filed any responses.
  18. The Auctioneer also took issue with the silence of the said Eliud Waititu Kimeria, who has not sworn any affidavit denying ownership of both companies, and indicated that his silence confirms that indeed he is the owner of the Respondent and the Objector as such the Application is merely meant to frustrate execution of the decree herein.
  19. The Claimant on the other hand filed his replying Affidavit on 19<sup>th</sup> December, 2023, stating that the Objector's Application is bad in law, made in bad faith, inept, lacks merit, an afterthought, and otherwise amounts to an abuse of the court process.
  20. He stated that he was employed by the Respondent in July, 2016 to the position of Food and Beverage Manager earning a monthly salary of Kshs. 80,000/= and that he instituted the case herein against the Respondent vide a Memorandum of Claim dated 9<sup>th</sup> January, 2023 claiming for non-payment of salary, unpaid leave and unpaid off days.
  21. That the Pleadings and Summons were served upon the Respondent on 17<sup>th</sup> February, 2023 but despite service, the Respondent did not enter Appearance and/or defend this suit, therefore the claim herein proceeded as undefended with the hearing conducted on the 19<sup>th</sup> April, 2023 and the Judgement delivered in his favour on 25<sup>th</sup> May, 2023.



22. Subsequently a decree was obtained and certificate of costs given on 2<sup>nd</sup> June 2023, which were both served on the Respondent, who ignored them but only sprang to action upon receiving notice of proclamation and the warrants of attachment.
23. On the Objection Application, the Claimant stated that the objector's application is founded on lies as the Allegation that the Respondent Hotel was closed during Covid-19 is farfetched. On the contrary that the Hotel remain in operation as recent as 2023, when the auctioneer visited the hotel and had a cup of coffee and even paid via Mpesa into a till number that reflected the name of Eliud Waititu, the director of the Respondent as confirmed by the Objectors CR-12 annexure attached to the supporting Affidavit filed by the Edith Wanjiku Waititu one of the Directors. Further that the allegations that the Objector's company was incorporated in 2015 is far from the truth because the CR-12 show that it was registered on 25th January, 2018.
24. He stated that the Objector has not denied that the proclaimed goods are possessed by the Respondent thus the Auctioneer did not error or illegally proclaim the said goods. In fact, that paragraph 7 of the Supporting Affidavit sworn by Ms. Edith reads that "...on 5th October, 2023, Direct O" Auctioneers under the instructions of the Claimant's advocate procedurally went to the Respondent's premise and handed over a proclamation notice and signed warrants of attachment", a further confirmation that the goods in the said hotel are owned by the Respondent.
25. He stated that all the items listed in the Proclamation notice dated 5th October, 2023 are all located at the Judgement debtor's premises along Maai Mahiu- Nairobi Highway, a confirmation that the Auctioneer procedurally proclaimed goods and/or items.
26. He avers that annexures marked as EXB 3 and EXB 4 do not prove ownership of the proclaimed items rather that they show random transactions carried out by various people including quotations and proclamation with no direct nexus to the Objectors Resort.
27. With regard to annexure-EXB 3 of the Supporting Affidavit, the claimant stated that the swift/RTGS form dated 18<sup>th</sup> July, 2016 by one Eliud Waititu Kimeria of Kshs One Million Six Hundred Thousand, for drilling, casing of a borehole plus supply and installation of a pump to Geoscience Products and Services Ltd, does not indicate the exact location the work was to be done or prove any ownership thereof.
28. On the invoice dated 15<sup>th</sup> June 2016, the Claimant stated that the invoice is not an ownership document, the transaction status was incomplete and no location was disclosed therefore, thus there is no nexus between the documents and the Objector.
29. On the receipt dated 20<sup>th</sup> June, 2016 for monies received from Elimar Art Depot Ltd of Kshs. 4,260,000/= being payment of assorted furniture as for Delivery Note No. 018 on 15<sup>th</sup> June, 2016 attached allegedly from Earth and Water. He stated that the same are not ownership documents nor do they prove ownership as the documents lack letterheads and/or company logos or the destination of the goods.
30. On annexure EXB 4 showing a quotation for Tunnelnet Technologies for various items amounting to Kshs 1,574, 620. He stated that the same does not indicated who is responsible for payment or where such items were purchased. In fact, that the quotation is not dated, was not accompanied by an invoice or a receipt or payment voucher to confirm such purchase. An indication that the document is random, in an attempt to frustrate the execution.
31. It is his case that the warranty by samsutech for a Samsung led TV purchased by Eliud Kimeria on 18<sup>th</sup> April, 2015 at Naivas does not state that the same was for the Objector company.



32. On annexure EXB 4 quotation dated 4<sup>th</sup> November, 2015 for various kitchen items with a net value of Kshs. 646, 049.80 and another quotation by Georock Invesco Co. Ltd for Kshs. 1,092,000, he stated that they do not indicate who is responsible for payment or where such items are purchased for to ascertain ownership.
33. The Claimant avers that there is a wood workshop at the resort where all the Respondent's wooden furniture were made by fundis in the workshop at the behest of the director Eliud Waititu Kimeria, as such the allegations that the furniture were purchased is far from the truth.
34. Based on the foregoing, the Claimant stated that the Objector has not produced any proof of purchase or warranty of the proclaimed goods as such the Application herein is filed to frustrate and deny him the enjoyment of the fruits of his Judgement.
35. He stated that it is apparent that the largest shareholder of the Respondent is also named as a director of the Objector, a fact that proves that despite being served with court documents the Respondent intentionally failed to honour the summons with an aim of hiding behind the objector to disregard Court direction and Orders. This, he added, shows that both the objector and the respondent were aware of the existing suit and intentionally failed to enter appearance and defend the suit thinking they will dupe the court with their games and stories.
36. He urged this Court to send the Application herein on judicial exile and the Objector together with the Respondent reprimanded by this court for attempting to mislead this court.
37. He stated that the director of the Respondent, Eliud Waititu Kimeria has exposed his fraudulent business practices by hiding under another company that he owns to evade fulfilling his obligations. On that note, he urged this Court to lift the Corporate veil and direct him to satisfy the decree and certificate of cost.
38. Direction were taken for the Application to be canvassed by written submission with the Claimant/ Respondent filling on the 19<sup>th</sup> December, 2023 and the Objector opted to rely on his supporting affidavit only without filling any submissions.

### **Claimant Submissions**

39. The Respondent submitted on two issues; whether the execution process was proper and whether the Objector is the legal owner of the proclaimed goods.
40. On the first issue, it was submitted that the Claimant embarked on the execution process through Direct "O" Auctioneers who properly obtained and served Proclamation notices upon the Respondent, then issued Warrants of attachments that were duly signed by this Court. As such, that the execution process was regularly and legally conducted. He added that all attached moveable properties were all located at the Judgement debtor's premises along the old Southlake junction road in Naivasha.
41. On the second issue, it was submitted that it appears that the Objector is a company that has been registered by the Respondent's majority shareholder, Eliud Waititu Kimeria. Hence the Application herein has been filed to frustrate the Claimant and preventing him from proceeding with the execution in pursuit of the decretal sum.
42. It was submitted that all the documents produced by the objector does not connect the said Objector to the goods attached as such that the said document are random and meant to frustrate the execution process aimed at realization of the decretal sum. He thus Urged this Court to find the documents



annexed by the Objector are void 'ab initio' and only meant to obstruct justice and prevent the Claimant from enjoying the fruits of his judgment.

43. He added that what the Application herein has managed to expose is that the respondent's director has two companies, the respondent and the objector and is attempting to fraudulently escape execution by criminal elements and that warrants lifting of the corporate veil to allow the auctioneer to attach, proclaim and sell personal property of Eliud Waititu Kimeria the director of the said companies.

44. To support their arguments above, the claimant relied on the case of *Kaimosi Tea Estate Limited v Count Motors Limited & another* [2015] eKLR in which the Objector's Application was dismissed with costs to the Plaintiff after failing to prove ownership of property as they had initially alleged. In its analysis, the court held that;

"It is a well settled principle that an objector must prove on a balance of probabilities, that he is entitled to or has legal or equitable interest in the whole part of the property attached...the Objector did not also provide proof of ownership of the proclaimed furniture and fittings. On this ground alone, the Objector's application would fail in the first instance."

45. The claimant also cited the case of *Zingo Investment Limited v Miema Enterprises Limited* [2015] eKLR, where the Court of Appeal judges in dismissing an appeal by Objectors whose Application to have the attached property released stated that;

"It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant's goods are proclaimed and this cannot be the law...for the foregoing reasons, it is our finding that the appellant's contention that the trial court ignored its title document and further ignored that the goods were proclaimed on its premises are not valid grounds to sustain objection proceedings. We find this appeal has no merit and is hereby dismissed with costs."

46. To Buttress their arguments, the claimant cited the decision by this Court in *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* [1993] eKLR; where the court held that;-

"The burden is on the objector to prove and establish his right to have the attached property released from the 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."

47. He also relied on another decision by this Court in *Research Foundation of Kenya v Patrisio Njiru Njeru; Stephen Njeru Chiengo(Objector/Applicant)* [2021] eKLR where this Court dismissed a similar objection on the grounds that; -

"...in the affidavit attached by the objector, he only avers that the attached goods are his and not produced evidence to demonstrate why the goods are his"

48. Based on the cited case law above, the claimant urged this Court to find that the objector's application herein lacks merit and dismiss it with costs to the claimant and direct the execution proceeding to proceed unless the decree is fully settled.



49. I have examined all the averments and submissions of the parties herein.
50. The objector herein has filed their objection proceedings claiming that the attached goods are his and not the respondents.
51. The objectors have however not attached any evidence of ownership of the said goods.
52. In reliance upon the Court of Appeal claim in *Zingo Investment Limited v Miema Enterprises Limited* (*supra*), the issue is not on premises where the attached goods were found but rather on proof of proprietary interest in the same.
53. The objector gave no such proof and for this case, the application must fail.
54. Cost to the claimant respondent.

**RULING DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Owino for Claimant – present**

**Ndichu for Objector - present**

**Court assistant – Fred**

