



**Kioko & 3 others v Primi Piatti Ltd & another (Cause
1322 of 2016) [2023] KEELRC 1173 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1322 OF 2016**

JK GAKERI, J

MAY 15, 2023

BETWEEN

JOHN MUKOSI KIOKO 1ST CLAIMANT

JOSEPH LUSAKA 2ND CLAIMANT

JANE WANGARI 3RD CLAIMANT

GEOFFREY SAFARI NTHENGE 4TH CLAIMANT

AND

PRIMI PIATTI LTD JUDGMENT DEBTOR

AND

ALEXANDRE CHOCOLATIERS LTD OBJECTOR

RULING

1. Before the Court for determination is the 2nd Respondent/Objector's Notice of Motion dated 5th October, 2022 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. Spent.
 3. The Honourable Court do raise/lift the attachment of the Objector's/Applicant's property set out in the Proclamation of Attachment by Betabase Auctioneers dated 29th September, 2022.
 4. The costs of this Application and the Attachment be borne by the Claimants in any event.
2. The Application is expressed under Order 22 Rule 51 of the *Civil Procedure Rules*, 2010, Section 1A, 1B & 3A of the *Civil Procedure Act* and all enabling provisions of law and supported by the Affidavit



of Michel Mouyart, a Director of the 2nd Respondent/Objector, who deposes that the 1st and the 2nd Respondent were limited liability companies and thus separate legal entities.

3. The affiant states that the judgement delivered on 24th February, 2022 was in favour of the 1st, 2nd and 3rd Claimants against the 1st Respondent and the claim by the 4th Claimant against the 2nd Respondent was dismissed.
4. The affiant deposes that the Warrants issued on 27th September, 2022 was against the 1st Respondent and not the 2nd Respondent.
5. That the Claimants instructed Betabase Auctioneers to attach the 2nd Respondent's movable property instead of that of the 1st Respondent.
6. That the Proclamation dated 29th September, 2022 was issued at the shop of the 2nd Respondent.
7. That the 2nd Respondent/Objector carries on business on L.R. No. 209/10670, Yaya Centre along Argwings Kodhek Road under a single business permit.
8. That all the furniture and goods listed in the inventory belong to the Objector and if the attachment proceeds, the Objector stands to suffer great loss and damage as its operations will grind to a halt should its goods of trade be carried away.
9. The affiant states that the Objector stands to suffer irreparable loss and damage and it is in the interest of justice that the orders sought be granted.

Response

10. In his Replying Affidavit, John Mikosi Kioko deposes that during his employment by the 1st Respondent, the proclaimed chattels were being used in the restaurant business by the 1st Respondent, a sister company of the Objector.
11. That the chattels do not form the business repertoire of a bakery which the Objector alleged to have been in its pleadings during the trial but those of a fully-fledged restaurant run by the deponent.
12. That the single Business Permit of the 2nd Respondent/Objector does not show the connection with the premises or the property attached or evidence that the Objector owns the property and thus the Objector has no legal or equitable interest in the chattels.
13. The affiant further states that the application was an attempt to prevent the Decree holder from enjoying the fruits of their judgement.
14. That the Objector has not fulfilled the requirements of Order 22 Rule 53 of the [Civil Procedure Rules, 2010](#) and the orders sought were not deserving.
15. The affiant invites the court to dismiss the Application.

Response to the Replying Affidavit

16. In his response to the Respondent's Replying Affidavit, Mr. Michel Mouyart deposes that the Objector is a tenant of premises known as Shop No. 15A, Ground Floor, Yaya Centre wherein the Auctioneer attached movable property and the movable property within Shop No. 15A is owned by the 2nd Respondent and not the Judgement Debtor.
17. That the furniture and goods listed in the inventory in the proclamation belong to the 2nd Respondent.



Objector's submissions

18. Counsel of the Objector submitted that it was trite law that goods of trade cannot be sold in execution of warrants of attachment and the Objector was not indebted to the Claimants.
19. Counsel relied on the decision in *Kem Paper Ltd V Kenya Times Media Trust Ltd* (2006) eKLR, where the court held that the Objector being a legal entity separate from the Judgement Debtor, its property could not be lawfully attached in execution of the decree.
20. That the 4th Claimant's claim against the 2nd Respondent was dismissed by the court and the Objector's goods could not be sold in execution of warrants of attachment against the Judgement Debtor.
21. Counsel maintained that the proclamation of the Objector's goods by Betabase Auctioneers in satisfaction of the Decree of Kshs.454,403.00 could not proceed against the Objector as it was a separate legal entity.
22. Reliance was also made on the decision in *Kenya Chemical & Allied Workers Union (Claimant/ Decree Holder) vs East African Portland Cement Co. Ltd (Respondent/Judgement Debtor) & Kenya Commercial Bank Kenya Ltd* (Objector/Applicant) (2018) eKLR where the Objector established ownership of the property and the proclamation was set aside.
23. Counsel Submitted that the Decree holder had not discharged the burden of proof to establish that the goods attached belong to the Judgement debtor and not the Objector and a great injustice would be committed if execution was allowed to proceed as the Objector would suffer great loss and damage.

Claimant/Respondent's submissions

24. The Claimant's counsel relied on the holding in *Precast Portal Structures V Kenya Pencil Co. Ltd & 2 others* (1993) eKLR that it was the duty of the Objector to prove that the attached property was not held by the Judgement Debtor itself or some other person on its behalf.
25. That where the property is held by another person in trust for the Judgement-Debtor or has been diverted to evade execution, the objection ought to be dismissed.
26. Counsel submitted that in this case, Mr. Michel Mouyart admitted being a director of the 1st Respondent, the Judgement-Debtor and the premises proclaimed belonged to the Judgement-Debtor or it operated its business and the Objector had not controverted that fact.
27. Counsel further submitted that the claim of ownership was part of a Scheme by the Judgement-Debtor to defeat the course of justice as the Objector had not denied knowledge of the Judgement-Debtor.
28. That the objection was intended to frustrate the decree holder.
29. Counsel further submitted that the Insurance Premium Debit Note for renewal of insurance relate to a car and neither the insurance cover nor the lease agreement on record relate to the chattels themselves.
30. Counsel urged the court to dismiss the Application with costs.

Findings and determination

31. The singular issue for determination is whether the Notice of Motion herein is merited.
32. The salient disagreement between the parties is that while the Decree-Holders urge that the goods attached belong to the Judgement-Debtor, Primi Piatti Ltd, the 1st Respondent, the Objector argues that the goods are its items of trade and thus belong to it.



33. While the Decree-Holders deponed that the Judgement-Debtor used to operate at the premises occupied by the Objector, the Objector provided a lease agreement of the premises and an Insurance Cover Debit Note attesting to the renewal of a burglary insurance.
34. A copy of the Insurance Policy was not availed for perusal to appreciate the scope of insurance cover.
35. The Objector has also provided copies of Certificates of Incorporation of the Judgement-Debtor and the Objector to reinforce its position that the two were distinct legal entities as enunciated in *Salomon V Salomon & Co. Ltd* (1897) AC while the 1st Respondent was registered on 15th July, 2009, the 2nd Respondent was incorporated on 4th October, 2007. Evidently both companies were in existence when the Decree-Holder worked for the 1st Respondent. From the copies of the pay slips availed by the Decree-Holders, it is evident that other than 4th Claimant, the rest were employees of the 1st Respondent.
36. Regrettably, the Decree-Holders do not appear to have appreciated that there were two sister companies and only one of them was their employer. A perusal of the constitutive documents of the respective companies would have revealed their objects, registered office shareholding and directorships. The fact that the Judgement-Debtor operated at the same place would not necessarily mean that it was the proprietor of the proclaimed goods.
37. The Proclamation of attachment prepared and issued by Betabase Auctioneers on behalf of the Decree-Holder identifies the Judgement-Debtor as Primi Piatti Ltd and the items proclaimed include seats, tables, bottles of bear with bear, dispenser, two fridges, oven, coffee making machine, glass cups, slicer, reception counter among others.
38. The foregoing catalogue reveals that the Objector's business is a restaurant, a fact confirmed by the single business permit for the period 12th April, 2021 to 12th April, 2022.
39. The permit shows that the Objector operates a Bakery and a wine bar.
40. From the documentary evidence on record, it is unclear as what the business of the Judgement Creditor was or its place of business.
41. However, according to the Decree-Holders, it operated a restaurant at the same place. In other words, the two companies were inseparable.
42. The Decree-Holders evidence that the proclaimed goods were not part of the Bakery is unconvincing as there is no evidence as to what the objects of the company were and it is now the entity permitted to carry on business at Shop 15A, Ground Floor, Yaya Centre.
43. The ownership of the proclaimed goods remains contested.
44. Order 22 Rule 51 states that;

Any person claiming to be entitled to or have a legal or equitable interest in the whole 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.
45. Although the Decree-Holders deponed that the Objector had not demonstrated that it had a legal or equitable interest in the proclaimed goods, they adduced no evidence to prove that the same belonged to the Judgement-Debtor.



46. However, the fact that the Objector is the lessee or tenant effective 2014 to 2024, permitted to carry on business at the location by the County Government of Nairobi and has a burglary policy on the stock whose declared value is Kshs.14,531,250/= at an annual premium of Kshs.40,170.00, is sufficient evidence to demonstrate that the Objector had at least an equitable interest in the goods at the premises, otherwise the Objector would not have had the requisite insurable interest to insure the stock. Insurance law requires a legal or equitable interest in the property. (See *Lucena V Craufurd* (1806) 2 B & P NR 269 H.L).
47. Significantly, although counsel for the Decree-Holders submitted that the claim of ownership by the Objector was part of a larger scheme to defeat the course of justice and frustrate the Decree-Holders from enjoying the fruits of their judgement, he availed no material to buttress the submission.
48. Similarly, in *Arun C. Sharma V Raikundalia T/A A. Raikundalia & Co. Advocates and 4 others* (2014) eKLR , the court stated as follows;
- “The Objector bears the burden of proving that he is entitled to or has a legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or have a legal or equitable interest in the whole or part of the property. Has the Objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”
49. In this case, the Objector’s renewal of the burglary policy from 2nd May, 2022 to 2nd May, 2023 is in the court’s view sufficient evidence that it has a legal or equitable interest in the subject matter of the policy as itemised above. The goods were in the possession of the Objector and in his own account.
50. See also *Chotabhae M. Patel V Chapraphi Patel* (1958) Ed. 743, *Ida Soman V Najib Mubiru* HCCCA No. 234 of 2005 Kiryabwire J. (Uganda) cited with approval in *Tawakal Airbus Ltd V Irene Muthoni Njeri Njirati & another* (2020) eKLR.
51. In the upshot, it is the finding of the court that the Objector has established that it has the requisite interest in the proclaimed goods which the Auctioneers found in the Objector’s possession and no evidence was adduced to prove that it was holding the same in trust for the Judgement-Debtor.
52. For these reasons, it is the finding of the court that the Notice of Motion dated 5th October, 2022 is merited.
53. Accordingly, the attachment of the Objector/Applicant’s property set out in the Proclamation of Attachment by Betabase Auctioneers dated 29th September, 2022 is hereby lifted.
54. Parties shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MAY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

