



**Oriwo v Bafagim Bakeries Company Limited (Cause 867 of 2017)
[2023] KEELRC 1111 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 867 OF 2017**

**AK NZEI, J
MAY 4, 2023**

BETWEEN

JOSEPH MISERI ORIWO CLAIMANT

AND

BAFAGIM BAKERIES COMPANY LIMITED RESPONDENT

RULING

1. The application before me is the Objector's Notice of Motion dated October 5, 2022. The Objector seeks the following orders:-
 - a. that this Honourable Court be pleased to grant a temporary stay of any further execution of this Court's judgment dated April 9, 2020 by way of attachment and sale of the Moveable assets proclaimed on 25/7/2022 apart from motor vehicle Registration No KCN 100N pending hearing and determination of the application.
 - b. that this Honourable Court be pleased to set aside and quash the proclamation, attachment and/or sale of the movable assets listed on the proclamation Notice dated 25/7/2022.
 - c. that this Court be pleased to permanently restrain the claimant/Respondent, whether by himself, his agents and /or servants from proclaiming and/or selling the movable assets listed on the proclamation notice dated 25/7/2022 apart from motor vehicle Registration No KCN 100N.
 - d. that costs of the application be in the cause.
2. The application is expressed to be brought under Order 22 Rules 51 and 52 of the *Civil Procedure Rules*, among other provisions of the law, and is supported by a supporting affidavit and a further affidavit of Abubakar Alwi Ali alias Abubakar Alwy Bafagih (the Objector) sworn 5/10/2022 and November 15, 2022 respectively. It is deponed in the said two affidavits:-



- a. that through an offer made by the Managing Director of Kenya Industrial Estates Ltd on 20/7/2000, the Objector accepted to purchase Bakery Equipment apart from motor vehicle Registration No KCN 100N.
 - b. that upon acceptance, the Objector was required to make payment as required by the Managing Director, which payments were made on various dates in the year 2005, and subsequently ownership of the equipment and shed was transferred to the Objector as evidenced by a letter 3/6/2005, a part from motor vehicle Registration No, KCN 100N.
 - c. that after purchase, the Objector lend the said equipment and the shed, apart from motor vehicle Reg. No KCN 100N, to his brother Mohsen Alwi Mohammed who had opened a bakery by the name Bafagih Bakeries Limited to kickstart his business, but without any proprietary rights over the said equipment todate.
 - d. that the Objector's said brother, Mohsen Alwi Mohammed, the sole director of the Respondent company (Bafagih Bakeries Limited) passed on on 7/6/2021; upon which the Respondent company went under, and the Objector lend the same equipment to a company known as Almo Bakeries Limited, which was registered on 7/7/2021, without passing any proprietary rights to the said company.
 - e. that by virtue of the Objector's ownership of the attached bakery equipment, the said equipment is not available for attachment in execution of the decree herein as the equipment is not owned by the Respondent.
3. Documents annexed to the Objector's supporting and further affidavits included:-
 - a. a letter by Kenya Industrial Estates Limited dated 20/7/2000 offering for sale to the Objector bakery equipment formerly for Voi manufacturing Limited at a consideration of ksh 700,000.
 - b. a letter dated 3/6/2005 referring to payment of mortgage clearance fees on shed B4 – ksh 85,000 and preparation of shed ownership documents in favour of the Objector.
 4. It is worthy noting that the said letter dated 3/6/2005 does not refer to purchase and/or sale of bakery equipment. Further, the letter of offer dated 20/7/2000 did not refer to or even mention anything concerning shed mortgage. These two appear to have been two unrelated matters.
 5. Further, the Objector has not demonstrated that he ever accepted the offer contained in Kenya Industrial Estates Limited's letter dated 20/7/2000 or paid the consideration of ksh 700,000 for the bakery equipment in issue. Indeed, the Objector has not demonstrated ownership of the proclaimed bakery equipment by himself, neither has he demonstrated that he has any form of legal or equitable interest in the equipment.
 6. Likewise, the Objector's allegation that he lend out the proclaimed bakery equipment to the Respondent/judgment debtor and subsequently to a company known as Almo Bakeries Limited was not proved as no agreements were exhibited in that regard.
 7. Further, the Objector has not demonstrated that the Respondent/judgment debtor company went under, or that his late brother was the sole director of that company.
 8. The application was opposed by the claimant/decreed holder *vide* a replying affidavit sworn by himself on October 31, 2022 whereby he demonstrated that the Objector had not demonstrated ownership of the proclaimed bakery equipment and that a letter dated 3/6/2005 which the Objector purported to be evidence of payment for the said equipment related to a different transaction.



9. Both parties filed written submissions on the application, which I have considered.
10. The Objector did not avail any evidence of title to or ownership of the proclaimed bakery equipment which he claims belong to him. He did not discharge the onus of proving his legal or equitable interest in the proclaimed equipment. The letter dated 20/7/2000 cannot, in the absence of acceptance of the offer and evidence of payment of the consideration and/or quoted purchase price (ksh 700,000), be said to have conferred on the Objector any form of legal or equitable interest in the proclaimed bakery equipment.
11. It was stated as follows in *Duncan Kabui vs Samuel Bede Ogembo & Another* [2014] eKLR:-

“the burden of proof in this regard is on the Objector to establish her legal or equitable interest in the property which is the subject matter of the execution objected to, and it is not for the decree holder to prove that the goods belong to the defendant. It was stated as follows in this regard by Hon Waki J (as he then was) in *Simba Colt Motors Limited vs Lustman & Co* (1990) HCC No 729 of 2002:-

“the purpose of Rule 57 is to provide the Objector with an opportunity to establish his claim to the attached movable property. The Rule casts the onus of proof on the Objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the judgment debtor.”

12. In the present case, it is my finding that the Objector has failed to discharge the onus of proving that the proclaimed bakery equipment belong to him, or that he has legal or equitable interest in the equipment. Consequently, the orders sought by him cannot issue.

The Notice of Motion dated October 5, 2022 fails, and is hereby dismissed with costs.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH MAY 2023.

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

M Tolo for Claimant

Ms. Wambua for Objector

