



Nyali International Beach Hotel v Bundi & 145 others; Hyatt Hotels International Limited (Objector) (Cause 960 of 2016) [2023] KEELRC 1993 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1993 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 960 OF 2016**

**M MBARŪ, J
JULY 13, 2023**

BETWEEN

NYALI INTERNATIONAL BEACH HOTEL CLAIMANT

AND

MPESHO BUNDI & 145 OTHERS RESPONDENT

AND

HYATT HOTELS INTERNATIONAL LIMITED OBJECTOR

RULING

1. The objector, Hyatt Hotels International Limited filed application dated May 26, 2023 under the provisions of Section 44 of the *Civil Procedure Act*, Order 22 rule 48, 51 rule 52 of the *Civil Procedure Rules*, rule 36 of the Labour Institutions Act and seeking for orders that;

Upon hearing and determination of this application inter-parties, this court be pleased to issue an order lifting and discharging the prohibitory order issued on May 18, 2023 against all that parcel of land comprising of eighteen decimal one (18.1) acres or less situate in Mombasa County and known as subdivision number 1546 (original number 1541 and 1544).

2. The application is supported by the Supporting Affidavit to Rahul Sood the chief executive officer of the objector and on the grounds that a notification of sale and prohibitory order issued from the court on May 12, 2023 and served upon the objector by the auctioneers pursuant to a decree issued in favour of the respondents, Mpeshindo Bundi & 148 Others and seeks to sell by way of public auction all that parcel of land comprising 18.1 acres land number 1546. The respondents seeks to sell the land and property in satisfaction of a decree issued against the claimant, Nyali International Beach Hotel as the judgment-debtor in the sum of Ksh 31,486,326/- and the objector is not a party to the suit from



- which the decree emanated and has been caught by surprise as it is the bona fide and registered owner of the property.
3. Rahul Sood aver that the claimant as the judgment-debtor does not have any legal or equitable interests in the property and as such cannot be sued to satisfy the decree passed against it, the respondents intentionally failed to attach the specifications of the subject property as mandated under Order 22 rule 9(b) of the *Civil Procedure Rules*. Had a search of the property been undertaken, it would have been clear that the objector is the registered owner.
 4. The objector has been the bona fide, lawful and registered owner of the property since November 19, 2009 and it is a separate and legal entity and not related by way of shareholding or directorship. To enforce a decree against a non-party herein will hinder the objector from obtaining any banking facility which it frequently requires in its normal course of business operation and the orders sought should issue with costs.
 5. In reply, the respondents filed the Replying Affidavit of Hezron Onwong'a the Industrial relations officer of the respondent and who aver that he has full knowledge of this matter and the respondents are its members by virtue of their union membership as allowed by the court to be represented by the respondent.
 6. The claimant moved the court herein under Certificate of Urgency to restrain the respondent's members from industrial action after the claimant failed to pay salaries and service charge and an order was granted.
 7. The parcel of land subject to objection proceedings herein was transferred to the claimant on October 14, 2009 as evidenced by the transfer document and as at October 2017 when the orders herein issued, there was no compliance by the directors of the claimant to pay the decretal sum.
 8. The respondents did a search from the Registrar of Companies, the result of which was that the objector cannot be traced. The claimant has continued to pay land rates over the same piece of land to the County Government of Mombasa as evidenced by the E-lands service statement. The objector's application is made in bad faith to delay justice and should be dismissed with costs to the respondents.
 9. The claimant opted to remain an observer in these proceedings.
 10. The objector and respondents made oral submissions.
 11. The objector reiterated the application and submitted that the notice of sale and prohibition has issued against the objector's property while there is no legal or property interest with the claimant who is the judgment-debtor herein. The property to be sold is in the name of the objector and had the respondents done a search and attached a copy herein, it would have indicated that the property sought to be applied to satisfy the decree herein is owned by the objector since November 19, 2009. The objector and the claimant are two different companies.
 12. Order 22 rule 9(b) of the *Civil Procedure Rules*, in making application for attachment, the respondents should have sought to attach the evidence of the property ownership of the judgment-creditor to show the interest they have in the objector's property. The objector and the claimant are two different companies and the respondents in reply have attached a document of transfer which is true but they failed to disclose that the same property was transferred on September 19, 2009 to the objector. No current search of the property has been undertaken and the allegations that the objector cannot be traced at the Companies Registry is because the CR12 is issued to show who the legal owners are. The Business Registration Service show the objector is a foreign company registered in Kenya as such and the current owner of the subject property and not the claimant.



13. The respondents submitted that the objector has not objected to the attachments to his affidavit to show that the claimant has been paying land rates annually to Mombasa County Government. The property was transferred on October 14, 2009 to the claimant and the alleged transfer on November 19, 2009 a month later is without evidence as the objector has not filed any ownership documents. At the time the claimant filed this claim, the objector's advocate Nyiha Mukoma was one of the directors and a list thereof of October 17, 2006 has been filed as evidence there is no change of ownership based on the fact that claimant has been paying land rates and the two entities are linked and the application stopping sale of the subject property should be dismissed with costs.

Determination

14. At the core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment, there was a legal or equitable interest in the property attached. For this purpose, an objector must demonstrate that unlike the judgment – debtor who has a decree to settle, the property set out to be applied in execution of such decree belong to the objector. There must be beneficial interest in the property. In *Stephen Kiprotich Koech v Edwin K Barchilei; Joel Sitienei (Objector)* [2019] eKLR 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 judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
- (2) that the objector holds that property on his own account.

15. The rationale is Order 22 rule 51(1) of the *Civil Procedure Rules* which provides that;

Any person claiming to be entitled to or to 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 parties to the decree-holder, of his objection to the attachment of such property.

16. The respondents response is that the claimant has been paying land rates on the subject property. But, payment of land rates is not sufficient interest to confer ownership.
17. The objector has filed a long record of change of ownership of Land Title Mombasa County Number 1546 (plot No 1541 and 1544 Nyalı Mombasa) starting from the record of September 25, 1968, change to the claimant on October 15, 2009 and finally the change to the objector a month later on November 19, 2009.
18. Effectively, when the claimant filed this claim on April 3, 2017, property rights in land Mombasa County Number 1546 was in favour of the objector. There is no evidence of this property reverting back to the claimant. This cannot form part of the assets or property to be applied in execution of the decree herein. The fact that the respondents could not find the registration details at the Companies Registry is not sufficient cause to proceed and issue notice of sale in execution of the decree herein.
19. Section 44 of the *Civil Procedure Act* only allow the attachment of the judgment debtor to be attached in execution of the court decree;

44.



- (1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree: ...
20. The evidence by the objector that on November 19, 2009 the claimant transferred its interest in land and property held in Mombasa County Number 1546, original title Number 1541 and 1544 is with evidence and such property cannot be applied to settle the claimant's decree herein.
21. Accordingly, application by the objector dated May 26, 2023 is found with merit and the orders issued on 18 May, 2023 hereby discharged against objector's property in Mombasa County Number 1546 (Original title Number 1541 and 1544). For these proceedings, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

