



**Maingi v Sen-Tech Limited; KHS East Africa (Objector) (Cause
1710 of 2013) [2022] KEELRC 1654 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1710 OF 2013
MA ONYANGO, J
MAY 12, 2022**

BETWEEN

JERUSHA NYAMBURA MAINGI CLAIMANT

AND

SEN-TECH LIMITED RESPONDENT

AND

KHS EAST AFRICA OBJECTOR

RULING

Introduction

1. Judgment in this case was delivered on December 7, 2018 and a decree in respect thereof was issued on July 22, 2019. Thereafter, the claimant commenced the execution process.
2. On July 26, 2019, a warrant of sale of property in execution of decree for money was issued to I.G Ringeria T/A Viewline Auctioneers for the sum of Kshs.1,351,838.87/-. On July 29, 2019, the auctioneer proceeded to the Objector's premises to execute the aforesaid decree via the warrant of sale.
3. KHS East Africa, the Objector herein, filed a Notice of Objection dated August 1, 2019 stating that it claims legal and beneficial ownership wholly in all the movable property proclaimed by Messrs Viewline Auctioneers as per the Proclamation of Attachment dated July 29, 2019. That KHS Africa has never been a party to this case, is unaware of any sums due from itself to the Claimant and has not in any way transacted with the claimant so as to warrant any debt arising necessitating the cause of action and suit herein.
4. The objector continues, that it is distinct and independent from the defendant (original respondent) herein. Shortly after, the Objector filed a chamber summons dated August 5, 2019 seeking the following orders:



- i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to grant an interim stay of execution of the decree dated December 7, 2018 and/or the Warrant of Sale dated July 26, 2019 as against the Objector pending the hearing and determination of the Objector's Application for Review of the Ruling of this court of August 2, 2019.
 - iv. Costs of the Application.
5. The application is supported by the affidavit of Denise Schneider Walimohamed, a Director of the Objector and further based inter alia on the grounds that:
 - i. The movable property in respect of which the Proclamation of attachment has been issued by the claimant's Auctioneers are wholly owned, legally and beneficially by the Objector
 - ii. The Objector was never a party to the present suit
 - iii. The Objector has never had any legal relationship or otherwise with the Claimant and was never an employee
 - iv. The Objector is an independent and separate legal entity from the defendant and has no relationship in any shape, form or manner
 - v. No prejudice will be occasioned on any party if the Application is allowed and the suit heard on merit
 - vi. Unless the orders herein are granted, the Objector stands to suffer greatly as its business operations will be stalled
 - vii. The application has been made in good faith.
6. The gist of the supporting affidavit is that both the Judgment and warrant of sale state that the Judgment Debtor is the defendant and does not mention the Objector. The deponent reiterates that it is an independent and separate legal entity. That while it acquired the defendant's assets in 2013, the objector has never had any legal relationship with the claimant nor has it ever been its associate or group member.
7. The objector asserts that while the defendant was solely owned by a Mr. Wilfried Sauerland as evidenced by the Agreement of Sale of Assets, Mr. Sauerland is neither a Director nor shareholder of the Objector as evidenced by the annexed CR12.
8. It is deposed that as per item 2 of the said sale agreement, the defendant retained assets such as Ir no.1870/01/210 demonstrating that the defendant and objector remained separate entities. That in fact, the objector did not assume all the defendant's liabilities particularly liabilities concerning the defendant's current and former employees, including the claimant.
9. It is deposed further that the moveable property attached via the proclamation of attachment dated July 29, 2019 legally and beneficially belongs to the objector and was at all material times located at the objector's premises, at Karen off Ngong Road where in the objector's estimation, they were unlawfully attached by the Auctioneers.
10. The deponent concluded, that neither the claimant nor the defendant has any interest or rights over the objector's property or assets hence the purported attachment of the objector's moveable property



is ill advised, malicious and lacking in legal basis. That the claimant is attempting to illegally pierce the corporate veil without the requisite application.

11. The Decree Holder vehemently opposed the application vide a replying and further affidavit sworn by herself on September 23, 2019 and 22nd November 2021 respectively. She deems the application to be an abuse of court process and an attempt to circumvent the law and deny her the fruits of her Judgment as the Judgment Debtor and Objector are one and the same entity.
12. That the objector took over the Defendant vide an agreement dated June 24, 2013 signed by the objector's deponent; Denise Schneider Walimohamed and that the Objector and defendant bear the same letterhead. Moreover, the Objector's application has been filed by the same counsel as the Defendant's Advocates Daly and Inamdar Advocates, formerly Daly and Figgis Advocates.
13. The claimant/decree holder opines that the objector is trying to scapegoat the defendant yet they have the same representation. She urges the court to dismiss the application with costs.

Analysis and Determination

14. Having carefully considered the Notice of Objection, the Application, together with its supporting affidavit, the replying and further affidavits and the attached documents presented by both parties, the issues for determination are:
 - i. Whether the Objector has proved that the goods proclaimed in execution of the decree herein belong to it or the Judgment Debtor;
 - ii. Whether the notice of objection dated August 1, 2019 and the application dated August 5, 2019 are merited.
15. The statutory underpinning of an objection to attachment is Order 22 Rule 51(1) of the *Civil Procedure Rules* which provides as follows:

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 the parties and to the decree-holder of his objection to the attachment of such property.
16. The Notice of Objection itself is premised on Order 22 Rule 53 which states as follows:

Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.
17. It is trite law that he who alleges must prove. In the case of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* [1993] eKLR the Court expressed itself thus:

“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."
18. In the case of *Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR the court held as follows:
- “The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to 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?”
19. The conduct of the objector and the defendant before it comes into question. Of note is that in its Judgment, the court highlighted the fact that the respondent filed its Memorandum of Defence to the claim on February 4, 2014; participated in the claimant’s case on October 7, 2015 but did not appear in court on April 19, 2018 for defence hearing nor did it file submissions as directed by the court.
20. Currently, the Objector being the applicant in this case has filed an application without supporting documents. The Agreement of Sale purportedly demonstrating acquisition of the original respondent’s assets by the objector and the CR 12 evidencing company shareholding have not been annexed to the Supporting affidavit to the application. Presently, there are no submissions on record from both the applicant and the decree holder despite the parties electing to dispense with the application by way of written submissions as intimated on November 7, 2019.
21. The claimant/decreed holder on the other hand has produced a letter addressed to its clients dated June 24, 2013 in which the objector states as follows:
- “It is our goal to build up strong lasting relationships with our clients and hence we are pleased to inform you that the management team, sales team and an extensive service team at SEN-TECH Ltd has joined KHS East Africa Ltd and they will remain at your service.”
22. From the above pronouncement which remains uncontroverted, it is unclear whether the objector and defendant have merged into a new company, whether it is a joint venture or a member of the same group of companies. Either way, the onus of illuminating the nature of the resultant entity lay with the objector for the court to determine whether the objector inherited the original respondent’s liabilities or not; just as it did regarding its assets. Moreover, the turquand rule comes into play. In consideration of the circumstances of this case, the decree holder does not need to have in depth knowledge of the inner workings of the objector/judgment debtor so as to realize the fruits of her judgment.
23. In light of the foregoing, I find the notice of objection dated August 1, 2019 and its corresponding chamber summons dated August 5, 2019 without merit and are accordingly dismissed with costs to the claimant/decreed holder and execution allowed to proceed forthwith.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MAY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

