



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 569 OF 2015

GABRIEL KAHINDI KENGA.....CLAIMANT

VERSUS

ANGLO DANISH (FOODS) LIMITED.....RESPONDENT

COAST ANGLO MEATS LIMITED.....OBJECTOR

(Before Hon. Justice Byram Ongaya on Friday 5th March, 2021)

RULING

The Objector Coast Anglo Meats Limited filed a notice of objection under Order 22 Rule 51 of the Civil Procedure Rules and through Moses Mwakisha & Company Advocates. The objector objected to attachment placed upon its office furniture, equipment and motor vehicles on the ground that the attached goods are the property of the objector and the respondent (judgment debtor herein) have no interest in the said goods. The objector also filed a notice of motion said to be under Sections 1A, 3A, and Order 22 Rule 51 of the Civil Procedure Act. The substantive prayer is for an order that the attachment levied by M/S Beyond Auctioneers upon the objector's goods be lifted as the goods attached pertain to the objector and not the respondent (judgment debtor); and that costs of the application be provided for.

The application is based on the supporting affidavit of Fatma Mohamed Sabur attached on the notice of motion and the exhibits thereto. The objector's case is urged as follows:

- a) That the goods attached within the butchery and premises of Coast Anglo Meats Limited belong to the objector.
- b) The respondent being the judgment debtor has no attachable interest in the attached goods.
- c) The objector is a limited company per the certificate of incorporation marked FMS 1 issued in February 2001 and the respondent is a separate limited company per the certificate of incorporation marked FMS 2 issued on 07.02.2006.
- d) The auctioneers attached the objector's machines and equipment at the objector's business premises being plot No. Mombasa/Block MN/1/4864 C-7 at Ratna Square Mombasa. The attached machines and equipment are the objector's tools of trade as set out in the proclamation. The objector has taken out the business permit being exhibit FMS 5.
- e) The orders as prayed for be allowed to enable the objector to continue in business because the judgment debtor has no attachable interest in the proclaimed machines and equipment.

The claimant (decree holder) filed a replying affidavit on 03.07.2020 through Muneo Katu & Associates Company Advocates. The claimant's case is as follows:

- a) M/S Beyond Auctioneers was issued with warrants of attachment and sale of properties of the respondent (judgment debtor) herein as per exhibit APP1. The warrants were issued on 09.06.2020 and on the same date the auctioneers proclaimed and took inventory of the property belonging to the judgment debtor and notified the respondent's counsel per exhibit APP2. That at the time of proclamation the premises were clearly marked with the respondent's logo. At the time of proclamation, the respondent never objected to the proclamation. On 22.06.2020 the auctioneer visited the premises and found that the premises and doors of the respondent had been changed to the objector's name. The occupants of the premises then negotiated with the auctioneer agreeing to pay Kshs. 200,000.00 by 27.06.2020 and a cheque for that sum dated 27.06.2020 for Kshs. 200, 000.00 as the first instalment was issued per exhibit APP 3.

b) The respondent and objector companies have a shared Director Fatuma Mohammed Sabur who swore an affidavit to support the objection application herein and as per the official search at the Companies Registry marked APP 4.

c) The objector's application is a delay of the claimant's justice.

The Court has considered the parties' respective positions and submissions and makes findings as follows:

1) The evidence is that the respondent (judgment debtor) and the objector are separate legal entities. Even if the companies enjoy shared director or directors, the Court returns that they remain separate legal persons as submitted for the objector. Accordingly, in absence of any other material, the Court returns that the objector cannot be held liable for the respondent's debt as flowing from the decree herein.

2) The Court has considered the inventory of the equipment and machines as proclaimed and finds that the objector has failed to provide reasonable evidence to show that the equipment and the machines belonged to the objector. The Court finds that the single business permit exhibited does not establish or show that the goods proclaimed from the premises belonged to the objector, and, not the respondent in the suit. The Court further finds that there is no reason to doubt the account made for the claimant that as at the time of proclamation the premises were clearly marked with the respondent's logo and, the respondent never objected to the proclamation.

3) The Court has considered the cheque of Kshs. 200,000 issued in part settlement of the decree at the time of proclamation and the Court finds that the same confirms that the proclaimed goods belonged to the respondent who opted to negotiate with the auctioneers. The objector does not deny the claimant's case that the cheque was issued and the respondent reneged to pay the agreed instalments.

4) The objector and the respondent enjoy shared directors and taking the evidence and circumstances into account, the Court returns that the attached equipment and machines belonged to the respondent and in view of the cheque of Kshs. 200,000 in part settlement of the judgment debt, the proclamation and attachment was clearly levied against the respondent's goods and as submitted for the claimant the objection proceedings were calculated to unfairly delay the satisfaction of the decree. The Court follows holding by Koome J in **Chart Engineering Enterprises Ltd –Versus- Attracting Supplies Ltd [2009]eKLR** citing Warsame J in **Miema Enterprises Ltd –Versus- Njoka Tanners Ltd [2007]eKLR** thus, **“It is my firm decision that the 2nd objector is using the Company's Act as an instrument to commit fraud and more so to run away from its obligation towards creditors. I think it is right to say that the Directors of the Defendant Company and the 2nd Objector are one and the same. They are using the legal protection given to them under the statute to defraud creditors by engaging in multiple companies. In the premises the objection of the 2nd objector is dismissed with costs.”** As submitted for the claimant, in the instant case, Fatma Mohamed Sabur is a director for both the respondent and for the objector and the Court has found that upon proclamation and attachment of the goods the respondent (judgment debtor) offered to pay the judgment debt by negotiated instalment so that there is no established ground to doubt that the goods belonged to the respondent in the suit and who is related to the objector by way of the shared directors.

5) In conclusion, the Court considers that the objector's application is liable to dismissal. The objection proceedings and application dated 24.06.2020 is hereby dismissed with costs.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 5th March, 2021.

BYRAM ONGAYA

JUDGE