



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 156 OF 2015

THE RESEARCH FOUNDATION OF KENYA.....CLAIMANT

VERSUS

DR. PATRISIO NJIRU NJERU.....RESPONDENT

AND

STEPHEN NJERU CHIENGO.....OBJECTOR/APPLICANT

RULING

1. This ruling is in respect of the Objector/applicant application dated 26th October, 2020 filed under certificate of urgency on 27th October, 2020 via the firm of Maina & Maina advocates seeking the following orders;

1. That this Honourable court be pleased to lift the attachment of any movable assets belonging to the objector/ applicant herein and situated on his property and in particular goods listed in the proclamation notice dated 30th September, 2020 pursuant to a warrants of attachment dated 6th July, 2020 issued in execution of the decree herein.

2. That the costs of this application be awarded to the objector.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by **Mr. Stephen Njeru Chiengo** on 26th October, 2020 on the following grounds: -

a. That on 30th September, 2020, Hegeons Auctioneers visited his residence in Ngunyumu village, Kathera sub-location, Kiang'ombe location, Mbeere North Sub-county in Embu County and served him with a proclamation notice dated 30th September, 2020. He annexed the proclamation notice as annexure MM-1.

b. The said household goods together with 4 cows were proclaimed in alleged satisfaction of a decree of this court in this matter against the respondent, judgement debtor.

c. That the Objector is the beneficial and or legal owner of the household goods and the 4 cows listed in the proclamation notice date 30th September 2020.

d. That the objector is not an agent, employee or servant of the respondent and does not hold the goods listed in the proclamation notice on behalf of the respondent.

e. That the warrants of attachment were issued on 6th July, 2020 and the proclaimed good are due for attachment by Hegeons auctioneers on behalf of the claimant. Copy of the warrants of attachment are marked as annexure MM-2.

f. That the goods due for sale are wholly owned by the objector/ Applicant and not the respondent as alleged by the auctioneers.

g. That the objector stands to suffer loss and prejudice if the auctioneers herein are not stopped by an Order of this Honourable Court.

3. In opposing the application, the claimant, through its legal officer Ms. Patricia Ngutu, swore a replying affidavit dated and filed in this

Court on 13th November, 2020 on the following grounds;

a. The Respondent deponed that, the claim that the objector owns either beneficial or otherwise the goods proclaimed is not true as the household goods together with the cows listed on the proclamation notice were duly identified as the respondent's properties in his village in Kathare sub location. He therefore deponed that the application was a ploy by the defendant and the objector to deny him the fruits of his judgment.

b. It was further stated that, the objector has not submitted any iota of evidence in support of his claim of ownership as he alleges over the proclaimed properties.

c. It is the claimant's case that, the respondent acknowledged ownership of the goods listed therein during proclamation and requested the auctioneer, **Hezron Getuma Onsongo**, to hold off the sale and promised to settle the decretal sum which is still accruing interest and now stands at Kshs.15, 082, 225/-

d. It is averred that, the objector is employing delay tactic and that the firm of advocates that represented the Respondent is similar to the one that represents the objector/ Applicant as such the Claimant is apprehensive that the Objector/applicant and the respondent are working in cahoots to defeat him from enjoying the fruits of his judgment.

e. It was further stated that, in as much as the objector has denied being an employee, servant or agent of the respondent he has conveniently declined to state the relationship between them thus raising questions as to their relationship. He therefore urged this court to dismiss this application with costs.

4. The parties herein agreed to canvass this application by way of written submission with the objector/ applicant filing his on 9th March, 2021 and the claimant filed on 31st March, 2021.

Objector/ Applicant's submissions.

5. The objector submitted that it is independent from the respondent and he does not own any of the goods proclaimed in trust for the respondent. He argued that even though the respondent enjoys a father/son relationship they do not live in the same compound neither do they own the proclaimed goods in common. He argued that, the burden of proof is with the claimant to prove that the objector does not own the goods proclaimed as alleged. He relied on the case of **Patrick Kingori Warugongo –versus- James Nderitu & another [2014 eklr**, which court was succinct thus; -

“...therefore the fact that the attachment machinery was in the premises of the 2nd Respondent did not rebut the objectors interest (legal or equitable) on the said items and having established then the burden thereafter shifted to the 1st Respondent to establish that the goods belonged to the 2nd Respondent and not the Objector which it failed to do.”

6. It is submitted that the Claimant, has in his replying affidavit, indicated that the goods were identified to be owned by the respondent but the claimant did not disclose the person who pointed out the goods neither has the auctioneer sworn an affidavit to affirm that he served the said proclamation notice to the respondent as alleged. He thus urged this court to treat the said averments as hearsay and strike the same out. To buttress his argument, the objector relied on the case of **Kenya Commercial Bank Limited –versus- Thomas Wandera Oyalo [2005] eklr** where the court stated that;

“It is hearsay and inadmissible when the objector of the evidence is to establish the truth of what is contained in the statement.”

7. He further relied on the case of **clement Kungu Waibara –versus- Annie Wanjiku Kibe & Another [2017] eklr** where the court held that;

“Hearsay is an out of court statement, made in court by a person based, not on what they know themselves but what they have heard from others to prove the truth of the matter asserted. A statement is, hearsay evidence, if offered to prove the truth of the matter stated.”

8. It was submitted that the claimant has not produced any evidence to demonstrate that he served the proclamation notice upon the respondent as alleged as such the objector argues that in absence of such evidence then the proclamation process is null and void. Further that the auctioneer who purported to have served the proclamation notice has not adduced evidence to confirm that he was licensed to levy execution as mandated by section 20(1)(b) of the Auctioneers Act no. 5 of 1996 and rule 3(1) of the auctioneers Rules 1997.

9 The objector also submitted that, the auctioneers who carried out the proclamation of his goods failed to give proper and ascertainable description of goods proclaimed as expressed under rule 11 (1)(a) of the auctioneers rules 1997.

10. He thus urged this court to allow the application as prayed.

Claimant/ Respondent's Submissions.

11. The Claimant submitted that, the objector has not attached any evidence to demonstrate that the goods attached belong to him therefore failed to satisfy the mandatory provisions of Order 22 Rule 51 of the Civil Procedure Rules. He reinforced his argument by citing the case of

precast portal structures –versus- Kenya pencil company ltd & 2 others [1993] eKLR where 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.

But where the Court is satisfied that the property was, at the time of attachment, held by the judgment – debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-debtor, or that ownership has changed whereby the judgment – debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the Court shall dismiss the objection. The Court takes into account the grounds of objections raised, and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.”

12. The claimant/Respondent submitted that it is the duty of the objector to demonstrate that he has an ascertainable interest in the attached property and he must demonstrate so by attaching the relevant document and receipt if any as seen in the case of **Stephen Kiprotich Koech –versus- Edwin K. Barchilei; Joel Sitienei(Objector) [2019] eKLR** which court held that;

“Has the objector established a legal or equitable interest in the whole or part of any property attached in execution of the decree herein as submitted by the claimant in the case of Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR where 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?

....

The objector has not demonstrated any direct, indirect or remote relation with the attached properties to justify the objection proceedings herein. The averments in the affidavit and in the application are bare.”

13. He also relied on the case of **Mercy Njambi –versus- Othaya Villas Co Limited & another [2020] eKLR** where the Court while dismissing a similar application held that;

“Accordingly, without any documentary evidence to prove ownership or beneficial interest in the attached goods, the objector’s case lacks any legs to stand on and as such it must collapse. Whereas the place where the proclaimed goods were found by the Auctioneer during the proclamation is quite material in determining whether the goods belong to the Objector, in this case the Objector has failed to prove by documents or otherwise, that the proclaimed goods were in her premises and not in the respondent’s premises.”

14. Accordingly, the claimant submitted that, on this limb alone, the objector’s application must fail and the warrant of attachment and the proclamation be allowed to run their full course.

15. On the allegation that the proclamation Notice dated 30th September, 2020 offends the provisions of section 20 of the auctioneers Act, the claimant submitted that the issue raised herein was not pleaded by the objector in his application and therefore urged this court to disregard that line of submissions. Nevertheless, he submitted that the proclamation Notice clearly indicated that the auctioneers are a ‘class B’ firm of auctioneers and the burden thus shifted to the objector who questions the same.

16. The claimant submitted that, the admission by the objector that he enjoys father-son relationship is an indication that they are working in cahoots to frustrate him from enjoying his fruits of judgement and reinforced this by citing the case of **Paul Otieno T/a Paul Mungla & Co advocates –versus- Anne Achieng Ajanja [2015] eKLR** where the court held that;

“From the decree holder’s replying affidavit at paragraph’s 9,10, which depositions have not been controverted in any way by the objector, I am persuaded that the objector and her mother the judgment debtor are well known to the decree holder and that the objection proceedings herein are a red herring and a smoke screen intended to deceive this court to aid the judgment debtor escape justice at that. For those reasons, I dismiss the objector’s Notice of Motion dated 24th March, 2014 and order her to pay to the decree holder costs of the objection proceedings for allowing herself to be used by her less than candid mother to steal a match on the decree holder.”

17. He thus implores upon this court to dismiss the objector’s application with costs to him.

18. I have examined the averments of the parties herein. The objector raised an objection that the attached goods belong to him and not to the respondent. Order 51 Rule 1, 2 & 3 of the Civil Procedure Rules states as follows;

51. Objection to attachment [Order 22, rule 51.]

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

19. The operation part of this order is that the objector is obligated through a supporting affidavit to set out in brief the nature of his claim.

20. The nature of this brief is my view would include a demonstration that the attached goods belong to him by submission of say purchase, receipts, title deed, lease agreement e.t.c.

21. In the affidavit attached by the objector, he only avers that the attached goods are his and not produced evidence to demonstrate why the goods are his.

22. As held in **Precast Portal Structures Vs Kenya Pencil Company Limited and 2 others (1993) eKLR**, the burden of establishing the attached goods belong to the objector. Lies on the objector.

23. I find that the objector herein failed to establish ownership of the attached goods and therefore the objection fails.

24. I allow execution to proceed, costs to the claimant.

Ruling delivered virtually this 27TH day of MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mwita for the claimant - present

Mana for the Respondent – absent

Court Assistant - Fred