



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1123 OF 2016

JAMAL OMONDI FREDRICK.....CLAIMANT

VERSUS

THE ARENA LIMITED.....RESPONDENT

AND

SEALINK HOLDINGS LIMITED.....OBJECTOR

RULING

The objector, Sealink Holdings Limited filed application dated 3rd March, 2021 under the provisions section 1A, 1B, and 3A of the Civil Procedure Act, section 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 22 Rule 51 and 52 and Order 51 rule 1 of the Civil Procedure Rules and seeking for orders that;

- a) an order of stay does issue against the execution of the decree dated 7th December, 2020 pending hearing and determination of this application.*
- b) This court does issue a declaration to the effect that the proclamation by Ballon Nagacama trading as Hebros Auctioneers on 5th February, 2021 is unprocedural and unlawful.*
- c) This court be pleased to lift the proclamation on the objector's goods herein as against the objectors.*

The application is supported by the affidavit of Rasinkkumar Daihyabhai Patel and on the grounds that the objector is the landlord over all that property known as Elgon Place Upper Hill Nairobi and all buildings and improvements thereon. On 5th February, 2021, Ballon Nagacama trading as Hebros Auctioneers visited Elgon Place and attempted to proclaim objector's goods namely gym equipment, office chair and office desk, despite finding no one or the judgement debtor at the premises.

Mr Patel avers in his affidavit that the proclamation against the objector's goods is unprocedural for the reasons that the auctioneers did not access the premises and therefore filled out the proclamation notices on information fed to them by persons manning the gate contrary to the Auctioneers Rules. No proclamation notices were served as the respondent was not in the premises. The items allegedly proclaimed belong to the objector and have been rented out to the Judiciary of Kenya. There is no legal entity known as Arena Limited at the premises

Mr Patel also avers that the proclamation is defective as it fails to disclose the value of the items attached. The respondent as the judgement debtor has no full, legal or equitable interest in the proclaimed goods and if allowed to cart them off, the objector will be deprived of its legal property without being given a hearing.

In reply, the claimant filed his Replying Affidavit and avers that the objector's application is in abuse of court process and aimed at evading settlement of the decretal sum and taken to defeat justice. The objector has not established by any evidence that at the date of attachment it had legal or equitable interest in the attached property, some interest or legal title. The Auctioneers issued notice and served upon the respondent contrary to what the objector has averred and the application before court should be dismissed with costs.

Ballon Wanjala Nangalama also filed his Supporting Affidavit and avers that he is a licenced auctioneer under the name of Hebros auctioneers and he received warrants of attachment from the claimant's advocates and proceeded to Elgon Place Masaba Road, Nairobi and served a 7 days' notice and then proceeded at the venue to attach the proclaimed goods when the respondent denied them entity. He proceeded and made application to the court seeking assistance of the police to be escorted to the premises and attach all the proclaimed goods to recover the outstanding grant arrears and his charges.

Parties agreed and filed written submissions.

The objector submitted that the proclamation by the auctioneers over its property is unlawful and unprocedural contrary to Auctioneers Rule 12 as they have not indicated the value of the good attached as held in the case of **African Merchant Assurance Co. Ltd v Hezron Getuma Onsongo [2019] eKLR** and **Lakeland Motors Limited v Harbhajan Singh Sembi [1998] eKLR**. The auctioneers proclaimed various moveable properties of assorted gym equipment, office desk and chairs without stating the value which is irregular.

The objector also submitted that the proclamation on its goods should be lifted for being unlawful and there is no legal entity known as Arena Limited in the premises of Elgon Place. There is no affidavit by the auctioneers stating the place where the proclaimed goods are or its ownership as held in the case of **Mwaniki Gitau & Co. Advocates v Esther Wambui Njoroge; Kambusu Ole Oakine (Objector) [2020] eKLR**.

The claimant submitted that by a consent judgement herein, the respondent agreed to pay the claimant Ksh.250, 000 but has refused to pay leading to execution proceeding. The claimant instructed Hebros Auctioneers and who served notice upon the respondent and upon which movable goods were proclaimed save the objector has moved the court to stop the process.

The claimant submitted that the objector has failed to prove ownership of the proclaimed goods. In the case of **akiba Bank Limited v Jetha & Sons Limited [2005] eKLR** the court held that for an objector to succeed he must exhibit his legal or equitable interest in whole or part of any property attached in execution of a decree. Therefore an objector who claims that the attached good belong to him and not the judgement-debtor must discharge the evidential burden placed upon him by Order 22 Rule 51(1) of the Civil Procedure Rules as held in **Peter K Ayiro v Mash Bus Services Limited & another [2015] eKLR**.

The objector in the Supporting Affidavit of Mr Patel avers that he is the landlord of Elgon Place but without any evidence. On the proclaimed goods, no title or ownership in full or in part has been claimed or established and the application is made to defeat justice and should be dismissed with costs.

Determination

The twin issues for determination herein are whether there should be stay of execution of the decree dated 7th December, 2020 and whether the proclamation dated 5th February, 2021 is unprocedural and unlawful and therefore be lifted.

At the core of objector proceedings is Order 22 Rule 51 and which requires an applicant to demonstrate that the attached property in execution has the legal title or equitable interest in whole or in part held by such party;

(1) 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.

Mr Patel, in support of the objector's application avers that the objector is the landlord over all that property known as Elgon Place, Upper Hill Nairobi with all building and improvements thereon.

In his affidavit, Ballon Wanjala, the auctioneers under the name of Hebros Auctioneers avers that he proceeded to Elgon Masaba Road, Nairobi and served proclamation notice to the respondent. He then proceeded to the premises with a view to attach the proclaimed goods and was denied entry when he moved the court seeking to be assisted by the police into the respondent's premises along Masaba Road, Nairobi.

On these averments, save to claim that the attached goods are without value and are attached without proper procedure, the objector does not claim legal or equitable interest in whole or in part. Upon seeking joinder as an objector to the execution of the decree herein, the onus rests of such party to prove legal or equitable interest.

In the case of **Chotabhai M. Patel v Chaprabhi Patel [1958] EA** it was held that;

b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.

c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.

d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.

The objector has heavily relied on the case of **African Merchant Assurance Co. Ltd v Hezron Getuma Onsongo [2019] eKLR** and **Lakeland Motors Limited v Harbhajan Singh Sembi [1998] eKLR**, save this appeal has a different and separate foundation from the instant suit.

The objector also relied on the case of **Mwaniki Gitau & Co. Advocates v Esther Wambui Njoro & another [2020] eKLR**, with respect; such proceedings have a different foundation from matters herein. In the miscellaneous proceedings cited, the parties therein, the respondent and judgement debtor were both tenants in the same building and the auctioneers did not clear whose property had been attached.

In this case, save to claim that the objector is the landlord, the auctioneers has specified the attached property belongs to the respondent. There is no evidence produced by the objector that there is any legal title of equitable interests over any of the proclaimed goods.

The auctioneer has sworn an affidavit to support the fact of the goods and property proclaimed as those of the respondent. Such facts have not been challenged.

Evidence of ownership by an objector is imperative. Such should be followed with possession and interest making the question of legal right and title relevant. These elements are lacking in this instance.

In this case, without any record and evidence of legal right and title over the proclaimed goods/properties in execution of the decree herein against the respondent, the objector application herein is found without merit.

Accordingly, application dated 3rd March, 2021 is hereby dismissed. Execution of the decree shall proceed. The objector shall pay the claimant costs herein.

DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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