



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1739 OF 2013

MERCY NJAMBI.....CLAIMANT/1<sup>ST</sup> RESPONDENT

VERSUS

OTHAYA VILLAS CO. LIMITED.....2<sup>ND</sup> RESPONDENT

LIMURU HILLS..... OBJECTOR/APPLICANT

RULING

#### **Introduction**

1. The Application before this Court is the Notice of Motion dated 3.7.2019. It is brought under Article 50 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A & 3B of the Civil Procedure Act, Order 10 Rule 11, Order 40 Rule 1 & Order 51 of the Civil Procedure Rules, 2010 and seeks the following Orders:

- a) **THAT** this Application be certified as urgent and in view of the urgency thereof service in the first instance be dispensed with.
- b) **THAT** this Honourable Court be pleased to issue orders restraining the Respondent or their agents from attaching and/or selling the Applicant's property listed under the proclamation notice dated 21.6.2019 or any other of the Applicant's property pending the hearing and determination of this Application.
- c) **THAT** this Honourable Court do issue an Order of stay of execution of the warrants of attachment thus restraining any further proclamation, attachment or sale of the Applicant's property pending hearing and determination of this Application.
- d) **THAT** the Respondents be permanently restrained from further proclaiming the Applicant's property.
- e) **THAT** costs of this Application be borne by the Plaintiff/Respondent herein.

2. The Application is premised on the grounds as set out on the body of the Motion and amplified in the Supporting and Further Affidavit of the Applicant's Managing Director Mr. Kirit Kanabar. In brief, the Applicant contends that the property listed in the proclamation notice dated 21.6.2019 belong to it and not the Judgment Debtor; that she is a separate entity from the Respondent/Judgment Debtor herein and therefore her properties should not be attached and sold to recover the debt owed by the Judgment Debtor/Respondent; that the proclaimed properties are her tools of trade as they are office furniture and that should the intended sale proceed she will suffer irreparable harm. She further contended that it is impossible for her to prove ownership as the goods listed in the proclamation notice are not specified, and the Motor Vehicles listed in the notice do not bear registration numbers to enable her verify whether the vehicle intended for the proclamation belong to her. Therefore, she urged this Honourable Court to allow her Application as prayed.

3. The Claimant filed a Replying Affidavit on 3.10.2019, to oppose the application. In brief she averred that the Application lacks merits but is frivolous and an abuse of the Court process as it is only meant to deny her from enjoying the fruits of the Judgment entered in her favour; that the objector has failed to demonstrate and/or produce any evidence to support her assertion that the proclaimed goods belonged to her; that the Objector and the 2<sup>nd</sup> Respondent are one and the same entity and that the Objector has always been aware of the proceedings in this matter. She, therefore urged this Honourable Court to dismiss the Application with costs.

#### **Submissions by the Parties**

4. The Objector submitted that the proclamation was not properly done and that the same cannot proceed as the proclaimed goods belonged

to her and not the respondent. She further submitted that failure to prove ownership was due to the fact that the proclamation was not properly done as it failed to indicate the registration number of the proclaimed Motor Vehicle. She further submitted that the other goods proclaimed are office furniture which were found at her premises and that the Auctioneer failed to confirm ownership before proceeding to proclaim. To buttress this argument, the Applicant cited the case of **Precast Portal Structures Vs Kenya Pencil Company Limited (1993) eKLR** and urged this Honourable Court to allow her Application as prayed to avert the unfair attachment and disposal of her property.

5. On the other hand, the Claimant submitted that the instant Application is frivolous and an abuse to the Court process as the Applicant has made reference to the wrong provisions of the law. She maintains that the error cannot be cured and therefore urged this Honourable Court to dismiss the same with costs. For emphasis, she relied on the case of **Stanley Ng'ethe Kinyanjui Vs Tony Ketter & 5 Others (2015) eKLR**.

6. The Claimant further submitted that the parties as prescribed in the notice of proclamation are the correct parties and that the objector's name does not appear anywhere in the proclamation. She further submitted that the Applicant has not availed any proof of ownership of the proclaimed goods. For emphasis the Claimant relied on the case of **Arun C. Sharma Vs Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others (2014) eKLR** where the Court held that an Objector bears the burden of proving that he is entitled to or has legal or equitable interest in the whole or part of the attached property. She, therefore, prayed for the Application to be dismissed with costs.

#### **Analysis of the issues raised**

7. After careful consideration of the application, affidavits in this matter, the submissions by the parties and the authorities relied upon, there is no dispute that the respondent has failed to settle the decree of this Honourable Court forcing the Claimant/Decree Holder to proceed with the process of execution of the decree for purposes of satisfaction of the decree. The only issue for determination is whether the Objection by the applicant meets the threshold for lifting the impugned attachment.

8. The threshold for lifting attachment pursuant to objection proceedings is set out under Order 22 rule 51(1) of the Civil Procedure Rules as follows: -

*“Any person claiming to be entitled to or to have 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 the 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.*

9. In **Precast Portal Structures Vs Kenya Pencil Company Limited (1993) 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 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.**

10. It is crystal clear from the above provision of the applicable Rule of Procedure and the precedent that threshold for lifting attachment of property in favour of an objector is proof of ownership of the attached property. In this case the Objector/Applicant admitted that it was impossible for her to prove the ownership since the proclamation was not done properly by indicating the registration number of the Motor Vehicles. She produced no documentary evidence to prove ownership of the unspecified vehicles and the other goods she described as tools of trade in her premises. On the other hand, the Claimant maintained that the proclamation was properly done and that the goods proclaimed belong to the Respondent/Judgment Debtor and not the Applicant.

11. I have carefully considered the arguments by the two parties and formed the opinion that the applicant has not met the threshold for granting the orders sought. She has not proved that she is the owner of the motor vehicles and the other goods proclaimed by the auctioneer in execution of the decree herein. The court takes judicial notice that the claimant was formerly employed by the respondent and she was able to point to the auctioneer, the respondent's premises and properties before the attachment.

12. 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.

13. The Court has also noted that the Objector did rebut the allegation that Mr. Kirit Kanabar was addressed an email by the former counsel for the respondent, notifying him of the entry of judgment herein and forwarding a demand for the judgment debt from the claimant's counsel. Although he swore a further affidavit on 11.11.2019, Mr. Kirit Kanabar deliberately failed to respond to the allegation on the said email, which places him, in the management position of the respondent. The said email is a pointer that the objection proceedings brought by the same Mr. Kirit Kanabar are mischievous, frivolous and an abuse of the Court process.

14. In conclusion, I find and hold that the objector has failed to prove legal or equitable right or interest over the proclaimed goods, and consequently, the application dated 3.7.2019 is dismissed with costs.

**Dated, Signed and delivered at Nairobi the 2<sup>nd</sup> day of July 2020.**

**ONESMUS N. MAKAU**

**JUDGE**