



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2126 OF 2014

GORDON OTIENO OMATCH.....CLAIMANT

- VERSUS -

ISMAEL ELISHA ESHIKOTE T/A HIGH CLASS AUCTIONEERS...RESPONDENT

WESTHOUSE HOTEL.....JUDGMENT DEBTOR

WINNIE WAMBUI KARIYU.....1ST OBJECTOR

MERCY MUTHONI KARIYU.....2ND OBJECTOR

TERRY WAMBUKU KARIYU.....3RD OBJECTOR

JEFFERSON MUNGAI KARIYU.....4TH OBJECTOR

RAHAB MWIHAKI KAROKI.....5TH OBJECTOR

(ALL T/A WEST WOOD HOTEL)

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

RULING

The claimant (being the decree holder) filed the suit on 09.12.2014 for unfair termination. The judgment debtor Westhouse Hotel entered appearance and filed defence through Mbuthia Kinyanjui & Company Advocates. On 17.03.2017 Abuodha J awarded the claimant compensation for Kshs. 75, 000.00 plus costs which were taxed at Kshs. 137, 315.00.

The objectors filed on 25.02.2020 an application through Kimandu & Ndegwa Company Advocates. The application was under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 22 rule 51 (1), (2), and (3), rule 52, rule 53 of the Civil Procedure Rules, section 3 and 12 (3) (viii) of the Employment and Labour Relations Court Act and rule 32 of the Employment and Labour Relations (Procedure) Rules 2016 and all other enabling provisions of law. An interim order of stay of execution is in place and the residual prayers are for orders:

- 1) That the Honourable Court to lift, raise and wholly set aside the proclamation of attachment dated 19.02.2020 and attachment of the whole of the properties attached by High Class Auctioneers belonging to the objector herein in execution of the decree against the judgment debtor.
- 2) That a permanent injunction to issue restraining the decree holder either by himself, his agents, servants, employees, assigns, representatives or anyone claiming for or under him from proclaiming, attaching, carting or selling by way of public auction or other way the movable or immovable properties and goods listed in the proclamation in the execution of the decree dated 16.03.2017.
- 3) That the Court be pleased to vary, vacate, review and or set aside its orders given on 26.06.2019 against the objector (West Wood Hotel) in respect of the warrant of attachment made pursuant to the application vide notice of motion dated 05.03.2019.
- 4) That costs of the application be provided for.

The application was based on the annexed supporting affidavit of Mercy Muthoni Kariyu and upon the following grounds:

- a) The objectors are a separate legal entity from the judgment debtor herein, Westhouse Hotel.
- b) The objectors have legal and equitable interest in land L.R No. 1870/1/555 together with the properties therein pursuant to purchase and transfer of the property on 01.08.2019.
- c) The claim herein was filed on 09.12.2014 in a cause of action dated 24,07,2014 against WestHouse Hotel, the judgment debtor which is completely different from the objectors.
- d) In the notice of motion dated 05.03.2019 the claimant, as prayed, misled the Court that the judgment debtor was the objector herein, West Wood Hotel. The Court was further misled that WestHouse Hotel had rebranded to West Wood Hotel. The judgment debtor ceased to operate and own the Hotel in issue following change of ownership of the property on 01.09.2015.
- e) High Class Auctioneers Company Limited has wrongfully obtained an order against the objectors and proceeded to the objectors' premises to proclaim the objectors' goods for a non-existent decretal amount of Kshs. 214, 765.00 plus auctioneer's fees of Kshs.70, 600.00. The proclamation is unlawful and should be set aside and the prayers granted.
- f) The objection notice has been filed in Court.

The objectors have filed the certificate of registration dated 01.09.2011 of business under the name Westhouse – A One Degree South Hotel carried out by one Kibe Muigai Holdings Limited C. 100411. They have also exhibited a certificate of registration dated 25.08.2015 showing that the objectors herein carry on business in the name of West Wood Hotel. The objectors have also exhibited the evidence for purchase of the land on which the hotel is situated showing the purchase was by private treaty around September 2015.

The claimant filed the replying affidavit on 11.03.2020 through Cavin Anyuor Advocate. The claimant stated as follows:

- a) The suit was filed 09.12.2014 and judgment delivered on 17.03.2017 for Kshs. 75, 000.00 plus costa which were taxed at 137, 315.00. There after the respondent was informed about the decretal sum and the costs but failed to satisfy the same.
- b) The objectors at all material times had taken over the management, assets and liabilities of the respondent.
- c) The purported acquisition was on 01.09.2015 while the suit was pending. To challenge the proceedings 5 years later amounts to inexcusable laches.
- d) The claimant learned from his former co-workers that the respondent rebranded itself to the objectors herein. Thus the claimant applied for warrants of attachment to issue in the name of the objectors. The application was served upon the objectors but they failed to attend Court and on 26.06.2019 the orders were granted as had been prayed. The orders were served but the objectors raised no objection. The current application will derail due process as the objectors are misleading the Court.
- e) The objector should pay the Kshs. 214, 765 plus auctioneer's fees of Kshs. 70, 000.00 in issue. Refusal to pay has rendered the claimant destitute. Further Court orders should not issue in vain and the execution proceedings should be allowed to go on.

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

- 1) The objectors by the certificates of registration of business names have established that as per the certificates, the objectors and the respondent in the suit (the judgment debtor) are separate persons in law. While alleging that the judgment debtor rebranded to the objectors, the claimant has failed to establish the same by way of relevant evidence. Thus, by that finding, the Court returns that the objectors have established their claims and prayers as made in the application.
- 2) The objectors have not denied that they were served with the claimant's application of 05.03.2019 and orders flowing thereof given on 26.06.2019 but had failed to oppose the application or respondent to the claimant until the execution proceedings issued. In that regard the Court returns that parties will bear own costs of the objection proceedings.
- 3) The Court has considered the grounds for review in rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 and returns that in view that the objectors are different persons from the judgment debtor, manifest injustice will result if the orders for review as prayed for are not granted. The review will therefore be allowed and orders for execution against the objectors vacated as prayed for.

In conclusion, the application dated 24.02.2020 and filed on 25.02.2020 for the objectors is hereby allowed with orders:

- 1) That the proclamation of attachment dated 19.02.2020 and attachment of the whole of the properties attached by High Class Auctioneers belonging to the objector herein in execution of the decree against the judgment debtor is hereby set aside or lifted.
- 2) That a permanent injunction is hereby issued restraining the decree holder either by himself, his agents, servants, employees, assigns, representatives or anyone claiming for or under him from proclaiming, attaching, carting or selling by way of public auction or other way the movable or immovable properties and goods listed in the proclamation in the execution of the decree dated 16.03.2017.

3) That the Court hereby reviews and vacates its orders given on 26.06.2019 against the objector (West Wood Hotel) in respect of the warrant of attachment made pursuant to the application vide notice of motion dated 05.03.2019.

4) That each party to bear own costs of the application.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 23rd October, 2020.

BYRAM ONGAYA

JUDGE