



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 64 OF 2014

SAMUEL OJWANG JUMA.....CLAIMANT

VERSUS

SAPHIRE COLLECTIONS LTD.....RESPONDENT

DILIP GUDKA, SOBHNA GUDKA BIJAL

GUDKA, & AMEET GUDKA (T/A RAILI ENTERPRISES).....OBJECTOR

RULING

Introduction

1. On 28th September 2018, I entered Judgment for the Claimant against the Respondent for the sum of Kshs.267,805.45 plus costs. After the costs were determined, the Claimant, obtained warrants of attachment through the Icon Auctioneers and proceeded to proclaim the Respondent's goods. Thereafter, the Objector filed the Notice of Motion dated 21st February 2019, under Orders 22, 51, 52 and 53 of the Civil Procedure Rules basically seeking the following orders:

a) THAT the proclamation and execution against the Objector relating to the Decree and warrants be declared illegal and be set aside.

b) THAT the Claimant's Advocate M/s Rakoro & Co. advocates and M/s Icon Auctioneers of bear costs of the objection proceedings and the application.

2. The application is supported by the Affidavit of Ameet Gudka sworn on 21st February 2019 and is premised on the grounds set out on the body of the motion. In brief, the objector contended that the execution levied against it is illegal as it was not a party to the suit. That, the proclaimed goods including the stock of bicycles belong to it and not the Respondent as the latter only deals in clothing business. Finally, it contended that it does not carry business in the same premises with the respondent or share any business with it and exhibited copies of records of the proclaimed motor vehicles as at 22nd February 2019 to prove ownership.

3. In opposition to the application, the claimant filed a Replying Affidavit sworn by his advocate Daniel O. Rakoro on 14th March 2019 whereby he deposed that during the hearing Mr. Dilip R. Gudka the Director of the Respondent testified on behalf of the Respondent. That the Respondent has failed to pay the decretal sum of Kshs.403,966.78 and he got instructions to proceed with execution. That Icon Auctioneers proclaimed from the respondent's premises, assets believed to belong to the Respondent but Dilip R. Gudka, a Director of the Respondent, failed to sign the proclamation. Finally, he contended that Mr. Dilip R. Gudka is also a Director of the Objector.

Submissions

4. The Objector submitted that the Respondent does not carry business in the said premises and this fact was not denied by the Claimant as the Auctioneer has not tendered any evidence or sworn an affidavit showing that it proclaimed the Respondent at its premises. It maintained that the claimant has not discharged the burden of proving that the assets proclaimed belongs to the respondent and has not denied that the proclaimed bicycles are its stock for sale. It concluded by observing that, during the trial, the claimant gave evidence that the respondent's business was stitching of clothes and not selling of bicycles.

5. On the other hand, the Claimant submitted that there is no dispute that the respondent has not settled a decree for the sum of Kshs.403,906.78 and that a proclamation notice was served on the Mr. Dilip R. Gudka on 18.2.2019 but refused to sign it. That there is further no dispute that Mr. Dilip R. Gudka is a Director of both respondent and the Objector and they share the same postal address. Finally,

he submitted that the objector has not proved that the proclaimed goods belonged to it and relied on **Chai Trading Co. Limited v Muli Mwanzia & 2 Others [2019]eKLR** where the court held that the objector has the obligation of proving title or equitable interest in the attached goods. He therefore prayed for the application to be dismissed.

Analysis and determination

6. After careful consideration of the application, affidavits and the submissions, there is no dispute that the respondent has failed to settle a decree passed by this court on 28.9.2018 and the claimant has executed the decree by proclaiming assets believed to belong to the respondent. The main issue for determination is whether the objector has met the threshold for setting aside a proclamation, that is, established either legal or equitable interest in the proclaimed goods as required by Order 22 Rule 51 of the Civil Procedure Rules. The said rule provides that:

(1) Any person claiming to be entitled to or to have a 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 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.

7. The Objector contends that the proclaimed goods belong to it and not the Respondent. It produced copies of each of the proclaimed motor vehicle's Copy of Records and Registration books as proof of ownership. The proclamation notice by Icon Auctioneers dated 18.2.2019 listed motor vehicles KBV 936N, KAT 945S and KBA 704C for attachment. From the copy of records and registration books all the three motor vehicles belong to it and not the Respondent.

8. In my view, the said registration books and copies of motor vehicle records exhibited by the applicant are sufficient proof that the proclaimed motor vehicles belong to the objector. It is therefore immaterial that Mr. Dilip R. Gudka is a director or shareholder in both respondent and the Objector or whether they share the same address as shown in the exhibited Certificate of Registration of Change of Particulars dated 20.3.2003.

9. In accordance with the doctrine of separate legal entity enunciated in **Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22** a company has distinct legal personality from its members. It is trite that, unless the directors or members of a company are using it as a conduit for fraud, or there are circumstances warranting the corporate veil to be pierced or lifted, execution of a decree against a company cannot proceed against assets lawfully owned by its directors or members.

10. The Claimant herein relied on the decision in **Chai Trading Co. Limited v Muli Mwanzia & 2 others [2019] eKLR**, I cite the same decision to fortify the foregoing view. The Court held that:

“The last question to consider is whether a majority or a holding company is one and the same as the company in which the shares are held. I entertain no hesitation to uphold the age old principle of company law that a company is separate and distinct from its directors, shareholders and promoters. In Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor. (2014) eKLR... The principle holds even where a company is wholly owned by a holding company. It would not therefore matter and the trial court ought not to have been swayed by the fact that the objector was related to the judgment debtor by shareholding or sharing of office and other facilities.”

11. As regards the proclaimed 1000 bicycles, the objector adduced no clear evidence that it had legal interest on the same. It did not produce any title documentation in respect of the said bicycles and argued that there is no registration for bicycles. That explanation does not however, hold much water because the acquisition of such magnitude of stock of bicycles cannot have happened without any documentation like receipts for purchase or importation documents. If the Objector is indeed the owner, it ought to have produced at least purchase documents as prove of such ownership in the bicycles.

12. The foregoing notwithstanding, I have to say that the place where the bicycles were found by the Auctioneer during the proclamation is quite material in determining whether there was any reasonable ground upon which the claimant and the Auctioneer believed that the items belonged to the respondent. If the proclaimed goods were in the respondent's premises and custody, the claimant and the auctioneer would have a basis to believe that the goods belonged to the respondent. However, claimant did not indicate the premises and the location where the proclamation was conducted. The auctioneer who did the proclamation swore no affidavit to clarify where he found the proclaimed bicycles and in whose custody. The Claimant's advocate, who did not take part in the proclamation, gave hearsay evidence in paragraph 12 of his Repeating Affidavit when he alleged that auctioneers proclaimed the 1000 bicycles at the Respondent's premises. The objector was emphatic, that the proclamation was done at its premises.

13. The burden of proving the premises where the bicycles were kept and that they were in the respondent's custody lies with the claimant and the auctioneer. As already observed hereinabove, the auctioneer who made the proclamation swore no affidavit to discharge that burden. I therefore find that the claimant has failed to prove that the 1000 bicycles were stored in the respondent's premises and under its custody. The foregoing means that the objector's contention that the bicycles were proclaimed from its premises where they were stocked for sale has not been rebutted. Consequently, and notwithstanding the lack of documentation to support ownership, I must return that the objector has proved on a balance of probability that it had equitable interest in the 1000 new bicycles proclaimed herein.

14. Having found that the objector has proved that all the motor vehicles proclaimed by the auctioneer herein were in its custody, and that the 1000 bicycles were proclaimed from its premises where they were stocked for sale, I must return that the application herein has met threshold

for setting aside an attachment by didn't of Order 22 Rule 51 of the Civil Procedure Rules.

Conclusion and disposition

15.. I have found that the objector has proved on a balance of probability that it has both legal and equitable interest in the 3 motor vehicles and 1000 bicycles proclaimed from it by Icon Auctioneers on 18.2.2019 in execution of the decree made by this Court against the respondent on 28.9.2018. Consequently, I allow the application dated 21.2.2019 to the extent that the proclamation and execution against the objector relating to the decree herein is illegal and it is set aside. I will not grant costs because both the objector and the respondent has common shareholders and managers. I will also not recall the warrants of execution issued against the respondent because the decree has not yet been satisfied.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June 2019

ONESMUS N. MAKAU

JUDGE