



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1333 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GRACE WANJIKU KAGENI WAIYAKI.....CLAIMANT

VERSUS

PEGRUME LIMITED.....RESPONDENT

AND

COMMCARRIER SATELLITE SERVICES LIMITED.....OBJECTOR

RULING

Judgment in this suit was delivered on 4th December 2018. The court entered judgment for the claimant against the respondent in the sum of Kshs.745.978.50/= with interest from date of filing suit, and costs. The claimant thereafter had a decree extracted, bill of costs taxed and commenced execution process.

Warrants of sale of property in execution of decree for money was issued to Jumbo Airlink Auctioneer for the sum of Kshs.1,170,754.00/- on 6th May 2019 and on the same date, the auctioneer proclaimed the goods that are the subject of the objection proceedings now before me for determination.

By an undated motion filed under Section 31 of the Civil Procedure Act, order 22 Rule 51(2) of the Civil Procedure Rules and all enabling provisions of the law, CAMMCARRIER SATELLITE SERVICES LIMITED, the Objector seeks the following orders –

1. That the proclamation dated 6th May 2019 by Jumbo Airlink Auctioneers was unlawful.
2. That the items proclaimed on 6th May 2019 by the agents of the plaintiff/decree holder belong to the objector.
3. That the defendant/judgment debtor has no legal or equitable interest in the items proclaimed on 6th May 2019.
4. That costs of this application be provided for

The motion which was filed on 14th May 2019 under certificate of urgency is supported by the grounds on the face thereof and the affidavit of GIRI BABU. The gist of the application is that the goods proclaimed do not belong to the respondent but to the objector who is not a party to this suit. That should the goods be attached and sold the objector would suffer injustice and harm.

The application was heard ex parte by Ongaya J. who was duty Judge who made the following orders –

1. That the application is certified urgent and the same be served in two days for inter partes hearing on 23rd May 2019 at 9.00 before Honourable Justice Onyango PJ.
2. That pending the inter partes hearing on further orders by the court there be stay of execution herein with respect to the proclaimed items subject to the objector's case.
3. That costs in the cause.

The claimant/decree holder filed a replying affidavit sworn on 21st May 2019 in which she deposes that the objector and respondent are sister companies sharing the same office space, postal address, office stationery, work machinery and have the same directors. That the respondent and objector are part of a group of companies trading under “Core Technology Group” as is evident from the footer of the letters. The claimant attached a copy of letter of termination of employment signed by AZHAR CHAUDRY, as Managing Director. At the foot of the letter headed paper for Pegrume are the names Pegrume Limited and Core Technology Group.

The names of the directors are also given as Anjum Chaudry (Chairman), Azhar Chaudry (Managing) and J. S. Maingi.

At the hearing Mr. Osiemo, learned Counsel for the Objector and Mr. Anyonje, learned Counsel for the claimant/decree holder reiterated the averments in the affidavits filed by their respective clients.

Mr. Osiemo submitted that the attached property belonged to the objector and referred to the invoice annexed to the supporting affidavit of GIRI BABU. He further submitted that the motor vehicle KAM 651V is not registered in the respondent’s name. He referred the court to the lease agreement for the premises where the proclamation was carried but which is in the objector’s name.

Mr. Osiemo further submitted that the attaching creditor has not complied with Order 22 Rule 21 by indicating whether or not he intends to proceed with the proclamation. That Order 22 Rule 53 provides that the court shall raise the attachment and make orders for costs where an attaching creditor does not indicate its intention to proceed with attachment. That Rules 51 to 54 of the Civil Procedure Rules are mandatory and the court has no option but to lift the proclamation. He relied on the decision in *Siso Limited –V- Carolyn Wanjira (eKLR) 2015* where at paragraph 5 of the ruling the court stated –

“I have carefully considered the application by Mr. Gaturu to raise the attachment. The requirement under Order 22 Rule 52 is mandatory. The Attaching Creditor has no option but to intimate in writing whether he intends to proceed with attachment and execution. If he intends to do that, such notice will be accompanied by a replying affidavit under Rule 54, and the court will give directions for the hearing of the application. If however, the attaching creditor fails to give information in writing, under the above stated Rule 53, the court has no option but to raise the attachment and give direction on costs. This is what appears to have happened in this particular matter.”

For the claimant/decree holder, Mr. Anyonje submitted that the respondent who has been a party to these proceedings has not been served. That the notice under Order 22 Rule 51 is required to be served on all parties.

He submitted that there is no response to the averments in the claimant/decree holder’s replying affidavit and the matters deponed therein are thus uncontroverted. That the averments are that the objector and the respondent share office space, directors and furniture.

Mr. Anyonje further submitted that the claimant/decree holder having worked in the company is privy of the averments of fact in her affidavit. That the objector has not proved ownership of motor vehicle KAM 651V and that there is no sale agreement for assets of the respondent.

The claimant/decree holder prays that the objection application be dismissed.

Determination

I have considered the application, the grounds and affidavit in support and in opposition thereto and submissions by Counsel. I have further considered the authorities cited both judicial and statutory.

Objection proceedings are provided for under Order 22 Rule 51 to 55. It is the objector’s argument that the decree holder having failed to comply with Order 22 Rule 54, the court has no option but to lift the proclamation.

Rule 52 provides as follows

[Order 22, rule 52.] Stay of execution.

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

[Order 22, rule 53.] Raising of attachment.

Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.

[Order 22 rule 54.] Notice of intention to proceed 54. If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the

application expeditiously.

My understanding is that Rule 52 requires the attaching creditor to respond to a valid notice only if called upon by the court to respond by a notice in writing. Rule 53 and 54 were not activated.

Further, Rule 52 refers to a valid notice. The Notice of Attaching Creditor and the Notice of Stay of Execution filed with and attached to the Notice of Motion by the Objector are not signed and do not appear to have been specifically served upon the attaching creditor. They appear to have been served as part of the bundle in the notice of motion. They are thus not “**a valid notice**” in terms of Rule 52. Further, the decree holder has responded to the objection proceedings wherein she has contested the same.

For these reasons the provisions of Rule 53 having not been activated by the objector, are not applicable in the present case. The decision in the ruling in the case of **Siso Limited** (supra) is thus not applicable herein.

Turning to the substantive issues in the application, the objector’s

affidavit in support of the application is sworn by GIRI BABU who describes himself as an officer of the Director. According to the documents presented during the hearing, the said Giri Babu is the Chief Commercial Officer of the respondent. He is thus an officer of both the respondent and the objector.

Further, Azhar Chaudry has admitted that he is a Director of the objector. The same Azhar Chaudry is also the Managing Director of the respondent.

It has not been specifically denied that the respondent and the objector are sister companies operating under the same roof as averred by the attaching creditor in her replying affidavit. Indeed the attaching creditor has stated that the objector and the respondent share the same office space, postal address, office stationery, work machinery and have the same directors. This is evident from letterheads in correspondence in the suit, which reflect that the offices of Pegrume Limited are at 8th Floor, Longonot Place Kijabe Street of P. O. Box 41093 – 00100 Nairobi. This is the same address of Giri Babu as per his affidavit in support of the objection proceedings.

This would explain why the lease of the premises which is produced in the affidavit of Giri Babu is in the name of the objector. It is because the objector and respondent share the same office space.

The objector has further attached an invoice for a curved reception unit and opera mid back chair in the name of COMMCARRIER SATELLITE SERVICES LIMITED. The invoice is not accompanied by proof of payment to prove that the furniture was actually paid for. Further, the invoice is for delivery at Universal Church, Old Globe Cinema and not the premises where the proclamation took place. There is no indication that such was the furniture proclaimed herein.

There is thus no proof of ownership of any of the furniture proclaimed herein. The objector has further not proved ownership or beneficial interest in motor vehicle registration number KAN 651V that was proclaimed. It has further not contested that the objector and respondent are sister companies sharing directors, office space and furniture including the attached goods.

The foregoing notwithstanding, Section 2 of the Employment Act defines an employer as –

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

This therefore means that Directors of a company are also employers and/or agents of an employer against whom or whose property the employee may claim terminal dues.

In his submissions in respect of the application herein, Counsel for the objector stated that service of objection proceedings was effected upon the respondent who failed to attend court. The question therefore is, upon whom was service on behalf of the respondent to be served where the officers of the respondent are the same officers of the objector? Was the objector to serve itself in its office?

I find that the objector has not proved that it is the owner of any of the goods and motor vehicle attached. I further find that the objection proceedings are a sham intended to deny the attaching creditor the benefits of his decree and regular judgment.

For these reasons, the objection proceedings are dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE