



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1902 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DONALD ELIAKIM OHON.....CLAIMANT/DECREE HOLDER

VERSUS

HABO GROUP OF COMPANIES LIMITED....RESPONDENT/JUDGMENT DEBTOR

GTEC COMPANY LIMITED.....OBJECTOR

RULING

Judgment in this case was delivered on 19th October 2018 and a decree issued on 5th March 2019. Thereafter the Claimant commenced execution process.

On 18th June 2019 a warrant of sale of property in execution of decree for money was issued to NEXTTGEN AUCTIONEERS for the sum of Kshs.441,200/-. On 2nd April 2019 the auctioneer proclaimed the goods set out in the proclamation.

GTEC Company Limited filed a notice of motion application under certificate of urgency dated 22nd May 2019 seeking the following orders:-

1. That this Application be certified urgent and heard ex-parte in the first instance.
2. That the Objector's property/goods attached and carried away by M/s Nexttgen Auctioneers on 21st May 2019 in execution of the decree herein be released to the objector upon deposit of the decretal sum as security pending the hearing and determination of the application herein by the objector for the lifting and/or setting aside of the attachment.
3. That there be a stay of execution of the decree given on 18th October 2018 in this cause pending the hearing and determination of this application.
4. That the attachment levied against the objector on 21st May, 2019 by M/s Nexttgen Auctioneers in purported execution of the decree herein be lifted/set aside.
5. That costs of this Application be borne by the Plaintiff/Decree Holder or the Auctioneer.

The Application is premised on the grounds set out on the face of the Notice of Motion Application in which the Applicant contends having not been a party to this suit yet its property/goods have been attached in purported execution of the decree issued herein.

The Applicant further contends that the said execution of the decree against it is unlawful and that the Auctioneer has crippled its business operations following the attachment.

The Applicant urges the Court to protect it from all current and future attachments and/or execution intended against the Respondent herein in this matter.

The Application is further supported by the Affidavit of **STANLEY KASYOKA**, the Managing Director of the Objector sworn on 22nd May 2019 in which he reiterates averments made on the Notice of Motion Application.

The matter proceeded for hearing of the certificate on 22nd May, 2019 when the following Orders were issued:

1. That the Application be and is certified urgent.
2. That the Objector is directed to deposit in Court the amount of Kshs.376,915 immediately as security in exchange of release of the attached goods
3. That upon deposit of the amount the Auctioneer Allan Otieno T/A Nexttgen Auctioneers is directed to immediately release the attached goods to the objector or his representative pending hearing and determination of the Objector's application dated 22nd May 2019.
4. That this orders to be issued with a penal notice.

On 24th May, 2019, the Claimant herein filed an Application under certificate of urgency under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 22 Rule 22 and Order 45 – Rule (1) and (2) of the Civil Procedure Rules and all enabling provisions of the Law, seeking the following Orders:

1. That this Application be certified urgent and heard ex-parte in the first instance
2. That there be stay of execution of the ex-parte orders made by this Court on 22nd May, 2019 pending hearing and determination of this Application.
3. That in the alternative to prayer 2 above, the Objector be ordered to top up the amount deposited to Kshs.600,000/- to cover decretal sum, the auctioneer's fees, costs of attachment, storage and sale and security for costs of the objector proceedings.
4. That the Court be pleased to set aside and or vary aside the ex-parte orders made by the Court on 22nd May 2019.
5. That the amount deposited by the objector be released forthwith to the Claimant's Advocates Mbiriri Ngugi & Company Advocates.
6. That the costs of this Application be borne by the Objector and the Judgment Debtor.

The Application is premised on the grounds that the objector misled the Court by giving false information and failed to disclose material facts and obtained the orders of release of goods attached despite the fact that the decree remains unsettled to date.

It was further contended that the Objector had failed to avail any evidence to prove ownership of the attached goods and that the amount deposited as ordered by this Court did not cover the decretal sum, the auctioneer's fees, cost of attachment and sale as well as the cost of the Application.

The Application was further supported by the Affidavit of **DONALD ELIAKIM OHON**, the Claimant/Decree Holder sworn on 24th May 2019, in which he reiterated the averments made on the face of the Notice of Motion Application.

The claimant's application was heard ex parte under Certificate of Urgency on 24th May, 2019 and the Application was allowed in terms of prayer 1 and 3 to the effect that the objector tops up the amount deposited in court to Kshs.600,000/=. The Court further directed that the variation to the Orders made on 23rd May 2019 only affected the objector. The matter was thereafter fixed for hearing of the objector's Application on 29th May 2019.

In response to the Application dated 22nd May, 2019 the Claimant through his Auctioneer, ALLAN OTIENO on 28th May, 2019 filed a replying Affidavit sworn on even date, in which he avers that Judgment in this matter was delivered in favour of the Claimant as against the Respondent/Judgment Debtor on 19th October, 2018. That following failure to settle the decretal sum the advocate on record for the Claimant applied for execution.

It is contended that the Auctioneer's firm was issued with warrants of attachment which he proceeded to serve upon the Respondent/Judgment Debtor who was an officer at the objector's. The officer who was served with the warrants of attachment clarified that the Respondent/Judgment Debtor had many companies under it and any of the stamps of the companies can receive documents on behalf of others.

The Auctioneer further averred that he was not informed by Stanley Musyoka as alleged that the proclaimed goods belonged to the Objector. He further averred that all attached goods belong to the Respondent/Judgment Debtor.

The Auctioneer states that when the Claimant's Advocates on record noted the anomaly they wrote to the Court requesting to be issued with other warrants of attachment and sale which was done. He further averred that the Respondent/Judgment Debtor was hostile and declined to sign or stamp in confirmation of receipt of the 2nd warrants.

It is further contended that the objector is being used by the Judgment Debtor to circumvent or delay payment of the decretal sum as both

companies are owned by the CEO Hon. Hezron Awiti Bolo directly or through a family member as he has in the course of execution indicated his willingness to settle the decree but has failed to honour his promise.

The two Applications proceeded orally on 17th September 2019

Objector's Submissions

In both the affidavit in support of the Objector's Notice of Motion and the Oral submissions made in Court on behalf of the Objector by his Advocate Mr. Amuga, it is submitted that the Objector is a limited liability company trading as GTEC Company Limited registered under the Companies Act, Cap. 486 on 27th October 2016. He further submitted that the Objector has never been a party to this suit and that the execution levied against it is therefore unfair, unlawful, null and void *ab initio*.

Mr. Amuga further submitted that the proclamation was done at the Objector's office and not that of the Respondent/Judgment Debtor. Further, that all the objector should do is not necessarily prove ownership but show that it has legal or equitable interest in the goods, which has been done by the Objector. He further submitted that the fact that the goods proclaimed were proclaimed at the Objector's premises is sufficient proof of ownership and the Objector need not avail receipts to prove the same.

It is further submitted that the argument that the two entities belong to one Hezbon Awiti is irrelevant as there has been no attempt to lift the corporate veil to show that Hezbon Awiti is avoiding execution. He further contended that the assertion that the Objector and the Respondent companies are owed by the same person has not been proved. He urged the Court to dismiss the same.

In conclusion, the Objector urged the Court to allow its application with costs.

Claimant's/Decree Holder's Submissions

Mr. Ngugi for the Claimant/Decree Holder on the other hand submitted that for an objection application to succeed the objector has to prove ownership or an interest in the goods, be it legal or equitable. He contended that this has not been done by the Objector herein.

The Claimant further submitted that the Objector's reliance on the stamped proclamation has no legal basis whatsoever as it has been explained how service was effected and that the same was repeated a fact that was not disputed by the Objector. He further submitted that a stamped proclamation does not meet the threshold for grant of the Orders sought.

The Claimant/decree-holder contended that the proclamation was served on the Respondent's head office therefore confirming that the Objector and the Respondent are owned by the same person.

The Claimant further contended that the Affidavit filed in support of the Objector's application is fatally defective as the same is not made under seal. It is further submitted that the Court ought to dismiss the Application dated 22nd May 2019.

The Claimant/decree-holder urged that the Court to allow prayer number 5 and 6 of his Application dated 24th May 2019 allowing the amount deposited by the objector to be released to him in satisfaction of the decree, as the said Application is unopposed.

Rejoinder

In a brief rejoinder Mr. Amuga submitted that no evidence has been availed to this Court to prove that the Respondent Company and the Objector are owned by the same person and that the Objector was under no obligation to deny that fact as alleged.

On the issue that the affidavit is not made under seal, it is submitted that there is no need to avail the seal where a person has deposed to have authority of the company.

It was further submitted that on the issue of ownership of the proclaimed goods the Objector needs not to attach any receipt in proof of ownership of the goods as the goods were inside its premises. It is contended that this is sufficient proof of ownership.

In conclusion the objector urged the Court to allow its application with costs.

Determination

Having carefully considered the two Applications together with the

Supporting Affidavits, the Replying Affidavit and the attached documents and submissions by both Counsels, the following are the issues for determination:

1. Whether the Objector has proved that the goods proclaimed in execution of the decree herein belong to the Objector and not the Judgment Debtor.
2. Whether the Objector's application dated 22nd May 2019 is merited

3. Whether the claimant's application dated 24th May 2019 is merited.

The Submissions made by Counsel for the Objector is that the Objector need not to attach any document to prove ownership of the attached goods and operate from the same office, thus the fact that the goods proclaimed were in its premises is enough proof of ownership.

The decree-holder on the other hand contends that the Objector has not attached any document proving ownership of the goods. He further submitted that the two companies are owned by the same person and operate form the same office thus the Objector only wants to delay him from enjoying the fruits of the judgment entered in his favour.

It is trite law that in objection proceedings the Objector must prove ownership of the goods that are subject of the execution to succeed in the lifting of the attachment as was held in the case of *Akiba Bank Limited Vs Jetha & Sons Limited (2005) eKLR* and in the case of *Peter Morwabe & 3 Others Vs E-smart College Limited & Another (2015) eKLR*.

From the facts of this case and the attachments before the court, the Objector has failed to attach any document to prove ownership or beneficial interest of the attached goods. Further, the Objector did not contest the decree holder's averment that the attachment was done at Habo Group of Companies Limited Offices were all pleadings in this suit have been served upon the respondent/judgment debtor, a fact that the object did not deny.

In the circumstances the Objector's Application dated 22nd May 2019 must fail for want of proof of ownership of the attached goods.

From the foregoing, the Objector's application dated 22nd May 2015 is not merited and therefore is dismissed with costs.

The Claimants/Decree Holder filed an Application dated 24th May

2019 seeking the release of the money deposited in court by the objector to his advocates as prayed in prayer 5 and 6 of the application. The said Application was not opposed by the Objector. **In the absence of any objection to the application, the Court allows the claimant's application in terms of prayer 5 and 6, that is, that the amount deposited in court by the Objector be immediately released to the claimant's advocates Mbiriri Ngugi and Company Advocates.**

The Objector will also pay claimant's costs of the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE