



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 895 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th March, 2018)

LUKA LUNAYO.....CLAIMANT/DECREE HOLDER

VERSUS

NYPD RESTAURANT.1ST RESPONDENT/JUDGEMENT DEBTOR

UPSTATE KENYA AUCTIONEERS..... 2ND RESPONDENT

AND

CHARLES GOKO WAITHAKA t/a

ICE ON FIRE BAR AND RESTAURANT.....OBJECTOR

RULING

1. The application before Court is dated 27th November 2017 brought under Order 22 Rule 50 & 51 of the Civil Procedure Rules (2010) Sections 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law seeking orders:

a) THAT this application be certified urgent and be heard exparte in the first instance.

b) THAT pending hearing and determination of this application, the 2nd Respondent, its servants, agents and/or employees acting on the instructions of the Claimant/Decree Holder be restrained by an order of injunction from proclaiming, attaching and/or selling by way of public Auction the Objector's Goods.

c) THAT pending the hearing and determination of this Application, an Order do issue compelling the Claimant/Decree Holder and the 2nd Respondent herein to reimburse the Objector a sum of four Hundred and Eighty Four Thousand Kenya Shillings only (Kshs. 484,000/=) paid in answer to a Decree of this Honourable Court.

d) THAT costs of this Application be provided for.

2. The Application supported by the affidavit of Charles Goko Waithaka, a sole proprietor of the Objector is premised on the grounds that:

1. THAT the Objector is a proprietor of Ice on Fire and Restaurant registered under the Registration of Business Act under No. BN-AAAOHSKO on 27th March 2017.

2. THAT the Claimant/Decree Holder as well as the 1st Respondent/Judgement Debtor are all strangers to the Objector, a fact well explained to the 2nd Respondent over time in futility.

3. THAT proclaimed items are the property of the Objector who is not party to this suit.

4. THAT upon checking manually with the Registrar of Companies to establish who the 1st Respondent/Judgement Debtor is, the

Objector found out that the same has never been registered as a company in order to be sued as done hereby.

5. THAT unless this Honourable Court intervenes with an injunctive Order, the Objector's rights will be violated and will suffer irreparable loss if the 2nd Respondent acting on the instructions of the Claimant/Decree Holder goes on to attach, proclaim and/or sell the objector's goods.

3. The Claimant has opposed the Application by filling a replying affidavit wherein he avers that Mr. Charles Goko Waithaka is not being honest and truthful to the court and the application is merely an afterthought solely meant to delay the course of justice and deny the Claimant's enjoyment of the fruits of his lawfully obtained judgement.

4. The Claimant states that the Objector was an employer who has been trading as NYPD Restaurant, having changed the name of the business from Zigin Restaurant and now to Ice on Fire Bar Restaurant after Judgement was been delivered and believe that the Objector only changed the name of the business to hide from settling the decretal sum.

5. The Claimant further avers that the objector has not shown sufficient cause why the court should exercise its discretion in his favour by allowing the said application, it is not enough for the Objector to depone that he will suffer irreparable loss and prejudice unless the present application is allowed. The Objector approached my Advocates on record and proposed to settle the decretal sum by installment and made cash part payment and postdated cheques for the full decretal sum only to turn around with allegations that he is not the Judgement Debtor.

6. That when the first proclamation was done by the Auctioneers on the 10th of July 2017, there was no objection raised by the Objector. Another proclamation was done on the 22nd September 2017 and no objection was done.

7. The Objector has failed to attach any document referred to in his replying affidavit dated the 27th November 2017 and the court should read mischief and mala fides and conspiracy on the part of the objector. This is an industrial matter which has been pending before this court for over six (6) years now and the same should be brought to an end as the Claimant would suffer grave prejudice and injustice if the application herein is allowed and especially the Objector having defended this matter and only to turn around after the judgement to object to the execution.

8. In their submissions, the Objector stated that the claim arose by virtue of the fact that an order was issued on 3rd April, 2017 as against the 1st Respondent/Judgement-Debtor and in favour of the Claimant/Decree Holder for a sum of Kshs. 414,251/= the partial execution of which was done through the attachment of movable property belonging to the Objector herein and not the 1st Respondent/Judgement-Debtor as it ought to be under the law.

9. The Objector submits that the property attached was his and not for the Judgment Debtor and he agreed to give his cheque in the sum of Kshs. 414,251/= to avert a problem at his work place.

10. I have considered the submissions of both parties. I note that the Objector runs a business in the name of Ice on Fire Bar and Restaurant as per the business permit dated 31/3/2017. The business is situated at Ngong road.

11. The Judgement Debtor is NYPD Restaurant. The nexus between NYPD Restaurant and Objector is not clear. However, the Decree Holder has submitted that the Objector and Judgement Debtor are one and the same person only that he changed the name of the Business. The Decree Holder has averred that the Objector Charles Waithaka was one running the Restaurant NYPD and he is one who employed him. He avers that the goods were proclaimed in Objector's presence in July and September 2017 and he never raised any complaint until 22.11.2017.

12. The Objector has not however proved by way of receipts that the documents attached are his. No receipts on ownership are annexed. It is the duty of the Objector to prove the attached goods are his. This has not been done. I will therefore dismiss the Objector's proceedings and order the execution to proceed.

13. Cost to the Decree Holder.

Dated and delivered in open Court this **19th day of March, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties