



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1232 OF 2014**

**POOROOSOTUM P BHEEKHOO ..... CLAIMANT**

**VERSUS**

**LINKSOFT GROUP LIMITED ..... RESPONDENT**

**AND**

**LINKSOFT COMMUNICATIONS SYSTEMS LIMITED ..... OBJECTOR**

**RULING**

1.The Objector by application dated 10<sup>th</sup> August, 2016 is seeking for orders that the claimant as the decree holder herein and Garam Investment be restrained from attaching or dealing with the Objector's property in efforts to satisfy the judgement; that there be stay of execution of the decree and the proclamation of the Objector's assets be lifted; and the auctioneer's fee be paid by the claimant.

2.The application is field on the grounds that the goods proclaimed on 5<sup>th</sup> August, 2016 do not belong to the Respondent as the judgement debtor but to the objector. The Objector is not liable to satisfy the decree herein as it is not a party to the suit and the proclamation issued to the Objector is defective, illegal and a nullity. Unless the claimant is restrained from attaching the assets and property of the objector, there will be grievous prejudice and financial loss having to shoulder liabilities for matters the Objector is not a party.

3.The application is supported by the affidavit of Njomo Kamau who avers that he is the legal manager of the objector. That on 22<sup>nd</sup> June, 2015 judgement was entered against the Respondent and the claimant awarded salaries, benefits and dues per the decree of 22<sup>nd</sup> October, 2015. On 26<sup>th</sup> May, 2011 the Respondent employed the claimant as the Group Regional Head – West Africa and he had an oversight role in the Group companies.

4.The claimant through Garam Investment have proclaimed for the Objector's goods. The Objector is a separate legal entity from the Respondent and having its offices at Methodist Ministries Centre and handling the local business development and service delivery. When the auctioneer proclaimed the Objector's good they were informed that such items were for a company totally different from the Respondent and the Objector has not transferred any rights and interests to the Respondent over its assets. The schedule of assets is erroneous and exaggerated and the schedule of assets list goods that belong to the objector.

5.Ms Kamau also avers that there is Local Purchase Orders (LPO) for the goods proclaimed to show they belong to the objector. The Objector not being a party herein is not liable to satisfy the decree and its

goods should not be attached.

6. In reply, the claimant filed his Replying Affidavit on 24<sup>th</sup> August, 2016 and avers that he was employed by Linksoft Group Limited by contract of employment dated 26<sup>th</sup> May, 2011 for 3 years until termination in May, 2012. His suit and judgement delivered on 22<sup>nd</sup> October, 2015. Taxation proceeded and decree issued and due to non-payment of judgement sum execution proceeded by proclamation on 4<sup>th</sup> August, 2016.

7. The claimant also avers that Linksoft Group Limited is under the control and management of Anthony Wahome Githinji who is the Chief Executive Officer, shareholder and director therein and holds the same capacity **in Linksoft Communications Systems Kenya (the Objector); Linksoft International Limited (registered in Mauritius); Linksoft Group Limited Kenya; and AG Group International Limited (registered in Mauritius)**. This court has held that the Objector is under the umbrella of the Respondent Group, known as Linksoft Group Limited. The documents now presented before court is an effort to circumvent justice and avoid paying the judgement sum. The Respondent is closely controlled by Anthony Wahome Githinji as the chief officer and uses the companies when convenient where he has sent mails from AG Group International or as the objector.

8. The Respondent and Objector run under the same entity, control and office where the chief office, main shareholder and director is Anthony Wahome Githinji under the same office at Methodist Ministries Centre Block C-3. This goes for employees who serve the same entity. The claimant received payments from Linksoft Group Limited; the Objector; and Linksoft International Limited through inter-bank transfer on 24<sup>th</sup> October, 2011, 5<sup>th</sup> December, 2011 and 6<sup>th</sup> January, 2012. This formed the record at the hearing of the main suit.

9. On 31<sup>st</sup> October, 2012 the Respondent offered to pay the claimant under the Objector's name as the companies forming the Respondent group are all under the management and control of one person and work for the same benefit.

10. The documents produced are not consistent with the alleged ownership by the Objector of attached goods as the LPOs do not have the Objector's logo or the letter head of the company placing the order; the LPOs are signed for by AG Group International Limited and not the objector; and the receipts indicate to have been paid for by the objector. The LPO are not proof of ownership. The various names of the Respondent group are used in the LPOs interchangeably and this is not proof that the Objector herein is the owner of such proclaimed goods.

The court has since made a finding that the Respondent is a group of companies and were liable in judgment. Application by Objector should be dismissed.

### **Determination**

11. The main purpose of objection proceedings is for the Objector to establish claim to the attached goods/property. Proof of ownership therefore becomes primary.

12. It is trite that the burden of proof is on the Objector to establish a legal or equitable interest in the property subject matter if the execution objected to, which burden is to be discharged on a balance of probabilities. The duty is not on the decree holder to prove that the goods belong to the respondent. See **Kenya Oil Company Ltd versus Fuaad Mahmoud and others, HCCC No.886 of 2002**. Therefore, where there is a challenge as to ownership of property, and the court is invited to investigate such ownership, concern should be who has possession of that property and not necessarily who has title over that property. Such possession must be held in light that the Objector has insisted that they have an interest other than possession. In this case, the submitted LPOs, though issued to the objector, the same have been received and/or acknowledged by the Respondent or AG International Group and in any event such does not confer ownership upon the objector, rather, the Respondent has possession of the same.

13. In this regard, the court in **Joane Tabuke and others versus Busia Sugar Company Limited and others, HCCC No.7 of 2006 (Busia)** held that;

*...if the judgement debtor was in possession or some other person was in possession on behalf of the judgement debtor, then the attached property will be sold. The court will disallow the Objector application [in such circumstances]. ... In the instant application it is quite significant that in an Objector application, the Objector did not plead that he was in possession of the attached property on the date of attachment.*

14. In this case, the Objector has submitted the Certificate of Incorporation to confirm that the Objector is a separate and legal person from the respondent. There also various LPOs at pages 31 to 36 of Mr Kamau affidavit all issued to *Linksoft* and received by various officers some from AG Group. What is apparent and was evident during the hearing of the main suit is that the Respondent company comprise an umbrella group of companies who share various resources. This can be discerned from the minutes of the Board of Director's meetings on 26<sup>th</sup> July 2012 and 1<sup>st</sup> November, 2012. The agenda items relate to the Respondent Company but under such, various entities are discussed as being part and parcel of the same - AG Group, Linksoft Group.

15. It is not lost to the court that while the claimant was in the employment of the respondent, his monthly salaries were paid by the various Group Companies. There is evidence of the Respondent effecting payment of salary; the Objector paid; and the other group companies also paid. Does this then release the Respondent of the responsibility to settle the decretal amount?

16. The Objector has not demonstrated any legal or equitable interest in the attached property. Such is not found in the submitted LPOs.

**For the above reasons, the objection proceedings fail and is hereby dismissed with costs to the claimant.**

Delivered, dated and signed in open court at Nairobi this 3<sup>rd</sup> day of March, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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