



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 418 OF 2013

MOSES HINZANO.....CLAIMANT

VS

MOMBASA SLAUGHTER HOUSE.....RESPONDENT

RULING

Introduction

1. On 10.7.2015, I delivered judgment in this suit whereby I ordered the respondent to pay kshs.108,000/= plus costs and interest to the claimant. Subsequently thereto, the claimant was not paid and he executed through attachment of the respondents movable property. However on 25.4.2016, the objector filed a Notice of Objecting to the attachment and sale of her property in execution of the judgment dated 10.7.2015.

2. The Notice of Objection is accompanied by a Notice of Motion and a supporting affidavit which sets out the grounds for the objection. According to the objector, the goods allegedly attached from the respondent were actually owned by her and not by the respondent. Additionally the objector contends that the claimants reply to the objection is a nullity because he did not file notice of intention to proceed with execution.

3. The respondent did not oppose the objection but the claimant has opposed the objection by filing a Notice of Intention to continue with execution and a Replying affidavit sworn on 3.5.2016. The gist of the affidavit is that the Objector and the Respondent are one and the same person and the claim described the respondent as a Limited liability Company and the respondent admitted the said description in her defence. The claimant contends that the objection is incompetent because it was only a normal motion without Notice of objection.

4. The objection was disposed of by written submission filed by counsel for the claimant and the objector but the respondent filed none. The issues for determination are:

- a) Whether the objector and the respondent are different and separate legal entities.**
- b) Whether the attached movable property belong to the objector and not the respondent.**
- c) Whether the reply by the claimant to the objection is a nullity.**

Separate legal entities

5. There is no dispute that the objection by the objector hinges on the Name of the respondent cited on the heading of the suit. That the name of the respondent as cited does not include the word "Limited" after the name MOMBASA SLAUGHTER HOUSE. Consequently according to the objector, the omission of the word "Limited" in the respondents name has made the respondent to be a different person from herself (objector) and as such any judgment arising from such proceedings would not be enforced against her but the respondent.

6. The claimant has however contended that the respondent and the objector are one and the same person and their Director is Mr. Mohamed Sheikh Mohamed. That the error on the name of the respondent is not fatal because under paragraph 2 of the claim, the claimant pleaded that the respondent was a Limited Liability company and the respondent admitted that description in her defence. According to the claimant, there is no other company known by the names Mombasa Slaughter House except the objector.

7. After considering the pleadings, Notice of objection, Affidavits and the rival submissions by counsel, it is clear that the claimant who was not initially represented by counsel intended to sue his employer herein. That under paragraph 2 of his claim he described the respondent as a Limited Liability Company and the respondent admitted that she was indeed a Limited Liability Company. That the respondent was clear that the claimant intended to sue her to enforce his rights under the contract of employment between them. The respondent admitted that the claimant was indeed her employee and that she was entitled to dismiss him for gross misconduct. It is only after the judgment that the respondent purports to deny what he had earlier admitted.

8. I will not grant that opportunity to the respondent to use mischief to dishonor the judgment of this court. She and the objector are one and the same person. Although the name cited for the defendant in the suit omitted the word "Limited", the claimants adequately described the identity of the claimant as a Limited Liability Company to which the respondent admitted. The respondent then participated in the proceedings without raising any objection or alleging any prejudice.

9. In my opinion, the omission of the word "Limited" in the respondents name did not therefore make her a different person from the objector. The word "Limited" mainly serves the purpose of describing the entity and if the description can be in the body of a pleading the omission is cured. The case herein is distinct from the authorities cited by both the objector and the claimant which were mainly dealing with the independence of the company's legal personality from her shareholders. The answer to the first issue for determination is therefore that the objector and the respondent are one and the same person.

Owner of the Attached property

10. The objector has contended that she is the owner of the attached property and has even attached exhibit "MSM1" as proof that she is the owner of the attached property. In view of the finding herein above that the respondent and the objector are one and the same entity, I make a further finding that the attached property also belonged to the respondent.

Incompetent Reply

11. The objector contends that the claimant's response to the Notice of Objection is a nullity because he never filed a Notice of Intention to continue with execution within 7 days. The court record however shows that the claimant indicated to the court on 9.5.2016 that the objector had only served him with a Notice of motion to which he filed the reply and that the objector only served the Notice of Objection on 9.5.2016. That the claimant then proceeded to file his Notice of Intention to continue with execution on 11.5.2016, 2 days after service.

12. In view of the chronology of the events highlighted above, I find that the failure by the claimant to file the Notice of Intention to continue with execution within 7 days together with his Replying affidavit was occasioned by the objector herself when she failed to serve the Notice of Objection and a notice calling the claimant to file his intention to proceed or not to proceed with execution as provided under Order 22 rule 52 of the Civil Procedure Rules. The answer to the third issue for determination is therefore that the

claimants reply to Objection proceedings in not a nullity.

Disposition

13. For the reasons stated above, the objectors Notice of Objection dated 25.4.2016 and accompanying Motion are dismissed and the stay order subsisting is lifted. The objector shall pay cost to the claimant.

Signed, Dated and Delivered at Mombasa this 15th day of July 2016.

ONESMUS MAKAU

JUDGE