



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1264 OF 2010

KIZITO SAVALI CLAIMANT

VERSUS

MARSHALLS EAST AFRICA LIMITED RESPONDENT

Mr. Kalove for Objector

M/s Kabiru for the Claimant/Decree Holder

RULING

1. The Objector herein filed a Notice of Motion dated 17th October, 2014 seeking the following reliefs inter alia;
2. The proclamation by Keysian Auctioneers dated 15th October, 2014 be lifted and the Decree herein be stayed.
3. Interim orders were granted ex-parte.
4. The Respondent/Decree holder filed a Replying Affidavit sworn on 11th November, 2014.
5. **Grounds for Objection**
 - (i) Keysian Auctioneers proclaimed the Objector's movable goods and properties held at the Respondent's premises on 15th October, 2014 to recover Ksh.2,922,450.00 pursuant to a Judgment entered in favour of the Claimant.
 - (ii) The proclaimed goods do not belong to the Respondent but belong to the Objector/Applicant
 - (iii) That the seven (7) attached motor vehicles are customs bonded, not identifiable and duty has not been paid and hence they are not attachable in law. The rest of the goods attached are office furniture belonging to the Objector. The Objector is a separate legal entity from the Respondent and that both the Objector and the Respondent have business relations, where the Objector can store and/or display its goods in the Respondent's premises
 - (iv) That the Objector stands to suffer great loss and damage if the execution is

proceeded with.

6. The Application is supported by the Affidavit of Sanjay Kishorekumar Mashru sworn on 17th October, 2014. He deposes that the proclaimed goods listed in Annexure “SKM1” (Proclamation) belong to the Objector and the proclamation and attachment ought to be lifted. The deponent filed a further Affidavit sworn on 30th January, 2015.
7. The Objector deposes that the proclaimed goods were stored in the Respondent’s offices located on Koinange Street, Nairobi. That the said motor vehicles belong to the Objector and are customs bonded, not identifiable and duty has not been paid and hence they are not attachable in law.
8. That the vehicles are displayed for sale in the Respondent’s offices. In the further Affidavit, the Applicant has attached vehicle consignment and sales agreement between the Objector as (“the Consignor”) and the Respondent as (“the Consignee”) of the said motor vehicles.
9. In terms of the Agreement, the Respondent is to sell the said vehicles to customers on behalf of the Objector.
10. The Respondent is to forward the moneys paid as purchase price to the Objector and only retain 10% of the purchase price as commission/fees for the same.
11. The Consignment Agreement is dated 30th August, 2014 and was not attached to the Application initially when it was filed on 17th October, 2014.
12. The deponent adds that the Objector intends to acquire offices in Nairobi and that in the meanwhile the office furniture, laptops, chairs, sofa sets, color televisions belonging to the Objector are being used by the Respondent’s employees who work in the said premises.
13. That the Objector has established legal and equitable interest in the proclaimed goods and it is fair and just that the proclamation carried out by Keysian Auctioneers be lifted.
14. **Replying Affidavit**

The Claimant in his Replying Affidavit opposes the Application. He states that he has been advised by his Advocate that the proclaimed goods are not exempt from attachment under Section 44 of the Civil Procedure Act or any other law as alleged by the Objector, or at all.
15. That he has perused the Application and Supporting Affidavit of Sanjay Kishorekumar Mashru sworn on 17th October, 2014 and noted that the Objector has not furnished any evidence in support of the contention that the Objector is not the same entity as the Respondent in this matter.
16. That it is common cause, the goods were proclaimed in the Respondent’s premises.
17. That the annexed documents to the Supporting Affidavit marked “SKM2” outlined in the Claimant’s Affidavit as “a-h” relate to different motor vehicles to those proclaimed by the Auctioneers.
18. That he believes that these documents do not relate to the proclaimed motor vehicles since most of these documents relate to motor vehicles imported between the years 2012 and 2013 and cannot still have been custom bonded and unregistered.
19. That annex “SKM2” is merely intended to hoodwink the court because they relate to 28 motor vehicles whereas the Auctioneers only proclaimed seven (7) motor vehicles. That the transfer of motor vehicle form and Logbook of motor vehicle registration number KBX 881K is intended to compound the Objector’s misconduct as the said motor vehicle was never proclaimed.

20. That in any event, the Objector as indicated in the Application is a different entity from the entity which settled the invoices for importation of the motor vehicle. The Objector is Susan General Trading Limited whereas the accounts for importation and the marks on the package for the consignment were in favour of Susan General Trading LCC. Both companies bear different addresses.

21. The Claimant believes that the Objector is merely a façade and a cloak employed by the Respondent intended to aid the Respondent in evading execution of the decree issued by the court.

22. It is clear from the commercial invoices and Bills of Lading that the Respondent was a party to be notified upon importation and that the Objector was simply responsible for settling the invoices.

23. The Objector has therefore not demonstrated that it has the sole legal interest in the proclaimed goods to the exclusion of the Respondent.

24. **Issues for Determination**

a) has the Objector demonstrated that it has the legal and equitable ownership(interest) in the attached goods to warrant setting aside of the proclamation?

25. **Facts of Law**

The court notes that the Consignment Agreement was executed on 30th August, 2014, one year after the delivery of the Judgment of the court on 14th August, 2013 in favour of the Claimant.

26. The said agreement was not attached to the Application but was only introduced on 30th January, 2015, after the Claimant had filed its Replying Affidavit on 11th November, 2014.

27. The court is not satisfied on its authenticity and is of the view that the same was concluded with this case in mind.

28. Upon a careful perusal of the proclamation the court is satisfied that;

29. Firstly, the Objector has not satisfactorily proved legal or equitable interest of the office furniture proclaimed in the offices of the Respondent and the Application fails in this respect.

30. Secondly, the seven (7) motor vehicles proclaimed are all unregistered and were in possession of the Respondent and displayed for sale to customers in the Respondents showroom at Koinange Street.

31. It is not disputed that this showroom belongs to the Respondent and Respondent was in lawful possession of the said motor vehicles for sale purposes.

32. It is also not in doubt that the Respondent was the party to be notified of the importation in terms of the Bill of Lading and commercial invoices produced by the Objector. The Objector has in this regard failed to demonstrate legal and equitable interest in the proclaimed motor vehicles to the exclusion of the Respondent who was in legal possession of the same.

33. The Respondent fully participated in the importation of the said motor vehicle and therefore in its custody as a matter of law and fact.

34. In **Jennifer Nyambura Kamau V. Humphrey Mbaka Nandi [2013] eKLR**, the court held;

“Section 107 of the Evidence Act provides that “whoever desires any court to give Judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exist”. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”

35. It is the court's considered view that the Objector has not discharged the onus of proof on a balance of probabilities.

36. In **Akiba Bank Ltd V. Jetha & Sons Ltd [2005] eKLR**, Waweru J. held that for an Objector to succeed in his objection, he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of decree.

37. Further Odunga J. in **Dubai Bank (K) Ltd V. Come-Cons Africa Ltd and IMPAK Holdings Co. Ltd** stated as follows;

*“Although the law is that in objection proceedings, the court does not and cannot make a finding as to the ownership of the property, the subject of the objection proceedings but simply decide whether or not the Objector has interest, legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership, see **Chatabhai M. Patel & Another HCCC No. 544 of 1957 (Lewis) on 8/12/58 (1958)**.*

38. In conclusion, the Objector has failed to proof legal or equitable interest in the proclaimed goods that were held for commercial purposes by the Respondent in its office/showroom at Koinange Street.

39. Accordingly, the court does not fault the proclamation and same is lawful.

Dated and Delivered at Nairobi this 17th day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE