



REPUBLIC OF KENYA A
IN THE EMPLOYMENT & LABOUR RELATIONS COURT IN KISUMU

C AUSE NO. 253 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PETER MORWABE

BOAZ NYARIKI

JOASH NYASENDE

DANIEL OMBATI).....CLAIMANTS

VERSUS

E-SMART COLLEGE LIMITEDRESPONDENT

AND

JULIUS MOGAKA GEKONDI

T/A THE E-SMARK TECHNICAL COLLEGE)OBJECTOR

R U L I N G

Judgement in this case was delivered on 31st March, 2014 and a decree issued on 24th April, 2014. The Claimants thereafter commenced execution process.

The Claimants first applied for garnishee order against the Respondent's account Number 0050015014139309 at Eco Bank Kenya Limited for the decretal sum of Shs.2,542,000 but the account was found to be in debit balance and the application was withdrawn.

On 10th September, 2014 a Warrant of Sale of Property in execution of decree for money was issued to PAMBO AUCTIONEERS for the sum of Shs.2,613,200. On 6th October, 2014 the auctioneer proclaimed the goods set out in the proclamation.

Julius Mogaka Gekonde T/A The Esmart Technical College filed a notice of objection to attachment and the notice of motion herein on 8th October, 2014 seeking the following orders:-

1. The instant application be certified urgent and same be heard on priority basis.
2. Pending the hearing and determination of this application the Honourable Court be pleased to grant

an Order of Stay, staying the attachment and/or actual seizure of the goods at the foot of the Proclamation Notice dated 6th October, 2014 and issued by M/s Pamba Investment Auctioneers, (sic) in execution of the decree of this Honourable Court issued on the 31st of March, 2014.

3. The Honourable Court be pleased to Declare and/or pronounce that the assorted goods and/or items, at the foot of the Proclamation Notice dated 6th October, 2014 and issued by M/s Pamba Investment Auctioneers, (sic) in execution of the decree of this Honourable Court issued on the 31st of March, 2014, belongs to the Objector/Applicant and not otherwise.

4. Consequent to prayer (3) hereinabove being granted, the Honourable Court be pleased to Discharge, vary and/or rescind the attachment of the assorted goods (details in terms of prayer 3 hereof), vide Proclamation Notice dated 6th October, 2014.

5. Costs of this application, together with the Auctioneers Charges, if any, be borne by the Claimant/Decree Holder and the Nominated Auctioneer.

6. Such further and/or other orders be granted as the Court may deem fit and expedient.

The application is supported by the affidavit of Julius Mogaka Gekonde sworn on 7th October, 2014 and on the grounds on the face of the application.

The Claimants responded to the application through the Replying Affidavit of Peter Morwabe, the 1st Claimant decree-holder opposing the application.

The application was argued on 2nd July, 2015.

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. Kimanga, it is submitted that the Objector is a business man trading as Esmart Technical College, a business entity registered under the Business Names Act on 11th October, 2013. The decree sought to be executed in favour of the Claimants is against e-Smart College Limited, a limited liability company incorporated under Cap 486. The Objector has never been a party to the suit and the execution against him is unlawful. Mr. Kimanga urged the court to declare the execution null ab initio.

It was submitted that even if the Objector was a director of the Respondent it would still be unlawful to execute the decree against him for a claim against the Respondent. That the Claimants decree holders have not proved the circumstances for lifting of the corporate veil in order to execute against the directors, or shown that the Respondent has been wound up.

Responding to the issues deponed in the Replying Affidavit of Peter Morwabe the 1st Claimant, Mr. Kimanga submitted that the summons alleged to have been served on the Objector should have been served on the Limited Company and not the Objector. He further submitted that the allegation that while receiving summons the Objector stated the Claimants will not see the fruits of their judgement should be treated for what it is.

Regarding the letter from one of the directors addressed to the college directing that the Claimants be paid, Mr. Kimanga submitted that the letter introduced a new entity called Kisii Esmart College, that the letter was addressed to the Principal and not the Objector Julius Mogaka Gekonge. He submitted that the letter is not a promisory on the part of the Objector to pay salary arrears to employees who are strangers to the Objector.

Claimants/Decree-holders submissions

Mr. Odhiambo for the Claimants/decree-holders submitted that the Claimants had clearly stated they are

conversant with the facts of the case and that they were employed by E-Smart College. That when they were dismissed it is the Objector who blocked them from accessing the premises claiming that the building belongs to Esmart. Mr. Odhiambo submitted that the Claimants knew where they were working. That the Claimants have annexed documents showing that Dr. Gekonge the Objector owed Esmart college some money which he agreed to pay. That Dr. Gekonge was running Esmart but not remitting money to the college in Nairobi. The Claimants annexed a letter directing the Objector to pay the Claimants/decreed-holders their salary arrears.

Mr. Odhiambo submitted that the registration of the Esmart Technical college on 11th October, 2013 in a manner likely to confuse the Claimants is proof of the mischief by the Objector. He submitted that the Objector accepted the service of summons.

Mr. Odhiambo submitted that the Objector did not annex any receipts to prove he owns the attached goods. Mr. Odhiambo submitted that the Objector is obstructing the Claimants from enjoying the fruits of their decree. He urged the court to dismiss the Objector's application.

Determination

I have carefully considered the application together with the supporting affidavit and documents, the replying affidavit and attached documents and the submissions by both parties counsels. The issue I have to determine is whether the Objector has proved that the goods proclaimed in execution of the decree herein belong to the Objector and not the judgement debtor.

My understanding of the facts from the totality of evidence on record is that the Claimants/decreed-holders were employed by e-Smart College Limited operating from Eco Bank Chambers, Tom Mboya Street Nairobi. They were then deployed to work at E-Smart Teaching Centre Kisii where the Claimant was the Principal. This is confirmed by the letter dated 15th May, 2012 by 1st, 2nds, 3rd and 4th Claimants to the Managing Director of E-Smart College Nairobi (page 18 of Memorandum of Claim) in response to the letter the Managing Director wrote to the Principal Kisii Esmart College directing him to pay the said Claimants' arrears of their salaries from January to June, 2012. The letter is dated 2nd June, 2012 and is annexed at page 20 of the Memorandum of Claim and also to the Replying Affidavit as Annex PM 2.

This is further confirmed by Appendix 3 of the Replying Affidavit which describes the relationship between Professor Kihumbo Thairu and Professor Wanja Thairu, and the Objector Dr. Julius Gekonde. In the Agreement, the Objector is described as one of the Directors of the Respondent Esmart College Limited which operated 3 teaching centres being Kisii Centre, Mumias Centre and Nairobi Centre. By virtue of the agreement Dr. Julius Gekonge the Objector was to take over the running of the Kisii Centre. This would explain the service of summons in this case upon the Objector and the registration of the Esmart Technical College by the Objector on 11th October, 2013, as well as the directive to the Objector in his capacity as the Principal Kisii Esmart College to pay the Claimants arrears of salary. This registration was effected after the filing of this claim and appears to have been entered to defeat execution of any decree that may be issued against the Respondent, and by extension, the Objector.

The Objector did not deny any of the facts contained in the Replying Affidavit, including the fact that he personally received the summons in this claim and informed the process server that he is an intelligent person and will teach the Claimants a lesson and will never pay them a single cent.

Notwithstanding the foregoing, 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. This was the decision of the court in the case of *Akiba Bank Ltd v Jetha & Sons Ltd (2005) eKLR* quoted by Mutava J in *Naran Hirani T/a Classico Builders vs Maina Mwangi and Wanjiku Karanja* wherein 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.

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 the 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 HCU(1958) 743. emphasis added

The Objector's application herein must fail for the following reasons: the first, that he was a director of the Respondent, the second, that he registered the Business name to defeat justice in this case and finally, he has not proved that the goods that were attached belong to him.

The application is thus dismissed with costs.

Dated, signed and delivered this 4th day of November 2015

MAUREEN ONYANGO

JUDGE