



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1795 OF 2011**

**CATHERINE KINYANY .....CLAIMANT**

**VERSUS**

**MCL SAATCHI & SAATCHI.....RESPONDENT**

**AND**

**MARKETING COMMUNICATIONS LTD .....OBJECTOR/APPLICANT**

**RULING**

The application herein is filed by Marketing Communications Ltd, the Objector by way of notice of Motion dated 2<sup>nd</sup> December 2013 seeking the following orders:-

1. That this application be certified as urgent and that the same be heard ex-parte in the first instance for the purposes of prayers 2, 3 & 4 below.
2. That there be an order of temporary injunction against the Claimant/Decree Holder directly or through her agents, servants, employees and especially Keysian Auctioneers from attaching the Objector's property including but not limited to:-
  - a. Office Chairs, Office Desks, Filing Cabinets, Reception desk, Executive Office Chairs, & Executive Office Desks.
  - b. Assorted Computers, printers, internet gadgets and other Office equipment.
  - c. Water dispenser
  - d. Motor Vehicles
  - e. Any other assets of the object as described in the proclamation
3. That the Auctioneer's fee be paid by the decree holder.
4. That costs be paid by the decree holder.

The application is supported by the affidavit of NATHANEL MBUGUA KANGETHE and the following grounds: -

- a. That the goods proclaimed do not belong to the judgment debtor but to the Objector herein.
- b. That the proclamation is defective, illegal, null and void in so far as they purports to proclaim and attach the Objector's assets.
- c. That the said proclamation is therefore unlawful and the same cannot be enforced by the Claimant as the basis of executing her judgment.
- d. That unless the Claimant is restrained from attaching the Objector's assets, the

Objector stands to suffer grievous prejudice and financial embarrassment in having to shoulder liabilities, which it did not accept or agree to accept. Indeed any proclamations and /or sale based on the said judgment shall constitute a violation of the Objector's constitutional right to Property and in any event shall be illegal, irregular, null and void ab initio.

- e. If the Claimant is not restrained from attaching the Objector's assets there is grave danger the Objector will suffer irreparable loss.
- f. Any prejudice to the Claimant in any event, can be compensated by way of costs.
- g. This application has been filed without any delay.
- h. It is the interest of justice that the orders sought be granted.
- i. The objector is not liable to satisfy the decree as it is not a party to the suit.

The Claimant filed a Notice of Preliminary Objection and Grounds of Objection both dated 18th December and filed on 19<sup>th</sup> December 2013. The grounds of Preliminary Objection are that the objector's application is incompetent, fatally defective and bad in law and Secondly, that the application is otherwise an abuse of the process of court.

The grounds of opposition are that the objector has not shown a nexus between the properties proclaimed and the evidence of ownership adduced.

On 29<sup>th</sup> January 2014 the Objector filed a Further Affidavit of Nathaniel Mbugua Kangethe attaching more receipts and invoices.

On 4<sup>th</sup> March 2014 the Objector filed a supplementary affidavit of Lillian Agola Wood, the objector's Managing Director sworn on 28<sup>th</sup> February 2014.

The parties argued the application on 12<sup>th</sup> February 2014 and thereafter filed written submissions. Ms Muraguri instructed by Mulanya & Maondo Advocates appeared for the Objector while Mr. Ondati instructed by Mohammed Muigai & Company Advocate appeared for the Claimant.

The objector submitted that it is being made to shoulder liabilities of another person, that the proclamation is illegal as it purports to proclaim goods and properties legally owned by the objector who is not a party to the claim filed by the claimant. The objector produced receipts and invoices marked as NKM 7, NKM1 , and LAW 1 to prove its ownership of the proclaimed goods. The objector relied on the following authorities:

1. **K-Rep Bank Ltd. V Basilio Pascal & 2 others [2012]eKLR.**
2. **Scan house Press Ltd V Times NRW Services Ltd [2010]eKLR.**
3. **Equatorial Commercial Bank Ltd V Bubacon Agencies Ltd & 3 others [2013] eKLR.**

The Objector prays that it's application be allowed with costs against the Claimant.

The Claimant in it's submissions argued that the objection application is defective for failure to give notice as provided in Order 22 Rule 51(2) and Rule 52 of the Civil Procedure Rules. That in the case of **Ngenye Kariuki V Kheira Omar Maalim [2011] eKLR** Justice Mwera struck out the application for failure to give notice. That this ground alone is sufficient to strike out the application.

Mr. Ondati further submitted that the application has no merit as in the receipts and invoices filed by the Objector, it is not clear whether the goods attached belong to the Judgment Debtor or the Objector. Some of the receipts bear the name MCL which could refer to either the Respondent or objector. That the receipts and invoices do not cover all the goods in the proclamation. That the receipts filed by the Objector relate only to computers, printers, motor cycles and chairs yet the notice of proclamation in addition include office desks, filing cabinets, reception desk, internet gadgets, reception waiting chairs and any other property found in the premises.

Mr. Ondati further submitted that the Objector has failed to disclose the nature of the relationship between the judgment debtor and the objector, and why the two companies bearing almost similar names have common directorship and share the same office space. He relied on the case of **Charles Muraya Ndegwa V Nahashon M. Gatere & 2 others**[2006]eKLR where the court dismissed the objector's application on the ground that receipts relied upon by the Objector being cash sale receipts unsupported by any other evidence did not prove that it is the objector who bought the goods. He urged the court to dismiss the objection.

I have carefully considered the application, the affidavit in support thereof, the preliminary Objection, grounds of objection and the authorities relied upon by the parties. I have also considered both the oral and written submissions.

In my opinion there are two twin issues for consideration. The first is the relationship between the judgment debtor and the Objector and the second is whether the objector has proved ownership of the attached goods in exclusion of the judgment debtor. Because they are twin issues. I will deal with them together.

In the supporting affidavit of Nathaniel Mbugua Kang'ethe, he states that he is well versed in the dispute between the claimant and the Respondent. He attached correspondence relating to the dispute between the two parties. In addition he attached the certificates of incorporation for the Objector and the judgment debtor and asserts at paragraphs 6 that the two share common directorship.

From evidence before me, the two companies appear to operate from the same premises. It has not been alleged in the supporting affidavit, the supplementary affidavit or the further affidavit filed in support of the objection proceedings, that the proclamation was carried out in the wrong premises or that the Respondent does not operate at the premises where the proclamation was carried out. I have also noted that the postal address in the objector's affidavits of the Chairman and the Managing Director are the same as those of the Respondent in the proceedings. It is the same address in the Claimant's contract and in all her communication with the Respondent.

The other issue is the name of the Respondent and the objector. The Respondent is MCL Saatchi & Saatchi (E.A) Limited while the Objector is Marketing Communications Ltd. This means that the initials MCL can refer to both the Respondent and the Objector. In the receipts and invoices that have been filed by the objector in support of the objection, many are addressed simply to MCL or MCL Marketing Communications Limited. It is therefore possible that the goods addressed to MCL Marketing Communications Limited are jointly owned by the Respondent and the Objector as it is apparent the two companies operate from the same offices.

The Claimant raised an issue about the procedure by which the objection proceedings were commenced. It was the Claimant's contention that the proceedings do not comply with Order 22 Rule , Rule 51 and 52 and based on the decision of the court in the case of **NGENYE KARIUKI** he urged the court to strike out the application.

I find that the Respondent and Objector are essentially the same person operating under different registered company names. As stated in the affidavit of Nathaniel Mbugua Kangethe, the Respondent and the Objector have common directorship. It has transpired from the proceedings that they share the same office, the same address and most probably the same office furniture and equipment. Some of the invoices produced as evidence of purchase of the proclaimed goods bear the name MCL & Marketing Communications Ltd meaning that they do not belong to the Objector alone but also to MCL which is part of the name of the Respondent.

Although the Objector argues that the two are separate legal entities as they are registered as two separate companies, the persons acting on behalf of both companies are the same. Nathaniel Mbugua Kangethe is the Chairman of both the Respondent and the Objector. He is the one who recruited the Claimant as an employee of the Respondent.

I therefore find that although the objector alleges it is the owner of the proclaimed property, it has not proved that the said property are not at the same time owned by the Respondent. The difference between the Objector and the Respondent appears to be on paper only. Again there are several items that are not included in the receipts and invoices produced by the Objector. The Claimant raised the issue about the Objector having failed to explain the relationship between it and the Respondent which the Objector has ignored to explain.

The foregoing being the case, I find that the Objection proceedings are an abuse of court process and I dismiss the same with costs to the Claimant.

Orders accordingly.

**READ AND SIGNED IN OPEN COURT THIS 7<sup>TH</sup> DAY OF APRIL, 2014**

**HON. LADY JUSTICE M. ONYANGO**

**JUDGE**

In the presence of

Mwangi for Claimant

No appearance for Defendants