



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

CAUSE NO. 243 N OF 2009

(Before D.K.N. Marete)

ZACHARIAH MOSERI OTWERE.....CLAIMANT

versus

FLEX PAC INTERNATIONAL LIMITED.....1ST RESPONDENT

RULING

This is an application by way of Notice of Motion dated 10th June, 2013 and brought to court via a certificate of urgency of the same date. The application is supported on the supporting affidavit of Rafique Ebrahim sworn on even date and seeks orders;

1. That this application be certified as Urgent.
2. That this Honourable Court be pleased to allow Rafique Ebrahim to be enjoined as an interested party to these proceedings.
3. That this Honourable Court be pleased to issue temporary injunction against the claimant, his agents, representatives, auctioneers or whosoever from in any way, proclaiming, attaching, selling, trespassing, or in any way dealing with the properties belonging to Rafique Ebrahim pending the hearing and determination of these proceedings.
4. That this Honourable Court be pleased to issue a Permanent Injunction against the Claimant, his agents, representatives, auctioneers or whosoever from in any way, proclaiming, attaching, selling, trespassing, or in any way dealing with the properties belonging to RAFIQUE EBRAHIM.
5. That the costs of this Application be in cause.

It is based on the grounds THAT;-

1. That the claimant has obtained Judgement in this case against the Respondent which is a limited liability company.
2. That the Claimant has proceeded to apply and obtained a decree together with warrants of attachment of property in execution of decree for money.
3. That the Claimant has however directed his auctioneers to the property of the Interested Party herein.

4. That the interested party does not own any shares in FLEX PAC INTERNATIONAL LIMITED which is one of the Respondents herein.
5. That the interested party was not, and has never been served with any proceedings and was never aware of this case until he was served with a copy of Proclamation of goods under attachment.
6. That the interest is apprehensive that it is about to be condemned unheard and his goods wrongfully attached in execution of a debt he never derived any benefit.
7. That it is trite law that a limited liability company has perpetual succession hence imperative that the claimant proceeds against the goods belonging to the company and not those of the former share holder.
8. That the interested party no longer holds any shares in the company and it is imperative that the claimant be ordered to proceed against the company.
9. That this court has immense powers to grant the orders as sought out herein.
10. That it is in the best interest of justice that the orders sought herein be granted to prevent miscarriage of justice.

The respondent vide a Replying Affidavit sworn on 24th June, 2013 opposes the application and totally opposes the averments by the interested party. He argues that the so called interested party is indeed the 2nd respondent and is well known to him and therefore the allegations on identity and ownership of proclaimed good is a lie and fraud and intended to defeat the ends of justice. He further argues that the interested party has not in any way adduced documentary evidence of ownership of the proclaimed properties to dispel the factual basis of his assertions on ownership of this proclaimed property.

The matter came for hearing on 10th May, 2013 when the duty judge, one, Nzioki wa Makau, made the following orders;

1. That the proposed interested party be and is hereby enjoined to the proceedings as prima facie the grant of the order is merited.
2. That the matter be and is hereby certified urgent and temporary stay of execution is granted for 14 days.
3. Inter partes hearing on 24th June, 2013 at 9.00 a.m. before Honourable Mr. Justice D.K. Njagi Marete.
4. Notice to issue and application be served forthwith.

On 24th June, 2013, the matter came before this court and the court issued the following orders;

- a. The application for the service of the claimant in court is allowed.
- b. The claimant is awarded 7 days to make and file a response to his application.
- c. Mention on 2nd July, 2013 at 900 hours
- d. Interim orders extended

On 2nd July, 2013, further orders as to filing of further pleadings were made and the matter fixed for hearing on 10th July, 2013 with an extension of the interim orders.

When the matter came for hearing on 10th July, 2013 there was a change of tune. Mr. Kinga for the

Interested Party submitted that the application was already listed for hearing whereas it was coming for mention with a view to confirming filing of a further affidavit and taking a hearing date. This was denied by the claimant/respondent and the record of court bore testimony to the claimant/respondent's position.

When the matter came for hearing at 11.00 hours, the parties were in agreement that the court makes a ruling on the basis of the proceedings filed in court. Therefore this exercise at a ruling which was slated for delivery on 18th July, 2013.

The interested party/applicants position in this cause is that he is not a party to these proceedings and therefore proclamation against his property in satisfaction of a decree against the respondent company and other respondents should be stopped and a permanent injunction issued against the claimant.

The interested party disowns any association with the respondent company and avers that he transferred his shares in the company to one, Leonard Mwangi for valuable consideration on with effect from 14th September, 2009 and therefore is not liable to any acts of the company of which he has no interest.

The claimant/respondent avers and submits that Rafique Ebrahim and Hassan Popat are one and the same person and is well known to the claimant. That during the course of his employment with the 1st respondent, the 2nd respondent purchased the company from previous owners and all throughout his employment he has known the respondent as Hassan Popat. This is the person who was served with the attachment warrants.

That this is camouflage intended to defeat the ends of justice. In any event, he has not adduced documentary evidence of the proclaimed goods in the stead of Hassan Popat as alleged. The claimant/respondent in his averments even prays that the said Rafique Ibrahim (interested parties) should be brought to court for verification of identity and therefore circumvent abuse of the process of court and foreclose the interests of justice. This was a pursued by either party when they agreed on reliance on pleadings for a decision.

What is the possible scenario in this instance? Who of the two parties is the more credible in the circumstances?

The claimant/respondent obtained an *ex parte* judgment in his favour on 10th February, 2011. In the process of execution of his decree these proceedings arose. The interested party has made his case on contentions and averments which are not fully supported by material evidence. Whereas he ably presents a case of transfer of shareholding of his interest in the respondent company, he does not in any way raise answers to the pertinent issue of identity. When this issue is raised in opposition to his case, he does not address the same and only goes mum. This is curious.

It is trite law that he who alleges must prove. It is also trite law that every party must prove his case, in these circumstances to a standard or test of a balance of probabilities or preponderance of evidence. In the circumstances of this case the Interested Party has chosen to be silent on proof of his case and or identity thus leaving this court to pursue the logic of balancing the situation on a balance of probability.

The above tilts in favour of the claimant/respondent. Situations of estopping warrants of attachment and execution can be very tricky indeed. All manner of allegations and positions always arise to stupefy the intent on execution. These must be strictly proven or else struck out. Excuses at avoiding execution must be short circuited by our courts. Decree holders must be safeguarded and facilitated to enjoy the fruits of their judgment. This should be so in the present circumstances.

I therefore dismiss this application with costs to the claimant/respondent. Interim stay orders hereto before issued are discharged.

Dated, delivered and signed this 23rd day of July, 2013.

D.K. Njagi Marete

JUDGE

Appearances:

1. Claimant/respondent in person.
2. Mr. Kinga instructed by Khaminwa & Khaminwa Advocates for the Interested Party/applicant.