



**Titus Makhanu & Associates Advocates v Alicate Holdings Limited; Southern Shield Holdings Limited (Interested Party) (Miscellaneous Reference Application E145 of 2021) [2024] KEHC 11836 (KLR) (Commercial and Tax) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS REFERENCE APPLICATION E145 OF 2021  
FG MUGAMBI, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**TITUS MAKHANU & ASSOCIATES ADVOCATES ..... APPLICANT**

**AND**

**ALICATE HOLDINGS LIMITED ..... RESPONDENT**

**AND**

**SOUTHERN SHIELD HOLDINGS LIMITED ..... INTERESTED PARTY**

**RULING**

1. The application before court is brought pursuant to sections IA, IB, 3A and 38 of the [Civil Procedure Act](#), Order 22 Rules 40, 55, 66(3) (4) (5) and (6), Order 40 Rule I and Order 51 Rule I of The Civil Procedure Rules, 2010.
2. It arises from a reference application in which judgment was entered on 23/6/2023 for the amount of 26,449,774.64 in favor of the applicant. Following the judgment, the applicant extracted a decree dated 10/7/2023 but at the same time filed an appeal on the issue of interest arising from the said decision.
3. In the meantime, the decree remains unexecuted. It is the applicant's case that the respondent (Alicate) transferred to the interested party (Southern Shield), its only attachable assets being 1,500,000 shares held with Fidelity Shield Insurance Company (Fidelity Insurance), so as to defeat execution of the said judgment.
4. It is these facts that necessitated the application before the court. The parties filed their respective pleadings and submissions, which I have carefully considered alongside the evidence and authorities in support of their arguments.



## **Analysis and determination**

5. From the pleadings, three issues arise for determination:
  - i. Whether Southern Shield should be joined in these proceedings;
  - ii. Whether the corporate veil of the Alicate and Southern Shield should be lifted;
  - iii. Whether a prohibitory order against the 1,500,000 shares should be issued.
6. The parties have raised some preliminary points which I should deal with before the substantive application. Firstly, Southern Shield contends that the application before this court is res judicata in relation to the one of 23/5/2023. Upon reviewing both the present application and this court's determination regarding the earlier application, I find that the two are substantively different. The issues raised in this application have not been adjudicated on their merits in the prior one. Therefore, the argument of res judicata fails.
7. Secondly, regarding the replying affidavit sworn on 27/2/2024 by Southern Shield, the applicant contends that it violates the requirements of the *Oaths and Statutory Declarations Act* that require the jurat and the last paragraph of the affidavit to appear on the same page. I have reviewed the affidavit sworn by Abdulali Kurji, a Director of Southern Shield.
8. A strict interpretation of the law would require me to strike out the affidavit for being incurably defective. However, this court retains the discretion under Article 159 of *the Constitution* to examine and determine the application on its merits, particularly when the issue raised does not affect the substance of the matter and no prejudice has been occasioned. I will proceed accordingly.

### **Whether Southern Shield Holdings Limited should be joined in these proceedings:**

9. The applicant contends that Southern Shield should be enjoined to these proceedings in light of the shares transfer transaction between itself and Alicate, its holding company. The applicant has raised concerns about the legitimacy of the said transaction, noting that the shares are Alicate's only traceable assets, which the applicant seeks to attach for purposes of satisfying the decree herein.
10. In light of this, the applicant also seeks orders against Southern Shield. It is the applicant's case that Southern Shield should therefore be enjoined into the proceedings so as to be heard and to show cause why the orders should not issue against it.
11. Alicate opposes the application and contends that the proceedings before the court concern the applicant and Alicate only. It argues that since the issues before the court have already been adjudicated on as between the applicant and Alicate, there is no basis for enjoining Southern Shield at this point in time. Southern Shield shares this view, contending that post-judgment joinder is highly unusual.
12. Alicate further maintains that its relationship with Southern Shield is not a basis for enjoining the latter, emphasizing that the two companies are distinct legal entities.
13. For its part, Southern Shield asserts that it has no interest in the matter and that its inclusion would not assist the court in resolving the issues at hand. It argues that no agreement exists between itself and the applicant and as such it should not be dragged into the dispute. Furthermore, it points out that there are no garnishee proceedings and no garnishee orders against it and that the prohibitory orders sought are therefore unnecessary.



14. The court's power to join parties to a legal proceeding who were not originally included in the suit is prescribed under Order 1 Rule 10 of the Civil Procedure Rules (CPR) which provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person.... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”. (emphasis mine).

15. The bone of contention is whether this discretion extends to proceedings post judgment. I do not see why not given the text as cited above. The Black's Law Dictionary (8<sup>th</sup> Ed 2004) at page 3808 defines proceedings in the following terms:

“Proceeding’ is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word ‘action’, but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions, the term ‘proceeding’ may include-

- (1) the institution of the action;
- (2) the appearance of the defendant;
- (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat;
- (4) the pleadings;
- (5) the taking of testimony before trial;
- (6) all motions made in the action;
- (7) the trial;
- (8) the judgment;
- (9) the execution;
- (10) proceedings supplementary to execution, in code practice;
- (11) the taking of the appeal or writ of error;
- (12) the remittitur, or sending back of the record to the lower court from the appellate or reviewing court;
- (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.”

16. It follows that 'proceedings' include both pre-judgment and post-judgment activities, as demonstrated by the application before this court. Additionally, a party may be joined to the proceedings even after litigation has concluded. The discretion afforded to the court under Order 1 Rule 10 is broad enough to allow joinder at the execution stage. The guiding principle for the court should be whether such joinder is necessary for the fair resolution of the case.



17. As to whether Southern Shield is a necessary and interested party, the applicant has cited Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“the Mutunga Rules”) which define an interested party as:

“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”
18. In *Trusted Society of Human Rights Alliance V Mumo Matemo & 5 Others*, [2014] eKLR the Supreme Court of Kenya defined an interested party as:

“One who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way...”
19. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others V Attorney General & 4 Others*, [2017] eKLR, the court outlined the key considerations for the joinder of a party to a suit. The primary purpose of joinder is to allow the court to effectively resolve the matter before it and to prevent a multiplicity of suits. Additionally, the party sought to be joined must have a legitimate interest or identifiable stake in the case. The orders sought in the suit must directly and legally affect the party seeking joinder, and the party must have a duty or role in the proceedings.
20. The court went on to note that:

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.”
21. Looking at the circumstances in this matter, in relation to the authorities cited, although Southern Shield is not a party to the main suit or directly involved in the underlying litigation, it may still be subject to injunctive relief at this stage. The applicant seeks to attach shares that Southern Shield acknowledges were transferred to it by Alicate. The applicant contends that this transfer was a deliberate attempt to evade the execution of a judgment or ruling, constituting a fraudulent conveyance aimed at frustrating the court’s ability to enforce its decision.
22. Moreover, the applicant seeks additional reliefs, including the piercing of the corporate veil and the imposition of joint liability on Southern Shield. These claims rest on the close relationship between Southern Shield and Alicate, which according to the applicant are intended to shield assets from execution. Should an order prohibiting transactions concerning the 1,500,000 shares be issued, Southern Shield’s legal rights and ability to transact with those shares would be directly impacted. To deny Southern Shield the opportunity to participate in these proceedings would not only compromise the company’s ability to protect its interests but would also undermine the fundamental principles of justice and equity.
23. The applicant’s argument that Southern Shield should be given the opportunity to show cause why the reliefs sought should not be granted is both reasonable and necessary. There is a clear, identifiable legal interest at stake for Southern Shield, particularly regarding the ownership and control of the shares in question. In this context, Southern Shield must be allowed to defend its position and protect its rights, especially given the serious allegations of asset concealment and fraudulent intent.



24. Furthermore, the applicant's oversight in describing Southern Shield as a "proposed interested party" rather than simply an "interested party" should not be permitted to detract from the substantive legal and factual issues before the court. This prayer is therefore successful.

**Whether the Corporate veil of Southern Shield AND Alicate should be lifted:**

25. It is trite law that a company is a distinct legal entity from its members as was espoused in the landmark case of *Salmon and Salmon and Co Ltd*, (1897) A.C. 22HL. Be that as it may, there are instances that call for the piercing of the corporate veil. The need to see what happens behind the corporate personality arises where there is evidence that the company is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the company.

26. In *Stephen Njoroge Gikera & Another V Econite Mining Company Ltd & 7 Others*, [2018] eKLR, the court noted that:

“...there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance.”

27. In that case, the court referred to the *Halsbury's Laws of England*, 4<sup>th</sup> Edition at paragraph 90 where the circumstances calling for lifting the veil of incorporation are discussed. It provides in part as follows:

“Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company.

This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such a case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company...

The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘a creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity...in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. (emphasis mine)

28. In the case of *Jiang Nan Xiang V Cok Fas-St Company Limited*, [2018] eKLR, the court further held that:

“The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal legal separation between the Company and its shareholders' personal financial affairs and/or that the Company is just a sham or the Company's actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company's creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment.



In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.”

29. The applicant has presented evidence demonstrating that Southern Shield is the majority shareholder of Alicate. Additionally, the applicant has provided documentation showing that Alicate previously held 1,500,000 ordinary shares in Fidelity Insurance, which were subsequently transferred to Southern Shield. The exact date of the transfer remains unclear, even though the applicant's records reflect the transaction as of 10/7/2023. This cannot provide a conclusive basis for determining the timing of the transfer in relation to the court's decision.
30. Southern Shield and Alicate do not dispute their corporate affiliation, nor do they deny that the directors and shareholders of Alicate also serve as directors of Southern Shield. Both entities maintain that the share transfer was legal and assert that it was not carried out with the intention of evading the execution of the court's decree. Their position is that the transfer, which is undisputed, was conducted pursuant to an arbitration award, and at the time of the transaction, no judgment had been entered in the present proceedings.
31. It is a well-established principle under the rules of evidence that the burden of proof lies with the party making an allegation. In this case, the applicant bears the responsibility of proving that the share transfer from Alicate to Southern Shield was conducted with fraudulent intent. Aside from the documentation from the Company's registry confirming the transfer, the applicant has not provided sufficient evidence to suggest that the transaction was fraudulent.
32. The mere fact that a holding company transfers shares to its subsidiary, without more, does not in itself indicate fraudulent behavior or an intent to evade a court ruling. Therefore, in the absence of compelling evidence to the contrary, I find no basis for piercing the corporate veil of either Southern Shield or Alicate.

**Whether a prohibitory order against the 1,500,000 shares should be issued:**

33. The applicant seeks a prohibition order against the shares held by Southern Shield In Fidelity Insurance. The prayer is premised on Order 22 Rule 40(1) of the Civil Procedure Rules which provides that:
  - “In the case of
    - a. A share in the capital of the corporation; or
    - b. Other movable property not in the possession of the judgment – debtor for the attachment of which specific provision is not made by these Rules the attachment shall be made by a written order prohibiting –
      - i. In the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereof: or
      - j. In the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment – debtor.”
34. The submission by the respondents is that the application ought to have sought garnishee orders against it as opposed to prohibitory orders. This court, in *Pyaralal Mhand Bheru Rajput V Barclays Bank and Others*, CC No. 38 of 2004 observed that there exists a prescribed procedure governing the



attachment of shares. This procedure is that set out in Order 22 Rule 40(1) of the Civil Procedure Rules. The court held that:

“The law is that attachment of shares in execution of a decree is only by means of a prohibitory order. Once the prohibitory order is made and registered against the shares, there is effective attachment in law.”

35. I equally share the sentiments of this court as expressed in *Orion East Africa Limited V Tetu Coffee Growers Co-operative Society Limited (In Liquidation) Co-operative Bank of Kenya Limited*, [2018] eKLR to the extent that:

“The law therefore is that in relation to shares an “attachment and sale” order may only be satisfied by adhering to the procedure set out in Order 22 r 40(1) that is by means of a prohibition order. It is only once a prohibition order is made and registered against the shares that there can be deemed in law to be an effective attachment of those shares.”

36. In addition to what I have already stated, the applicant has in place a partial decree albeit the fact that there is also a pending appeal to wit Civil Appeal No. E671 of 2023. The applicant contends that the said appeal could be rendered nugatory should the prohibitory orders not be allowed and it is successful in the appeal.

37. Following judgment, an application for stay of execution pending appeal was made before this court by Alicate. The application was allowed on conditions that the respondent failed to meet. I have combed through the replying affidavit filed by Alicate and I note that they do not deny this. As such, the applicant is within their right to execute the partial decree. For these reasons, it is my finding that the applicant is deserving of the orders attaching the shares so as to enable the execution and pending the appeal as well.

## **Disposition**

38. Accordingly, the application succeeds in part in the following terms:

- i. That Southern Shield Holdings Limited be and is hereby enjoined as an interested party to these proceedings;
- ii. That an order is hereby issued prohibiting the interested party from transferring (except to a purchaser paying for the shares in satisfaction of the Decree dated 10<sup>th</sup> July 2023) or receiving any dividends or interest thereon on the 1,500,000 shares it owns and held by Fidelity Shield Insurance Company Limited (“Fidelity Insurance”);
- iii. That an order is hereby further issued prohibiting the directors, Secretary, Managers or any other proper officer of Fidelity Insurance from permitting the transfer of the 1,500,000 shares or receiving any payment from any person except the purchaser paying for the shares in satisfaction of the Decree dated 10<sup>th</sup> July 2023;
- iv. That the interested party’s directors namely, Akbarali Karim Kurji, Almas, Akbarali Karim, Abdulali Akberali Karim Kurji and Safiya Abdulali Kurji be and are hereby ordered to execute the transfer or other instrument and all necessary documents in respect of the interested party’s shares to the purchaser, failing which, the secretary, manager or any other proper officers of Fidelity Insurance do execute the transfer or other instrument and all necessary documents in respect of the interested party’s shares to the purchaser and in default thereof, the Registrar



of this Court do execute such transfer or documents as may be necessary for purposes of transferring the shares to the purchaser;

- v. That pending the hearing and determination of the applicants intended appeal the respondent and/or the interested party either directly or indirectly and/or any person (natural or juridical) be and are hereby restrained from transferring the interested party's shares (remaining after execution of the decree dated 10<sup>th</sup> July 2023) held by Fidelity Insurance or receiving any dividends payable thereto; and
- vi. The applicant shall have the costs of this application.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

