



**Aggregate Construction Company Limited v Ashleah Developers Limited & another (Civil Case 434 of 2016) [2023] KEHC 4034 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4034 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 434 OF 2016  
A MSHILA, J  
APRIL 28, 2023**

**BETWEEN**

**AGGREGATE CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF**

**AND**

**ASHLEAH DEVELOPERS LIMITED ..... DEFENDANT**

**AND**

**94 EASTCHURCH PROPERTIES LIMITED ..... OBJECTOR**

**RULING**

1. The Notice of Motion dated June 16, 2022 was brought under Order 22 Rule 51 and Order 51 Rule 1 of the [Civil Procedure Rules](#) for the following orders;
  - a. Pending the hearing and determination of this Application a temporary order of stay be issued for the orders of sale of Land Reference No 1870/VI/94 registered in the name of the Objector and stay of the settlement of terms of sale orders issued by the Court on June 13, 2022.
  - b. The orders of sale and settlement of the terms of sale of Land Reference No 1870/VI/84 issued by the Court on June 13, 2022 and any consequential warrants of attachment and sale be set aside.
  - c. Costs be provided for.
2. The Application was supported by the sworn Affidavit of Dharmesh Shah who stated that the Objector is the registered owner of Land Reference No 1870/VI/94 and was not a party to the suit between the Plaintiff and the Defendant.



3. The decree in favour of the Plaintiff does not refer to the Objector's said property. The Objector is a separate and distinct legal entity from the Defendant and its said property is not a property of the Defendant. The said property is therefore not available to the Plaintiff to attach and sell in satisfaction of its said Decree.
4. The warrants of attachment and settlement of terms orders issued by the Court on June 13, 2022 were therefore issued in ignorance of these facts. The Objector, being the registered owner of the said property was not served with any notification of the settlement of terms or any other prior proceedings in this matter. If it had been served these salient facts would have been brought to the attention of the Court. The Objector has its own numerous creditors and the liabilities can only be paid from the said property which is the only asset of the Objector.
5. The Objector only learnt of the proceedings of June 13, 2022 settling the terms of the sale as its advocate, Edwin Koech saw the matter listed on the day's cause list as he was perusing the same in the usual course of business. This Application has therefore been made with great haste upon learning of the said proceedings.

### **Applicant's case**

6. The Objector in its Application dated June 16, 2022 sought a substantive order that the orders of sale and settlement of terms of sale of Land Reference No 1870/VI/94 issued by the Deputy Registrar on June 13, 2022 and any consequential Warrants of attachment and sale of the said property be set aside.
7. The Objector, Ninety-Four Eastchurch Properties Limited, erroneously christened with the numerical in the title to the suit is the registered proprietor of L.R. No 1870/VI/94 as shown on the copy of title annexed to the supporting affidavit and marked as "B" and in particular entry No 7 to the title.
8. The Objector was not a party to this suit and its said property was also not a subject of the suit which was a dispute on a building contract between the Plaintiff and the Defendant. Any assertions by the Plaintiff that the Objector was aware of this suit are misleading and have been answered to at paragraph 8 of the Further Affidavit of Dharmesh Shah sworn on July 18, 2022.
9. It is a well settled principle of law that a Company is separate and distinct from its shareholders/directors and the acts or liabilities of the shareholders/directors cannot be attributed to the Company and vice versa as was held in the Court of Appeal decision in *Valentine Opiyo & another v. Masline Adhiambo t/a Ellyams Enterprises* (2014) eKLR.
10. The mere fact that the Defendant/Judgment Debtor herein is a former shareholder of the Objector does not at all entitle it to execute against the Objector's property. It is noteworthy that the Judgment Debtor is not currently a shareholder in the Objector as per the CR 12 attached to the Further Affidavit.
11. The Objector only became aware of these proceedings on June 13, 2022 when its advocate Edwin Koech heard the proceedings herein before the Deputy Registrar when he was appearing on a separate matter. These Objection proceedings were filed immediately on June 16, 2022.
12. The Plaintiff has also not intimated in writing whether it still intends to proceed with the attachment and execution as required under Order 22 Rule 52. It was therefore the Applicant's submission that the Objector is now entitled to the raising of the attachment as provided under Order 22 Rule 53.
13. The right to property is a fundamental Constitutional right under Article 40 that cannot be easily taken away. Having shown that it is the registered owner of the subject property and that there is no judgment and decree against it, the Objector is entitled to the orders sought in this Application.



## Respondent's case

14. It was the Respondent's case that having established with ample evidence that throughout the current proceedings the JD's interest in property known as land parcel number LR 1870/VI/94 together with its interest in 99.9% shares held in Ninety-Four Eastchurch Properties Ltd, have always been protected through express unequivocal orders of the Court. Therefore, by purporting to have transferred shares in its interest Ninety-Four Eastchurch Properties Ltd the JD acted in contempt of orders of this Court and is therefore lacking audience before the court. It would be unfair and unjust to the DH if the Objector can be rewarded for its contempt of express orders of this Court, while at the same time having acted in contempt of orders of the same court.
15. It was the Respondent's argument that any purported transfer of the JD's interest in the suit property herein is null and void ab initio, it is also clear that the said Directors of both the JD and Ninety-Four Eastchurch Properties Ltd have not only retained a controlling interest in the said company, but have also are operating behind the scenes in order to defeat justice. In the circumstance they have resorted to self-defeating and irreconcilable fraudulent misrepresentation of facts, half-truths and mischief clearly exhibiting the JD's deliberate intention to abuse the processes of the Court.
16. Whilst the Objector introduced itself as the owner of property known as land parcel number LR 1870/VI/94. The 94 East Church Limited is an unregistered entity which lacks legal personality and is therefore incapable of transacting or owning any property. Generally, it is not an entity recognized under the law from which the Objector can sustain its claims against the DH. The Objectors own evidence clearly established that the said property as known is owned by Ninety-Four Eastchurch Properties Ltd, which is a distinct legal personality. This matter was brought to the attention of the court and was dismissed as non-issue by the Objector, despite the weighty legal repercussions. It was therefore the Respondents submission that being incapable of owning property and/or transacting in its own name the objector lacks legal standing before this forum.

## Issues for determination

17. The Court has carefully considered the Application, response and the written submissions the court has framed the following issue for determination;
  - a. Whether a temporary stay should be issued and/or the orders of sale and settlement of the terms of sale of Land Reference No 1870/VI/84 issued by the Court on June 13, 2022 be set aside?

## Analysis

18. The Applicant placed reliance on Order 22 Rule 51 (1) of the [Civil Procedure Rules](#) which provides as follows: -

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

19. Order 22 Rule 52 of the [Civil Procedure Rules](#). The same provides as follows: -

“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within



seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

20. Order 22 Rule 53 of the *Civil Procedure Rules* states that: -

“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

21. It was the Applicant’s case that the decree in favour of the Plaintiff does not refer to the Objector’s said property. The Objector is a separate and distinct legal entity from the Defendant and its said property is not a property of the Defendant. The said property is therefore not available to the Plaintiff to attach and sell in satisfaction of its said Decree.

22. The Respondent on the other hand contended that the judgment debtor’s shareholding in Ninety-Four Eastchurch Properties Limited is an integral and inseparable element of the judgment debtor’s ownership of an interest in land parcel number LR No 1870/VI/94. Further, the judgment debtor owns no other property within the jurisdiction of the court known to the decree holder that is capable of satisfying the decretal sum together with the accrued interest.

23. The law is clear that the onus lies on the Objector to establish its legal or equitable interest in the properties which are the subject matter of the proclamation and attachment objected to, and not for the decree holder to prove that the goods belong to the Defendant. This position was affirmed in the case of *Simba Colt Motors Ltd v Lustman & Co* (1990), HCCC No 729 of 2002 that:

“The purpose of Rule 57 is to provide the objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the objector to prove that the property belonged to him and not, as submitted before me, for the Decree-holder to prove that the property belonged to the Judgement-Debtor.”

24. To its Application, the Objector attached a copy of the search title indicating that Objector is the registered owner of Land Reference No 1870/VI/94.

25. It goes without saying that the Objector is a separate legal entity from the Judgment Debtor, the separation of corporate legal entity as was espoused in *Salomon v Salomon* [1897] AC 78, that:

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”

26. Based on the material placed before this court by the objector, the court is satisfied that the Objector’s prima facie legal interest in Land Reference No 1870/VI/94 has been established and the Respondents have not adduced evidence to the contrary.



27. This court is satisfied that the Objector's Application for the setting aside of the orders of sale and settlement of the terms of sale of Land Reference No 1870/VI/84 issued by the Court on June 13, 2022 is merited.

**Findings and determination**

28. In light of the forgoing this court makes the following findings and determinations;

- i. The application is found to have merit and it is hereby allowed;
- ii. The orders of sale and settlement of the terms of sale of Land Reference No 1870/VI/84 issued by the Court on June 13, 2022 and any consequential warrants of attachment and sale be and are hereby set aside.
- iii. Each party shall bear its own costs.
- iv. Mention on May 4, 2023 before the Deputy Registrar for directions.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

**Kagunyi holding brief for Kamau Chege for the Interested Party/Objector**

**No appearance by Plaintiff**

**No appearance by Defendant**

**Sarah-----Court Assistant**

