REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 108 OF 2014

ISAAC KIPKORIR.....APPELLANT

VERSUS

SILAS S. KOROS.....1ST RESPONDENT

FRANCIS CHERUIYOT.....2ND RESPONDENT

AND

TOWN SHELTERS CONSULTANTS LIMITED.....OBJECTOR

RULING

[1] The Notice of Motion dated **30 November 2020** was filed by the Objector, **Town Shelters Consultants Limited,** pursuant to **Sections 3 & 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Order 22 Rule 51** of the **Civil Procedure Rules,** for orders that:

> **[a]** the intended attachment in execution of the decree against the assets of the objector is illegal, null and void as the objector has legal or equitable interest in the whole of the movable property proclaimed on **11 November 2020.**
>
> **[b]** That there be stay of execution and/or further execution of the decree herein pending the hearing and determination of the application *inter partes*. (spent)
>
> **[c]** That the costs of the application be provided for.

[2] The application was premised on the grounds that the objector is the owner of the assets that were proclaimed herein in execution for costs. In proof thereof, the objector swore and filed an affidavit along with the application to which he annexed a Certificate of Incorporation dated **18 October 2010** as well as other documents to demonstrate that it carries on business at the National Bank Building, L.R. No. 4/88; and therefore that it is an entirely separate and distinct entity from the respondents in this appeal.

[3] The appellant filed a Replying Affidavit sworn on **8 December 2020** in which he reiterated the facts giving rise to the appeal. He asserted that, since the 2nd respondent is the majority shareholder in the objecting company, the attachment was properly levied and ought to be proceeded with to conclusion. He relied on the documents marked **Annexure IK 3** and **Annexure IK 7** in proof of the fact that the respondents changed their business name from **Six Four Prime Properties** to **Town Shelters Consultants Limited;** and that this was done with the sole objective of hiding their fraudulent activities from unsuspecting members of the public. In the appellant's view, the instant application is another of the respondents' schemes to evade execution and defeat the judgment passed in his favour on **2 September 2014**.

[4] The application was canvassed by way of written submissions, pursuant to the directions given herein on **9 December 2020**. Accordingly, **Mr. Tororei** for the objector filed his written submissions dated **15 March 2021** on **24 March 2021**. He proposed the following issues for determination:

> **[a]** Whether or not the objector and respondents are one and the same;
>
> **[b]** Whether or not the objection should be lifted.

[5] According to **Mr. Tororei**, in asserting that the respondents changed their business name from **Six Four Prime Properties** to **Town Shelters Consultants Ltd** to hide their fraudulent activities from unsuspecting members of the public, the appellant is inviting the Court to pierce the corporate veil as an exception to the principle established in **Salomon v Salomon & Co. Ltd** [1987] AC 22. He accordingly submitted that the appellant was under obligation to demonstrate that the objector is a mask for the fraudulent dealings of the respondents; which the appellant has, in his view, failed to do. He relied on **Justine Nyambu vs. Jaspa Logistic [2017] eKLR, Githunguri Dairy Farmers Co-operative Society vs. Ernie Campel & Company Limited & Another** [2018] eKLR, **De Ruiters Roses East Africa Limited vs. Alora Flowers Limited** [2006] eKLR and **Victor Mabachi & Another vs. Nurtun Bates Ltd** [2013] eKLR to support his argument that the objector is in fact a separate legal entity and cannot, in law, be called upon to settle the respondents' debts.

[6] **Mr. Tororei** relied on **Section 35** of the **Companies Act** and submitted that by dint thereof, the objector has the freedom to contract; which includes the freedom to acquire and own property, including the items proclaimed. He argued that it was therefore incumbent upon the appellant to prove, either that the attached items belong to the respondents or that they were held by the objector for and on behalf of the respondents. He added that since the appellant did not avail such proof, the Court should find the attachment unlawful. He consequently urged that the same be lifted forthwith with attendant costs.

[7] **Mr. Kibii** for the appellant relied on his written submissions dated **13 April 2021**. He raised two preliminary points of law in objection to the application, urging the Court to find, *in limine*, that the application is untenable. His first ground of objection was that the application is incurably defective, as there is no resolution by the objector's board of directors authorizing **Tecla Cheruiyot** to swear the documents filed in support of the Notice of Motion dated **30 November 2020,** or authorizing the law firm of **M/s Tororei & Company Advocates** to represent the company in these proceedings. He relied on **Nairobi HCCC No. 45 of 2012: Kenya Commercial Bank vs. Stage Coach**; **Directline Assurance Co. Ltd vs. Tomson Ondimu** [2019] eKLR; among other authorities.

[8] The second point raised by **Mr. Kibii** in objection to the application is that there was non-compliance with **Order 22 Rule 51(1)** of the **Civil Procedure Rules**; which requires that a notice of objection be issued before such an application can be filed. Counsel relied on **Arun C. Sharma vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others** [2014] eKLR in urging the Court to find that failure by the objector to comply with a mandatory provision of the law renders the application incompetent and incurably defective.

[9] On the merits, **Mr. Kibii** reiterated the appellant's stance that the respondents merely changed from **Six Four Prime Properties** to **Town Shelters Consultants Limited.** He urged the Court to rely on Form CR12 annexed to the appellant's Replying Affidavit as proof of that fact. In addition, counsel pointed out that, the fact that the 2nd respondent is the majority shareholder of the objector is proof enough that the respondents merely changed their business name and location to evade, avoid and defeat court process and the appellant's judgment. He relied on **Malindi Air Service Ltd vs. Prestige Air Service** [2000] eKLR and urged the Court to find that the instant application is totally lacking in merit.

[10] **Mr. Tororei** filed supplementary submissions, with the leave of the Court, in response to the technical points raised by **Mr. Kibii**. In respect of board resolution, he took the view that the issue was not pleaded in the appellant's Replying Affidavit and therefore ought not to be entertained by way of written submissions. He underscored the principle that parties are bound by their pleadings and that it would amount to a violation of the objector's right to fair trial for such fundamental issues to be raised by way of written submissions. Re cited **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission and 2 Others** [2017] eKLR; **Mumo Matemu vs. Trusted Society of Human Rights Alliance** [2013] eKLR and **Linet Chepkemoi Masai vs. Moses Ndiema Masai & Another,** Eldoret High Court Civil Case No. 29 of 2020 (Unreported) to underscore his arguments.

[11] **Mr. Tororei** also contended that since objection proceedings are incidental to execution proceedings, such a requirement as board approval, which is envisaged for purposes of commencement of suits pursuant to **Order 4 Rule 1(4)** of the **Civil Procedure Rules,** ought not to strictly apply. And that, in any event, failure to comply can be rectified, and is therefore not necessarily fatal. He referred the Court to **Leo Investments Ltd vs. Trident Insurance Co. Ltd** [2014] eKLR, **Republic vs. Registrar General and 13 Others** [2015] eKLR and **East Africa Safari Air Ltd vs. Anthony Ambaka Kegode & Another** [2011] eKLR to support the position that such a resolution can be filed afterwards.

[12] In terms of compliance with the procedure set out in **Order 22 Rule 51** of the **Civil Procedure Rules, Mr. Tororei** pointed out that all the pertinent documents were duly filed and paid for by the objector. He blamed the Deputy Registrar of the Court for the failure to sign and issue the same. He added that, in any case, the requirement to first serve notice of objection was overtaken by events, after the Court gave directions on the disposal of the application; taking into account that the subject application was filed under a certificate of urgency. He urged the Court to note that, pursuant to those directions, the appellant filed a response to the application, notwithstanding that a Notice of Objection had not been filed.

[13] Starting with the two preliminary points, there is no gainsaying that the objector is a limited liability company; and therefore a separate legal entity capable of suing and being sued in its own right. For this reason, it is the law, by dint of **Order 4 Rule 1(4)** of the **Civil Procedure Rules** that:

> **Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.**

[14] Hence, the appellant submitted that, in so far as the objector did not file a resolution of its board of directors authorizing **Tecla Cheruiyot** to swear the documents filed in support of the Notice of Motion dated **30 November 2020** and authorizing the law firm of **M/s Tororei & Company Advocates** to represent the company in these proceedings, the objection application is incurably defective. I however have no hesitation in rejecting that argument. The rule aforestated is explicit in so far as it is in respect of suits instituted by corporations as plaintiffs; hence the specific reference to situations **"...where the plaintiff is a corporation..."** The rationale for this was explicated in **Affordable Homes Africa Ltd vs. Henderson & 2 Others** [2004] eKLR, thus:

> **"... As an artificial person ... a company can only take decisions through the agency of its organs, which are primarily the**

board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court..."

[15] Order 4 Rule 1(4) of the **Civil Procedure Rules** does not expressly state that such a requirement is applicable to corporate defendants. Indeed, in **Saraf Limited vs. Augusto Arduin** [2016] eKLR the Court of Appeal held that:

"...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see Solomon & Solomon [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law."

[16] By parity of reasoning, it would be unreasonable to expect that a board resolution be first obtained sanctioning objection proceedings before such proceedings can be taken by a company whose property has been attached wrongfully. The fact is that, upon proclamation, the affected parties ordinarily have no more than 7 days' window for preemptive action before actual seizure of the proclaimed goods for sale; bearing in mind the sort of timelines provided for in **Order 22 Rule 51** of the **Civil Procedure Rules.** In the same vein, I am not convinced that in the circumstances hereof, a resolution by the board was needed for the firm of **M/s Tororei & Company Advocates** to act herein for the objector. In **Wanyiri Kihoro vs. Konahauthi Ltd** [2017] eKLR, the Court of Appeal clarified the position thus:

The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

However, the principle enunciated in the *Bugerere case* has since been overruled by the Uganda Supreme court in the case of Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere case* was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

[17] In the instant matter, Tecla Cheruiyot averred that she is a director of the objector and that she was duly authorized to make the impugned deposition. That suffices; as it would otherwise require evidence to refute her assertions; which would remove the issue from the purview of a preliminary objection. The same would apply in respect of the objector's instructions to have the firm of M/s Tororei & Company Advocates act for it in the objection proceedings.

[18] The second technical point raised by Mr. Kibii in opposition to the application is that **Order 22 Rule 51(1)** of the **Civil Procedure Rules**, was not complied with. That provision requires that a notice of objection be issued before such an application can be filed. Counsel relied on **Aron C. Sharma vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others** (supra) in urging the Court to find that failure by the objector to comply with a mandatory provision of the law renders the application incompetent and incurably defective. In that case, attachment was levied on items that are exempt from attachment by dint of Section 44 of the **Civil Procedure Act**. The objection application was accordingly successful on that score and the attachment was lifted.

[19] According to **Mr. Kibii**, upon filing a Notice of Objection, the Deputy Registrar ought to have complied with **Order 22 Rule 51** of the **Civil Procedure Rules**, which provides that:

(1) 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.

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties."

[20] A perusal of the court record herein reveals that the objector duly complied by filing a Notice of Objection along with an application dated **30 November 2020**. Additionally, there are on record, signed copies of Notice to Attaching Creditor issued by the Deputy Registrar as well as a Notice of Stay of Execution addressed to **M/s Limo R.K. & Co. Advocates** and **M/s Igare Auctioneers**. It is plain therefore that there was compliance. In any case, upon presentation of the application dated **30 November 2020**, it was certified urgent by the duty judge and directions issued that it be served within 3 days for further directions on **9 December 2020**. On the **9 December 2020**, the duty judge issued directions for stay and for the application to be canvassed by way of written submissions. From the standpoint of **Article 159(2)(b)** of the **Constitution**, the process cannot be faulted. I therefore find no merit in the two points of law raised in opposition to the application.

[21] On the merits, the parties are in agreement that, following the Judgment of the Court dated **30 April 2019**, the appellant, as the successful party, caused his Bill of Costs to be filed and taxed by the Deputy Registrar of the Court. A Certificate of Costs was accordingly issued in his favour on **19 February 2020** in the sum of **Kshs. 118,750/=** which the appellant sought to execute vide the Warrant of Attachment dated **6 November 2020**. It is also common ground that, on **11 November 2020, M/s Igare Auctioneers** proclaimed attachment on the following properties with a total estimated value of **Kshs. 80,000/=:**

[a] One desktop monitor and CPU

[b] One big office desk,

[c] One executive office chair,

[d] 6 office chairs (small)

[e] One glass table

[f] One HCL, CPU and HP desktop monitor plus HP printer

[g] Ten office desks

[22] A copy of the Proclamation of Attachment was annexed to the Supporting Affidavit of **Tecla Cheruiyot** along with receipts and delivery notes in the name of the objector, evidencing purchase. In essence, the objector, **Town Shelters Consultants Ltd**, a registered limited liability company with powers to sue and be sued in its own right, contends that its property was wrongly attached as it is neither a party to the appeal nor the lower court suit. Accordingly, the single issue arising for determination is the question whether the attached properties were justifiably attached; or put differently, can it be said that the objector has vindicated its claim to ownership of the attached property.

[23] From a perusal of the documents annexed to the objector's Supporting Affidavit, there is credible proof that the attached items belong to the objector. The objector averred that its registered office is at National Bank Building, and exhibited documents to that effect; including its Certificate of Incorporation, Letter of Offer in respect of lease of office space dated **5 August 2014**, as well as receipts for rent payment for the premises on the property known as **LR No. 48/88, National Bank Building** in Eldoret Town. Thus, the assertion by the objector that it is the legal and equitable proprietor of the property is unrebutted. This is because, in his Replying Affidavit, the appellant took the stance that the respondents are the individuals behind the **Town Shelters Consultants Ltd**; and that they changed the business name for the sole purpose of defeating the Judgment of the Court in this appeal. Thus, at paragraph 12 of the Replying Affidavit, the appellant averred that:

> **"It is evidently clear that the judgment debtors changed their business name from Six Four Prime Properties to Town Shelters Consultants Ltd to hide their fraudulent activities from the unsuspecting members of the public as demonstrated by the receipt dated 12th January 2010 as the CR 12 being annextures IK 3 & 7 respectively wherein it is clearly indicated that the judgment debtors and the objector share the same premises."**

[24] The general position at law is that a limited liability company, such as the objector, is a legal entity in its own right; an entity that is distinct and separate from its shareholders and directors, notwithstanding that as a juristic person, it operates through human members, directors and employees. The principle was well expounded in **Salomon v Salomon & Co. Limited** [1897] AC 22 thus:

> **"The company is at law a different person 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 trustee 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..."**

[25] On account of this basic principle, a director ought not to be held personally liable for the liabilities of the company of which he is a director unless a plausible justification be made for the lifting of the corporate veil. Hence, at Paragraph 90 of **Halsbury's Laws of England, 4th Edition**, it is opined that:

> **"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 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 case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced."**

[26] Although the appellant averred that the objecting company was incorporated for the sole purpose of defeating his Judgment, the Certificate of Incorporation marked **Annexure JC 1** to the Supporting Affidavit clearly shows that the company was incorporated on **18 October 2010**, long before the lower court suit was filed. It will be recalled also that the lower court dismissed that suit with costs; and therefore that the appellant's decretal rights did not accrue until **30 April 2019** when the appeal was determined by this Court. There is therefore no proof that, either before or since the pronouncement of that Judgment, the respondents have acted fraudulently with regard to the affairs of the objector.

[27] It is plain, then, that the facts of this case are incomparable to the facts in **Malindi Air Service Ltd vs. Prestige Air Service** [2000] eKLR cited by the respondent in which the changes were effected *post facto*. The following excerpt which counsel for the respondent drew the Court's attention to confirms as much. The Court observed that:

> **"...the judgment debtor has attempted to evade settlement of the decree in this matter and one of the stratagems employed was the change of name at the company's registry which does avail the judgment debtor as the legal position on its property remained the same. The judgment debtor and M/s Prestige Air Ltd are one and the same. The other was to make objections to attachment on the pretext that the property of the judgment debtor is now owned by other people unconcerned with the judgment debtor's debts. The Managing Director one Tajunder Singh Kalsi has been instrumental in these maneuvers and if he did not disclose to those he enticed to take part in the maneuvers that the company's property was under attachment, then he must have been acting fraudulently or to be charitable to him, not in good faith. I cannot put it beyond him to arrange for execution of the sale agreement exhibited and to issue the letters exhibited showing purported receipts of money..."**

[28] Thus, there being no proof of fraudulent conduct on the part of the directors of the objector, I am unable to find justifiable cause for lifting the corporate veil. I consequently find merit in the objection application dated **30 November 2020.** The same is hereby allowed and orders issued as hereunder:

[a] That the intended attachment in execution of the decree herein against the assets of the objector is illegal, null and void as the objector is the legal and equitable owner of the whole of the movable property proclaimed on **11 November 2020.**

[b] That the costs of the application be borne by the respondents.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF MARCH 2022.

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OLGA SEWE

JUDGE