



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 239 OF 2013**

**NJERU KABURU.....APPELLANT**

**VERSUS**

**GERMANO MUGEREKA.....RESPONDENT**

**(Being an appeal from the Ruling of the Chief Magistrate's Court at Meru by the Honourable Magistrate M.Nasimiyu (R.M) delivered on 19<sup>th</sup> April 2013 in Meru Civil Suit No. 189 of 2007)**

**JUDGMENT**

**Introduction**

1. The Appellant herein was initially the Defendant in *Meru- CMCCC No. 189 of 2007* filed by *Germano Mugerek*. Later, he was replaced with Maid Limited through amended Plaintiff dated 12<sup>th</sup> February 2008.
2. The case was heard and judgment was entered against the defendant, i.e. Maid Limited on 14.9.2012.
3. The Respondent herein executed the decree arising from the said judgement through View Line Auctioneers who attached motor vehicles KAA 134R and KAA 120Q. The appellant filed objection to the attachment based on Order 21 Rule (5) of the Civil Procedure Rules (which ought to be Order 22 Rule 51 of the Civil Procedure Rules). The appellant claimed ownership of the attached goods. The Appellant/objector stated that he had no association whatsoever with Maid limited and therefore had no legal obligation to satisfy the decree obtained by the Respondent.
4. The Respondent replied to the Application by stating that the proclaimed goods belonged to Maid Ltd. That Maid limited belongs to the Appellant herein and is a short version of Mbaki Agricultural Inputs Distributors. He accused the Appellant of lying under oath by stating that he has no connection with Maid Ltd yet he testified on its behalf as a defendant witness. He described the objector as just an interloper who should not be entertained.
5. In its ruling, the trial Court noted that the Appellant had filed a supporting affidavit stating that he is a Managing Director of Maid Limited but later in the proceedings appeared as a witness of Maid Limited and testified that he is a director of Mbaki Agriculture Inputs Distributors Limited which had no association with Maid Limited. The trial Magistrate then dismissed the application and specifically stated;

**“.....the objector has not provided any evidence in support of his objection. Order 22 Rules 51 of Cap 2 Laws of Kenya provides that the objector has to prove on a balance of probabilities that he has legal or equitable interest in the attached properties. The burden of prove in this objection proceedings therefore lies with the objector. No evidence of ownership was presented by the objector and he has therefore failed to satisfy the burden of proof.**

**Finally and with all due respect the counsel for the objector, I find it curious that the objector has appeared in this suit first as a defendant, as a witness for the defendant and now as an objector, and has at the same time persistently and on oath denied to have any association with the judgement debtor Maid Limited. I doubt that the objector told this court the truth. He has by his conduct in this case raised serious doubts in his credibility and may have committed perjury without care of the serious consequences thereof.**

**In view of the foregoing findings and observations, I order as follows:**

1. That the application dated 17<sup>th</sup> December 2012 is dismissed with costs to the plaintiff/decreed holder to be paid by the objector
2. That the Criminal Investigations department do carry out investigations to ascertain the relationship between

**Maki Agricultural Inputs Distributors Limited and Maid Limited and the relationship between Maid limited and Njeru Kaburu the objector herein, with a view to ascertain whether he had committed perjury, and if so appropriate action to follow.**

**3. The executive officer to ensure that a certified copy if this ruling and resultant Orders are served upon the CID Meru Orders accordingly”**

### **The appeal**

6. Dismissal of his objection aggrieved the Appellant and he filed this appeal. In the Memorandum of Appeal dated 24th April 2013 the Appellant has cited the following grounds of appeal;

- a. That the Learned Magistrate erred in law and fact by dismissing the appellant’s application dated 17/12/2012 which was merited.**
- b. That the Learned Magistrate erred in law and fact in misconstruing the gist of the application dated 17/12/2012 and therefore arriving at a wrong finding in law.**
- c. That the Learned Magistrate erred in law and fact by taking into account extraneous matters while determining application dated 17/12/2012 occasioning the appellant mis-carriage of justice.**
- d. That the Learned Magistrate erred in law and fact by issuing subsequent orders after dismissing the application dated 17/12/2012 effectively demonstrating that the court was not certain of its dismissal orders.**
- e. That the Learned Magistrate erred in law and fact by shifting the burden of proof to the appellant occasioning him miscarriage of justice.**

7. The Appeal was responded to by the Respondent vide Replying affidavit dated 10<sup>th</sup> June 2013 stating that the proclaimed goods belonged to Maid Ltd. That the objector never produced any documents to attest to his claim of ownership over the vehicles attached. That the appellant has not revealed that there is a substantive appeal to wit H.C.C.A No. 95 of 2012. That contrary to the appellant’s denials he clearly owns Maid Ltd.

8. The appellant filed a Supplementary affidavit dated 30<sup>th</sup> September 2013 stating that Maid Ltd and he are not one and the same entity. That the sworn affidavit was withdrawn when he discovered that his counsel had drawn the same saying that he is a director of Maid ltd contrary to his instructions.

### **SUBMISSIONS**

9. The Court on 19/11/2018 directed that the Appeal be canvassed by way of written Submissions.

#### **Submission by Appellant**

10. The appellant submitted that the vehicles attached to wit; KAA 120Q and KAQ 134R are his, KAQ 120Q is registered in his name and KAQ 134R is registered in the company, MbakiAgri Industries and that there is no affidavit sworn to show that the goods belong to the judgement debtor. The Appellant further submitted that he had discharged his burden of proof on a balance of probabilities to clearly show his interest to the attached/proclaimed goods. He relied on the following cited authorities **Arun. C. Sharma v AshanaRaikundalia t/a A. Rainkundalia & Co. Advocates & 4 others [2014] eKLR, Peter Kingori Warugongo James Nderitu & another [2014] eKLR**

#### **Submissions by the Respondent**

11. The Respondent submitted that this Honourable Court should look at the analysis in the trial Courts Ruling and that the Appellant/Objector had not proved its case on a balance of probabilities.

#### **Duty of court**

12. As this is a first appeal, the Court is required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat however; that I neither saw nor heard the witnesses and as such, nuances as to demeanor are best observed by the trial court. See **Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.**

### **ANALYSIS AND DETERMINATION**

13. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the submissions by learned counsels for both parties. From the record of Appeal, and submissions by parties the single issue for determination is:-

- a. Whether the appellant proved his claim that he is entitled to or he has a legal or equitable interest in the whole of or part of any property attached in execution of a decree herein**

## Objection proceedings

14. Objection proceedings are governed by Order 22 Rule 51 of the Civil procedure Rules which provides;

**51. (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.**

15. The Objector bears the burden of proving his claim that he is 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. What evidence was tendered by the Appellant/Objector before the trial court?

16. The Objector claimed that Njeru Kaburu and Maid Limited are not one and the same entity. The Goods attached belonged to him and Mbaki Agricultural Distributors Industries Limited. He stated that the latter is his registered Company. The Respondent has averred that Maid Limited and Mbaki Agricultural Distributors Industries Limited are one and the same entity hence both belong to the objector herein. That the execution process was therefore proper.

17. Before I delve further into other arguments, I must state the greatest innovation in Salomon vs. Salomon that a company is a legal person separate from the people who compose it. Therefore, arguments that the Appellant or Maid Ltd and Mbaki Agricultural Industries Distributors are one and the same person are entirely indefensible. Of the two companies, nothing shows that one is wholly owned subsidiary company of the other.

18. From the trial Court proceedings the Respondent had averred that the tractor belonged to Maid Ltd- a company belonging to Appellant. The Respondent also stated that was not the first time he was working for the Appellant. The application dated 19.11.2011 where the objector had sworn that he is a director of Maid Limited was withdrawn by the consent of the parties with costs of Kshs. 1,500/=granted to the defendant/applicant.

19. The objector testified and denied that he is a director of Maid Limited. In its judgement the trial Court considered this fact and held;

**“The plaintiff’s evidence against the Defendant remains unchallenged. The evidence of Domiciano Kaburu Njeru is irrelevant and the court is at a loss whose interest he was representing if he has nothing to do with Maid Limited.”**

20. I have perused the trial court’s record and I have not found any evidence to support the claim that the attached vehicles are owned by the Appellant and Mbaki Agricultural Industries Distributors Limited. It bears repeating that the Appellant as the Objector to attachment of property bears the legal burden of proving that the attached vehicles are owned by him, and the other company. I have however seen two annexure in the affidavit in support of an application dated 24<sup>th</sup> April 2013 for stay of execution which was filed in this court. The annexure are mere photocopies of log book for KAA 134R & KAA 120Q. These documents were not produced before the trial court during the objection proceedings. They are also photocopies annexed in support of application for stay before the appellate court. I do not think that kind of throwing papers to the court complies with the law on production of evidence. But, this court does not understand or been told why the original of these documents were not produced during the objection proceedings. This deepens the mystery in this case. Accordingly, the trial magistrate did not err in holding that the Appellant did not prove his claims of ownership on a balance of probabilities.

21. It does not end there. It is clear from the record that the Appellant herein sought to disassociate himself from Maid Limited. Lamentably, none of the parties provided record and particulars of directors of the two companies to confirm or otherwise that the Appellant was a director and beneficial owner of Maid Limited and Mbaki Agricultural Industries Distributors limited or that both companies had same director(s). I however do find it disturbing that the Appellant would at one instance swear an affidavit that he is the Managing director of Maid Limited; and at another he retracts that averment. There is evidence by the Respondent that he knew the Appellant and his companies.

22. In these circumstances, I appreciate the decision by the trial court to direct the CID Meru to conduct investigations to establish whether the Appellant did commit perjury and his relation with the two stated companies. There is however no record or report on the result of the investigation

23. I will give more reasons on this finding. I am aware of the concept of separate corporate existence of a corporation from the people who compose it. But, it is not strange for unscrupulous individuals to abuse the corporate vehicle by using it to commit fraud or crimes or to avoid liability or defeat a judgment of the court. See the case of **Arun .C. Sharma v Ashana Raikundalia & 5 others [2015] eKLR** that;

**The artificial person “created” in Salomon v Salomon exists only in contemplation of law and does not possess the body of natural person. It has had to act and acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc. And as time passed by, there were other developments in law in the nature of lifting or piercing the corporate veil which entails going behind the veil of incorporation of the company to identify the individuals who are the real beneficiaries of the corporate advantages; see *Gallagher v. Germania Brewing Company* that,**

**‘...for, while, by fiction of law, a corporation is a distinct entity, yet in reality, it is an association of persons who are in fact the beneficiaries of corporate property’.**

The statute law and judicial interpretation has developed instances when corporate veil will be lifted for purposes of doing justice. See para 90 of *Halsbury's Laws of England 4th Edition*(supra) 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 the litigation before it, as identical with the person or persons who control that company.*

**And the instances when corporate veil will be lifted are not limited to fraud or improper conduct of the directors but also include all cases where the character of the company, or the nature of the persons who control it, is a relevant feature.** See again para 90 of *Halsbury's Laws of England 4th Edition* that:-

*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.*

[16] I am aware that the corporate veil may be lifted...*Where the private company is founded on personal relationship between the members.* See the case of *Mugenyi & Company Advocates vs. The Attorney General* [1999] 2 EA 199 on the listing in *Palmers Company Law Vol. 1 (22 ed)*.*[Emphasis mine]*

24. The intricate relationship between the Appellant and the companies herein presents a kind of a squirm. The conduct of the Appellant added to the quagmire and the trial court was keen at establishing whether the Appellant committed perjury in his contra statements. The nuances of the demeanour of the Appellant were best observed by the trial court.

25. With much trepidation, although claims of distinct corporate entity of a company may have been indomitable argument, the absence of proof of ownership coupled with the strong and repeated echoes of the events in and circumstances of this case, compels me to dismiss this appeal. For the reasons I have recorded above, the presence of mere photocopies of logbooks for the attached vehicles in the application for stay of execution made to this court does not persuade me to make orders in favour of the Appellant. I do not even think that this is an appropriate case to call for additional evidence given the reservations and observation I have alluded to above.

26. In the upshot, I find that the Appellant did not prove claim of ownership of the attached vehicles. I therefore dismiss the appeal. No orders as to costs.

**Dated, Signed and delivered at Meru this 30<sup>th</sup> April 2019**

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**F. GIKONYO**

**JUDGE**

In presence of

M/S Njenga for appellant

Mokua for respondent  
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**F. GIKONYO**

**JUDGE**