



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 79 OF 2001**

**NELSON KOMBE MANGARO.....PLAINTIFF**

**VERSUS**

**TANA RIVER BUS SERVICES.....DEFENDANT**

**AND**

**1. MANSOUR NAJI SAID**

**2. TWALIB OMAR NAJI.....OBJECTORS/APPLICANTS**

**CORAM: Hon. Justice R. Nyakundi**

**Lucy Wangari Mwangi for the Objectors**

**RULING**

The respondent had sued Tana River Bus Services on 17.1.1994 in negligence seeking general and special damage for the personal injuries sustained in an accident which occurred on 28.11.1991 involving motor vehicle registration number KXZ O12 owned by the aforesaid company.

After full trial the respondent obtained Judgment delivered on 20.5.2005 on quantum spelt out as follows:

**General damages Kshs.500,000/=**

**Special damages Kshs. 13,000/=**

**Net Award Kshs.513,000/=**

Plus costs and interest

The respondent on 28.1.2019 moved the court by way of an application seeking attachment of property and assets of Tana River Bus Services vide instruction issued to Work No Words Auctioneers to enforce the claim outstanding as of that time of Kshs.1,057,960 plus costs and interest. The auctioneers acting on instructions from the respondent proclaimed the objectors properties to have them sold by public auction to satisfy the decree of the court. Aggrieved with order

the objectors filed a notice of motion in court on 8.2.2019 seeking the following orders:

***1. That pending the hearing and determination of the application inter-partes or further orders of the Court this Honorable Court be pleased to grant to the 1<sup>st</sup> and 2<sup>nd</sup> objectors/applicant's an interim stay of execution of the Judgment dated 20<sup>th</sup> June, 2015, together with the warrants of attachment and sale dated 16<sup>th</sup> January 2019.***

***2. That this Honorable Court be pleased to quash the illegal proclamation of the 1<sup>st</sup> and 2<sup>nd</sup> objectors/applicant's movable properties dated 29<sup>th</sup> January 2019.***

**3. That the execution and proceedings to enforce the Judgment and decree herein against the 1<sup>st</sup> and 2<sup>nd</sup> objectors/applicant's be declared a nullity.**

**4. That this Honorable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and sale dated 16<sup>th</sup> January 2019 herein for cancellation for having been issued irregularly against the 1<sup>st</sup> and 2<sup>nd</sup> objectors/applicants.**

**5. That the plaintiff/respondent bears the auctioneers costs.**

**6. That the costs of this application be provided for.**

The notice of motion is based on the following grounds:

**1. That the objectors are not in any way related to or party to the proceedings herein.**

**2. That the objectors are not the directors of the defendant service nor are they involved in the defendants affairs in any way.**

**3. That the objectors have been wrongly dragged into these proceedings without knowledge of the suit herein.**

**4. That the warrants of attachment issued herein are illegal and directed at the wrong parties herein.**

**5. That the plaintiff is required by law to attach the property of the defendant herein and not innocent parties who are not aware of the suit herein.**

**6. That the notices to show cause why execution should not issue have been directed at the wrong parties herein and the same have not been placed before this honorable court for determination.**

**7. That the proclamation of attachment/repossession was issued illegally and meant to scare the objectors herein who are not involved in the proceedings herein.**

**8. That no prejudice shall be caused to the plaintiff should this application be allowed.**

In opposition to the application the respondent filed a replying affidavit dated 25<sup>th</sup> March 2019 where he deponed interalia as follows:

**1. That I was an employee of the objectors/applicants herein, working as a bus conductor since the year of our lord 1971, a public service bus service known as TANA RIVER BUS SERVICES a trading name and marks of TANA EXPRESS LTD a registered private limited company number 32536 whereas the 1<sup>st</sup> objector/applicant was a bus ticket management director, working under his supervision.**

**2. That on the 28<sup>th</sup> day of November 1991, while on my official duty in TANA RIVER BUS SERVICE, a public bus service vehicle belonging to TANA EXPRESS LIMITED under the directorship and control of the 1<sup>st</sup> and 2<sup>nd</sup> objectors/applicants herein, got a traffic road accident causing severe bodily harm where I sustained permanent body injuries.**

**3. That in the premise therefore, I had no other option but to institute this suit herein claiming against the defendant and objectors/applicants whereupon expeditious hearing of the Honorable Court, I was awarded the decree herein.**

**4. That this Honorable Court with all its wisdom found that the defendant and objectors/applicants in this suit are one and the same person, the defendant is a sham and a puppet of the two objectors/applicants herein.**

**5. That the warrant of attachment and sale by public auction against the defendant Judgment debtors' movable property and or personal arrest and committal to civil jail in execution of the decree in this suit be continued as ordered by this Honorable Court.**

It is against this backdrop together with the submissions of the applicant's counsel am bound to determine whether the objectors have a case on the merits.

## **Analysis**

## **The Law**

It will be necessary to examine certain key provisions of the Civil Procedure Act and Rules on objection proceedings.

Order 22 Rule 50

**“Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date and upon the dismissal of such application the attachment shall cease.”**

***“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 this objection to the attachment of such property.”***

When there is evidence that the property is registered or owned by the company or corporation under the principles in **Salomon & Co. Ltd v Salomon** the property cannot therefore be available for attachment by the Judgment debtor. Again in **Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor [2014] eKLR Lord Gikonyo** says:

***“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of Salomon & Co. Ltd v Salomon [1897] A. C. 22 H. L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of the companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”***

The issue raised before me seems to be plainly the question of whether the proclaimed and attached property under instructions of the respondent was company property, the defendant in the primary suit or that of the directors/shareholders.

The order to lift the attachment by the Court, is an evidential burden to be discharged by the objector. This is as stated in the case of **Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others [1993] eKLR**

***“The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.***

***(1) That the property was not, when attached, held by the Judgment-debtor for himself, or by some other person in trust for the Judgment-debtor; or***

***(2) That the objector holds that property on his own account.***

In determining this issue, the Court of Appeal in **Ngungi Holdings Limited v Mwangi [2009] eKLR** held that:

***“A registered company is a legal person separate from its members. This principle is often referred to as the veil of incorporation. The veil may however be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or a device for enabling the directors to hide themselves from the eyes of equity.”***

Based on these factors and the significant portion of the objectors’ affidavits demonstrate the following undisputed facts:

- 1. The respondent was involved in a road traffic accident on 28.11.1991 while lawfully working as a loader with motor vehicle registration number KXZ 012.***
- 2. That on the stated date the respondent suffered personal injuries including the fracture of tibia, fibula fracture left ramus of mandible, lost lower teeth.***
- 3. That the respondent case on liability and quantum was against Tana River Bus Services.***
- 4. In the Judgment of the High Court delivered on 20<sup>th</sup> June 2005, the respondent was awarded Kshs.513,000/= inclusive of general and special damages.***
- 5. A search certificate from the company registry confirmed the defendant to the suit to be a private company in the name of Tana Express Limited.***
- 6. The distinctive of the respondent’s case was that he was entitled to attach the assets of the directors or shareholders thereby piercing the corporate veil. However, he failed to bring himself within the exceptions as discussed in the case of re Barcelona Traction, Light and Power Co Ltd [1970] ICJ 3 when the Court held that: “the concept of piercing the corporate veil is a limited principle permitted in cases of misuse, fraud, malfeasance or evasion of legal obligations.”***

In addition, there are a number of particular features that were not dealt with in the specific attachment by the respondent. The attachment was issued against the applicants who were not litigants in the original suit. The decree holder did not undertake due diligence to ascertain the ownership or legal interest and equitable interest of the property proclaimed to fully justify the attachment in execution of a valid Judgment of the Court. This is what seems to have occurred which broadly speaking must have infringed the rights of the shareholders, a decision which could have been avoided by recognizing and giving effect to the basic structure of a limited company with share capital and

its shareholders.

The assumption that the company is equal and one and the same as the shareholders was detrimental to the execution proceedings carried out by the respondent. This was the dominant principle in **Macaura v Northern Assurance Co Ltd [1925] AC 619** where House of Lords held that:

***“no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”***

On the basis of the above reasons the notice of motion filed on 7<sup>th</sup> February, 2019 is hereby allowed with an order that the proclamation and attachment was unlawful and is hereby lifted and costs of the attachment be borne by the auctioneer.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF OCTOBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**Respondent in person**