



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 22 OF 2014**

**WAMAE NJENGA.....1<sup>ST</sup> APPELLANT**

**SIMON NJOGU MUTURI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EMBU GATURI HOUSING**

**CO-OP SOCIETY LTD.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling pertains to the preliminary objection dated 1/03/2019 filed by the 1<sup>st</sup> respondent in response to the appellants' Notice to show Cause why execution should not issue dated 25/02/2019. The appellants had obtained judgment against the respondents for Kshs. 2,649,009/= on the 22/02/2017 and subsequently filed a Notice to Show Cause against Sylvester Njeru Muruatetu, the Chairman of the 1<sup>st</sup> respondent.

2. It is the 1<sup>st</sup> respondent's case that the 1<sup>st</sup> respondent and the individual Sylvester Njeru Muruatetu are different legal entities and as such this court ought to deny the piercing of the corporate veil. The 1<sup>st</sup> respondent further states that individuals are entitled their freedom and thus deprivation of one's freedom by way of enforcement of civil debt through imprisonment curtails their freedom.

3. The parties filed submissions to dispose of the preliminary objection.

**B. 1<sup>st</sup> respondent's Submissions**

4. It is the 1<sup>st</sup> respondent's case that Sylvester Njeru Muruatetu is not a party to this suit and further that no judgement has been entered against him but rather the same has been entered against the 1<sup>st</sup> respondent, a corporate body capable of suing and being sued, and the 2<sup>nd</sup> respondent.

5. The 1<sup>st</sup> respondent further submits that Section 38 of the Civil Procedure Act and Order 22 Rule 31 (1) limits the court's power to order execution of a decree by way of detention to prison unless it is shown that the judgement debtor has been given an opportunity of showing cause why he should not be committed.

6. The 1<sup>st</sup> respondent further submits and relies on the provisions of Order 22 Rule 35 of the Civil Procedure Rules that provides that it is the duty of the decree holder to satisfy the court that the judgement debtor was not suffering from poverty and was able to pay the decretal sum. Further it was submitted that the appellants had failed to show that they had attempted other modes of execution considering that Sylvester Njeru Muruatetu was an elected chairman of the 1<sup>st</sup> respondent whose term as about to end.

7. The 1<sup>st</sup> respondent submitted that since the facts of this case did not envisage an agency or trustee relationship and as such it did not warrant a departure from the principle espoused in the case of Salomon v Salomon & Co. Ltd [1897] AC 22 that declared a company a separate legal entity and thus a juristic person in the eyes of the law.

8. It was further submitted that the application for lifting the veil had not been formally made before court.

### **C. Appellants' Submissions**

9. The appellants submit that they prepared the Notice to Show Cause against Sylvester Njeru Muratetu in his capacity as the chairman of the 1<sup>st</sup> respondent and the Notice was meant for the chairman to show how they intend to satisfy the decree and as such civil jail was not automatic as it would arise only after the judgement debtor was heard. It is further submitted that a body such as the 1<sup>st</sup> respondent can only be made to act through its officials such as the aforementioned Sylvester Njeru Muratetu.

10. It is further submitted that the argument by the 1<sup>st</sup> respondent that committal to civil jail is unconstitutional is flawed as a number of cases such as **Charles Lutta Kasamani v Concord Insurance Co. Ltd & 2 Others [2018] eKLR**, **Kinatwa Co-operative Savings Credit Society Ltd v Nakimu Classic Travellers Sacco Ltd [2016] eKLR**, **Nairobi HC Civil Appeal No. 413 of 2014 – Samuel Njenga v Augustino Onanda & Orokise Sacco Ltd** and **John Richard Ouma Nyamai v The Co-operative Tribunal & 3 Others [2013] eKLR**, have upheld it to be constitutional.

11. It is submitted that the preliminary objection by the 1<sup>st</sup> respondent does not raise pure points of law as there are some facts that need to be ascertained, such as the status of Sylvester Njeru Muratetu with the 1<sup>st</sup> respondent, and as such ought to be dismissed. Further it is submitted that the preliminary objection is premature as the appellants are in the process of affording the judgement debtor an opportunity to be heard as provided in Section 38 of the Civil Procedure Act.

12. It is also submitted that the issue of lifting the veil as espoused in the **Salomon (supra)** case does not arise as the 1<sup>st</sup> respondent is a co-operative society and under Section 28 (3) and (6) of the Co-operatives Society Act the Management Committee of the co-operative society can be held personally liable without lifting of any veil.

### **D. Analysis & Determination**

13. The single issue for determination is whether the preliminary objection by the 1<sup>st</sup> respondent has merit, and should be upheld. This court has already pronounced itself on the threshold to be met in dealing with preliminary objection. The Court endorsed the principle in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR** that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

14. On that basis, two questions emerge for this Court's consideration: *what pure point of law has the 1<sup>st</sup> respondent raised in its preliminary objection? Are the facts in issue, settled?*

15. The main ground in the preliminary objection is that the Notice to Show Cause against Sylvester Njeru Muratetu, the Chairman of the 1<sup>st</sup> respondent is a departure from the principle in the **Salomon** case. *Prima facie*, this is a point of law. Flowing from the status of the aforementioned Sylvester Njeru Muratetu, is the ground raised in the preliminary objection whether the committal to civil jail as a means of repayment of a civil debt is constitutional is a factual issue, to be established by evidence from both parties.

16. **Section 38 of the Civil Procedure Rules** which deals with the powers of Courts to enforce execution provides that;

***“Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree- holder, order execution of the decree—***

***(a) by delivery of any property specifically decreed;***

***(b) by attachment and sale, or by sale without attachment, of any property;***

***(c) by attachment of debts;***

***(d) by arrest and detention in prison of any person;***

***(e) by appointing a receiver; or***

***(f) in such other manner as the nature of the relief granted may require”***

17. The proviso to **Section 38 of the Civil Procedure Act** provides thus;

***“Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison,”***

18. I have perused the Notice to Show Cause given on the 25/02/2019 and note that it is an initiation of the process of affording the judgement debtor an opportunity to be heard as provided in Section 38 of the Civil Procedure Act. It is thus not an attempt to lift the corporate veil as argued by the counsel for the 1<sup>st</sup> respondent.

19. The 1<sup>st</sup> respondent is a co-operative society run by officials elected by members. These are the persons responsible for official matters of the company including liabilities. A co-operative society cannot be summoned to court, but must be issued to its officials who will be given

an opportunity to be heard.

20. **Order 22 Rule 35 of the Civil Procedure Rules** provides as follows:

***“Where a decree is for the payment of money, the decree- holder may apply to the court for an order that—***

***(a) the judgment-debtor;***

***(b) in the case of a corporation, any officer thereof; or***

***(c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor or officer, or other person, and for the production of any books or documents.”***

21. It is true that the above provision does not expressly provide for the lifting of the corporate veil. This Court has had occasion to deal with the same provision in **Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company Limited [2012] eKLR**. In that case the Court expressed itself as follows:

***“It is however my view that the lifting of a corporate veil is not the same thing as an application under Order 22 rule 35 of the Civil Procedure Rules. In the latter an officer is examined as an agent of the Company while in lifting the corporate veil, the mask of incorporation is lifted with the result that the shareholders are no longer agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity. The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. In other words, the corporation’s brain is the Board of Directors who make decisions on behalf of the company.”***

22. It is my opinion that the Notice to Show Cause to the chairman of the 1<sup>st</sup> respondent’s Management Committee Sylvester Njeru Muratetu is not an attempt to lift the corporate veil but an opportunity to the judgment debtor through its elected official to be *examined as an agent of the Company so that he can show cause why he should not be committed to prison*.

23. Consequently, it is my considered view that the preliminary objection is incompetent and should not be upheld.

24. The preliminary objection is hereby dismissed.

25. Costs in the cause.

26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Kahare for Abubakar for Appellants**

**Appellants present**