



REPUBLIC OF KENYA



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Baobao Ventures Ltd v Equator Products Ltd; Equator Kenya Ltd (Objector) (Civil Suit 131 of 2014) [2023] KEELC 21664 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 131 OF 2014
EK MAKORI, J
NOVEMBER 16, 2023**

BETWEEN

BAOBAO VENTURES LTD PLAINTIFF

AND

EQUATOR PRODUCTS LTD DEFENDANT

AND

EQUATOR KENYA LTD OBJECTOR

RULING

1. The Chamber Summons dated 6th March 2023 seeks that:
 - i. Spent
 - ii. A temporary injunction to issue restraining the Decree Holder from proclaiming the objector's properties pending the hearing and determination of the application.
 - iii. That a declaration that the Defendant/Judgment Debtor has no legal or equitable interest in the items proclaimed on 7th November 2022.
 - iv. A declaration that the items proclaimed on 7th November 2022 by the agents of the Plaintiff/Decree Holder belong to the Objector.
 - v. A declaration that the proclamation dated 7th November 2022 by Siftways Auctioneer was unlawful.
 - vi. A declaration that the attempted attachment on 23rd November 2022 was unlawful.
 - vii. Costs of the application be provided for.



2. The application is supported by an affidavit of one Daniel Makavu Mbuvi dated 6th of March 2023 and his further affidavit deposited on 10th May 2023.
3. The application is opposed. There is a Supporting Affidavit deposited by one Robert Karume on 11th April 2023 and a Further Supplementary Affidavit deposited on 13th June 2023.
4. The court directed parties to file written submissions, which they did, in compliance.
5. The Objector averred that it has never been involved in the litigation between the Decree Holder and the Judgment Debtor.
6. The Decree Holder attempted to execute its decree on properties that solely belong to the Objector.
7. The Objector asserted that it has presented to this court logbooks for Motor vehicles KAX 992B and KCF 370S - Annexures DMM-2 and DMM-4 all registered in the name of the Objector.
8. The certificates of incorporation marked DMM1A & DMMM1B show it is a separate entity from the Judgment Debtor.
9. The Objector has cited the legal basis and several authorities in support of its proposition. Order 22 Rule 5(1) Civil Procedure Rules - based on objection proceeding. Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR - stating that the burden lies on the Objector to prove that it has a legal or equitable interest in the attached property. Akiba Bank Ltd v Jetha & Sons Ltd [2003] eKLR - a decision elucidating that the Objector has to exhibit evidence of his legal or equitable interests in the whole or part of the property attached in execution of a decree. Section 8 of the Traffic Act - that a person whose name appears on the logbook is prima facie the owner of the motor vehicle unless the contrary is shown. Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743 and David Muhenda and 3 Others v Margaret Kamuje Succession Case No. 9 of 1999 - the two cases holding that objection proceedings like other proceedings ought to be probed by the court in the normal examination like other cases.
10. The Objector further contended that as held in Solomon v Solomon [1897] AC 78, the Objector is a separate entity from the Judgment Debtor or that it is a separate personality and ought to be treated as such. This position was supported in the case of Victor Mabachi v Nurtturn Bates Ltd [2013] eKLR.
11. The Objector is of the view that the Decree Holder has failed to prove under Section 109 of the Evidence Act that the attachment herein was lawful.
12. On the contrary, the Decree Holder stated that the attachment was legal and regular. The Objector and the Judgment Debtor have been operating as if they are the same entity. They have the same directorship, management, vehicles, online space, letterheads, and rubber stamps, which are often used interchangeably. The differences are cosmetic changes introduced and are meant to circumvent lawful obligations owing to 3rd parties including the Decree Holder herein, as shown in the sampled correspondences and flash disk marked RK4 appearing in this proceedings. The Decree Holder submitted that the usage shows in law the entities are the same or ancillary and ought to be treated as such.
13. The Decree Holder claimed that there was no legal way for the corporate veil to act as a shield. Mugenyi & Company Advocates v. The AG [199] 2 E.A. 199 found that it is not absolute. The Decree Holder proposes that the corporate veil should be pierced as the current application, in which fraud and unlawful activity are cited cannot be countenanced as it will lead to an unjust verdict against the Decree Holder.



14. The Decree Holder submitted that the Objector Company is a subsidiary of the Judgment Debtor as shown in the preservation of names during incorporation. The Directors are also the same. Being a separate entity, the Objectors cannot escape the piercing of the corporate veil. The Decree Holder further quoted the case of *Ukwala Supermarket v Jaideep Shah & Another* [2022] eKLR.
15. The issue that falls for the determination of this Court is whether the Objector herein has demonstrated that it is a separate entity from the Judgment Debtor and that the attachment herein was illegal, unlawful, and ought to be lifted. As correctly stated by the Objector the burden was on it to show that the attachment herein is illegal as held by Gikonyo J. in the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the Court held:

The law is clear; under Order 22 rule 51(1) of the Civil Procedure Rules:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 parties to the decree-holder, of his objection to the attachment of such property.”

The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. If as the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree.

16. In this case, what the Objector is relying upon is that Equator Products Ltd - the Judgment Debtor is a separate and distinct corporate entity or personality from the Objector - Equator Kenya Ltd. The distinctness cannot be taken away. This has been discussed in our courts for a while and the effect of *Solomon v Solomon* [1897] AC 78.
17. On the legal personality and its extent, In the *Arun C. Sharma Case* (supra) Gikonyo J. had this to say:

“Separate Corporate Personality

- (13) This is a very important subject in company law as I stated in *Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano* (2014) eKLR that:

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.

- (14) The above formulation is correct but the following is also correct.

Lifting or piercing the corporate veil

- (15) 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)*.

18. And in *Ukwala Supermarket v Jaideep Shah & Another* [2022] eKLR, on the same subject matter Nyakundi J. stated as follows:

“In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
- b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.”

19. I have reviewed the materials and submissions by the parties. The Objector lays claim to the attached motor vehicles by dint of the corporate personality and states it is a separate entity from the Judgement debtor. The Decree Holder thinks otherwise and asserts that the entities are the same citing the usage of features like Letterheads, and rubber stamps, and the same directorship, and concludes that in law the entities are the same and ought to be treated as such. Documents filed before this court for instance in support of the application, the lease termination letter, dated 30th July 2011 from Equator Kenya Ltd the letterhead used is in the same name as Equator Kenya Ltd. Signed by one Almut Van Casteren in



the official capacity as a director, the rubber stamp bears the same name Equator Kenya Ltd in all those correspondences. Equator Kenya Ltd sought to terminate the agreement herein. Besides, the Objectors requested to utilize the deposit placed with the Decree Holder in July 2011, for August and September 2011. The two entities operate interchangeably depending on the circumstance.

20. The Objector and the Judgment Debtors are Siamese twins but for the corporate veil. The documents in use in this case show that. The incorporation cannot shield the Objector. The rubber stamp, the letterheads, and the Directorship are the same. The corporate veil cannot be used to shield the Objector, whose ownership is the same as that of the Judgment Debtor. The corporate veil has to be pierced and discovered that behind the façade of the Objector and the Judgment Debtor, the beneficiaries are the same. There is an attempt to fraudulently obstruct the Decree Holder from executing the current decree. If the veil is not perforated it will occasion an injustice.
21. The upshot is that the attachment herein was lawful. The objection raised in the Chamber Summons dated 16th March 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16TH DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Machuka holding brief for Matini for Decree Holder

Ms. Burjra for the Objectors

Court Clerk: Happy

