



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 446 OF 2016

KARACHIWALLA (NAIROBI) LIMITED.....PLAINTIFF

VERSUS

DYNACORP MOTORS LIMITED..... DEFENDANT

AND

DYNAMART MOTORS LIMITED.....OBJECTOR

RULING

1. This is an application by an Objector, **DYNAMART MOTORS LIMITED**. It asks the court to restrain the plaintiff, **KARACHIWALLA (NAIROBI) LIMITED**, from attaching the property and assets which allegedly belong to the objector.
2. The application is supported by the affidavit of **LAWRENCE NZAU NGOVI**, a Director of the objector.
3. The objector produced invoices and receipts, to back its claim to the ownership of the goods which a court broker had attached in the execution of the Decree.
4. The Decree shows that the Judgement-Debtor is **DYNACORP MOTORS LIMITED**.
5. The objector says that although it shares a common Director with the Judgement-Debtor, it was a completely separate legal entity.
6. In its submissions, the objector stated that the plaintiff had fore-knowledge that the objector and the defendant share a common director, and that the defendant was on the verge of insolvency.
7. As far as the objector was concerned, the only reason that prompted the Decree-Holder to proceed with execution against assets belonging to the objector, was that the Decree-Holder knew that the Judgement-Debtor was on the verge of insolvency.
8. Nonetheless, the objector contends that even if the execution were to be carried out against a director of the Judgement-Debtor, the person who was pursuing execution would have to first apply to the court, to lift (*or to pierce*) the corporate veil of the defendant company.
9. First, it must be emphasized that a limited liability company is a legal person, which has its own

distinct identity, separate from that of its directors and shareholders. It is capable of suing or of being sued in its own name.

10. In the event that any person had reason to believe that a company was nothing more than a sham, the person could make an application to the court, to lift the device or the cloak which the persons behind the sham company were using to try and avoid recognition by the eye of equity.

11. However, until and unless the court either lifted the cloak or pierced the cloak, to reveal the persons behind the company, the said persons could not be held accountable for the actions or omissions done by the company.

12. The Decree-Holder did not dispute that assertion, as it is the correct legal position.

13. However, the Decree-Holder pointed out that the objector had provided proof of ownership in respect to only a few of the items which had been attached.

14. In my understanding, the respondent was saying that it did not oppose the application in-so-far-as it was in relation to the items which the objector had proved ownership of.

15. I find that the attachment of items which belong to the objector was irregular.

16. However, the critical question relates to the proof of ownership of the items which belong to the objector. The onus is upon the objector to prove ownership.

17. In this case, the plaintiff was dealing with the defendant, who was physically located at the same premises where the execution was thereafter levied. Therefore, the plaintiff had every reason to believe that when execution was carried out at the premises where the defendant was operating from, the items found at that location belonged to the defendant.

18. The fact that the plaintiff and the defendant had held several meetings at the premises where the defendant was operating from, further served to fortify the plaintiff's belief that the items at that place belonged to the defendant.

19. Thirdly, it is notable that Lawrence Nzau Ngovi had given instructions for and on behalf of both the defendant and the objector, at different times.

20. In the circumstances, although the goods whose ownership the objector has proved, must be released to the objector, I find that it would be wrong to order the plaintiff to pay the costs of the objector's application. I so find because it appears to me that the whole confusion has been caused by the defendant and Lawrence Nzau Ngovi.

21. Accordingly, the costs of the application shall be paid to both the plaintiff and the objector, by the defendant.

22. The defendant will also pay to the Court Broker the charges for the process of execution.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Shivaji for Nyaga for the Plaintiff

No appearance for the Defendant

Mirie for Kiptoo for the Objector

Collins Odhiambo – Court clerk.