



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 574 OF 2014**

**ALY JAMAL.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ERASTUS GEORGE MOMANYI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JULIUS MARS OUMA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AUTOMATED LOGISTICS**

**COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AND**

**FARAM EAST AFRICA LIMITED.....OBJECTOR/APPLICANT**

**RULING**

1. This Ruling relates to a Notice of Motion Application dated 14<sup>th</sup> February, 2017 brought under the provisions of Order 22 Rule 51 of the Civil Procedure Rules 2010, and all other enabling provisions of the law.

2. The Applicant is seeking for orders that:-

(i) *Spent*

(ii) *The attachments of the Objector's properties in the proclamation of attachment by Mr. Joseph M. Gikonyo trading as Garam Investments Auctioneers made on the 7<sup>th</sup> February, 2017 be raised and/or lifted.*

(iii) *The plaintiff do pay the costs of the attachment and this application.*

3. The Application is based on the grounds thereto and supported by an affidavit sworn by Erastus Momanyi Moruri, a Director of the Applicant and the 3<sup>rd</sup> Respondent. He deposed that, the Applicant carries on the business of supply of medical and laboratory equipments, within the office space in the building erected on L.R. No. 1870/X/87, save for one room on the ground floor measuring 20 by 15 feet which it has leased to the 3<sup>rd</sup> Respondent at a monthly rent of Kshs. 40,000.00

4. That the 3<sup>rd</sup> Respondent was incorporated in the year 2011 and only carries on the business of tracking Cargo under the Kenya Revenue Authority Electronic Cargo Tracking System (ECTS). It has no other business and does not sell any medical laboratory equipments a fact within the knowledge of the Plaintiff. That this suit as a matter of fact arose out of monies that the Plaintiff and his partners had invested in the Cargo tracking business.

5. That on the 7<sup>th</sup> February, 2017, Mr. Joseph M. Gikonyo, trading as Garam Investment Auctioneers proclaimed the Applicant's properties, in their registered office in Westlands which was bought in the year 2006 as evidenced by the receipts attached as follows:

*(a) copies of Webtech Solutions four (4) invoices for purchase of computers and accessories bought in the year 2013 for the sum of Kshs. 469,300.00 and Kenton Enterprises and Branded World Computers invoices and receipts for repair/service of the Computers (marked "EMM 5")*

*(b) Great Wall Quality Furniture and Seal honey receipts on purchase of furniture (Marked "EMM 6")*

*(c) Centurion Scientific Limited, Memmert, Thermo Electron LED GMBH invoices and Electronic Transfer forms in payment of the assorted medical equipments (Marked "EMM 7")*

*(d) Thermo Electron LED – GMBH and Thermo Shandon Limited Proforma invoices and Remittance application transfer forms in payment of the assorted medical equipments (Marked "EMM 8")*

6. That although not receipts are availed, all the boardroom tables, the L.G. Television in the board room, all the office desks, chairs, filing cabinets, water dispensers and modern cupboard shelves proclaimed are the properties of the Applicant.

7. The Applicant argued it is a separate Corporate Legal entity distinct from the 3<sup>rd</sup> Defendant/Respondent and cannot and should not be liable for a Judgment entered against the Defendants/ Respondents. Therefore the proclamation of their property is unjustified and contrary to the rule of law.

8. However the Application was opposed vide the Replying Affidavit sworn by Aly Jamal, the Plaintiff/Respondent. He deposed that, before he could file execution proceedings, he instructed Messrs Wisemen Limited, a private investigation firm to investigate the financial capability of the Defendants/Respondents to settle the decretal amount as detailed in the decree issued on 17<sup>th</sup> March, 2016 and/or to trace the assets owned by them.

9. He was advised that, the 3<sup>rd</sup> Respondent carries on business at House No. 29, Westlands Avenue, off David Osieli Road. The moveable properties itemized in the Proclamation Notice dated 7<sup>th</sup> February 2017 were identified as part of the moveable properties within 3<sup>rd</sup> Respondent's premises.

10. That the Applicant has admitted through the Affidavit sworn in support of this Application, that the 3<sup>rd</sup> Defendant/Respondent and the Objector/Applicant have common Directorship and that the two companies operate from the same premises sharing a common reception and the 1<sup>st</sup> Respondent is the Director of both companies despite his argument that the Applicant is a separate legal entity from the 3<sup>rd</sup> Respondent.

11. As such the Applicant has come to the aid of the 3<sup>rd</sup> Respondent through untruthful and/or unsubstantiated depositions by their shared Directorship who, not only has an obvious interest in frustrating the execution in his own right by virtue of being the 1<sup>st</sup> Judgment Debtor/Respondent, but also whose evidence is shockingly contradictory and borders on contempt and perjury.

12. The plaintiff /Respondent argued that the Applicant is being less than candid with the truth by stating that the 3<sup>rd</sup> Respondent occupies one room measuring 20 by 15 feet of all the office space in the premises housing both the companies.

13. That the Applicant cannot succeed in lifting execution in respect items where no receipts are produced in proof of ownership. The payment in respect of costs of the suit was made by the Applicant.

14. Therefore the Plaintiff/ Respondent should be allowed to realize the fruits of his judgment from which no appeal has ever been filed, and in respect to which a final decree has also been issued and the settlement of which decree has been captured in a consent order which is on record.

15. The Plaintiff /Respondent averred that terms of the consent are not in doubt and the same was entered into by the Respondent in utmost good faith. Yet the Defendants/Respondent are repaying his indulgence by employing every possible effort including lying to the Court, so as to frustrate him and to avoid their legal and contractual obligations and keen to drag this Honourable Court into those efforts by abusing its due process by way of “this dubious objection application”.

16. In response to the Replying Affidavit, the Applicant filed a further affidavit sworn by Erastus G. Momanyi, denying that Wisemen Limited investigators carried out proper and thorough investigations. That had they done so they would have easily found that the Applicant is not only the registered owner of the property but also occupies almost all the space in the building thereon.

17. That although both the registered office of the 3<sup>rd</sup> Defendant/Respondent and the Objector/Applicant are in the same building, the 3<sup>rd</sup> Respondent is however a tenant who pays rent to the Applicant and the 3<sup>rd</sup> Respondent is a tiny Company doing poorly financially and with no valuable attachable assets, and that is the reason the Applicant agreed to pay the decretal amount in installments.

18. The Parties agreed to dispose of the Application by filing submissions which were subsequently highlighted, which I have considered. Basically the Applicant reiterated the averments that if proper investigations, was conducted it would have been discovered that the proclaimed property was bought 17 years before incorporation of the 3<sup>rd</sup> Respondent, and it belongs to the Applicant and the Plaintiff should have therefore proclaimed properties in that line of the 3<sup>rd</sup> Respondent’s business.

19. That the fact that there is common Directorship in both the 3<sup>rd</sup> Respondent and the Applicant Company does not make the two entities one and the same. Reliance was placed on Section 19 (a) of the Companies Act 2015, which states as follows:-

***19 From the date of incorporation of a company***

***(a) the subscribers of the memorandum, together with such other persons as many from time to time become members of the company, become a body corporate by the name stated in the certificate of incorporation;***

20. The Applicant submitted that it is trite law that a Company is a separate legal entity from its shareholders as held in the case of, ***Salomon vs Salomon & Co. Ltd (1897) AC 22***. Further the fact that, the Plaintiff/Respondent was paid costs with a cheque drawn by the Objector/Applicant, it does not qualify the Applicant as a Defendant. The Applicant denied frustrating the Plaintiff/Respondent from realizing the fruits of the Judgment.

21. The Plaintiff/Respondent also basically reiterated the averments in the Replying Affidavit and maintained that the proclaimed goods belong to the 3<sup>rd</sup> Defendant/Respondent as revealed by adequate investigation carried out. That the Applicant has not furnished receipts for all the proclaimed items, and the issue of the receipts and/or invoices being in the name of another person should be a non-issue and that the Court should dig deeper to establish the actual beneficial owners of the property.

22. In any event it is now settled law that the burden is on the Applicant to prove that the proclaimed assets do not belong to the Judgment Debtors/Respondents but to the Objector/ Applicant. As such the Objector has not discharged this burden, consequently, the objection Application should be dismissed with costs to the Plaintiff/Respondent.

23. The Plaintiff/Respondent relied on the following cases to support their submissions that the Judgment Debtor/Respondent and Objector/Applicant have colluded to frustrate his right to enjoy the fruits of the Judgment.

(i) *Charles Muraya Ndegwa vs Nahashon M. Gatere & 2 Others (2006) eKLR.*

(ii) *Catherine Kinyany vs MCI Saatchi & Saatchi & Another (2014) eKLR;*

24. Finally, the Applicant argued that the Application lacks merit and it is only intended to unreasonably and inordinately delay the execution process and prayed the same be dismissed.

25. Having heard and considered the submissions and arguments made by the learned counsels representing the respective parties I find that the law is clear, he who alleges proves. It is incumbent upon the Applicant to prove that the goods attached do not belong to the Judgment Debtor or belongs to it.

26. The provisions of Order 22 Rule 51 of the Civil Procedure Rules that relates to Objector's Proceedings provides as follows:-

(a) *Any person claiming to be entitled to or 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.*

(b) *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 makes to the whole or portion of the property attached.*

(c) *such notice of objection and application shall be served within seven days from the date of filing on all the Parties.*

27. I have considered the schedule of movable property annexed to the Affidavit in Support of the Application and find that it clearly indicates the goods proclaimed. These include both medical and non-medical equipments.

28. I also note that the Applicant has also produced its certificate of incorporation showing its existence from 23<sup>rd</sup> January, 1992, and a single Business Permit No. 1044647 issued by Nairobi City County to the Applicant for the year 2016, which shows the Company is trading in the premises located at House 29, Westlands Avenue, Off David Osieli Road-Nairobi.

29. The Applicant has produced the 3<sup>rd</sup> Defendant/Judgment Debtor's Certificate of incorporation dated 11<sup>th</sup> January, 2011 to support the submissions that the 3<sup>rd</sup> Defendant/Respondent is distinct from the Applicant.

30. The Applicant in addition produced several documents including a Kenya Medical Laboratory Technician & Technologists Board Certificate of Registration Serial No. 0014, describing the Objector as an entity dealing in Medical Laboratory Equipments and Reagents to prove it is engaged in the business of "supply of medical and Laboratory Equipment". That the proclaimed goods belongs to it. Also produced is a Commercial Lease Agreement made and effected on 15<sup>th</sup> December, 2014 ending 31<sup>st</sup> January, 2017, by the Applicant and the 3<sup>rd</sup> Respondent.

31. I have taken time to go through the receipts annexed to Affidavit in support of the Application and I analyze them as follows:

- a) *invoice dated 27<sup>th</sup> May, 2013 for purchase of HP ELTE Book 8560P Laptop.*
- b) *invoice dated 13<sup>th</sup> May 2013 in respect of APC 1.5 Rock Monnitor Ups SC 1500 12 V 7A, & 12A*
- c) *invoice dated 12<sup>th</sup> September, 2013 in respect of Batteries EPSON LX 350 Printer & Mercury 650 V.A UP'S;*
- d) *invoice dated 25<sup>th</sup> September 2013 3500 (HP PRO) 3500 SERIES; Elite 650 PRO UPS and Battery Pack*
- e) *cash sales dated 3<sup>rd</sup> October, 2011 for purchase of a wooden stool, mahogany table, metal steel of Block seat;*
- f) *cash receipt from seal Honey of assorted stationery;*
- g) *receipts for (3) Patient Record Trolley and (1) Medical Trolley*

32. The other documents produced are “Quotations, Commercial” and Proforma invoices and/or acknowledgment of the Orders placed for purchase of various items and applications for EFT and Remittance

33. I however matched the documents produced and the goods proclaimed as stated in the schedule thereof and I note that the proclaimed goods are described generally as computers, laptops, chairs, cabinets, assorted medical equipments and shelves and the receipts produced also just refer to general items, for example, computer or printer. The Court is not able to identify to which item the receipt produced relates.

34. In the given circumstances, doing the best I can, I order that the Applicant and the Respondent to isolate the goods proved by the availed receipts from those not proved by any documentary evidence. If there is no concurrence to the same each party be at liberty to apply. In addition the Court directs that all other goods seized which relate to the core business of the Applicant should be released to the Applicant.

35. However, I find that although a Company is a distinct entity from its owners and any other Limited company, where two Companies have same shareholders and/or directors, there is a tendency to hide under the veil of incorporation to defeat execution of a decree.

36. In the instant case Mr. Geoffrey Muriuki has admitted that the 3<sup>rd</sup> Defendant/Respondent Company in which he is a director is truly indebted to the Plaintiff/Respondent. He is also a director in the Applicant's company and both companies are “housed” in the same premises and even shares a reception. Further that he paid costs related to this matter therefore unless he proves that all the proclaimed goods belong to belong to the Applicant, he cannot be allowed to defeat the Plaintiff/Respondent's rights to attach the same.

37. I therefore lift attachment to only those goods proved vide receipts or nature of its business as belonging to the Objector/Applicant. I decline to lift attachment on all the other goods.

38. The costs of the Application share be borne by each party.

It is so ordered accordingly.

**Dated, delivered and signed in an open Court on this 23<sup>rd</sup> day of October, 2017 at Nairobi.**

**G.L.NZIOKA**

**JUDGE**

**Delivered in the presence of:-**

Mr. Obonyo for Plaintiff/Respondent

No Appearance for 1<sup>st</sup> Defendant/Respondent

Mr. Kanyiri for Mr. Kiungu for 2<sup>nd</sup> Defendant/Respondent

No Appearance for 3<sup>rd</sup> Defendant/Respondent

Mr. Kanyiri for Mr. Kiugu for Objector /Applicant

Teresia .....Court Assistant

**Mr. Kanyiri for Kiugu:** I am made to understand that Mr. Kiugu appears for all the Defendants/Respondents and the Objector too.

**G.L.NZIOKA**

**JUDGE**