



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION, MILIMANI
MISC CIVIL APPLICATION NO. 298 OF 2013

KENYARIRI & ASSOCIATES ADVOCATE/APPLICANT.....ADVOCATES

- VERSUS -

HANS JURGEN LANGER.....CLIENT

RULING

1. The application before me was brought by the Objector, **TEMPLE POINT RESORT LIMITED**. It was brought by way of a Notice of Objection, which was lodged pursuant to Order 22 Rule 51 of the Civil Procedure Rules.
2. The Notice of Objection was accompanied by a Notice of Motion pursuant to Order 22 Rule 51 (2) of the Civil Procedure Rules.
3. In effect, there is an objection to the process of execution of the Decree. There is also an application for the release, to the Objector, of all the property which had been attached in execution of the warrants of attachment which the Decree-holder had obtained against the Judgement-debtor.
4. The application specifies the following items as belonging to the Objector, and asks that the said items released to the objector;
 - a) **100 “pilipili” Beds.**
 - b) **100 Mattresses.**
 - c) **500 Chairs.**
 - d) **100 Chairs.**
 - e) **50 Air Conditioners.**
 - f) **50 Television sets.**
 - g) **Kitchen utensils.**
 - h) **Fridges, Freezers & Cookers.**

i) One Laundry Machine.

5. The objector lays claim to both the legal and beneficial interests in those assets.
6. Therefore, as the objector was not a Judgement-debtor in the Decree being executed by the Decree-holder herein, it says that there was no lawful basis upon which its assets can be attached.
7. The Objector made available its Certificate of Incorporation dated 15th October 2010, to demonstrate that it was a distinct legal entity, which was separate from the judgement-debtors, **HANS JUERGEN LANGER** and **ACCREDO AG**.
8. But the Decree-holder believes that the directors of the Judgement-debtor were simply using the legal protection given to them under the statute to defeat the process of execution.
9. Why does the respondent say so?
10. To use the words of the respondent;

“The memorandum and Articles of Association annexed to the affidavit to the objection proceedings clearly reflect that the directors of the objector company are the same as those of the judgement debtor, Salama Beach Hotel Limited”.

11. In law, the fact that two or more companies have the same shareholders does not make such companies the same.
12. Even when the shareholders of 2 companies are the same, that does not make such companies the same.
13. The reason for that legal position stems from the fact that duly incorporated companies are distinct from both its members or shareholders, and also from its directors. That position was restated by Gikonyo J. in **LITEIN TEA FACTORY LIMITED & ANOTHER Vs DAVIS KIPLAGAT MUTAI & 5 OTHERS Hccc No. 483 of 2014**, when the learned Judge said;

“The principle that a company is a legal person separate from those who compose it, is the greatest legal innovation that we have seen in company law. The company sues or is sued on its name; it owns its own properties and bears its liability. The company is not even an agent of its members. And as a general rule, the directors are not liable for omissions and actions of the company”.

14. When the company which is the objector says that it is a distinct legal entity, separate from its directors and shareholders, that is a statement of its legal status. It is the law which says that the company is not even an agent of its members.
15. Therefore, I cannot fathom how the objector can be accused of using the legal protection which was given to them by statute, to defeat execution which was due to have been levied against persons other than the objector.
16. In this case, the objector has pointed out that it is the Decree-holder who was its advocate at the time when the company was incorporated.
17. The objector was incorporated in the year 2010. It has not been suggested that the sole purpose for its incorporation was to try and shield the Judgement-debtors from such execution as was being levied by the Decree-holder in this case.
18. I therefore reject the notion being advanced by the Decree-holder, that the objector was simply using the law as a structured attempt to use statute and the legal concept of distinct corporate personality to

avoid, defraud and frustrate creditors of the judgement debtors.

19. It is common ground that the land upon which the hotel called Temple Point Resort is operating from belongs to **SALAMA BEACH HOTEL LIMITED**. And I do not understand the objector to have laid any claim to that land.

20. The objector only lays claim to the moveable assets at the hotel. And in order to support its claim to ownership of the said assets, the objector has made available documents showing how it purchased the same.

21. Of course, the actual purchase was made by **HANS JUERGEN LANGER**, who is one of the Judgement-debtors. But just because the said **HANS JUERGEN LANGER** was a director of the objector, does not mean that anything which he bought for the objector belonged to him.

22. The invoices were addressed to the objector, thus making it clear that it was the objector who was purchasing the assets.

23. The Decree-holder has asserted that the assets actually belong to the Judgement-debtor.

24. In the case of **TRANS AFRICA ASSURANCE Co. Vs. NATIONAL SOCIAL SECURITY FUND [1999] 1.E.A 352**, the Supreme Court of Uganda expressed itself as follows, at page 357;

“The objector, in their view, had adduced sufficient evidence to establish its interest in the disputed property. As the Appellant denied such interest, it had to adduce some evidence in rebuttal, to disprove the claim.

....

However, to swear an affidavit and say that the property does not belong to the claimant was no evidence to controvert the objector’s claim”.

25. Similarly, in this case, I find that the objector has proved, on a balance of probability, that the assets which the respondent wished to attach, in execution of the decree, belonged to the objector.

26. Meanwhile, the failure of the objector to demonstrate that it had come to court after getting the requisite authority from the company, renders the application voidable. The application is not fatal because;

a) there was no company resolution to commence it, or

b) because the Law Firm of Opolu & Company Advocates did not exhibit any written authority from the company, appointing them to act for the objector.

27. I so hold on the strength of the authority of **EAST AFRICAN SAFARI AIR LIMITED Vs ANTHONY AMBAKA KEGODE & ANOTHER, CIVIL APPEAL No. 42 of 2007**, which was cited by the Decree-holder.

28. The High Court had struck out proceedings because the company had not demonstrated that their advocate had been duly authorized to institute the said proceedings.

29. On an appeal, the Court of Appeal expressed the view that the High Court ought not to have struck out the suit, before;

“giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized”.

30. The reason why that was the most appropriate course of action is because the company is permitted, by law, to ratify actions which were taken on its behalf, if such initial actions had been taken without the requisite authorization of the company.

31. In the case of **DANISH MERCANTILE CO. LTD Vs. BEAUMONT & ANOTHER [1951] 1 ALL.E.R 925**, the Court of Appeal handled a matter in which action had been commenced in the name of the company, without authority.

32. The court said that such an action could be ratified, and when so ratified by the company, the;

“ratification relates back, and is deemed equivalent to an antecedent authority”.

33. The Court went on to offer the following explanation;

“I think that the true position is simply that a solicitor who starts proceedings in the name of the company without verifying he had proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, provided the aggrieved party does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor, who started the action, to adopt the proceedings, and say!

‘I approve of all that has been done in the past and instruct you to continue the action’.

When that has been done, then in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority”.

34. That decision was quoted, with approval, by the Court of Appeal for Kenya in the case of **EAST AFRICAN SAFARI AIR LIMITED Vs. ANTHONY AMBAKA KEGODE & ANOTHER, CIVIL APPEAL No. 42 of 2007.**

35. The objector has ratified the actions which may have been taken in this case, originally, without appropriate notice. Therefore, the preliminary objection raised by the Decree-holder cannot now be sustained.

36. In the result, I find merit in the objector’s application. I therefore order that the warrants of attachment which were being executed against the objector be set aside forthwith. I further order that any assets belonging to the objector, but which had been attached in execution of the Decree in this case, be forthwith released to the objector.

37. Finally, the Decree-holder will pay to the objector the costs of the Application dated 11th November 2015.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Kenyariri for the Advocates

Opulu for the Client

Collins Odhiambo – Court clerk.