



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 67 OF 2004

ROSELINE AWINO OKWACH.....1ST DECREE/HOLDER/APPLICANT

JOSHUA OMONDI AGORO.....2ND DECREE/HOLDER/APPLICANT

VERSUS

PAN AFRICA INSURANCE COMPANY.....JUDGEMENT/DEBTOR

PA SECURITIES LIMITED.....1ST GARNISHEE

APA INSURANCE LIMITED.....2ND GARNISHEE

R U L I N G

1. The Application before this Court is the Notice of Motion brought by the Decree holders dated 2nd December 2015. The same is brought under Sections 34, 38, 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution for orders that:

1. **Pending the hearing and determination of the applicants' earlier applications dated 23rd June, 2011 and 31st September, 2011 as ordered on 6th February, 2014 this court be pleased to determine the following questions which have arisen during the process of execution:**

- a. **Whether for purposes of the satisfaction of the balance of the decretal sum herein PA SECURITIES LIMITED(formerly Pan African General Insurance Limited) and APA INSURANCE LIMITED (formerly Newco Limited) are successors in title, assignees and/ or representatives of PAN AFRICA INSURANCE COMPANY LIMITED, the decree creditor creditor(sic) herein?**
- b. **Whether the current managing directors of M/S PA SECURITIES LIMITED and APA INSURANCE LIMITED can be summoned in court to produce under oath the following information and materials;-**

M/S PA SECURITIES LIMITED

- i. **The Business transfer sale agreements between PAN AFRICA INSURANCE COMPANY LIMITED and PAN AFRICAN GENERAL INSURANCE LIMITED(now M/S PA SECURITIES LIMITED)executed between 10/5/2001 and 28/2/2004**
- ii. **The inventory of assets and liabilities covered by the agreements in (a) above**
- iii. **A copy of a transfer of business pursuant to the agreements in (a) above**

APA INSURANCE LIMITED

- i. **The Business transfer sale agreements between PAN AFRICA INSURANCE COMPANY LIMITED and NEWCO LIMITED executed between 1/11/2002 and 15/12/2003**
- ii. **The inventory of assets and liabilities covered by the agreements in (a) above**
- iii. **A copy of a transfer of business pursuant to the agreements in (a) above**

APA INSURANCE LIMITED and M/S PA SECURITIES LIMITED

- i. **The business transfer sale agreements between PAN AFRICA INSURANCE COMPANY LIMITED (as transferor) and Apollo INSURANCE COMPANY LIMITED and PAN AFRICAN GENERAL INSURANCE LIMITED (as transferees) executed between 1/11/2002 and 31/12/2003**
- ii. **The inventory of assets and liabilities covered by the agreements in (a) above**
- iii. **A copy of a transfer of business pursuant to the agreements in (a) above**

2. Whether the court can, after reviewing the information availed in (2) above determine the following;

- a. **After Pan African General Insurance Limited purchased all the general insurance business and long term insurance business together with all or any part of the property and other assets comprised in or associated with such general insurance, from PAN AFRICAN Insurance Company Limited what remained a Pan Africa Insurance Company Limited?**
- b. **What was the difference between the interests purchased by Pan African General Insurance Limited from those bought and purchased by Apollo Insurance Company Limited with Pan African General Insurance Limited to become NEWCO Limited and later APA Insurance Limited?**

3. Can the court after reviewing the information in 2 and 3 above determine who is to settle the balance of the decree herein, APA Insurance Limited or PA Securities Limited or by these two companies jointly and severally?

4. The court to make such consequential orders as a necessary to meet the ends of justice.

5. The costs of this application be provided for.

2. The application is based on the grounds set out in the application and the affidavit of Roseline Awino Okwach, the 1st Decree Holder sworn on 2nd December, 2015.

3. M/s Roseline deponed to that the decree holders successfully sued the judgment debtors, JOHN Abungu and Another and judgment was entered on 28/6/2001 for the sum of Kshs. 4,050,800/= in Kisumu HCC NO. 86 of 1999. The judgment was as a result of a road traffic accident where the offending motor vehicle was insured by Pan Africa Insurance Company Limited(PAI).

4. In the year 2004 the judgment debtors filed a declatory suit against PAI and judgment was entered in their favour. However, before the judgment debt could be satisfied in full, changes started occurring in PAI to wit that: On 1/11/2002, a company known as Pan Africa General Insurance Company Limited(PAG) was formed. A copy of its certificate of incorporation and Memorandum of Association were annexed to the application. According to Clause 1 of its Memorandum of Association, its purpose was:

"to acquire and take over as a going concern the general insurance business now carried on by Pan Africa Insurance Company Limited"

5. Roseline deposed further that on 8/10/2002, another company known as NEWCO Limited was

formed. In its memorandum of Association at Clause 1 the purpose of its formation was

" to acquire and take over as a going concern the business carried on by any person including without limitation the insurance business carried on by any person and including without limitation the general insurance business carried on by either or both of Pan Africa Insurance Company Limited and Apollo Insurance Company limited ... ".

6. It is the case for the decree holder that PAG acquired part of PAI's insurance business and then teamed up with Apollo to purchase the remaining part of PAI through NEWCO which later changed its name from NEWCO to APA and PAG also changed its name to PA Securities Limited (**PA**).

7. She stated further that it is obvious from the chronology of events that took place that APA and PA are successors in title and assignees of PAI and it is thus paramount to answer the questions set out in their application herein before proceeding to deal with the earlier applications so as to determine who is liable to pay the decretal sum. She called upon this Honourable court to unveil PAI, PA and NEWCO so as to determine which company was liable to settle the sum which now stands at more than Kshs.14,000,000/-

8. The decree holders also filed written submissions. Counsel began by giving a chronology of happenings since the filing of the initial case Kisumu HCC No. 86 of 1999. They argued that as early as February 2008 the execution proceedings had commenced against PAI but in the process it was noticed that PAI's assets had been transferred and it thus became almost impossible to execute. They filed two applications seeking to join APA and PA to the suit but it is important that the questions raised herein are determined first before the hearing of the earlier applications. Counsel submitted that **Section 34 of the Civil Procedure Act** empowers the court to settle questions arising between parties after judgment concerning execution and as such this court is the right forum to answer the questions asked herein and there was no requirement to file an originating Summons as was argued by the 2nd garnishee. He relied on the case **MORAA MASARE & 4 OTHERS VS.- GEOFFREY MATOKE [2013] eKLR** where the court established that issues on execution had to be settled in the same suit they arose in and not separate suits.

9. It was submitted further that it was necessary that the corporate veil of the garnishees be pierced so as to ascertain who was liable to pay for the debt. He relied on **ARUN C. SHARMA VS.- RAIKUNDALIA & 5 OTHERS [2015] eKLR** where it was held that a company could be unveiled where the character of the company, or the nature of the persons who control it, is a relevant feature.

10. On the issue of limitation of Actions, Counsel was of the view that the 2nd Garnishee's preliminary objection does not lie as this is a matter which the decree holders are not guilty of laches. He submitted that the decree holders' efforts to execute were thwarted by the judgment debtors schemes and mechanisms of hiding behind several companies. Counsel urged this court to allow the application herein be as prayed and this suit be set down for a determination on the issues raised.

11. The application was opposed by the 2nd garnishee, APA INSURANCE LIMITED (hereinafter APA), which filed a Notice of Preliminary Objection to the effect that the current application and the execution action it advances are time barred by dint of Section 4(4) of the Limitation of Actions Act and the Honourable court lacks jurisdiction to entertain it. APA also filed Grounds of Opposition stating that the questions sought to be answered are only capable of address by way of a case stated by way of originating summons and not vide a Notice of Motion. That the application herein is a complete abuse of court process as there lies in court two applications where directions of the court are subsisting and remain disobeyed by the applicants and finally that the application herein is an attempt at forum shopping intended to crowd matters.

DETERMINATION

Preliminary Objection

12. The 2nd garnishee has raised a preliminary objection to the effect that the same is time barred by dint of section 4(4) of the limitation of Actions Act. That section provides as follows:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

13. A look at the record reveals that the decree holders have been pursuing execution in this matter since 2004 when the declaratory judgment was delivered. Several applications have been filed and determined since then all in a bid to execute the decree and even part of the decretal sum was paid. I will agree with the decree holders that the changes in the organisation of the judgment debtor thwarted their endeavours to execute the decree because as is evident from the memorandum of association exhibited herein, the assets of PAI were transferred to different companies.

14. The 2nd Garnishee has also raised the issue of filing this application within the main suit. According to it, the decree holders should have filed an originating summons and the questions raised herein raised in the originating summons. However, Section 34 of the Civil Procedure Act gives jurisdiction to this court to determine all questions relating to the execution, discharge or satisfaction of the decree and whether any person is or is not the representative of a party. It provides as follows:

“(1)All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2)The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”
(underlining mine).

15. The questions herein clearly seeks to establish whether the garnishee companies herein are representative of the judgment debtor that is whether they are one and the same thing. It is therefore my opinion that the court has jurisdiction to deal with the matter at hand.

Lifting the corporate veil

16. The main reason for the application is to call upon the directors the judgment debtor and the garnishees to be orally examined as to whether the garnishee companies are liable for the payment of the judgment debt and if so to what extent , and whether the judgment-debtor has any and what property or means of satisfying the decree herein.

17. As a general rule, courts do not interfere with companies and essentially going by the principle of separate legal entity laid down in the famous **Salomon vs Solomon's** case, but with the passage of time, courts have come to realize that indeed some promoters and members of companies have formulated and executed fraudulent and mischievous schemes through the corporate vehicle. See the case of **JONES & ANOTHER VS. LIPMAN & ANOTHER [1962] 1 WLR 833** where it was held that whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity.

18. Paragraph 90 of HALSBURY'S LAWS OF ENGLAND 4TH EDITION details as follows:

“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. 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. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.

19. In **CORPORATE INSURANCE CO. LTD V SAVEMAX INSURANCE BROKERS LTD & ANOR. HCCC NO. 125 OF 2002** the court stated thus:

"The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company."

20. Having set out the principles on lifting a company's veil, I must also state that this court has jurisdiction to lift corporate veil. However, the decision to lift the corporate veil should not be undertaken lightly as it opens the directors or members of the company to personal liability. In the present case, there is no formal request for the lifting of the veil. The judgment debtors have only sought the appearance of the directors of PA, APA and PAI to be questioned concerning the transfers between PAI and the Garnishee Companies and the inventory of assets and liabilities covered in the agreements.

21. Under Order 22 Rule 35 of the Civil procedure Act, 2010 the Court has the power to summon any officer of a company to attend before it to be examined on 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. See **MASEFIELD TRADING (K) LTD V RUSHMORE COMPANY LIMITED & ANOTHER[2008] eKLR** , on the Court’s jurisdiction under Order 22 Rule 35:

“I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”

22. It is therefore my finding that summoning the directors to answer the questions asked would not make them liable and thus will not occasion any liability and it would shed some light on which of the three companies is liable to pay the balance of the judgment debt herein.

23. The application dated 2.12.2015 is allowed. The applicant shall have the costs of this application.

Dated, signed and delivered this 26th day of May 2016.

H. K. CHEMITEI

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