



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**HIGH COURT CIVIL NO. 354 OF 2009**

**PRIORITY DEVELOPMENT COMPANY LTD.....PLAINTIFF**

**VERSUS**

**HACIENDA DEVELOPMENT HOLDINGS LTD.....DEFENDANT**

**ADAM GEORGE HENRY TULLER.....APPLICANT**

**R U L I N G**

1. The applicant, ADAM GEORGE HENRY TULLER has approached the court by the Notice of Motion dated 12/07/2016 and sought orders that:-

**a. This application be certified as urgent and be heard *ex parte* in the first instance.**

**b. c. Execution of the warrants of attachment given on 20/4/2016 or 29/4/2016 to attach property of the applicant ADAM GEORGE HENRY TULLER be stayed pending the hearing and determination of this application.**

**The undated application for execution of Decree filed on 12/5/2016 and the warrants of attachment given on 20/4/2016 or 29/4/2016 be declared nullities and be struck off and expunged from the record as a matter of right.**

**d. Costs of this application be paid by the Plaintiff/Decree Holder in any event.**

2. In reality the substantive prayer is only prayer (b) as Prayer (a) was disposed off the moment the matter was placed before the judge. The costs would be at the discretion of the court and would follow the outcome of the substantive prayers.

3. The gist of the grounds of the application is that the applicant is not a party and has never been a party in this suit hence no decree subsists against him to merit warrants of attachment and sale issuing against him.

4. The application was supported by the affidavit of the said applicant which affidavit reiterates the grounds of the application and underscore the fact that the court having granted an order that the two directors of the Defendant/judgement debtor do produce the books of accounts and that they attend court for their examination, no date has been fixed for such examination or production of books of accounts and therefore the Defendants corporate veil is yet to be pierced and therefore there is no justification to have applied for or obtained any warrants of attachment and sale against the Applicant who is separate and

distinct from the Defendant/judgement debtor.

5. In opposition to the application the plaintiff/decree holder has filed a replying affidavit sworn by one SHLOMO JEROMO in which the historical development in the file have been narrated.

6. As far as is relevant to the application before the court that affidavit confirms that the court issued an order on the 22/3/2016 for the directors of the judgement debtor to be examined as to whether the company has any property or means to satisfy the decree among other prayers. The deponent says at paragraph 20 that there was an order for execution against the two named directors of the judgment debtor.

7. It is therefore contended by the Respondent/decree holder that there is a court order decreeing execution against the applicant which to this court is the single and only issue for determination in the application.

8. This court is a court of record and whether or not there exists an order in the court file is a matter of perusal and ascertainment by the court.

9. I have perused the court file and the order issued on the 22/3/2016. According to the court records, on that day the court rendered itself as follows:-

**“there being evidence of service of the application on the defendants’ advocates and there being no opposition the same, it is deemed unopposed, to be heard *ex parte* and granted as prayed”**

10. The court having said so, the application dated 9/7/2014 stood allowed as prayed.

11. As the court order did not specify the orders that were granted, it is necessary to revisit that application to interrogate what prayers were sought and granted. That application prayed for orders that:-

**a. This application be certified as urgent and be heard *ex parte* in the first instance.**

**b. Execution of the warrants of attachment given on 20/4/2016 or 29/4/2016 to attach property of the applicant ADAM GEORGE HENRY TULLER be stayed pending the hearing and determination of this application.**

**c. The undated application for execution of Decree filed on 12/5/2016 and the warrants of attachment given on 20/4/2016 or 29/4/2016 be declared nullities and be struck off and expunged from the record as a matter of right.**

**d. Costs of this application be paid by the Plaintiff/Decree Holder in any event.**

12. The orders of 22.03.2016, on the face of the application if granted can only mean that there was an order for the judgement debtor’s officers named, to be examined on the whereabouts of the judgement’s debtors property, in the course of examination, the said officers were required to produce books of accounts for the years 2009 to 2013 and the incorporation documents of the company and that after examination and productions of the books the court would make orders as to the execution of the decree either against the judgement debtor’s assets or against its directors by lifting the corporate veil.

13. I am in no doubt that the examination, production of books sought were to be subsequent to the orders of 22/3/2016 as well as the courts order against whom execution was to issue.

14. I have resorted back to the court file and record to confirm if any proceedings ever ensued after the orders of 22/3/2016 by which examination was conducted any orders made as to warrant and justify the taking of execution process against the applicant or indeed any other person apart from the judgement

debtor and I have been unable to come by any.

15. It therefore follows that as at the 12/5/2016 when the decree holder's advocates applied for execution against the applicant in person, there was no decree or order against him capable of enforcement by attachment and sale as sought in the undated application filed in court on 12/5/2016. In taking out the application for execution as aforesaid, I think the advocate for the decree holder totally failed to appreciate who the judgement debtor was or the intention was to just exert undue pressure on the applicant. I say exert undue pressure because, after the application dated 9/7/2014 was allowed, the decree holders advocates duly extract the order and it is apparent that the order extracted was unequivocal that there were outstanding proceedings to be undertaken towards lifting the corporate veil. If repetition makes things clearer, I would repeat that the orders of 22/3/2016 did not adjudge any liability against the applicant to bear the burden of the decree herein. The steps taken towards the issue of warrants of a statement and sale dated 24/4/2016 were to this court outrightly irregular and unlawful.

16. Unlawful because only a judgement debtor is open to be executed against. Section 44 of the Civil Procedure Act is explicit on which property is liable to attachment. It limits property liable to attachment to those ascertained to belong to the judgement debtor.

The law provides:-

**Section 44 Property liable to attachment and sale in execution of a decree**

**(1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:**

17. It is no excuse that the court accepted the application for execution and issued warrants. That process was initiated by an officer of the court, being the advocate for the decreed holder, upon whom the court staff must believe to act in good faith.

18. To compound the matter even further, the judgement sought to be enforced was entered by consent on the 17/5/2011. It is clearly, more than one year has lapsed since the judgement was entered and therefore order 22 Rule 18 makes it mandatory that the warrants of attachment must be preceded with a Notice to the person against whom execution is sought to show cause why the decree should not be executed against him. No such notice was issued and the law was clearly sidestepped.

19. The upshot of all the above is that the warrants dated 24/4/2016 were improperly sought and issued when they ought not to have been sought nor issued. They cannot be allowed to stand. They are recalled for purposes of being cancelled and the application for execution forming the basis of their issue is equally expunged from the record and declared null and void.

20. As the decree holders director confirm that the application was made under his directions I order that the decree holder shall not only pay the applicant's costs of the application dated 12/7/2016 but also all costs occasioned by the issuance of those warrants including any auctioneers costs. Such costs if not agreed upon shall be taxed by the taxing officer of the court.

Dated, signed and delivered this **16<sup>th</sup>** day of **September 2016**.

**P.J.O. OTIENO**

**JUDGE**

In the presence of

Mr Momanyi for the defendant/Decreeholder

Mr Muthuri for the applicant

No appearance for the judgement debtor