



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 1175 OF 2002

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA1ST DEFENDANT

SHAH MUNGE & PARTNERS LIMITED.....2ND DEFENDANT

BEN MTUWETA.....3RD DEFENDANT

AND

EURO BANK LIMITED (In Liquidation).....THIRD PARTY

AND

SOUTHERN BELL LIMITED.....OBJECTOR

RULING

INTRODUCTION

1. The Objector's Notice of Motion application dated 12th September 2014 and filed on 16th September 2014 was brought under the provisions of Sections 1A, 1B, 3A, 63 (c) of the Civil Procedure Act, Order 22 Rule 51 (2) 8, Orders 51 Rule 2 of the Civil Procedure Rules, Article 159 of the Constitution of Kenya and all the inherent powers of the court. Prayer Nos (1) and (2) were spent. It sought the following remaining orders **THAT:-**
1. **Spent.**
2. **Spent.**
3. **A finding be made that the Objector was the lawful proprietor of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd.**
4. **The attachment by way of a temporary prohibitory order of all shares held by Shah & Munge Ltd in Nairobi Securities Exchange Ltd be partially discharged to the extent of releasing 1,575,000 ordinary shares owned by the Objector.**
5. **The Objector be and is hereby allowed to register through the Nairobi Securities Exchange**

the transfer of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd.

6. The costs of this application be borne by the Plaintiff and the 2nd Defendant.

THE OBJECTOR'S CASE

2. The Objector's application was supported by the Affidavit of John Njenga Mungai that was sworn 16th September 2014. Its written submissions were dated 13th October 2014 and filed on 14th October 2014.
3. The Objector's case was that it purchased and acquired 1,575,000 shares which were free from encumbrances that the 2nd Defendant held in the Nairobi Securities Exchange Limited for a consideration of the sum of Kshs 13,000,000/=. It said that it executed the Share Subscription Agreement (hereinafter referred to as "the Agreement") and made payment for the purchase of the said shares on 28th October 2011 which was prior to the attachment herein.
4. However, there were pre-emptive rights to other existing shareholders that prevented a transfer of shares to new comers at the time which explained why the said shares had not been transferred to it. It contended that following the Annual General Meeting on 25th April 2014, the said pre-emptive rights were lifted.
5. It averred that it and the 2nd Defendant dully executed the Purchase & Sale Transfer forms. Stamp duty amounting to Kshs 15,760/= was paid and documents lodged for registration of the transfer at the CDSC Registrars Limited.
6. It said that the attachment of the shares occurred before the CDSC Registrars Limited could register the transfer of the shares due to a minor glitch that had caused the documents to be returned. Being the beneficial owner of the shares, it said that it was entitled to oppose the attachment of its portion of shares as the Plaintiff had been indolent in pursuing its claim against the 2nd Defendant despite knowledge in the public domain that the 2nd Defendant owned a substantial number of shares in the Nairobi Securities Exchange Limited.
7. It was its averment that it had come to court without delay and stated that it was in the best interest of justice that the orders it had sought be granted.

THE PLAINTIFF'S CASE

8. The Plaintiff filed its Grounds of Opposition dated 18th September 2014 on 22nd September 2014. The same could be summarised as follows **THAT:-**
 - a. **The application was misconceived and had no merits.**
 - b. **The Objection proceedings made no reference to the provisions of Sections 82 and 83 of the Companies Act Cap 486 (Laws of Kenya) which contained statutory enactments regarding ownership of shares and evidence of title to shares in a limited liability company.**
 - c. **The Objector had no title to the shares as it held no Certificate of ownership of the said shares.**
 - d. **By the time the Plaintiff served the Prohibitory Order, the Objector did not even have a valid transfer of the said shares and in the circumstances, the Plaintiff was entitled to attach the said shares as the 2nd Defendant was by law the owner of the said shares.**
 - e. **The sale and transfer of the shares was intended to steal a match from the Plaintiff as a result of which it was an obstruction of justice and an abuse of the court process.**
9. Its written submissions were dated and filed on 17th October 2014.

LEGAL ANALYSIS

10. The Objector identified the following as the issues for determination by the court:-

- i. **Was there a valid opposition to the objection application?**
- ii. **Did the Objector hold an equitable interest in the subject shares?**

- iii. **Was the sale and the transfer of shares intended to steal a march from court?**
- iv. **What was the effect of delay on the Decree Holder's part?**
- v. **Was the Objector entitled to the prayers sought?**

11. The court addressed issues nos (ii) and (v) hereinabove as in the mind of the court, the same were sufficient to determine the matter herein. However, the court found it prudent to deal with the question of whether or not there had been a valid opposition to the Objector's application as a preliminary issue.
12. The Objector contended that Order 22 Rule 54 of the Civil Procedure Rules, 2010 required that a creditor who intended to proceed with an attachment give an intimation accompanied by a Replying Affidavit of his intention to do so. It was its argument that the said Rule did not make any reference to grounds of opposition as the matters being considered were primarily matters of facts which required that a respondent wishing to oppose objection proceedings controvert the said facts by way of a Replying Affidavit. It was therefore its argument that the Plaintiff Grounds of Opposition were misplaced and incapable of countering its application.
13. It placed reliance on the case of **Stanley Livondo vs Raila Odinga & 2 Others [2013] eKLR** where it had been observed that without a Replying Affidavit, the facts therein had not been challenged by the Respondent leading the court therein to believe the Objector.
14. On its part, the Plaintiff submitted that there was no merit at all to the Objector's aforesaid argument. It stated that the purpose and object of a replying affidavit was to provide evidence in order to prove a fact which was in dispute between the parties but that where a given fact was not in dispute, it became an established fact for the purpose of adjudicating a matter before the court and hence there was no need to file a replying affidavit to say so.
15. It pointed out that in the present application, the Objector had made various admissions of fact both in its application and written submissions and that it accepted those admitted facts as true and relied on them in support of its opposition to the Objector's application. It stated that it did not therefore need to file a Replying Affidavit.
16. Order 22 Rule 54 of the Civil Procedure Rules provides as follows:-

“If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”

17. It is correct as was stated by the Objector that Order 22 Rule 54 of the Civil Procedure Rules made no provision for Grounds of Opposition and instead mandated that the attaching creditor's intimation to proceed with the attachment shall be accompanied by a replying affidavit. However, the court was also alive to the provisions of Order 51 Rule 14 of the Civil Procedure Rules. The same provides as follows:-

1. **Any respondent who wishes to oppose any application may file any one or a combination of the following documents —**

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

18.

- (3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.
- (4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard *ex parte*.

19. The key words in that Order is that “**Any respondent who wishes to oppose any application may file any one or a combination of the following documents**” (emphasis court). Whereas Order 22 Rule 54 of the Civil Procedure Rules is couched in mandatory terms, there does not appear to be any suggestion that a respondent is barred from filing grounds of opposition in response to an application that had been filed pursuant to the provisions of Order 22 Rule 51(2) of the Civil Procedure Rules or that provisions of Order 51 Rule 14 of the Civil Procedure Rules could not apply at all to applications brought pursuant to the provisions of Order 22 Rule 51 (2) of the Civil Procedure Rules.
20. If that was indeed the intention of the drafters of the legislation, nothing would have been easier than for them to have provided that the provisions of Order 51 Rule 14 of the Civil Procedure Rules excluded applications that had been brought under the provisions of Order 22 Rule 51(2) of the Civil Procedure Rules.
21. The court found that an attaching creditor could proceed in any of the modes that were provided for in Order 51 Rule 14 of the Civil Procedure Rules. In any event, the court agreed with the Plaintiff’s submissions that it had admitted the facts as had been set out by the Objector. There was nothing for the Plaintiff to have objected to. However, the question of the objector’s *locus standi* to bring the proceedings herein was not a matter of fact that could be raised in a replying affidavit but rather it was a matter of law that could only be raised in Grounds of Opposition. In the circumstances, the court came to the conclusion that the Plaintiff’s Grounds of Opposition were properly on record and would consider the same in the determination of the present application.
22. Turning to the substantive issues, the Objector contended that the burden of proof in objection proceedings was on the objector and that any person could object as long as they had either a legal or equitable interest in the whole of or part of any property attached in execution of a decree.
23. It was emphatic that it had an equitable interest in the shares that the Plaintiff had attached as was evidenced by the said Agreement annexed to its Supporting Affidavit and marked Exhibit “JNM 2” that was executed between it and the 2nd Defendant, way back in the year 2012.
24. It pointed out that even though the objector was not currently the “registered” owner of the subject shares, it was for all intents and purposes an equitable/beneficial owner of the same having purchased and paid for the same and was awaiting registration of the same.
25. It relied on Clause 2.1 of the said Agreement where there was an express written acknowledgment by the 2nd Defendant of the sum of Kshs 13,000,000/= which was paid on 28th October 2011. It pointed out that the date of 28th October 2014 indicated in Paragraph 7 of its Supporting Affidavit was a typographical error.
26. It also relied on the fact that the sale took place 2 years prior to the attachment herein, together with the 2nd Defendant it executed sale transfer documents dated 25th April 2014, it had received pro-rata dividends amounting to Kshs 570,000/00 from the 2nd Defendant as was shown in Exhibits marked “JNM 5 and 6” and that it had even paid stamp duty for the transfer of shares and applied for a registration of the transfer which processes it said took place prior to the attachment herein.
27. To buttress its argument, it referred the court to the case of **Akiba Bank vs Jetha & Sons Limited [2005] eKLR** in this regard. In that case it was held as follows:-

“An Objector coming court...so as to establish his claim to attached goods as required by Rule 56 of the same order must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.....”

28. On the other hand, the Plaintiff argued that the Objector had admitted that the shares that formed

- the subject matter of the present application were still registered in the name of the 2nd Defendant as the shareholder of the said company and merely described its interest in the said shares as equitable in nature.
29. The Plaintiff contended that the Objector's name had never been entered in the register of members of Nairobi Securities Exchange Limited as a member or shareholder of the shares that formed the subject matter of this application and that consequently, the 2nd Defendant remained the legal owner of the shares to date.
 30. It referred the court to Sections 112, 118, 119 and 120 of the Companies Act. Its argument was that the register at the National Securities Exchange Limited showed that the 2nd Defendant was still its member and that the Objector's request to be registered as a member of the Nairobi Securities Exchange Limited was rejected on 22nd July 2014 as was evidenced in Exhibit marked "JNM 10".
 31. It was its further contention that if the name of any person had without sufficient cause, been entered in or omitted from the register of members of a company, such person could apply to the court for rectification of the register, which it said the Objector had not done.
 32. The court was not persuaded by the Plaintiff's submission that the Objector's claim that it had equitable interest in the said shares meant that the 2nd Defendant held the said shares in trust for the benefit of the Objector.
 33. From what the court understood to be the Objector's case, it had contended that it had purchased the said shares and had an equitable and/or beneficial interest because the transfer of the said shares in its name had not been effected by the CDSC Registrars Limited due to the reasons that it had advanced. That did not in any way seem to suggest that the Objector was holding the shares in trust for the 2nd Defendant herein. For that reason, the court did not therefore find the provisions of Section 119 of the Companies Act to have been relevant to the Plaintiff's case.
 34. Section 118 (3) of the Companies Act did not also appear to be applicable herein as there was no dispute as to which party was said to be the equitable and/or beneficial owner of the said shares. The section would ordinarily apply where a party applies to court to have it decide a question relating to the objector's title to the said shares, and/or the registration of the objector as a member of a company.
 35. However, the court found Section 120 of the Companies Act to have been more pertinent as the same dealt with the effect and purport of the register. The same provides as follows:-

"The register of members shall be prima facie evidence of any matters by this Act directed or authorized to be inserted therein".

36. In its letter dated 22nd July 2014, Nairobi Securities Exchange Limited, in part, stated as follows:-

"...We hereby reject the documents on the following grounds:-

- 1. The consideration at which the shares were sold had not been indicated.**
- 2. The seller's transfer form was not witnessed and signed by (at least) 2 directors of the company.**
- 3. The copy of the stamp duty form was incomplete with part of it concealed by the stamp duty receipt. These two (stamp duty payment receipt) should be a full print and not one overlapping the other.**

Kindly make these amendments and forward the documents to us for further action."

37. In this regard, the court agreed with the Plaintiff's submissions that the register of members of Nairobi Securities Exchange Limited did not contain the Objector's name as a shareholder and that this was prima facie evidence that the Objector was not a member of the said company and was not a share holder of any of the shares that formed the subject matter of this case as at the time the Plaintiff attached the same on 21st July 2014.
38. The Plaintiff's assertions that the proceedings of this case up to the passing of the judgment and decree were a matter of public concern and were widely published in the media which ought to have come to the attention of the Objector or the Objector's contentions that the Plaintiff had been

- indolent in executing its judgment against the 2nd Defendant were neither here nor there.
39. A prudent man would not have been expected to have had knowledge of a case that was pending in court unless he had an interest in such a case. It would have been too onerous for the Objector to have been expected to establish the status of the 2nd Defendant's shares in the Nairobi Securities Exchange Limited before entering into an agreement to purchase the 2nd Defendant's attachable assets. The Plaintiff had the option of attaching any of the assets owned by the 2nd Defendant to satisfy its decree, which may not have been within the knowledge of the Objector.
40. The court was thus not convinced by the Plaintiff's submissions that duty was upon the Objector to carry out due diligence on the 2nd Defendant and establish whether the 2nd Defendant had paid its creditors before entering into a transaction to purchase any of the assets owned by the 2nd Defendant.
41. Similarly, the Objector could not purport that the Plaintiff had been indolent in not executing its judgment against the 2nd Defendant despite knowledge that the 2nd Defendant held a substantial stake in the Nairobi Securities Exchange immediately it obtained judgment against the 2nd Defendant. The Plaintiff was well within its right to investigate the 2nd Defendant's with a view to determining which of its assets would satisfy its decree.
42. The Plaintiff could not have been faulted for not moving to execute its judgment against the 2nd Defendant for over five (5) years, the decree having been issued on 27th October 2009 as had been contended by the Objector for the reason that the limitation period for executing a Decree was twelve (12) years from the date of judgment, a position that was rightly submitted by the Plaintiff. Indeed, the limitation period was prescribed by law under the provisions of Section 4(4) of the Limitations of Actions Act Cap 22 Laws of Kenya.
43. The court considered the Plaintiff's submissions that the 2nd Defendant could have the intention to dispose of his or its assets in order to evade execution and obstruct justice and thus steal a march on the court process.
44. It was not lost to the court that whereas the Plaintiff attached the 2nd Defendant's said shares on 21st July 2014, CDSC Registrars Limited's letter dated 22nd July 2014 was in response to a letter dated 25th April 2014.
45. The court could not make a conclusive determination whether or not the 2nd Defendant had purported to dispose of its shares so as to defeat the course of justice as had been averred by the Plaintiff. The circumstances of this case was thus different from those in the case of **Dr Michael Kwena vs Raza Properties Limited & Others [2008] eKLR**, that was relied upon by the Objector, in which Nambuye J (as she then was) cited the case of **Seringa Jill Bright Gotke vs Settlement Fund Trustees** and found that the object of the transfer was to put the available asset out of the reach of the defendant therein.
46. While it may have been possible that the Objector was not aware of any proceedings between the Plaintiff and the 2nd Defendant herein when it paid Kshs 13,500,000/= for the shares in 2011 or when it signed the shares said Agreement in 2012, it was not clear to the court whether or not the amendments that had been pointed out by the CDSC Registers Limited were made and the changes properly effected in the register and if not, the reasons for the failure to do so.
47. The fact that the Objector made the payment on 28th October 2011, executed the Agreement in 2012, signed the Purchase and Sale Transfer Forms on 25th April 2014 and paid stamp duty on 17th July 2014 was immaterial. The bottom line was that the shares were still in the name of the 2nd Defendant. The Plaintiff was therefore legally entitled to attach the same. It was irrespective that the attachment herein was only issued by the court on 21st July 2014 which was way after all the previous processes as had been concluded as was contended by the Objector.
48. The Objector may or may have been an innocent purchase without notice but the fact that it was not the legally registered owner of the said shares, it could not bar the Plaintiff from attaching the same. In as much that the Objector argued that the court ought to reward the diligent like itself not the indolent like the Plaintiff, the court noted the Objector did also take a lengthy period of time to effect the changes at the CDSC Registrar Limited and was now caught up in execution proceedings by the Plaintiff against the 2nd Defendant.
49. For all purposes and intent, there was no valid transfer within the terms of Section 82(1)(b) of the

Companies Act which stipulates as follows:-

“For the purposes of this subsection “transfer” means a duly stamped and otherwise valid, and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register.”

50. The Objector’s submissions that Section 82 of the Companies Act had nothing to do with a person acquiring the shares and that the same only applied to the company and its officers and had penal consequences was clearly misplaced. The court did not therefore deem it necessary to address the submissions on distinction between **“allotment”** and **“transfer”** of shares as the said argument was not relevant in the circumstances of this case.

51. It therefore follows that for all purposes and intent, the Certificate held at the CDSC Registrar Limited was that of the 2nd Defendant was *prima facie* evidence of the title of the member to the shares. The Objector had no title or evidence of title to the shares as was envisaged in Section 83 of the Companies Act which provides as follows:-

“A certificate, under the common seal of the company, specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares”.

52. Having said so, although the issue of the validity of the said Agreement was not in issue, the court observed that the said Agreement was not dated. It could have explained the reason the Objector kept on referring to the same having been signed in the year 2012. The same was also not sealed with the common seals of the respective companies.

53. Be that as it may, the court found that nothing would have been easier than for the Objector to have furnished proof of payment of the sum of Kshs 13,000,000/= that was made on 28th October 2011. It was not sufficient to have contended that the said Agreement had indicated that the said sum had been paid. It could have provided bank statements, banking slips, RTGS or any other documentation to demonstrate such payment.

54. In the absence of such crucial information, the court was completely unable to come to a definite determination on this fact based on affidavit evidence. It was also for the same reason that the court could also not determine whether or not the payment of the stamp duty was to defeat the court process as the Stamp Duty was made on 17th July 2014 which was just about four (4) days before the attachment.

55. The court could also not ignore the remarks that had been made by CDSC Registrar Limited as had been mentioned hereinabove, it was not clear to the court whether the amendments that had been pointed out by the CDSC Registers Limited.

56. Having considered the pleadings, affidavit evidence, written submissions and case law in support of the parties’ respective case, the court came to the conclusion that the Objector had not demonstrated to the standard required that it was the lawful proprietor of the said shares. It was not within the jurisdiction or the power of this court to order that the said shares be registered in its name as that there was an entity recognised by the law to register the said shares provided that all the requisite provisions of the Companies Act had been fulfilled.

57. The Court could also not make a finding that the Objector was the lawful proprietor of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd in an application. Those were issues of fact that could only be ventilated in a full trial. In fact the court could not grant Prayer Nos (4) and (5) of the application herein as the court found that the Objector had not satisfied the court that it was the lawful proprietor of the said shares as the said shares were still in the 2nd Defendant’s name or that it had equitable interest in the said shares.

DISPOSITION

58. Accordingly, the upshot of this court’s ruling was that the Objector’s Notice of Motion application dated 12th September 2014 and filed on 16th September 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff.

59. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of February 2015

J. KAMAU

JUDGE