



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
MISC. APPL. NO. 108 OF 2012
IN THE MATTER OF THE ESTATE OF ZERAKHANU HAIDERALI SAYANI (DECEASED)
CONSOLIDATED WITH
MISC. APPL. NO. 109 OF 2012
IN THE MATTER OF HAIDERALI KANJI SAYANI
CECIL G. MILLER
T/A MILLER & CO. ADVOCATES.....APPLICANT
VERSUS
PARIN SHARIFF.....1ST RESPONDENT
NAZLIN NIZAR JETHA.....2ND RESPONDENT
YASMIN JANMOHAMMED.....3RD RESPONDENT
ANAR HANALI.....4TH RESPONDENT
AND
STANDARD CHARTERED BANK LTD
KENYATTA AVENUE BRANCH.....GARNISHEE

RULING

1. The applicant acted as counsel for the respondents in two succession Causes concerning their father and mother, respectively. On conclusion of the Causes he filed a bill of costs in each matter. The bills were taxed by the Deputy Registrar and allowed at Kshs.18,759,474/= and Kshs.18,760,692/=, respectively. The total was Kshs.37,520,166/=.

2. There is at Standard Chartered Bank Ltd, Kenyatta Avenue Branch (Garnishee) money held in the current account numbers 247977 and 0102024797700 and fixed deposit account No. 41624797706 all in the name of Sayani Investment Limited. At the request of the applicant an order was made in each application to freeze the money in the accounts. This ruling relates to the request contained in the application that the taxed sums plus interest be released from the accounts to the applicant to meet the taxed bills. The basis of the application was that the respondents had not, since the taxation, made any effort to pay the taxed bills of costs. It was sworn that the respondents are the ones who jointly operate Sayani Investment Limited and that the company collects on their behalf substantial amounts of monies received as rent from various prime properties. These are the monies that are in accounts held at the Garnishee. The applications were prosecuted by Mr. Murgor for the applicant.

3. Mr. Ojiambo defended the applications. The substantial point that he raised was that Sayani Investment Limited is a third party to the proceedings; that it is a limited liability company with a legal personality that is separate from the respondents and that the taxed amount was never at any one time payable by it for and on behalf of the respondents. Its assets cannot therefore be attached in the circumstances to realise the taxed bills. Counsel submitted that there was no evidence on record to show that the respondents solely owned the company, or that they were its shareholders. The second point that was raised was the company was one of the assets in the succession Causes; that the grants in the Causes have not been confirmed. The respondents may be beneficiaries, but the legacies due to them have not been established, it was argued. Therefore, the assets of the company cannot be attached as their ownership has to be ascertained.

4. To all these, Mr Murgor's position was that the respondents have been shown to be the ones operating the accounts in question and that makes them the owners of the companies, and the monies in the accounts. It was averred in the affidavit in respect of the applications that the respondents were joint directors, shareholders, and sole beneficiaries to the benefits and profits accruing from the company which operates the accounts held by the Garnishee bank. There was no replying affidavit to challenge that factual position. This is why counsel asked that the monies be attached and released to his client in satisfaction of the taxed costs.

5. The Garnishee bank was represented by Mr. Wetangula. Its Head of Legal and Compliance, Retail Clients swore that it shall comply with any orders that the Court will make in regard to the accounts it holds for the company, otherwise it was a stranger to the statements made on oath regarding how the respondents manage their accounts and the purpose of such an arrangement.

6. I have considered the oral arguments, the written submissions and the authorities cited by either side.

7. The respondents may be directors or shareholders of Sayani Investment Limited. They may be the ones operating the accounts subject to the proceedings. They may be the beneficiaries of the monies in the accounts. However, the well established company law principle enunciated in **Salomon .v. Salomon & Co. Ltd (1895-9) ALL. E.R. 33** is still relevant. At page 48 Lord Macnaghten had this to say:-

“When the memorandum is duly signed and registered, though there may be seven shares taken, the subscribers are a body corporate “capable forthwith” to use the words of the enactments, “of exercising all the functions of an incorporated company”.....These are strong words. The company attains maturity on its birth. There is no period of minority, no interval of incapacity. I cannot understand how a body corporate thus made “capable” by the statute can lose its individuality by issuing the bulk of its capital to one person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment.”

(Nasir Ibrahim Ali and Others –vs- Kamlesh Mansukhlal Danji Pattni and Another, Civil Appeal No. 72 of 1998 at Nairobi). A share in a company is the expression of a proprietary

relationship: the shareholder is the proportionate owner of the company but does not own the company's assets which belong to the company as a separate and independent legal entity (**Paragraph 34-01 of Chapter 34 of Palmer's Company Law, Volume 1 at page 332**). It follows that the respondents, if they are shareholders of Sayani Investment Limited, are only proportionate owners of the company but do not own the company's assets which belong to the company as a separate and independent legal entity. The monies in the accounts subject of these proceedings belong to the company, and not to the respondents, and cannot be attached, or released, to satisfy the taxed bills.

8. The other pertinent issue raised by Mr Ojiambo related to the fact that Sayani Investment Limited was part of the estate of the deceased persons, and that its assets cannot be disposed of in any other way than what has been provided under **sections 67 to 73 of the Law of Succession Act (Cap. 160)**. There was no specific response to this by counsel for the applicant. I have read the evidence that was tendered by Cecil C. Miller Allan advocate during the hearing of the taxation before the Deputy Registrar. He stated that the deceased Mr. Sayani was his client, and that he (deceased) had a company which is the company now subject of these proceedings, in which he had majority shares. The company had an account with Standard Chartered Bank. If that is evidence, it is clear that the company became part of the estate of the deceased which can only devolve in accordance with the **Act**.

9. The applicant has stated, and it was not disputed, that the respondents are the ones who instructed him, they are the ones who withdrew the instructions and they are the ones who instructed Mr Ojiambo's firm. If he was instructed to act for the estate of the deceased he can proceed to recover his costs from the estate. The alternative would be to proceed against the respondents in their individual capacities.

10. In conclusion, I find the applications by the applicant to be without merit. Each is dismissed with costs.

DATED and DELIVERED this 16th day of September 2015.

A.O. MUCHELULE

JUDGE