REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 541 OF 2005

BARCLAYS BANK OF KENYA LIMITED::::::::::::::::::::::::::::::::::PLAINTIFF

AND

ABDI ABSHIR WARSAME::1ST DEFENDANT

DAQARE TRANSPORTERS LIMITED::::::::::::::::::::::::2ND DEFENDANT

R U L I N G

1. The *ex-parte* Chamber Summons application before the court is dated 27th April 2007 and filed in court on the same date. It seeks the following prayers:

1. ***That the credit in deposit account No.s 7174242 and 7175184 be utilized to pay the sum of Kshs.2,999,484.00.***

2. ***That the credit in deposit account No.s 7174242 and 7175184 be utilized to pay the costs of the decree holder.***

3. ***That cost of this application be borne by the Judgement Debtor and be recovered and retained out of the money under the Garnishee order.***

2. The application is premised on the grounds set out therein and is supported by affidavit of **STEPHEN GITONGA** dated **27th April 2006** with annextures thereto.

3. The application is opposed by the **1st Defendant** through his replying affidavit dated **23rd November 2012** filed in court on the same date. It is also opposed by the 2nd Defendant vide a replying affidavit by **ENOS L. IGESA** dated **9th October 2012** and filed in court on 11th October 2012.

4. The brief history of the application is as follows. The Plaintiff/Applicant filed the present suit seeking the sum of USD 39000 against the Defendants joint and severally and obtained a temporary injunction restraining the Defendants from withdrawing any sums from accounts number 7174242 and 7175184 at its Muthaiga Branch. Prior to this, the 1st Defendant had on the 20th July 2005 instructed the Plaintiff Bank to issue a Bank draft for USD 39000 in favour of Awash Highland Traders which the Bank obliged. After 3 days the 1st Defendant changed his mind and re-banked the draft at the Plaintiff's branch at Jomo Kenyatta International Airport.

The draft was made from the account of the 1st Defendant but taken and/or transferred to the 2nd Defendant's account. The Bank did not reflect the transaction between the two accounts, at the time the

dispute arose. The evidence on record indicates that the 2nd Defendant is a company formed by the 1st Defendant and one Kassim Warsame, who sold his shares to the 1st Defendant making the 1st Defendant the sole proprietor of the company at the time.

5. On 12th October 2005, a consent was recorded and adopted on the 17th October 2005 as an order of the court by Justice (retired) Ransley on the following terms:-

i. ***That the 1st Defendant do pay to the Plaintiff the sum of USD 39000 on or before 2nd November 2005.***

ii. ***That pending payment of the said amount, the injunction orders shall remain in force on account's number 7174242 and 7175184 with Barclays Bank of Kenya Limited Muthaiga Branch.***

iii. **. . .**

iv. ***That in default of payment, execution to issue against the 1st Defendant.***

6. The 1st Defendant never complied with the consent order and on the 8th November 2005 made an application seeking to set aside the consent order dated 17th October 2005. The application was heard on the 18th November 2005 and was dismissed on the 25th November 2005 for lack of merit. The 1st Defendant decided to lodge an appeal against the said dismissal but later abandoned the same. The Plaintiff resorted to execution for the sum of USD 39000 in terms of the consent order but no fruitful result has yielded from the said action.

7. With the leave of the court parties field written submissions to the application. The Plaintiff/Applicant filed their submissions on 20th January 2014, the 1st Defendant/Respondent field his submissions on 14th march, while the 2nd Defendant/Respondent the same on 7th February 2014.

8. I have considered the application and the opposing affidavits together with the submissions. What is emerging, as i understand it, is that the Plaintiff/Applicant believing that it has a decree against the 1st Defendant, is unable to fully execute the same to enable it enjoy the fruits of its judgement. The Plaintiff also believes that the 1st Defendant is the sole owner of the 2nd Defendant Company, and that being so, the Plaintiff believes that it has a right to execute the said Judgement against the said two accounts, one of which belongs to the 1st Defendant, with the other belonging to the 2nd Defendant. In support of this position, the Plaintiff/Applicant submitted that while they recognise the legal status of the 2nd Defendant, it is equally important that this court takes cognizance of the role the 1st Defendant plays in the 2nd Defendant. Justice Warsame in his ruling dated 4th April 2008 at page 4 had this to say regarding the connection of the 1st Defendant to the 2nd Defendant: ***". . . perhaps it is also important to note that the 1st Defendant acknowledges he operates, runs, manages and/or controls the account of the 2nd Defendant alone. It is also clear that as at 27th September 2005 the 1st Defendant knew the account of the 2nd Defendant had been blocked from any transaction by the bank. And in one of the affidavits filed in court, the 1st Defendant states in part"***:

> ***"It is evident from the bank statements that my account and that of the 2nd Defendant have had credit amounts well in excess of USD 39000 and the Plaintiffs error could easily have been rectified with understanding and cooperation rather than harassment and intimidation."***
>
> Justice Warsame in his Ruling dated 17th July 2006 states at page 8 thereof that: **". . . it is not in dispute that some money need to be refunded to the Plaintiff, which was lost through the action of the 1st Defendant"**. The Plaintiff further submitted that the Honourable Justice Lesiit in her Ruling dated 31st July 2008 stated as much that: **" . . . it is quite apparent that the Defendant's have employed all possible means to prevent the Plaintiff from enjoying the fruits of its judgement."** According to the Plaintiff Justice Lesiit admitted the Plaintiff's claim that the cause of action rose out of the 1st Defendant's act of overdrawing his account with the Plaintiff bank to the tune of USD 39000, which was made without any prior arrangement with the Plaintiff

Bank.

9. The Defendants on their part raise points of law as to why this court should not proceed to grant the order sought by the Plaintiff. It is their argument that should the Plaintiff application succeed it would be tantamount to a review or otherwise sitting on appeal on the orders made by Kasango J. In her ruling of 18th December 2006 staying execution pending judgment against the 2nd Defendant, the Honourable Judge stated that:- "**Judgement and execution against the 2nd Defendant be stayed until judgement is entered against that Defendant and/or until <u>further orders of the court</u>**". In response to this submission, the Plaintiff states that Justice Kasango's Ruling was and is not an absolute bar to this court making further orders it deems fit in the interest of justice, and that entering judgement in favour of the Plaintiff will not amount to dismissing and striking out the Defendant's counter-claim as alleged in the Defendant's Reply to the application. The Plaintiff believes that account number 7175184 is owned and controlled by the 2nd Defendant and the credit deposit in the account was made by the 1st Defendant who is its Director. The 1st Defendant consented to owing the Plaintiff USD 39000 and undertook to repay the said amount on or before the 2nd November 2005, which he dishonoured, and execution issued which raised a paltry Kshs.283,920/= way below the total decretal amount of Kshs.2,999,484/=.

10. In effect, the Plaintiff hinges its onslaught against the 2nd Defendant on the fact that the 1st and 2nd Defendant, despite being separate legal entities, are one and the same, and that if the corporate veil is lifted, which should be done by this court, then the Plaintiff should have the liberty to execute the said decree both against the 1st Defendant and the 2nd Defendants aforesaid accounts.

11. This submission by the Plaintiff/Applicant is resisted by both the two Respondents who submitted that in the first instance there is no judgement or decree in favour of the Plaintiff pursuant to which an execution can lie. It is alleged by both Respondents that the alleged decree is not in existence, as the said consent between the Plaintiff and the 1st Defendant did not determine all the issues in the suit, and that there are many issues raised in the "**Amended Plaint and Defence to counter-claim**" dated 23rd October 2006 that have not been determined by the consent, e.g. the questions of costs of the suit, fraud, unjust enrichment, restitution and interest, and the question of whether or not at all, or some of the Plaintiffs claim are due from the two Defendants jointly or severally, if due at all. The 1st Defendant submitted that executing the said decree against any of the Defendants will prejudice the position of the two Defendants.

12. As I understand it, the first issue which I want to deal with is whether or not there is a judgement or decree in favour of the Plaintiff against the 1st Defendant. The simple answer to that is in the affirmative. Paragraph (a) of the said consent stated this:-

a. ***That the 1st Defendant do pay the Plaintiff the sum of USD 39000 on or before 2nd November 2005.***

That being so, even if there are outstanding issues in the Plaint, the Plaintiff is at liberty to secure what is already awarded to it, by way of the proposed attachment provided that what the Plaintiff claims does not exceed the amount so awarded. Other outstanding issues can still abide the finalisation of the matter. I therefore find that as against the 1st Defendant/Respondent, there is a judgement in favour of the Plaintiff, and the Plaintiff is at liberty to execution to the extent of that Judgement, against any property of the 1st Defendant, including the 1st Defendant's account number 7174242 maintained at Barclays Bank of Kenya Limited Muthaiga Branch.

13. The next issue is whether the Plaintiff/Applicant has laid a firm foundation for the proposition that this court should lift the corporate veil and find that the 1st defendant is the sole owner of the 2nd Defendant so that the 2nd Defendant's account number 7175184 should be attached. Citing relevant authorises the Plaintiff has submitted that the 2nd Defendant is an appendage of the 1st Defendant and so, the corporate vail should be lifted to enable the 2nd Defendant's account be attached to satisfy the claim.

In the case of **Mugenyi & Company Advocates – Vs – the Attorney General, [1922] EA 199**, the court went at length to list 10 instances in which the veil of corporate personality may be lifted. Of interest to the case are instances when there is an abuse of law in certain circumstance and/or where the device of

incorporation is used for some illegal or improper purpose. On this basis the Plaintiff submitted that the 1st Defendant is shielding behind the device of incorporation to improperly delay and/or deny the Plaintiff from enjoying the fruits of its Judgement, an action that in their view is unjust, legally immoral and pitable.

14. The 2nd Defendant has strenuously opposed this submission, citing the Ruling of Lady Justice Mary Kasango herein that there is no judgement against the 2nd Defendant and therefore no execution can be levied against it. It was submitted that the 2nd Defendant is a juristic person with a separate legal entity distinct from that of its members. The 2nd Defendant submitted that in a Ruling by Lady Justice Lesiit on the 3rd of July 2008 the court made findings as follows:-

i. ***Some admissions were made by the 1st Defendant, not the 2nd Defendant;***

ii. ***Execution was done without a decree being executed;***

iii. ***The 2nd Defendant already has a counter-claim against the Plaintiff for general damages and loss of income;***

iv. ***Execution was in relation to consent of parties where the 1st Defendant was to pay the Plaintiff USD 39000 on or before 2nd November 2005.***

15. Clearly, the 2nd Defendant cannot be dragged into the issue at hand which is purely between the Plaintiff and the 1st Defendant, until the alleged corporate veil is lifted, and on this issue of lifting the corporate veil, there is no formal application by the Applicant, in which all the relevant information and documentation is availed, and the 2nd Defendant given the opportunity to respond thereto. In any application to lift the corporate veil, the Applicant should at least attempt to provide relevant certificates of share provision from the Registrar of Company giving details of who owns what in which company. General allegations about how close two companies appear to be cannot suffice to lift the corporate veil. Specifically, that is the kind of application which must be made, and the Respondent given adequate opportunity to reply. That has not been done herein, and I dismiss the request by the Applicant to lift the corporate veil and to find that the account number 7175184 belonging to the 2nd Defendant is attachable to satisfy the Judgement herein.

16. In my view, the 2nd Defendant is not just a separate legal entity. More than that the proceedings herein against the 2nd Defendant, and the 2nd Defendant's counter-claim, have not been determined. No judgement or decree has been made against the 2nd Defendant to warrant the grant of these orders against the 2nd Defendant.

17. In the upshot I make the following orders:-

a. ***That the credit in deposit account number 7174242 be utilized to pay the sum of Kshs.2,999,484.00 and any other costs of the decree holder.***

b. ***The costs of this application shall be borne by the 1st Defendant/Respondent and be recovered and retained out of the money under the said account.***

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Shaban holding brief for M/s Onsae for Plaintiff

M/s Keitany holding brief for Katwa for Defendants

Jason – Court Clerk