



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS AT NAIROBI
CIVIL SUIT NO 1157 OF 2001

PIONEER PLUMBER LIMITED.....PLAINITFF

VERSUS

MORRIS & COMPANY LIMITED.....1ST DEFENDANT

MORRIS & COMPANY (2004) LIMITED.....2ND DEFENDANT

RULING

1. The Objector's Notice of Motion application dated and filed on 28th May 2014 was brought under the provisions of Section 1A 1B 63 (e) (sic) of the Civil Procedure Act, Order 22 Rule 51 and Order 52 of the Civil Procedure Rules, 2010. It sought the following orders:-
 1. **THAT the attachment on 23rd May 2014 against Morris & Company (2004) Limited, the Objector be stayed.**
 2. **THAT the attachment against Morris & Company (2004) Limited, the Objector be set aside.**
 3. **THAT costs of this Application be provided for.**

OBJECTOR'S CASE

2. The Objector's case was that it was not the Debtor herein having been incorporated in 2004. However, it was served with a proclamation by Nairobi Connection Services Auctioneers for execution of a decree of the sum of Kshs 13,241,932.70 which clearly showed that the Defendant was Morris and Co Limited that was incorporated in 2001. It prayed that the attachment and execution be set aside on the ground that it was unjust for the said auctioneers to attach its property purporting that the same belonged to the Defendant.
3. Its application was supported by the Affidavits of Martin Bett that were sworn on 28th May 2014 and 19th June 2014 respectively. Its written submissions were dated and filed on 7th July 2014.

THE PLAINTIFF'S CASE

4. In response to the Objector's application, the Plaintiff filed a Replying and Further Replying Affidavits that were sworn by Bharat Patel on 9th June 2014 and 24th June 2014 respectively.
5. Its case was that Defendant's registered offices and/or place of business from 1983 to date had always been situated at Mogadishu Road, Industrial Area Nairobi and that the Defendant and Objector were essentially one and the same person operating under different company names. The Plaintiff contended that it had been unable to locate any movable assets of the Defendant which

- had been disposing all its assets to avoid satisfying the decree herein.
6. It prayed for the dismissal of the objector's application on the grounds that the Objector had not come to court with clean hands, that the Objector had failed to give an undertaking as to damages and that the Objector's application was defective as it had been supported by affidavits which had been sworn by a person who lacked authority to do so.
 7. On 6th June 2014, it filed Grounds of Opposition of even date. On 9th June 2014, it also filed a Notice of Preliminary Objection on points of law and Notice of Intention to proceed with execution both dated 9th June 2014. Its written submissions were dated and filed on 1st July 2014.

LEGAL ANALYSIS

8. The Plaintiff raised several issues to attack the competence of the Objector's present application. These were generally as follows:-
 - a. **THAT Objector could not invoke the provisions of Section 1A, 1B and Section 63 (e) of the Civil Procedure Act.**
 - b. **THAT application did not satisfy the mandatory provisions of Order 22 Rules 51 and 52 of the Civil Procedure Rules, 2010.**
 - c. **THAT order issued by the court was incurably defective as it did not indicate the Objector as a party to the proceedings herein.**
 - d. **THAT Martin Bett had no capacity to depone to facts on behalf of the Objector herein.**
9. The court felt that the issue of competence of the Plaintiff's application was an issue that ought to be addressed from the outset. After a careful analysis and consideration of the submissions by the parties on the aforesaid issues, the court found that the Plaintiff could not succeed on the same due to the reasons shown herein below.
10. Firstly, the application herein could not be rendered defective merely by the Objector having cited Sections 1A, 1B and 63 (e) of the Civil Procedure Act. Indeed, Article 159 (2) (d) of the Constitution of Kenya, 2010 enjoins the court to determine matters without undue regard to technicalities. In any event, Order 51 Rule 10 of the Civil Procedure Rules, 2010 stipulates that every order, rule or other statutory provision shall be stated but that no objection shall be made or refused merely by reason to comply with the said provision.
11. Secondly, the case of **Ngenye Kariuki vs Kheira Omar Maalim [2011] eKLR** was not of assistance to the Plaintiff's arguments. This is because the notice dated 28th May 2014 showing it was issued pursuant to Order 22 Rule 52 (2) of the Civil Procedure Rules, was attached to the Objector's present application and clearly set out in brief the Objector's claim. This was in compliance with the said Order that provides as follows:-

“Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which the objector or person makes to the whole or portion of the claim.”

12. Thirdly, the Objector could not be faulted for having served the Order that was issued on 29th May 2014 as it was drafted by the court. In any event, it was not a party to the proceedings herein as parties can only be enjoined in proceedings as has been provided under Order 1 of the Civil Procedure Rules.

Rather it had become involved in the matter herein in its capacity as an Objector.

13. As regards the fourth issue hereinabove, the Plaintiff argued that there was no evidence of a Board Resolution that authorised the deponent, Martin Bett to swear to the facts on behalf of the Objector herein. It also expressed doubt as to whether he was the Objector's Legal Officer or if indeed he was engaged by the Objector at the material time. Its argument was really that the said Martin Bett had not disclosed his source of information and his averments were therefore hearsay evidence. It relied on the case of **Intermart Manufacturers Limited vs Akiba Bank Limited & 2 Others [2004] eKLR** in this regard.

14. In his Supplementary Affidavit that was sworn and filed on 19th June 2014, Martin Bett was categorical that there was no law that required that a Board Resolution be passed before a Legal Officer of a company could be authorised to swear an affidavit on behalf of a company. Whilst the Objector did not submit on this issue in its written submissions, the court found the averments by the Objector to have been the correct position. There is no law that prohibits any officer of a company from deponing to facts even when he was not an employee of a company at any material time. It was thus not necessary for the Objector to have filed a Board Resolution to authorise the said Martin Bett to depone to facts that he himself could verify from his own information, knowledge and belief.
15. The above notwithstanding, after perusal of the affidavits that were sworn by the said Martin Bett, it was clear to the court that he appeared to have deponed to facts that were of his own knowledge. He stated that the Objector's property was proclaimed on 23rd May 2014, that the name of the debtor in the said proclamation and Affidavit of Service that was sworn on 1st November 2013 by Walter Onchuru Motari and filed on the same date appeared to have been the Defendant herein, that the Objector was not indebted to the Plaintiff, the Objector had never been served with any court process in the matter herein and that it was unjust for the Plaintiff to have attached the Objector's property.
16. As it is trite law that he who alleges must prove, it was incumbent upon the Plaintiff to demonstrate that Martin Bett could not depone to the facts that he did in his Supporting and Further Affidavits. In the absence of any evidence to the contrary, the court found that the Plaintiff's submission on the competence of the Objector's application on the ground that it was supported by affidavits sworn by a person with no authority was therefore misplaced and found no favour of this court.
17. Turning to the substantive issues herein, while the Plaintiff submitted that the Objector failed to disclose its relationship to the Defendant herein and that the names and postal addresses of the directors of the Objector and the Defendant were one and the same, the Objector furnished the court with an Agreement for the Sale of Assets that was dated 1st April 2004 showing that the Defendant sold to it its assets.
18. The court was thus in agreement with the Objector's submissions that a party cannot be held liable for another's debt due to a similarity of names or to have his goods attached as was held in the case of **Busia Civil Appeal No 6 of 2010 Channan Agricultural Contractors (K) Limited vs Rosemary N. Oyula t/a Channan Agricultural Limited & Another** (unreported) and **Civil Appeal No 165 of 1989 Atago vs Agricultural Finance Corporation & Another** (unreported) respectively.
19. The Plaintiff could not therefore attach the Objector's goods just because it was in the same premises as the Defendant as they were different legal corporate entities. In fact as was rightly pointed out by the Objector on pg 9 of its Replying Affidavit, it was evident that the Defendant was in receivership. The oral submissions by the Plaintiff's counsel that the Objector did not annex a schedule of assets that were transferred to it were therefore immaterial as the Plaintiff could not attach goods belonging to a company that was in receivership.
20. Appreciably, whilst a court has power to unveil the corporate veil of a company as had been contended by the Plaintiff, the same cannot be done at the stage of objection proceedings. It was incumbent upon a Plaintiff to bring its application in an appropriate manner.
21. Accordingly, having considered the pleadings, affidavit evidence, written and oral submissions and the case law in support of the parties' respective cases, the court was more persuaded by the Objector's arguments that the Plaintiff could not attach its goods to satisfy a decree that was issued against the Defendant herein as they were separate and distinct legal entities. It was the finding of the court that the Plaintiff's Ground's of Opposition dated and served on 6th June 2014 and Preliminary Objection dated and filed on 9th June 2014 were not merited at all.

DISPOSITION

22. For the reasons foregoing, the Objector's Notice of Motion application dated and filed on 28th May 2014 was merited and the same is hereby allowed as prayed. The Plaintiff will meet the Objector's costs of the application herein.

23.It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th day of December 2014

J. KAMAU

JUDGE