



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

**Civil Suit 851 of
2010**

**TNT
EXPRESS
WORLDWIDE**

(K) LIMITED..... PLAINTIFF/JUDGMENT CREDITOR

-VERSUS-

ELSEK & ELSEK

(K) LIMITEDDEFENDANT/JUDGMENT DEBTOR

AND

ELSEK & ELSEK CONSTRUCTION LIMITED..... OBJECTOR

RULING

1. The Notice of Motion application before me dated 25th November 2011 is brought by the Objector /Applicant under Order 22 Rules 51, 52 & 53 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The application seeks orders for the unconditional release of goods attached by the Judgment-Creditor/Plaintiff on 17th November 2011 in execution of a decree obtained against the Judgment-Debtor on grounds that the attached goods wholly belong to the Objector.

2. The application is supported by grounds set out on the face of the Notice of Motion and which essentially state that the Objector is the owner of the attached goods; is not a party to the suit herein and

for that reason the attachment of its goods is illegal. The application is further buttressed by the supporting affidavits of Osman ErdinicElsek and Caren Alfred sworn on 25th November 2011. In the affidavits, the deponents state that the suit in this matter was filed against Elsek&Elsek (K) Limited which has nothing to do with Elsek&Elsek Construction Limited. The goods attached by the on 17th November 2011 including two motor vehicles KBK 508V and KBC 601J belong to the latter company and not the Judgment Debtor in the suit herein. The decree holder is therefore not entitled to attach the Objector's goods. Annexed to the affidavits are copies of logbooks of the motor vehicles indicating that they are registered in the name of Elsek&Elsek Construction Limited.

3. The application is opposed. There is a replying affidavit by Hopkinson Ngalaka the Finance Manager of the Plaintiff sworn on 9th December 2011 in which it is stated that the Judgment-Debtor and the Objector are sister companies and that other than the motor vehicles, the Objector had failed to show that the rest of the proclaimed goods belonged to the Objector. It is further stated that although motor vehicles KBK 508V and KBC 601J are registered in the name of the Objector, they are used for the benefit of the Judgment Debtor. It is further averred that the Objector was incorporated for the purpose of defeating the Defendant's creditors and the court should for that reason refuse to exercise its jurisdiction in favour of the Objector.

4. At the *inter partes* hearing of the application, counsel for the Plaintiff Mr. Wandabwa made an oral application for cross examination of Mr. Osman ErdinicElsek who had deponed the affidavit in support of the Objector's application. The application was based on the grounds that there was a consensual relationship between the Defendant and Objector companies and therefore there was need to explore the relationship between the parties to enable the court consider if the corporate veil of the Objector could be lifted. The application was allowed on 14th February 2012.

5. During his cross-examination by Mr. Wandabwa, Mr. Osman ErdicElsektold the court that he was the Managing Director of the Objector in which he holds 80% shares while his wife holds 20% shares. He was also a 50% shareholder of the Defendant CompanyElsek&Elsek(K) Ltd with the rest of the shares being held by his wife. Both companies however kept separate books of accounts and had separate managers and staff. The companies were part of Elsek and Elsek Group of companies in which he, Mr. ErdinckElsek was the Head of the Group. Shown an email dated 15th November 2010 from Mr. Y. Bahri Bilge the General Coordinator Elsek&Elsek Group of companies addressed to the Plaintiff, Mr. Erdinc confirmed that the email attested to the structure of the Elsek Group of Companies. He clarified that each member of the group had its own Chief Executive Officer, each company has its own assets and that there was no cross user of assets between members. However, upon agreement, the assets of one company could be used by the other subject to lease or other arrangement. He confirmed thatElsek&Elsek Construction Company was incorporated on 4th February 2010 and that the equipment purchased and transported by the Plaintiff for Elsek&Elsek(K) Ltd included steel formatic machines which were part of the goods the auctioneers proclaimed.

6. On re-examination by Mr. MbutiGathenji, Mr. ErdincElsekstated that Elsek&Elsek (K) Limited was incorporated on 28th April 2008 and that no evidence had been placed before the court to show that it was the owner of the attached motor vehicles KBC 601J and KBK 508V. The other assets were also owned by the company Elsek&Elsek Construction Ltd.

7. Counsel for both parties filed written submissions to bolster their respective cases.

8. I have carefully reviewed the application on the basis of evidence placed before me. I have also considered the submissions filed by counsel.

9. An Objector to attachment under Order 22 Rule 51 must satisfy the court that he has a legal or equitable interest in whole or part of the property attached.

10. In the instant application, Counsel for the Objector Mr. Gathenji submitted that the application wasundefended with respect to ownership of the motor vehicles and urged the court to order that the two

motor vehicles be released unconditionally. He submitted that Section 8 of the Traffic Act provides that a person in whose name a motor vehicles is registered is deemed the owner of the motor vehicle. In response, Mr. Wandabwa for the decree holder argued that even if the motor vehicles were registered in the name of the Objector, the same were used for the benefit of the Judgment Debtor and this user entitled the decree holder to attach the vehicles.

11. I have perused the copies of logbooks of motor vehicle numbers KBC 601J and KBK 508V. There is no doubt that the same are registered in the name of the Objector company. The law is clear that the person in whose name a motor vehicle is registered is deemed to be the owner of the motor vehicle. In that regard, I do not agree with the contention that user of the motor vehicle can confer ownership status to the person making such use as would defeat the title to the registered owner of the motor vehicle. I therefore find that the Objector is the owner of the attached vehicles and that as it was not a party to this suit, the attached motor vehicles should be released forthwith.

12. With regard to the other proclaimed assets, it is apparent from the material placed before me and from the oral evidence of Mr. ErdincElsek that the Judgment-Debtor and the Objector companies are run as separate entities within a Group of Companies substantially owned by Mr. Erdinc and his wife. Although each company is stated to have its own separate assets, it is apparent that there is extensive intermeddling of assets as between the member companies within the group, to the extent that it is not easy to distinguish which assets are attributable to which member of the group. So is the management of the finances of each member company. This is discernible in at least two respects. Firstly, there are cheques drawn on the Objector company for payment of the courier services for the consignment that the Plaintiff couriered for the Judgment Debtor. Secondly, the formatic machines which are among the goods whose attachment is objected to are part of the consignment that the Plaintiff transported for the Judgment Debtor. In that regard, this court is convinced that the intermeddling of assets as between the Judgment Debtor and the Objector Company is such that a third party cannot delineate which goods belong to which member of the Group. In the premises, it would be inequitable for the Group of Companies to take advantage of the mired up ownership situation in relation to the assets to defeat lawful execution levied against a member of the Group. This is more so given that the companies are essentially owned by the same shareholders, notwithstanding the separate legal existence of each member company. In the circumstances, I am unable to lift the proclamation of the rest of the attached goods.

13. For the above reasons, and save for the motor vehicles KBC 601J and KBK 508V which I have ordered to be released forthwith, the Objector's Notice of Motion dated 25th November 2011 fails and is hereby dismissed with no orders as to costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2012.

**J.M. MUTAVA
JUDGE**