



Chart Enginnering Enterprises Ltd v Attracting Supplies Ltd (Civil Case 406 of 2008) [2009] KEHC 2410 (KLR) (Civ) (21 August 2009) (Ruling)

CHART ENGINNERING ENTERPRISES LTD v ATTRACTING SUPPLIES LTD [2009] eKLR

Neutral citation: [2009] KEHC 2410 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 406 OF 2008

MK KOOME, J

AUGUST 21, 2009

BETWEEN

CHART ENGINNERING ENTERPRISES LTD PLAINTIFF

AND

ATTRACTING SUPPLIES LTD DEFENDANT

RULING

1. By a ruling delivered by Khaminwa J, on 19th November 2008, summary judgment was entered for the plaintiff against the defendant in the sum of Kshs.3,300,000/-= with interest at court rates together with costs. The plaintiff/decree holder proceeded with the execution and a proclamation was issued against the defendant in which the properties indicated on the schedule were attached in execution of the decree. On 13th March, 2009, M/S African Attraction Safaris Ltd. filed a notice of objection over the execution in this matter. The plaintiff filed a notice of their intention to proceed with the attachment under Order XXI Rule 54 of the Civil Procedure Rules.
2. On 30th March, 2009, African Attraction Safaris Ltd. filed the Chamber Summons under Order XXI Rule 56 of the Civil Procedure Rules seeking for orders that the proclamation issued on 6th March, 2009 be lifted since the goods attached did not belong to the judgment debtor. The application is supported by the affidavit of Geoffrey K. Githuka sworn on 30th March, 2009. The deponent of the affidavit is a Director of the defendant, he contends that the goods proclaimed do not belong to the judgment debtor. He annexed copies of a logbook for motor vehicle registration KAX 537U Toyota Land cruiser which is registered in the name of Equity Bank Ltd. and African Attraction Safaris Ltd. He also attached a logbook for motor vehicle registration No.KAW 024R which is registered in his name that is Geoffrey Kamuma Githuka and also a copy of the logbook for motor vehicle KAV 232Y



- a Toyota pick-up registered in the name of African Attraction Safari Ltd. and Equity Bank. Motor vehicle registration No.KAX 737Z Toyota Hiace registered in the name of Geoffrey kamumu Githuka. According to counsel for the defendant, these properties were acquired before the defendant a limited liability company was incorporated and before the suit was filed therefore there is no element of fraud in the registration of the motor vehicles.
3. This application was vigorously opposed by counsel for the plaintiff/judgment creditor. He relied on the replying affidavit by Charles Adams Thuku Thuo sworn on 23rd June, 2009. According to the judgment creditor, the objection in this application is meant to defraud the creditors through tricks and use of a dummy company. Counsel drew the attention of this court to an affidavit in support for the application which is sworn by Geoffrey K. Githuka who has sworn it on behalf of the defendant/ the judgment debtor and also the objector. It therefore goes without saying that the objector and the defendants are one and the same entity.
 4. The judgment creditor has annexed a letter from the Registrar of Companies showing the said Geoffrey Kamumu Githuka is the majority shareholder of the objector company where he owns nine shares and his son David Githuka Kamumu holds one share. The Directors of the defendant company are Geoffrey Kamumu Githuka and his wife Eunice Wamucii Kamumu. Some of the motor vehicle attached cannot be objected to, because Mr. Geoffrey Githuka has not filed any objection as a person. Therefore the attachment in respect of the motor vehicles in the name of Mr. Githuka should proceed.
 5. As regards the two motor vehicles, registered in the names of Africa Attraction Safaris Ltd. the objector herein, it was submitted this is a dummy company which the defendant is using to defraud creditors. Counsel urged the court to consider the offices of the objector are located at the same premises with the defendant that is where the attachment took place. The Director Mr. Geoffrey Githuka is also a director in both companies. It is Mr. Githuka who was corresponding on behalf of the judgment debtor with the plaintiff when the debt was incurred.
 6. According to the counsel for the judgment creditor, the objector is a company incorporated merely to defraud the plaintiff and Mr. Geoffrey Kamumu Githuka who is a director of both the defendant and the objector, should not be allowed to hide under the guise of incorporation to perpetuate fraud against the creditors of the defendant through the use of the statute. The objector was incorporated by the defendant in order to aid it in running away from its responsibility.
 7. Under Order XXI of Rule 53 of the Civil Procedure Rules, as I understand it, any person claiming to be entitled or to have a legal or equitable interest in the property attached in execution of a decree may file an objection against the attachment of such property. The objector in this case is the African Attraction Safaris Ltd. There is no objection filed by Geoffrey K. Githuka who is the registered owner of motor vehicle registration Nos. KAW 042R and KAX 727Z. Thus nothing turns on the attachment on those two motor vehicles because the objection is filed for African Attractions Safaris Ltd over motor vehicle registration Nos. KAX 537U and KAV 232Y which are registered in their names.
 8. The issue for determination is whether there is a valid objection and whether the objector has proved to this court that they have a legal and equitable interests over the properties attached. This application is brought on behalf of the objector by Geoffrey K. Githika who is the director of both the defendant judgment debtor and the objector. This particular aspect was not disclosed in the application and even the supporting affidavit of Geoffrey Githika it does not show or disclose to this court his relationship with the defendant company and the objector. This information is revealed to the court by the judgment creditor who enclosed the information from the Registrar of Companies. What the objector intended to achieve by failing to disclose vital information is a rhetorical question for a moot court.



9. Further communication between the judgment creditor and judgment debtor shows that Geoffrey k. Githuka is the one who dealt with the judgment creditor when the debt was incurred. It is discernable that the defendant is the objector through Geoffrey Githuka who is its director. Is the defendant which is owned and managed by the same people using the objector to circumvent the execution proceedings through the use of the statute in order to defraud creditors? The answer to this question is obvious when one looks at the totality of the evidence.
10. Going by the evidence before this court, beginning with the affidavit in support of the objection, which is blatantly sworn by the Director of both the defendant and the objector, the correspondence between the judgment creditor and the defendant, which is also written by Geoffrey Githuka, and the records from the Registrar of Companies that show Geoffrey Githuka is a director of both the defendant and the objector, all this lends credence to the submission that this application is meant to use the statute to defraud creditors. Mr. Geoffrey Githuka has used the objector where he is also a director to cause confusion, run away from responsibility of paying the creditors using the *Companies Act* as an instrument to commit fraud.
11. This court is well aware of the ancient rule founded in the case of Salmon vs. Salmon that a company is a separate entity from its directors. In this case I find Geoffrey Githuka who is a majority shareholder of the objector and being the director of the defendant with his wife, is deliberately and mischievously using the statute to run away from responsibility. I wholly agree with the decision of my brother Warsame J in the ruling delivered in Milimani Misc. civil Application No.552 of 2005 Mema Enterprises Limited Versus Njoka Tanners Limited and Evangeline Wanjira Njoka and Another The Judge expressed himself as follows:-

“It is my firm decision that the 2nd objector is using the Company’s Act as an instrument to commit fraud and more so to run away from its obligation towards creditors. I think it is right to say that the directors of the Defendant Company and the 2nd Objector are one and the same. They are using the legal protection given to them under the statute to defraud creditors by engaging in multiple companies. In the premises the objection of the 2nd objector is dismissed with costs”.
12. Based on the above analysis I find the objection lacks merit and it is hereby dismissed with costs to the judgment creditor.

RULING READ AND SIGNED ON 21ST AUGUST, 2009.

M. K. KOOME

JUDGE

