IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 643 of 2004

STOCKMAN ROZEN (K) LTD. …….……..……....PLAINTIFF

VERSUS

ALORA FLOWERS LIMITED ……...…..…… DEFENDANT

RULING

This application brought by the Objector, MISTY HILLS PETALS LIMITED, in an endeavour to raise the attachment which was effected on 11th July 2006.

Essentially, the objector lays claim to the property which was attached, and says that none of the said property belongs to the defendant herein.

In order to appreciate the particulars of the property that had been attached, reference has got to be made to the Proclamation dated 11th July 2006. The said proclamation lists the following five categories of items;

"1. All office furniture and equipment.

2. Assorted computers.

3. Assorted office cabinets.

4. All machinery at Alora flowers or any other property of the judgement-debtor.

5. All household items in the debtors house at Nandi Hills Town."

When canvassing the objection proceedings, the objector first pointed out that it was not a party to this suit. He then indicated that he was placing relliance on the affidavit of Tony Ketter, who was its director.

It is the objector's case that the 1st Defendant herein, had originally operated a flower farm on the property L. R. NO. 9399/16 NANDI HILLS. The property itself was registered in the name of Tony Ketter.

It is also the objector's case that the defendant herein collapsed in 2001, and that the farm remained desolate until 2005, when the objector bought all the equipment which the defendant had left.

However, the objector also states that as the flowers on the property had been planted by the 1st defendant, the objector acknowledged that the plaintiff was entitled to royalties accruing from the said

flowers. For that reason, the objector explained that it entered into an agreement with the plaintiff, so that the plaintiff could continue to earn royalties from the flowers.

As far as the objector was concerned, the effect of executing the agreement was, inter alia, an acknowledgement by the plaintiff that they were aware of the fact that the objector had purchased the flower farm from the defendant.

Thereafter, it is said that the 1st defendant did make payments of royalties, and that the said payments were merely facilitated by the objector.

In the circumstances, the objector submitted that it was wrongful of the plaintiff to cause execution to be carried out against the objector's property.

In answer to the application, the plaintiff submitted that the only way for the objector to succeed would by demonstrating that it had a legal or equitable interest in the attached property. And, in the plaintiff's assessment, the objector had failed to discharge that onus.

The plaintiff's reason for saying that the objector did not demonstrate that the attached goods belonged to it is that the objector did not make available any receipts or other documents of title to support their assertion to ownership.

Before delving into the evidence which was placed before me, I will first consider the law governing objection proceedings. The starting point is Order 21 rule 53 of the Civil Procedure Rules, which reads as follows;

"(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree-holder of his objection to the attachment of such property.

(2) Such notice shall contain the objector's address for service and shall set out shortly the nature of the claim which such objector or person makes to the whole or portion of the property attached."

In this case, the plaintiff was served with a notice issued by the objector. In response, the plaintiff indicated its intention to proceed with the attachment.

At that stage rule 56 came into play whereupon the objector was obliged to;

"take proceedings to establish his claim within 10 days of service upon him of such intimation."

And what exactly was the objector herein required to establish?

Pursuant to the contents of the "Objection to Attachment" dated 14th July 2006, the objector had laid claim to the ownership of all the furniture, equipments, machinery and moveables, which had been proclaimed. Accordingly, the objector was now expected to demonstrate to the court that it was the owner of the said goods and items.

In the case of **COMMERCE BANK LIMITED –VS- CAROLINE W. WANJIHIA, MILIMANI HCCC No. 433 of 2001,** the Hon. NJAGI J., quoted with approval, the following words of MADAN J. A. (as he then was) in **BRAR –VS- WARENG QUARRY ACHARE CONSTRUCTION [1984] KLR 705;** as regards the purpose of objection proceedings;

"…is to provide the objector with an opportunity to establish his claim to the attached moveable property. If he is able to do so and also that the judgement debtor has no attachable interest in it, the attached moveable property should be ordered to be released to the objector, otherwise I

suppose the execution proceedings will take their course …"

Given that understanding of the law, I must now ask myself if the objector herein did establish ownership of the attached goods, and also that the defendant did not have any attachable interest in the same.

The first piece of evidence which the objector produced was an Agreement dated 14th December 2005. As far as the objector was concerned, the plaintiff was a party to that agreement, as agents for KORDES and DE RUITER EAST AFRICA LIMITED, which two companies were plant breeders. By his affidavit sworn on 31st July 2006, Tony Ketter deponed that the plaintiff, who were propagators of flowers, also served as agents for the collection of royalties payable to both KORDES as well as DE RUITER EAST AFRICA LIMITED (hereinafter cited as "DE RUITERS").

A perusal of the "Payment Agreement" dated 14th December 2005 does not wholly acquit the objector. I say so because the said Agreement expressly states that the only two parties to it were DE RUITERS and the objector herein.

More instructively, the introductory part of the agreement is worded as follows;

"This AGREEMENT made this 14th day of December 2005 between DE RUITER EAST AFRICA LIMITED of P O Box 209, Naivasha, Kenya (hereinafter known as DREA Ltd. which expression shall include its successors and assigns) of the one part and MISTY HILLS PETALS LTD. of P O Box 52946 Nairobi hereinafter referred to as "ALORA" which is descriptive of the rose producing entity in Nandi Hills that in the past has been referred to an Alora Flowers Ltd.) which expression shall include its successors on the other part:-"

The objector executed the said agreement by way of the signature of Tony Ketter, who inserted against his name the initials "M.D.". And it is also expressly indicated that he was signing on behalf of ALORA.

On the same date (14/12/05) DE RUITERS wrote to the defendant. The letter, which was signed by the General Manager, was marked for the attention of Mr. Ketter; and it made reference to the discussions between the two gentlemen. It also made reference to the fact that Tony Ketter was the;

"representative of the rose growing and exporting entity that in the past was referred to as Alora Flowers."

And, finally the letter stated that it would be the onus of Alora to make sure that the process of payment ran smoothly, so as to prevent legal proceedings.

Posing at that juncture for now, it would appear that the 1st defendant was still very much in existence. I say so because there would otherwise be no justification for Tony Ketter describing himself as the Managing Director thereof.

Also, it does appear that the common understanding of both parties to the agreement was that Misty Hills Petals Limited was but the new name for the 1st defendant, Alora Flowers Limited. If that had not been the case, there would have been no need for the parties to describe Misty Hills Petals Limited as:-

"ALORA which is descriptive of the rose producing entity in Nandi Hills that in the past has been referred to as Alora Flowers Ltd. "

Of course, the objector has stated that the 1st defendant collapsed in 2001. But that contention does not seem to be borne out by the returns from the Register of the Companies, dated 5th November 2004. In other words, as far as the official life of the 1st defendant was concerned, the Registrar of Companies knew that it was still subsisting. Had the company been wound-up or struck-off from the register of companies, the Registrar of Companies ought to have so indicated from his records.

The continued life of the 1st defendant, Alora Flowers Limited, seems to have been confirmed, if any confirmation was necessary, by the correspondence exchanged between it and DE RUITERS. For instance, on 27th September 2002, Tony Ketter wrote to DE RUITERS clarifying that he wished to get 2000 celesta plants and another 2000 Royal Prophyta plants. That request was made on behalf of Alora Flowers Ltd. On the same date, DE RUITERS responded, by writing to Alora Flowers, saying that they would organise for the said plants.

In the light of that exchange of correspondence, I am satisfied that not only did Alora Flowers Limited continue to exist as corporate entity in the records of the Registrar of Companies, but also that as between the plaintiff, the 1st defendant and DE RUITERS, there was a common understanding of its existence in real terms.

On 20th June 2003 Tony Ketter once again wrote to DE RUITERS; and that communication was made on behalf of Alora Flowers Limited.

But then on 18th April 2005, Mafupa Enterprises produced an investigation report on behalf of the plaintiff herein. In that report they said that they could not trace any attachable assets;

"apart from the ghost buildings or the offices."

It is debatable if that meant that the said "ghost buildings" and offices were traced, and were attachable.

But they made it clear that the company itself had **"died completely and there is no activity going on."**

A little later, the investigators seemed to have clarified the issue of the company's death, when they said that it had collapsed.

It was also their finding that the company had ceased operations **"and now already sold".**

In my considered view, the said investigation report is not an elegant piece of literature. It does not make it clear whether the 1st defendant was sold as a corporate entity, or if it was only its assets that were sold.

Of course, it may be factually correct that the company's activities had collapsed. However, in law, that would not by itself bring the life of the company to an end.

In any event as we have already seen, both in 2002 and 2003, Tony Ketter was still communicating with other persons, on behalf of Alora Flowers Limited.

On the other hand, if the objector acquired the company, unless they could prove that such acquisition was exclusive of the liabilities of the said company, the objector may yet be liable for such liabilities.

However, if the objector only purchased the assets of the company, it has not demonstrated that fact to the court.

In the same breath, on 26th November 2005, DE RUITERS wrote to Jan.ruhe@deruiter .com, giving them an update on the position then prevailing. Inter alia, they said;

"Alora does not exist any more. It is now Misty Hills Flowers Ltd."

That would appear to be an acknowledgement that the 1st defendant had ceased to exist.

Yet, as I have already stated severally herein, a body corporate does not cease to exist unless it is through the process of either winding-up or of being struck-off from the register of companies.

In any event, if the 1st defendant now existed as Misty Hills Petals Limited, that is suggestive of no more than a change of name: And, that would be consistent with the express wording of the agreement which the objector produced herein, dated 14th December 2005. In **COLOUR PRINT LIMITED –VS- PRE-PRESS PRODUCTION, MILIMANI HCCC NO. 187 OF 2000,** the Hon. NJAGI J. expressed himself thus;

"**Granted, Digital Productions Limited is a corporate entity. But that is all it is. Considering that its managing Director is also a director of the judgement debtor; the two organizations share a common postal address as well as an electronic mail address, on a balance of probability and without explanation from Digital Productions Ltd, it would not be far fetched to conclude that the objector is clearly a façade for the judgement debtor."**

Those words seem to describe the situation before me, to a large degree. Except that in this instance, the objector itself has produced an agreement in which it has been expressly stated that it has been in the past referred to as Alora Flowers Limited.

There being no evidence to prove that the objector had acquired the assets which it readily admits to have previously belonged to the judgement debtor, I find that the objector has not established its entitlement to a legal or equitable interest to the property which is the subject of the proclamation dated 11th July 2006.

If anything, there is a clear indication that the judgement debtor has an attachable interest in the said property, as envisaged by MADAN J. A., in the case of **BRAR –VS- WARENG QUARRY ACHARE CONSTRUCTION** (above-cited).

Accordingly, I decline the request that the proclaimed property be released to the objector. The execution process is thus allowed to proceed.

The costs of the application dated 31st July 2006 are awarded to the plaintiff Decree-holder.

Dated and Delivered at Nairobi, this 1st day of February 2007.

FRED A. OCHIENG

JUDGE