



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Civ Appli 552 of 2005**

**MIEMA ENTERPRISES LTD.....APPLICANT**

**VERSUS**

**NJOKA TANNERS LTD.....RESPONDENT**

**IN THE MATTER OF THE FOREIGN JUDGEMENTS (RECIPROCAL ENFORCEMENT) ACT  
CAP. 43 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTRATION OF JUDGEMENT & DECREE IN  
COMMERCIAL CASE NO.60 OF 2000, HIGH COURT OF TANZANIA, DAR ES SALAAM  
(COMMERCIAL DIVISION)**

**BETWEEN**

**MIEMA ENTERPRISES LIMITED .....PLAINTIFF**

**VERSUS**

**NJOKA TANNERS LIMITED .....DEFENDANT**

**AND**

**EVANGELINE WANJIRA NJOKA .....1<sup>ST</sup> OBJECTOR**

**ZINGO INVESTMENTS LTD. ....2<sup>ND</sup> OBJECTOR**

**RULING**

This Chamber Summons is brought under Order 21 Rule 56 and 57 of the Civil Procedure Act. It prays that this Honourable court be pleased to order the lifting of the attachment of the objector's moveable

properties made by **Ostrich Lion Auctioneers** on 24<sup>th</sup> February, 2006. The application is supported by the affidavit of **Robert Njoka Muthara** who is the Managing Director of **Zingo Investments Ltd**, the 2<sup>nd</sup> Objector herein. He claims that he is the husband of **Evangeline Wanjira Njoka**, the 1<sup>st</sup> Objector herein.

He states that on 24<sup>th</sup> February, 2006 an Auctioneer by the names **Ostrich Lion Limited** went to the 2<sup>nd</sup> Objector's factory situate in L. R. No.209/8628 along Lunga Lunga road, Nairobi and proclaimed various assets within the factory. He also avers that some of the goods indicated in the proclamation namely motor vehicles **KAL 645V**, **KAL 644V** were not within the premises of the 2<sup>nd</sup> Objector and do not belong to it. It is further contended by **Mr. Muthara** that the other assets in the proclamation belongs to the 2<sup>nd</sup> Objector, **Zingo Investments** and are within the premises owned by the 2<sup>nd</sup> Objector. And that the 2<sup>nd</sup> Objector is a limited liability company and is distinct from the Defendant herein.

In a further affidavit **Mr. Muthara** avers that it is not true that he closed the Defendant Company in Embu or did remove its assets and thereafter set up a dummy Company in Nairobi to escape its liabilities as alleged by the Plaintiff herein. He also claims that the assets of the 2<sup>nd</sup> Objector belong to it exclusively and are not the ones belonging to the Defendant. He further discounts that the Directors and Shareholders of **Njoka Tanners Ltd** are the same as of **Zingo Investments Limited**.

**Mr. Muriithi** for the Objectors submitted that the 2<sup>nd</sup> Objector is a limited liability company, which is a distinct legal entity from the Defendant and its directors. And the machinery planted on the premises, where **Zingo Investment Limited** carries on business belongs to the 2<sup>nd</sup> Objector. And that the 2<sup>nd</sup> Objector was not a party to the proceedings between the Plaintiff and Defendant.

**Mr. Meenye** Advocate for the Plaintiff submitted that there is a decree of a designate court, Tanzania High Court sitting in Dar es Salaam. On the instructions of the Plaintiff, this court registered the decree on 13<sup>th</sup> October, 2005 and then an execution process commenced against the assets of the Defendant. According to **Mr. Meenye** Advocate the same Directors and shareholders of the Defendant are the directors of the 2<sup>nd</sup> Objector. The letter dated 13<sup>th</sup> June, 2005 confirms that position. He also contended that according to the **Memorandum of Association** and **Articles of Association**, the two Companies have the same objectives and the same Directors. He submitted that the machinery of the Defendant was removed and planted at the premises of the 2<sup>nd</sup> Objector with the sole intention of defrauding the Plaintiff. It is the case of the Plaintiff that the 2<sup>nd</sup> Objector is nothing but an instrument to commit fraud. And the company is a cover up to defeat the case of the Plaintiff. And in view of the various discrepancies shown in the documents exhibited by the 2<sup>nd</sup> Objector **Mr. Meenye** Advocate urged me to find that the equipment attached belonged to the Defendant and that the attachment is lawful and valid.

There is no dispute that **Zingo Investments Limited** was through a certificate of incorporation **No. C 105410** registered on 1<sup>st</sup> September 2003. It is also clear that the Defendant herein was registered and/or incorporated way back in 1995. According to **Mr. Muthara**, the shareholders of **Njoka Tanners Limited** are **Industrial & Commercial Development Corporation**, **Robert Njoka Muthara** and **Evangeline Wanjira** and its directors are 4 in number.

The goods attached by the Auctioneer were found at the premises where the 2<sup>nd</sup> Objector carries on business. The 2<sup>nd</sup> Objector exhibited various documents to show it purchased the goods by itself from its funds. However I am afraid to say the documents exhibited does not show that the 2<sup>nd</sup> Objector made any payments to the Companies indicated in the various letters. The 2<sup>nd</sup> Objector exhibited various proforma invoices to show it purchased the machinery from various companies. Ideally a proforma is not a proof of payment of goods purchased. In my understanding a proforma invoice is usually sent to a customer/client who made an inquiry into the price of a particular product. In this case there is no evidence to show that the 2<sup>nd</sup> Objector sent monies for the purchase of the alleged machineries. Equally there is no evidence of the goods ever supplied to the 2<sup>nd</sup> Objector.

It is the case of the Plaintiff that the machinery are the ones supplied to the Defendant but which were removed in anticipation to defeat the claim of the Plaintiff. In the instant case, most of the proforma invoices are dated before the registration and incorporation of the 2<sup>nd</sup> Objector. It is important to note that proforma invoices Nos. 76, 81, 84 and 96 are dated before the 2<sup>nd</sup> Objector came into operation as a legal entity. There is also the quotation dated 3<sup>rd</sup> September, 2003, from **Astron Computers Limited** to a company called **Singo Investment Limited** situate in Limuru. That company is not in my view the same as the 2<sup>nd</sup> Objector.

It is the contention of the Plaintiff that it has carried out a search at Company's registry to know the status of the 2<sup>nd</sup> Objector. According to the particulars of directors at the company's registry, the directors of **Zingo Investments Limited** are;

(1) **Robert Njoka Muthara** and

(2) **Evangeline Wanjira Njoka.**

The search was conducted on 13<sup>th</sup> June, 2005 and in my view it is an authentic and legitimate representation of the status of the 2<sup>nd</sup> Objector. The vein that runs through the two companies is that **Mr. Muthara** and his wife **Njoka** are directors and shareholders in both Companies. There is an assertion that the Defendant has 4 directors and 3 shareholders. But the 2<sup>nd</sup> Objector does not disclose the current status of the Defendant Company in particular whether **Industrial & Commercial Development Corporation** is still a shareholder of this shell company.

Having heard the submissions of both Advocates and having read the various material presented, I am satisfied that the objection has no legal basis. I hold that there is no evidence to show that the 2<sup>nd</sup> Objector owns the machinery that were attached by the Plaintiff. I am satisfied beyond doubt that the goods attached are the property of the Defendant disguised in a manner to defeat the claim of the Plaintiff. It is my decision that the objection is based on distortion, deceit and deception with view to obstruct the cause of justice. This court has the eyes, mind and ears to see through that deceit and deception. Indeed the assets of the Defendant company is held by this dummy company called **Zingo Investments Limited** in order to defeat or derail the liabilities that had accrued to the Company.

The way **Mr. Muthara** and his wife are changing and setting up companies is a clear reflection or manifestation of persons engaged in unlawful activities. I am in agreement with **Mr. Meenye** Advocate that the whole drama is purely to hide under the guise of incorporation of a new company and to commit and perpetuate fraud against the creditors of the Defendant. It is my firm decision that the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> objector is dismissed with costs.

There are two vehicles i.e. **KAL 644V** and **KAL 645 V** which were proclaimed by the Auctioneer. The two Objectors have not shown any evidence to show the ownership of the two vehicles. As things stand there is no valid objection against that proclamation done by the Auctioneer. It means there is no proper and valid objection raised by the Objectors. On the same breadth, I hold the attachment of the two vehicles is valid hence the Plaintiff is at liberty to proceed as it deems fit.

**Order: the objection of the 2<sup>nd</sup> Objector is dismissed with costs, while the objection against motor vehicle KAM 804E is lifted.**

Dated and delivered at Nairobi this 22<sup>nd</sup> day of March, 2007.

M. A. WARSAME

JUDGE