



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Divorce Cause 6 of 1997**

**MRADULA SURESH KANTARIA.....PETITIONER/D.HOLDER**

**VERSUS**

**SURESH NANALAL KANTARIA..... RESPONDENT/J.DEBTOR**

**AND**

**JARIBU CREDIT TRADERS LIMITED .....OBJECTOR**

**RULING**

The Chamber application before the court, is dated the 14.11.2006. It is filed by Jaribu Credit Traders Ltd who is seeking that the attachment levied against the goods set out in the proclamation inventory issued by M/s Kenya Shield Auctioneers dated 1.11.2006, be raised and discharged. The grounds given for the application are that the attachment was unlawful as the objector was not a party to this suit and that the goods attached belonged to the objector and not the judgment debtor. It is therefore necessary to introduce the parties in this application-

The Decree-holder/Petitioner, was from the records, the wife of the judgment-debtor/ respondent and the two are now divorced. The decree-holder holds a decree of this court for herself and for their daughter against the judgment-debtor for a sum of over Ksh.900000/- related to certain maintenance and other related orders of this court. The decree-holder (wife) is trying to execute the decree against her former husband, the judgment debtor.

Jaribu Credit Traders Limited, the objector herein is, as the court understands it from the information contained in this court file record, a limited liability company. It is owned by the Judgment-debtor and by another limited liability company called Tameera Ltd in the shares of 55% and 45% respectively. Tameera Ltd appears to be owned wholly by the son of both the Judgment debtor, Sureth Nanalal Kantaria (father) and the decree-holder Mradula Suresh Kantaria (Mother). The name of the son is Keval Suresh Kantaria. It is not clear who actually runs Tameera Ltd day to day but it would, appear to be a merely holding company.

Jaribu Credit Traders Limited although majority owned by the Judgment debtor by a majority share of 55%, has, as its Managing Director, the said Keval Suresh Kantaria, who, as just mentioned above, is the

son of the decree-holder and the Judgment-debtor. Keval Suresh Kantaria is shown to be 23 years old and appears to have little experience, which can run any business. He is otherwise a student who is yet to finish his university studies due to admitted drunkenness, drug abuse and gambling, as the records confirm. The records further show that he was still in the practice of gambling at a Casino called Mayfair in 2005 when the court was hearing the maintenance and property distribution case. Keval also confirmed when he testified that the 100% shareholding which he held in Tameera Ltd, was in his own absence, given to him as a free gift by his father the Judgment-debtor. He confirmed also that by March, 2005, he had purportedly run the Jaribu Credit Traders Limited as its Managing Director for only 9 months. He further confirmed in his said court testimony, that Jaribu Credit Limited in which he holds a 45% share acquired or received its property from Kenwood Ltd, another family company in which the Judgment-debtor and Decree holder (as husband and wife) had each a 50% share before it was run down.

In summary then the scenario existing in this case is that the decree holder(s) (wife) is executing a decree against the judgment-debtor (husband) after divorce. The attachment is against goods alleged to belong to a limited liability company owned by the father (with 55% share) and their son (with 45% share). The Managing Director of the company whose alleged goods are attached by the mother is the absolute shareholder of the company that owns the 45% share of the company in which he is the Managing Director. The further revelation from the material before the court is that it is the Judgment-Debtor (father) who effectively runs Jaribu Credit Traders Limited despite the fact that the Managing Director is the son. This is confirmed by the evidence on record that all payment cheques shown in this matter, are undeniably signed by Judgment-debtor. Indeed there was no attempt to prove that the son – the Managing Director of Jaribu Credit Traders limited-has any control of the day-to-day running of the company. This could be done by showing for example, that the Managing Director signs documents and cheques of the company.

This application is filed by Jaribu Credit Traders Limited. Mr Githii for the Objector asserts that the attachment by the Decree-holder(s) is unlawful because she attached the goods listed, which belonged to an independent third party who was never a party in this suit at any stage. The objector further argues that being a legal person with power and right to own property independently, its property cannot be accessed on the account of shareholders personal debts. Put differently, the argument is that the decree holder in this case, cannot, in trying to attach the goods or property of her former husband, the judgment-debtor attach the property of the objector merely because the judgment-debtor is a major share-holder in the objector company. The objector further argues that if such an act were to be allowed by the court, the principle of legal personality in Company Law would be destroyed and this would lead to economic insecurity and disaster. That accordingly this court should in protecting the important principle, allow this application and return the attached goods to the objector.

The respondent, decree-holder saw it differently. She argued through her counsel Mr Nyakundi, that the objector Jaribu Credit Traders Limited is one and the same person as the judgment-debtor. That the latter owns 55% shareholding of the Objector Company. That all the judgment-debtor's other personal bills and financial obligations, big and small, are met by the objector company. That all the cheques paying those personal debts and other personal obligation payments are signed by the Judgment-debtor himself, to the exclusion of the Managing Director of the objector Company who is the son of the Judgment Debtor. That the goods attached belong to the Judgment Debtor and were purchased by him personally for his exclusive use in the premises occupied by him at the instance of the objector as purposely arranged by the Judgment-debtor himself.

The decree-holder further argued that earlier on, similar personal financial obligations as the ones now being executed for in this application, were satisfied by cheques made by the objector (exhibit MSK 2). That all such cheques were signed by the judgment-debtor solely. Mr Nyakundi further pointed out that all loans or purported loans repayments are made by the objector company and cheques are signed by the Judgment-debtor solely to the exclusion of the Managing Director. Mr Nyakundi accordingly urged this court to find that the judgment debtor has created corporate entities such as the Jaribu Credit Traders Limited, Tameera Limited, Kenwood Ltd and others, merely to hide under and escape his financial obligations. He urged the court to "lift the veil" and call off the Judgment-debtors bluff.

Both counsel cited legal authorities to support their different stands.

I have carefully considered the material before me. To understand the case better I perused the whole file, which included earlier proceedings before my sister Ang'awa, J concerning the division of matrimonial properties between the parties in this application. I found the material, proceedings and final rulings quite enlightening. The conduct of the judgment-debtor therein in particular, is quite interesting. It became necessary to peruse the whole file because the material and information placed before me for this application were scanty.

The undeniable common facts are that all the incorporated companies introduced in this application were family private entities. They included the objector – Jaribu Credit Traders Limited, Tameera Limited and Kenwood Ltd. Shareholders of Kenwood Ltd appear to have been - the Judgment-debtor 50% and the Decree-holder at 50% share.

Tameera was owned wholly by the son of the Judgment Debtor and Judgment Creditor. It appears to be a merely holding company, but holds 45% share in Jaribu Credit Traders Ltd whose remaining shares of 55% are owned by the Judgment debtor. Its existence and therefore property came from Kenwood Ltd. This is borne out in the evidence and testimony given by Keval Suresh Kantaria before Ang'awa, J. The same evidence also confirms that the Judgment Debtor who ran and managed the Kenwood Ltd business and who held the power of attorney from the decree-holder herein in relation to the latter's 50% share, transferred her interest to the objector – Jaribu Credit Traders Ltd which he then shared with the parties son at 55% to himself and 45% to the son, through Tameera Ltd but Keval Suresh Kantaria, paid nothing to acquire the 45% interest.

The court makes the following findings of fact. That the objection before me is based on a supporting affidavit sworn by the said Keval Suresh Kantaria. It is a very limited affidavit. Keval swears that he is the Managing Director of Jaribu Credit Traders Limited, the objector. That the goods attached belong to the said company and that the objector is not a party to the proceedings between the Judgment Debtor and the Decree Holder. That the goods were taken from a premise L.R. No.1/35 Block B Flat No. B6, otherwise known as Jasmin apartments. Keval Suresh's further affidavit merely confirms that the Judgment, debtor owns 55% share in the company while 45% shares is owned by Tameera Ltd. He does not explain that Tameera Ltd is wholly owned by him. He does not explain that it is his father the judgment debtor who runs Jaribu Credit Traders Limited although he, Keval Suresh Kantaria, is the Managing Director. He does not explain how and why the Judgment-debtor, his father, Suresh Nanalal Kantaria alone signs all the important financial obligations and documents monthly and yet he, Keval Suresh Kantaria, is the Managing Director.

Furthermore Keval Suresh Kantaria, states in the affidavit that Jaribu Credit Traders Ltd in which he is the Managing Director, pays his father personal debts upon the securities from his father's against L.R. No's 91/118, 91/119 and 209/8343/151. No evidence of such securities in writing were placed before this court to confirm the existence thereof as well as show the properties ownership. Keval Suresh Kantaria's further affidavit made a mere mention of the existence of such securities. This court considered the further affidavit to be a supplementary affidavit sworn by Keval Suresh Kantaria in response to what the Decree-holder/respondent, raised in her replying affidavit. Keval Suresh Kantaria therefore, had opportunity to annex as exhibits, the alleged securities, but failed to do so. The conclusion I arrive on that issue of securities is that they do not exist beyond the claim of their existence made by the objector's – Managing Director. And if they exist there is no evidence of their ownership or who is having custody of them.

What about the Lease Agreement dated 28.11.2006? The Objector presented it as the evidence to prove the fact that there existed a lease between the Objector and one Jaswant Singh Rai in relation to flat No. B6, Block B Jasmin apartments from where the goods were attached. That would prove that the goods belonged to the objector, the objector asserted.

First, the attachment was done on 1.11.06 while the lease is shown to have been drawn much later on or about middle of November 2006. Attempts to register the lease do not appear to have succeeded

although it is shown to have been stamp dutied. It is backdated to September 2006 to cover the relevant dispute period. The application was prosecuted in June 2007 and even by then there was no evidence of the lease's proper registration. The court's view is that it was tailored for the purpose of this application and is not worth much evidential value.

However, even if I were to accept it as genuine and that the attached goods were attached from the apartments so leased, that does not stand on the way of the court to examine the rest of the evidence and make a finding as to the real owner of the attached goods.

The Objector produced receipts to show that the goods attached were purchased by the Objector Company and the receipts show the objector as the purchaser. There is no evidence that the purchaser for the company was anybody else different from the Judgment-debtor. The receipts, invoices and delivery notes closely scrutinized, will however show that the goods purchased and delivered were of great quantities, usually for sale by the purchaser. For example, receipts and invoices show that 30 or 12 or 10 or 26 or 18 of similar electronics like TVs, fridges, CTV'S OR DVD's were purchased. A good example also is where 5 LG plasma 42 inch TVs, each costing Ksh.160,000/- were purchased by Jaribu Credit Traders Ltd. Could these have been bought for the use of the company employee like the judgment-debtor in his leased apartment? Or could 30 LG CTV's or 28 Nikai CTVS or 9 LG fridges e.t.c have been purchased for use by the Objector's senior employee? The probable truth is that these receipts refer to purchases done by the Objector Company for sale to third parties or customers in its day-to-day business. The receipts and invoices have however been dumped in this application to just confuse or mislead the court. They fail to prove that the goods attached are the same as those reflected in the receipts and invoices annexed herein. Nor did the objector try to link the numerous goods shown in the receipts to be the actual goods attached in execution of the decree herein. The objector would find it impossible to link the receipts to the goods attached, which could explain failure to do so.

Supposing I am wrong in my conclusion above, and assuming that the attached goods were bought for and belonged to the objector company, would that make a difference?

The objector would say, "**Yes**" because an incorporated private company like Jaribu Credit Traders ltd has a legal independent personality from that of its officers. It has power and the right town properties such as those attached herein which must be protected.

On the other hand, the respondent decree holder states that a careful scrutiny will reveal that Jaribu Credit Traders Ltd is none other than and no different person from the judgment debtor owns 55% share of Jaribu Credit Traders Ltd. The other 45% share is owned by Taramera Ltd. Taramera is 100% owned by Keval Suresh Kantaria who is the son of the Judgment-debtor and the Decree-holder. Keval Suresh Kantaria being the owner the 100% of Taramera Ltd, can be safely said to be the holder of the 45% in Jaribu Credit Traders Ltd.

It was however not denied on record that the Judgment-debtor Suresh Nanalal Kantaria, holds full control of the operations of the objector company. Apart from holding majority share (55%), he signs all legal documents including cheques of the company. He also all along signed cheques towards the payment of his own personal debts including the cheques towards the maintenance of the Decree-holder and their daughter, Meera. Cheques to that end were produced and conceded.

The conclusion this court makes is that Keval Suresh Kantaria, the so-called Managing Director, has no controlling powers over Jaribu Credit Traders Ltd. He is merely a cover up. The practical Managing Director of the Objector company, is none other than the Judgment-debtor. Keval Suresh Kantaria conclusion conforms with several facts earlier shown to exist. He was appointed a director in his absence by the Judgment-debtor who also gave him the 45% shareholding as a gift. It is not clear when Jaribu Credit Traders Ltd was formed and no such evidence was tendered. However, there is evidence that the company from the start has never been in the control of anyone else except the Judgment-debtor. Even as recently as January 2007, and despite the fact that Keval Suresh Kantaria was the Managing Director of the company, it was the Judgment-debtor who was solely signing company cheques towards payment of his personal debts. He could only do so if the company in fact is his solely and that he has the complete

control despite what the official records may be showing at the Registrar of Companies Offices.

What is the legal position in cases such as this then?

**Charlesworth and Morse:Company Law** (14<sup>th</sup> Edition) at paragraph 27 – 28, lays down the applicable principle of law thus:

***“It was established in Solomon versus Solomon and Co. Ltd that a registered company is a legal person separate from its members. This principle may be referred as ‘the veil of incorporation’. In general the law will not go behind the separate personality of the company to the members, so that, for example in Macaura Versus Northern Assurance Co. Ltd, ante, it was held that the largest shareholder had no insurable interest in the property of the company. Similarly an employee cannot bring an action for unfair dismissal against the majority shareholder of a company, which employed him. However there are exceptions to the principle in Solomon’s case where the veil is lifted and the law disregards the corporate entity and pays regard instead to the economic realities behind the legal façade. In these exceptional cases the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated concerns.”***

Applying the above principal in the case of **Corporate Insurance Co. Ltd V. Savemax Insurance Brokers (2002)** IEA 41, Ringera, J (as he then was) stated at p.46: -

***“And it is a well known principle of company law that the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a devise or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts may well be disclosed in the examination of the directors or in affidavits filed... On principle I see no reason why the veil cannot be lifted at the execution stage ....”***

Considering the same principle as applied in the case above Mbaluto, J also in **Caneland Ltd V. Dolphin Holdings Ltd and another** (1999) I EA, 29 stated thus –

***“As shown above, the courts have refused to permit the logic of the principle laid down in Solomon’s case to apply ‘where it is too flagrantly opposed to justice, convenience or interests of the Revenue (Gower- Ed at 112) and will disregard the fundamental principle of corporate personality if justice warrants it. Equity will not permit a statute or indeed law to be a cloak for fraud. In my judgment this is one of those cases where the corporate veil ought to be lifted because given the special circumstances of this case, it would be tantamount to allowing a debtor to hide behind the cloak of corporate identity to avoid meeting its legal obligations...”***

In the case before me I arrived at the conclusion that the properties attached whose list was given were attached from the premises fully under the control and use of and by the Judgment-Debtor, Suresh Nanalal Kantaria. The evidence that the premises had been leased to the Objector Company and that therefore all the properties attached from the premises belonged to the Objector Company was totally unsatisfactory. First, because the lease was drawn and purported to be registered several weeks after attachment, thus suggesting that the lease was a scheme to defeat the attachment. Secondly, because the evidence consisting of receipts and invoices in the name of the objector company purporting to prove that the goods were purchased by the objector company, was also too poor in quality to be acceptable to the court. The objector in this regard, failed to identify the goods attached as the same goods that were shown in the receipts and invoices annexed to the supporting affidavit so as to indeed enable this court to come to the conclusion that the goods belong to it. Furthermore the court came to conclusion that receipts and invoices were commercial in nature in that they indicated a system of purchase in quantities not likely to be for one home use but for sale in shops or similar outlets. The court thus concluded that the receipts and invoices were annexed to the supporting affidavit with a view to confuse the court, which itself was a scheme in bad faith.

On the other hand if the court was wrong in its above conclusions in which case the goods attached belonged to the objector, the court comes to the further conclusion that Jaribu Credit Traders Limited was incorporated by the Judgment debtor, with the sole purpose to use it as a cloak, a mask, a sham, a devise or a stratagem, for enabling him to hide inside, in order to avoid meeting or keeping his legal and financial obligations. For example, while he chooses to live a life of luxury as the facts on the whole record of this case show, he has nevertheless used the several corporate entities to hide his wealth. Those obligations he chooses to meet, he solely and without any hitch or difficulty meets by signing cheques from any one of his companies. He refuses to make similar payments to some of the creditors he does not like by hiding behind the corporate veil and saying that he has no funds since all the money or properties belong to the companies which her terms independent legal entities. The case in hand in my view, represents a creditor the judgment debtor does not like to pay.

The final issue to be resolved is whether the judgment debtor herein should be allowed to hide behind the legal corporate personality of Jaribu Credit Traders Limited to prevent the decree holder, his former wife and his own daughter from recovering the maintenance funds due from him. My answer is that equity will not and should not in this case allow him to hide behind the cloak of incorporation to do injustice or commit fraud. In my humble view, this is one of those cases where the court should and does lift the corporate personality or veil to see who is and is in the Jaribu Credit Traders Limited. When the court does so, it finds the Judgment debtor comfortably seated inside the corporate entity with a sneer on his face, saying, ***“you cannot touch me, I am protected by statute”***. And this court in response do tell him ***“We know who you are and you cannot be allowed by equity to fraudulently continue avoiding your genuine financial obligations using statute or law.”*** And the court coming out in aid of equity, will and does hold the judgment-debtor by the neck and throws him out into the open world where he will gnash his teeth.

The result is that this application must fail on two independent grounds: -

First, that there is not enough evidence to come to the conclusion on the balance of probability that the goods attached belonged to the objector company. Secondly, and in the alternative, that even if the goods attached belonged to the objector, they so belonged because the judgment debtor deliberately purchased them in the name of the corporate entity whose corporate personality he little respected but which he used selectively to avoid meeting his legal obligations. The court indeed finds no reason to respect or honour a legal personality, which the judgment debtor himself honoured more in breach than otherwise.

This objection is dismissed with costs to the decree-holder respondent. Orders accordingly.

Dated and delivered at Nairobi this 11th day of October 2007.

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**D A ONYANCHA**

**JUDGE**