



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 593 of 2001

HEZEKIAH OGAO ABUYA PLAINTIFF

VERSUS

THRUST & ENGULF LTD. DEFENDANT

RULING

Before me is an application by Hezekiah Ogao Abuya T/A Abuya & Co. Advocates for one order that L.R. No.214/575 situated at Muthaiga, Nairobi and registered in the Government Lands Registry in Vol. No.54 Folio 24/21 file 4742 in the name of Just Real Estates Ltd. be attached and sold in execution of the decree herein. The application is brought under Sections 34 (1), 38 (b), 44 (1) and 3A of the Civil Procedure Act, Order L Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the Law and Procedure. The reasons for the application are that the said property hereinafter called “the suit property” was transferred from the respondent to Just Real Estates Ltd. by its directors in a bid to defeat execution of the decree herein; that the respondent herein has a disposing power over the suit property which is being held on its behalf by Just Real Estates Ltd; that the directors and shareholders of the judgment/debtor and Just Real Estates Ltd. are the same; that both the judgment debtor and Just Real Estates Ltd. are subsidiaries of Kuguru Foods Complex Ltd; that although the applicant herein has obtained judgment against the respondent, he cannot execute against it in the normal manner as the judgment/debtor no longer has any assets known to the applicant, the same having been transferred by its directors to evade attachment and sale; that the said transfer took place while the applicant was demanding his fees and the aforesaid property was transferred at Kshs.5,000,000/= whereas the actual market value was Kshs.35,000,000/= and that the said transfer was fraudulently done to evade the land’s attachment and sale in execution of the decree therein.

The application is supported by an affidavit sworn by the applicant. To the said affidavit are annexed two exhibits a certified copy of the title document and copies of correspondence with the Registrar of Companies.

The application is opposed and there is a replying affidavit sworn by one Mary Ciumwari Mwaniki the Company Secretary of the interested party.

The application was canvassed before me on 23.6.2006 by Mr. Njoroge, Learned Counsel for the applicant and Mr. Ngugi, Learned Counsel for the interested party. Counsel for the applicant in a nutshell argued that the respondent has a disposing power over the suit property despite the registration of the suit property in the name of the interested party, the suit property having been transferred to the interested party by the respondent/judgment –debtor fraudulently to avoid payment of the judgment debt. The foundation of that argument is that the judgment debtor and the interested party have the same directors and shareholders which means that the signatures on the transfer for the transferee and the transferor were the same.

According to the applicant, evidence of fraud is to be found in the extremely low purchase price of Kshs.5,000,000/= compared to the price of Kshs.13,000,000/= which is the sum that the respondent paid for the suit property when it acquired the same in 1996. Further evidence of fraud on the part of the respondent and the interested party is stated to be the timing of the transfer. According to the applicant, the transfer was effected at the time the applicant was demanding his fees for services rendered with respect to instructions to convey the suit property to a third party which conveyance fell through. In the plaintiff's view therefore the transfer to the interested party was merely intended to avoid payment of the decretal sum herein.

In opposition to the application, Counsel for the interested party submitted that the copy of the title document clearly showed that the transfer was made before the institution of these proceedings and cannot therefore be said to have been effected to avoid the payment of the decretal amount herein. In Counsel's view no fraud had been shown. Counsel further submitted that according to the filed returns of the respondent and the interested party, the shareholders and the directors of the companies were not the same and it was not true that the respondent has a disposing power over the suit property. In those premises Section 34 (1) of the Civil Procedure Act was not applicable. I was accordingly asked to dismiss the application.

I have considered the application. I have perused the annexures and further listened to Counsel. I have also considered the oral testimony of Mary Ciumwari Mwaniki, the interested party's Company Secretary. Having done so, I take the following view of the matter. A determination of this application in my view turns on the interpretation of Section 44 (1) of the Civil Procedure Act. The Section reads:-

“44 (1) – All property belonging to the judgment debtor including property which or over the profits of which he has a disposing power which he may exercise for his own benefit whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:-“

By dint of this sub-section, the plaintiff is of the view that the suit property is registered in the name of the interested party but the respondent/judgment debtor has a disposing power over the same because the two companies have the same shareholders and directors.

In Solomon vs. Solomon [1897] A.C. 22 HL the House of Lords held that:-

“The Company is at law a different person altogether from the subscribers ... and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable in any shape or form except and in the manner provided by the Act.”

The principle in the Solomon Case forms the basis of the separate legal existence of a Company. The principle is applicable in this country. It is therefore clear that the respondent/judgment debtor and the interested party are at law separate legal persons. It matters not that it has the same members and same management. It matters not that the same hands receive the profits. The interested party is not the agent or trustee of the respondent and vice versa. In law therefore, it cannot be said that the respondent has a disposing power over the assets of the interested party.

There are of course limited circumstances in which the corporate veil may be pierced. The plaintiff is of the view that because of fraud, the corporate veil of the interested party should be pierced and if this is done, it will be seen that the suit property can in reality be disposed of by the respondent. The fraud is alleged to be in the difference in the purchase price allegedly paid by the interested party as opposed to the purchase price paid by the respondent. In my view that aspect alone is not evidence of fraud. There are many reasons why a party may chose to convey his or its property at some particular price. Indeed, it is a well known principle of law that inadequacy of consideration per se cannot invalidate a conveyance. In any event I note that a decree in this application was given on 10.3.2004 and issued on 24.6.2004 pursuant to a Notice of Motion for judgment lodged on 13.2.2003. However exhibit A annexed to the

supporting affidavit of the applicant clearly shows that the conveyance of the suit property from the respondent to the interested party was made on 21.1.2001 and registered on 21.3.2002. I am not persuaded that the said conveyance was merely intended to avoid payment of the decretal amount due to the applicant which sum at the institution of the Notice of Motion for judgment was only KShs.174,746/= less than the stamp duty payable on the said conveyance. Being of that persuasion, I decline to grant the Orders sought in the Notice of Motion dated 13.5.2005 and filed on 19.5.2005.

I make no order as to costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 14th day of July, 2006.

F. AZANGALALA

JUDGE

14/7/2006

Read in presence of:-