



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 1794 OF 2000**

MASEFIELD TRADING (K) LTD.....PLAINTIFF

VERSUS

RUSHMORE COMPANY LTD.....1ST DEFENDANT

FRANCIS M. KIBUI2ND DEFENDANT

R U L I N G

The plaintiff by chamber summons dated 10th December 2004 and brought under Section 3A of the Civil Procedure Act, Order XXI Rule 36, Order XXXIX Rule 1 of the Civil Procedures Rules and all other enabling provisions of the law seeks the following orders: -

1. That this Honourable court be pleased to restrain Mr. Jackson Kahungura Kariuki the director of the 1st defendant herein from transferring, further charging, alienating or in any way dealing with the property known as L.R. No. 209/10577/2.
2. That Mr. Jackson Kahungura Kariuki the director of the first defendant herein do produce all books of accounts of the 1st defendant and more specifically the audited accounts covering the period October 2000 to July 2004.
3. That Mr. Jackson Kahungura Kariuki do attend to be examined on oath as to the first defendant's means and assets.
4. That Mr. Jackson Kahungura Kariuki do personally satisfy the decree made herein on 29th July 2004.

Before the plaintiff could argue the afore said application Jackson Kahungura Kariuki raised preliminary objection in the following terms: -

1. The application is wrong in law and misconceived as the legal provision cited on the face of it do not confer jurisdiction of this Honourable court to give the orders sought.
2. That the application is wrong in law and misconceived for seeking an equitable relief against a person who is not a party to the proceedings before the court.
3. That the application is wrong in law and misconceived for seeking execution against a stranger to the proceedings.
4. The application is wrong in law and misconceived for trying what amounts to lifting the

corporate veil through execution proceedings in total disregard of the provisions of Companies Act Cap 486.

Counsel raising the objection argued all the above grounds of objection together.

He argued that the 1st mistake in law in the plaintiff's application is found in prayer No. 2, which prayer sought an injunction against Mr. Kahungura to stop him transferring the property No. 209/10577/2. That the injunction was sought under Order 39 rule 1 yet that injunction cannot be granted in law. That Rule 1 (a) of Order 39 provided orders can be granted against "any party to the suit." Mr. Kahungura was not a party to the suit and accordingly an injunction cannot be granted against him. That under Order 39 injunctions are issued in a case where the suit is pending to safe guard certain status.

That since this case has been disposed there were not interlocutory proceedings pending and an injunction cannot be issued under that order. On these two propositions counsel relied on the case of THEURI V LAW SOCIETY OF KENYA (1988) KLR 334. In this case Mr. Theuri had initiated the proceeding by filing a miscellaneous application and therein sought an order for interlocutory injunction. The court of appeal held as follows: -

" 1. The grant of interlocutory relief is an interim remedy and is normally sought during the pendency of a substantive suit commenced in accordance with Civil Procedure Rules.

2. As the appellant did not file a plaint as envisaged under Order XXXIX of the Civil Procedure Rules, there was no competent action on which he could base his claim for the grant of interim relief. Section 3A of the Civil Procedure Act did not give the court power to act without jurisdiction."

Counsel submitted that he relied on the 1st holding to support his contention that there was no suit against Mr. Kahungura since what the application was seeking is to execute against Mr. Kahungura the director who is not a party to the suit. That in an application such as the one before court a party cannot seek to lift the veil under Order 21 rule 36. That Order 21 rule 36, using the explanation in the book, Mulla's code of Civil Procedure 12th Edition, clearly showed that the purpose of that rule was to get discovery for the purpose of execution. Counsel submitted that it is only under the provisions of the Companies Act, section 323 that the veil can be lifted where there are issues of fraud but that the section confines the lifting of the veil only in winding up of a company; and that can only be if the director is made a party to the proceedings, see the case of RE WILLIAM C. LEITCH BRO. LTD (1932) Zch. D.71. Counsel disagreed with the ruling of Justice Ringera in the case of ULTIMATE LABORATORIES –V- TASHA BIOSERVICE LTD HCCC NO. 1287 of 2000 where it was held that the corporate veil could be lifted at execution stage. Counsel was of the view since this case was not binding on this court; the court was free to make its own decision on the matter.

The 1st defendant company supported the objection raised by its director Mr. Kahungura. At first its counsel addressed the court on an issue raised by the plaintiff on whether Mr. Njuguna advocate was properly on record for the 1st defendant. Mr. Njuguna submitted that his firm had been on record for the 1st defendant from inception of this suit and had not filed any notice of change of advocates. Further submissions on behalf of 1st defendant were that the plaintiff's application related to property L.R. No. 209/10577/2. Counsel drew the court's attention to the plaintiff's exhibit marked as 'SW6' which was a plaint, in the suit, HCCC No. 1087 of 2003 which was filed by Francis Mochu Kibui (the co-director of Mr. Kahungura in the company, Rushmore Company Ltd) and the 1st defendant hereof against Mr. Kahungura.

The cause of action is that Mr. Kahungura fraudulently transferred property L.R. 209/10577/2 to himself and divested 1st defendant of the same. Counsel submitted since HCCC No. 1087 of 2003 is still pending before court the court would not have jurisdiction to have the plaintiff's present application; to hear the application would offend section 6 of the Civil Procedure Act. Counsel further submitted that the Plaintiff's affidavit in support of the application particularly paragraph 9, 10, 11 and 17 offend Order 18 rule 3 of the Civil Procedure Rules which requires that matters in an affidavit be confined to such facts as

the deponent is able to prove from his own knowledge. Counsel argued that since the plaintiffs application is not interlocutory the court should strike out these paragraphs for which the deponent does not have first hand knowledge. Finally counsel submitted that section 3A of the Civil Procedure Rules was only applicable where there were no other statutory provision which is not the case here, see case of MEDITERRANEAN SHIPPING CO. S.A. –V- INTERNATIONAL AGRICULTURE ENTERPRISES (1990) KLR 183.

The plaintiff's counsel responded to the submission by saying that the plaintiff sought the grant of an injunction and in so doing was seeking the court's aid in the execution of the decree it obtain herein. She said that the court was empowered to so aid the plaintiff counsel relied on the case of FAITH PANTON PROPERTY PLAN LTD. – V- HODGETTS AND ANOTHER (1981) 2 ALLER 877. Counsel further submitted that where there is a legal right the court can under Order 21 rule 36 and section 3A grant an injunction, see case A.G. –V- CHAUDRY & ANOTHER (1971) 3 ALLER 938. In response to submission on the provisions of Order 39 plaintiff's counsel responded and said that the rule provided that an injunction could be issued until the disposal of the suit or until 'further orders' of the court. This counsel argued gave court power to issue an injunction after execution. Counsel in this regard relied on the case of ORWELL STEEL CERECTION AND FABRICATION LTD –V- ASHALT AND TARMAC LTD (1985) 3 ALLER 747. Although counsel argued that this case was, by virtue of the Judicature Act binding on this court, I find that it is not binding because it was decided in 1985, see section 3 of Cap 8.

Counsel disagreed with submission that the veil cannot be lifted under Order 21 rule 36 and said that the submissions of Section 323 of the Companies Act is wrong. Counsel relied on the ruling of Justice Ringera in the case of ULTIMATE LABORATORIES –V- TASHA BIOSERVICE LTD (Supra), where the corporate veil was lifted under an application under Order 21 rule 36.

In respect of HCCC 1087 of 2003 counsel argued that the prayers in that suit were not similar to the application and that the plaintiff's application was attempting to preserve the only property, which Mr. Kahungura obtained from the 1st defendant.

In response to Mr. Njuguna's argument plaintiff's counsel submitted that the present application was against Mr. Kahungura and for Mr. Njuguna to act he required the 1st defendant company's, authority, and since Mr. Njuguna was opposing an application to have Mr. Kahungura return the property back to 1st defendant, it was not clear in whose interest Mr. Njuguna was acting.

That sums up the counsels argument and the length and depth of their argument can lead one to forget that what is before me for ruling is a preliminary objection. It would, I believe, be good to remind myself the finding of the celebrated case of MUKISA BISCUIT CO. –V- WEST END DISTRIBUTORS (1969) E.A. 696.

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Mr. Kahungura's submission that an injunction under Order 39 cannot issue in favour of the plaintiff because the suit has been disposed is I believe correct. Order 39 is entitled, **“Temporary Injunction and Interlocutory orders.”** The title itself is selfexplanatory. The order provides a measure of protection of property, which is likely to be destroyed or wasted during the pendency of the suit. I do not accept the plaintiff's submission that the use of the words “until further orders” opens the use of this order to its application after the disposal of the suit.

Having accepted the submission of Mr. Kahungura I however do not accept that the consequence of that acceptance is to hold that the application ought to be dismissed. The plaintiff has come under section 3A of the Civil Procedure Rules which is a section which saves the inherent power of the court to make such orders as may be necessary for ends of justice. Since I accept that Section 3A is of no

assistance to the plaintiff the plaintiff is entitled, as it has rightly done, to invoke the inherent jurisdiction of section 3A.

Mr. Kahungura's argument that Order 21 rule 36 does not empower the court to lift the corporate veil is misconceived. Mr. Kahungura quite correctly states that the court is empowered to get discovery for the purpose of execution. That statement then begs the question, if the discovery uncovers wrongdoing by an officer of a corporation does that mean that the court is entirely powerless to do anything. I find and I hold that the court would be able in those circumstances to lift the corporate veil, if necessary. In that regard I am in total agreement with holding of the case of ULTIMATE LABORATORIES –V- TASHA BIOSERVICE LTD (Supra). I do not accept the submissions that it is only under section 323 Companies Act that the court can lift the veil.

Mr. Njuguna's submissions that he is properly on record for the 1st defendant is correct. His firm has been on record for the 1st defendant since inception and there has not been any notice filed of change of advocates. He is on record even if, as perceived by the plaintiff, he is acting contrary to the interest of 1st defendant, it is for the 1st defendant to raise a complaint.

On the submissions that the present application offends section 6 of the Civil Procedure Act which provides power to stay a suit where the matter in issue is also directly and substantially in issue in previous suit. This submission by the 1st defendant cannot be properly dealt with as a preliminary objection, it is a submission that is seeking the exercise of the court's discretion on decision whether the matter is directly or substantially in issue and it further would require affidavit evidence. It is also material to note that the present plaintiff is not a party in the other suit in the central registry, and to allow the 1st defendant's submission would be to allow the plaintiff to remain without remedy.

The 1st defendant's submission on paragraphs 9, 10, 11 and 17 of the plaintiff's application are misplaced because Order 18 Rule 3(1) provides that the court can grant leave for a party to rely on an affidavit containing statements on information and belief. Such submission is not properly taken as a preliminary objection.

Finally I do accept the submission of the plaintiff that the court is not powerless to fail to aid and party who seeks the court's assistance to issue an injunction to aid execution of a decree. To hold otherwise would be a travesty of legal process. The end result is that the preliminary objection raised on behalf of Jackson Kahungura Kariuki is dismissed with costs to the plaintiff.

And in order to prevent the ends of justice from being defeated as provided by section 63 of the Civil Procedure Act. I do hereby grant a temporary injunction in terms of prayer No.2 of the chamber summons dated 10th December 2004 and will require at the reading of this ruling that parties do fix a hearing date of that chamber summons.

Dated and delivered at Nairobi this 4th may, 2005.

MARY KASANGO

JUDGE