



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 564 OF 1998

KIAMBU SERVICE STOREPLAINTIFF

VERSUS

MBO-I-KAMITI FARMERS COMPANY LIMITEDDEFENDANT

AND

D. N. NJOGU & COMPANY ADVOCATES1ST GARNISHEE

TOM MAINA MACHARIA ADVOCATES2ND GARNISHEE

STANDARD CHARTERED BANK OF KENYA3RD GARNISHEE

AND

OL-MOROGI LTD.INTERESTED PARTY

RULING

By its notice of motion of the 17.3.2005 the Applicant O. Morogi Ltd seeks to review my order of the 10th march 2005 attaching the monies held by the two Garnishees herein in respect of the proceeds of sale of land held by them in respect of the sale of land owned by the Judgement debtor and the Applicant. The Applicant as an aggrieved person is entitled to bring the application for review and it is not necessary to join it as a party in this matter and the application to join it is refused. It is the Applicant's contention that part of the sale proceeds belong to it and that the judgement debtor has no interest in these proceeds and as such the monies cannot be attached to satisfy the debts of the judgement debtor.

The application is supported by the affidavit of one Thuo Mathenge who states he is a director of the Applicant Company and annexes a letter from the Registrar General confirming this fact.

The application is postulated on the fact that the Applicant Company is a separate legal entity to the judgement debtor. It is not stated in the application who the beneficial owners of the Applicant Company are.

It is said the issue is resolved by an agreement recorded in HCCC Case No.862 of 2003 between the Applicant and Live Wire Limited in which a lease in favour of Live Wire Ltd was terminated for a monetary consideration. I do not see that this in anyway determines the beneficial ownership of the Applicant.

However, the Applicant by its director Joseph Kimani Muchegi deponed that the Applicant Company had different shareholders from those of the judgement debtor. It does not state who the Applicant's shareholders are.

In reply a number of affidavits were filed. Two by David Njogu Gachanja on the 25.4.2005 and 16.5.2005 respectively. He was the advocate for the vendors namely the Applicants and judgement debtor in the sale of the properties sold which gave rise to the proceeds of sale being held by his firm initially and subsequently by his firm and the 2nd Garnishee. He deponed that the Applicant Company is a subsidiary of and wholly owned by the judgement debtor and that as such the judgement debtor is the beneficiary of all of the monies received as the sale price. The only reason why a sum of Shs.62 million remain in an escrow account is because Live Wire Ltd. had not been paid Shs.840,000/= at that time.

A replying affidavit was sworn by Tom Maina Macharia and 2nd Garnishee on the 24.3.2005 in which he depones that the sum held by his firm is held on behalf of the purchaser of the said property and cannot be disbursed until the transaction is finalized on the payment to Live Wire Ltd and determination of what interest in the money belongs to the purchaser.

A further affidavit was sworn to by Mr. Gachanja on the 19.5.2005 to which was annexed minutes of an extraordinary meeting of the judgement debtor on the 13.3.2003 in which it was resolved "Ol'Morogi ranch be disposed to liquidate debts". In reply Mr. Kirtish Chandulal Karania, a Director of the Judgement creditor swore two affidavits on the 20.5.2005 and 30.6.2005. Annexed to the 1st affidavit was a copy of the Group annual Report of the judgement debtor as at the 31.12.2000. On page 9 it is stated the group accounts consolidated the accounts of the judgement debtor and all its subsidiaries. The judgement debtor owns 99.84% of the issued share capital of the applicant company. Annexed to the second replying affidavit are the annual Returns of the Applicant Company on the 15.12.1994 showing its shareholders as Loresho & Kiora (plantation) Ltd and Kacharoba Ltd.

Also annexed is the annual Returns for Loresho & Kiora (Plantations) Ltd showing it has 1,600,000 ordinary shares of Shs.5 each issued as to 1,576,970 by the judgement debtor and the balance by a number of named persons.

This is confirmed by the Registrar General in a letter dated the 15.6.2005. On the 20.5.2005 Thuo Mathenge swore an affidavit filed on the same day annexing a letter from the Registrar of Companies showing that from the annual Returns filed on 20.1.2005 and on the 7.2.2005 the Directors were as follows and had the held shares in the company as is set opposite their names

Name Address Shares

Thuo Mathenge P. O. Box 280 Karuri 3000

Stephen Kimani Mihiu P. O. Box 53 Githunguri 3000

Benjamin Mbocha Munyua P. O. Box 300 Kiambu 3000

Joseph Kimani Mwicigi P. O. Box 300 Kiambu 3000

John Nduati Mugo P. O. Box 300 Kiambu 3000

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There is no explanation as to how these directors acquired these shares nor are there any share transfer share certificates or other documentation annexed to show in what way the shares were transferred from the shareholders shown in the Annual Return for the year 1995.

On a balance of probabilities I do not accept that the shares are in fact held as stated in this latest annual Return. If in fact no consideration was paid nor any transfers were executed and stamped and no share

certificate issued which I strongly suspect is the case, then these five directors are guilty of making a false statement not to mention possible theft of the shares. One of the directors namely Benjamin Mbocha Munyua appears to have sworn an affidavit on the 3rd June 2005 to which two other directors namely Joseph Kimani Muchigi and John Nduati Mugo say they have authorized the same and states that Thuo Mathenge and Stephen Kimani Mihiu without their instruction or authority had them registered as directors of the Applicant Company with 3000 shares each. It is further deponed that to the best of the knowledge of the deponent and the two other directors authorizing the affidavit that no person owns shares in the Applicant Company in the range of 3000 shares and that they do not own such shareholding.

In the circumstances I order the CID to conduct investigations into the statement which appears to have been made by Thuo Mathenge and Stephen Kimani Mihiu that they owned 3000 shares each in Ol'Morogi Ltd and if the same be false that they be charged with the appropriate offence.

Having found as I do that the Applicant Company is a wholly owned subsidiary of the judgment debtor the question arises as to whether the funds held by the garnishee can be used to satisfy the debts of the Garnishees. Subject to the payment of the sum due to Live Wire Ltd, which I am told has been agreed, and the question of any interest due to the vendors I am satisfied that the sums held in the escrow account are available to meet the debts of the judgment debtor.

As I understand it the law is that monies held in trust for a beneficiary can be used to meet the debts of the beneficiary. I rely on the cases of Hancock Vs Smith (1998) 41 ChD and Harrord Ltd Vs Tester (1937) 2 ALL E.R Vol 2 page 236. In these cases it was found that the monies held in the name of another were held in trust for someone other than the judgment debtor. However, it is clear that had those monies been found to belong to the judgement debtor even though in the name of another the same could be used to satisfy the judgement debtor's liabilities.

In this case although the monies held in the escrow account are due in part to the Applicant Company, nevertheless that Company holds those funds in trust for its shareholders in this case the judgment debtor and as such these monies are available for payment of the judgment debtor's debts. There is evidence more so that the judgment debtor has specifically agreed that the funds can and should be used to pay off its debts. In the result I dismiss this application with costs against Thuo Mathenge and Stephen Kimani Mihiu.

Dated and delivered at Nairobi this 26th day of September 2005

P.J RANSLEY

JUDGE