



**Cape Holdings Limited v Synergy Industrial Credit Limited; Sanghrajka (Intended Interested Party) (Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated)) [2023] KEHC 19065 (KLR) (Commercial and Tax) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19065 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION 114 & 126 OF 2015 (CONSOLIDATED)  
DO CHEPKWONY, J  
JUNE 14, 2023**

**BETWEEN**

**CAPE HOLDINGS LIMITED ..... APPLICANT**

**AND**

**SYNERGY INDUSTRIAL CREDIT LIMITED ..... RESPONDENT**

**AND**

**JAYSUKHLAL BHAICHAND SANGHRAJKA .... INTENDED INTERESTED PARTY**

**RULING**

1. Subject to this ruling are three applications pending in this matter. The first application is dated December 19, 2022 filed by Synergy Industrial Credit Limited (hereinafter to be referred to as “the applicant” for purposes of discussions in this ruling) and seeks the following orders: -
  - a) Spent;
  - b) Spent;
  - c) That this honourable court be pleased to issue a prohibitory order stopping the transfer, alienation, renting, possessing, further charging, registration of any further dealings and or otherwise dealing with all that property known as title NoNairobi/Block 92/259 (previously LR No 5884/16 before conversion) situated within Nairobi County and registered in the names of Bipinchandra Bhaichand Sanghrajka, Vinaychandra Bhaichand Sangrajka and Jaysukhlal Bhaichand Sanghrajka pending further orders of this honourable court;



- d) That the honouable court be pleased to lift the corporate veil of the respondent/judgment debtor and issue summons to all the directors/ shareholders of the respondent/judgment-debtor to show cause why they should not be held liable to pay the decretal sum of Kshs 4,497,776,260.35 plus accrued interest and costs of this suit;
  - e) That the costs of this application be borne by the respondent/judgment-debtor.
2. On its face and in the affidavit of Jacob Mbae Meeme, the grounds adduced in support of the application are that on March 25, 2021, this court issued a decree against the respondent in the sum of Kshs 4,497,776,260.35 which had emanated from an arbitral award published on January 30, 2015 in a dispute regarding the sale of blocks erected on LR No 209/19436. The dispute was litigated through to the Court of Appeal up to the Supreme Court, wherein both superior courts upheld the award and decree issued in favour of the applicant. Thereafter, the applicant sought to garnish and attach the respondent's bank accounts. When it became apparent to the respondent's directors that execution was eminent, the directors moved and siphoned funds from the respondent's accounts to a tune of Kshs 555million towards the development of the parcel of land known as title No Nairobi/Block-92/259 (previously LR No 5884/16) which is personally owned by the directors and shareholders of the respondent/ judgment-debtor.
  3. According to the applicant, the developments were meant to be completed at a total expense of Kshs 624 million being the budget that had been approved by the National Construction Authority hence the funds siphoned from the respondent's accounts added upto 88.94% to completion of the project. The applicant believes that the withdrawals were concerted and aimed at defeating its decree, thus it (the applicant) has interests on the developments undertaken with the funds it sought to garnish.
  4. Further, the applicant has invited the court to the conclude that by withdrawing the respondent's funds for personal use or development of private projects, the respondents directors have demonstrated that there is no formal legal separation between them and the respondent company so that the latter is a mere vessel through which the directors/shareholders have used to evade lawful execution against its attachable assets. In view of this, it is the applicant's contention that if the prohibition sought is not granted, the directors may proceed with the sale and transfer the development to third parties and there would be no other assets available for execution against the respondent company.
  5. Based on the foregoing, the applicants seek the court to order lifting of the corporate veil and summon the directors to show cause why they should not be liable to pay the judgment debt owing to their fraudulent and improper conduct of using the respondent company to avoid execution against its attachable assets thereby leading the respondent into administration.
  6. In response to the application dated December 19, 2022, the respondent and intended interested party filed notices of preliminary objection dated February 20, 2023 and April 12, 2023 respectively. In summary, the preliminary objection raised by the respondent company is on the following issues;
    - a) Firstly, that this court lacks jurisdiction by virtue of section 560 of the [Insolvency Act](#) which stipulates that an automatic moratorium is created on all assets of a company once the company is placed under administration. As such no execution can ensue on assets of the respondent after being placed under administration.



- b) Secondly, that the application suppresses some pending Court of Appeal proceedings and an order dated April 1, 2022 stay execution against the respondent.
7. On the other hand, the proposed interested party has raised a preliminary objection challenging the court's jurisdiction to address the matter on account that the application revolves around the property known as Nairobi/Block 92 of 259 and the dispute is therefore a preserve of the Environment and Land Court.
8. Besides the notices of preliminary objection, the intended interested party and the respondent filed applications dated February 2, 2023 and February 20, 2023 respectively which shall be referred to as the 2<sup>nd</sup> and 3<sup>rd</sup> applications accordingly, having earlier mentioned that there are three applications subject of this ruling.
9. The notice of motion application dated February 2, 2023 filed by the proposed interested party essentially seeks;
- a) the enjoining of the interested party to these proceedings,
  - b) the setting aside or temporary prohibitory order issued by this court on December 22, 2022; and or,
  - c) the striking out of the applicants application with costs.
10. The grounds adduced in support of the application are that the proposed interested party is among the owners of the land on which the developments were made, and the prohibitory orders issued by this court are not only detrimental to him but are in violation of his right to own property. The proposed interested party adds that the persons mentioned as directors/shareholders of the respondent company were not enjoined or served with the orders of this court notwithstanding that under order 40 rule 4(3) of the *Civil Procedure Rules*, a party against whom an injunction is issued ought to be served with the adverse order within three (3) days, failing to which the orders ought to lapse.
11. The proposed interested party reiterates that he is not liable to settle the decree herein and he has an identifiable stake in the subject parcel of land warranting his inclusion in the present proceedings. Lastly, the interested party argues that the applicant notoriously filed the instant application dated December 19, 2022 in total disregard of the orders issued by the Court of Appeal staying execution against the respondent company.
12. On the other hand, the application by the respondent is a notice of motion application dated February 20, 2023 and it substantially seeks;
- a) the setting aside of the temporary prohibitory orders issued by this court; and,
  - b) the cross-examination of Jacob Mbae Meeme with respect to the averments he made on the affidavit sworn in support of the application dated December 19, 2022;
  - c) that Jacob Mbae Meeme, Vishal Vipul Shal, Vipul BabulShah and Hiral Vipul Shah to be punished for court contempt and more specifically for pursuing the execution whereas there is an order by the Court of Appeal staying any execution against the respondent company.



13. According to the respondent, the applicant's application ought to be dismissed for having been made in concealment of material facts including the failure to reveal to this honourable court that there is a ruling pending before the Court of Appeal in which the respondent seeks part of the award made reviewed and reduced downwards so that should the application be allowed, then the intended execution would be detrimental to the respondent.
14. Lastly, the respondent has argued that under section 560(1) of the *Insolvency Act*, execution may only be undertaken on a company placed under administration with the permission of the administrator or that of the court. That, no such permission was sought before filing the application hence the same ought to be dismissed.
15. In response to the two applications, the applicant filed two sets of grounds of opposition dated February 27, 2023 and February 24, 2023 respectively. Further, the applicant filed a replying affidavit sworn on March 20, 2023 by Jacob Mbae Meeme wherein he reiterated the position earlier taken by the applicant with the addition that the case allegedly pending before the Court of Appeal arose from a ruling delivered by the honourable Justice Mabeya on December 10, 2021 and has no nexus with the decree issued in this suit on March 25, 2021. As regards the joinder application, the applicant submitted that the proceedings in this suit were conclusively heard and concluded and at the point execution, a party has no identifiable interest which can be litigated after closure of the case.
16. Further, the deponent has averred that since the directors have not disputed that they siphoned funds from the respondent company for the construction of town houses in the directors privately owned land, they created a legal interest for the benefit of the applicant/judgment-creditor.
17. Directions were issued that parties do file submissions in support of their respective cases. Having perused the record, the court is satisfied that parties complied with the said directions by filing their respective sets of submissions, which I have read through and do not wish to reproduce the same here as they reflect the summary of affidavits that is reproduced above.

### **Analysis and Determination**

18. Having considered the three applications, the affidavits sworn in support and rebuttal thereof, alongside the submissions filed on behalf of the parties together with the authorities relied upon, the court is of the view that the following issues crystalize for determination:-
  - a) Whether the preliminary objections filed the applicant and proposed interested party are merited;
  - b) Whether the proposed interested party should be enjoined to these proceedings;
  - c) Whether an order of prohibition can issue as proposed by the applicant;
  - d) Whether the applicant has made a case to warrant piercing the respondent's corporate veil.

#### **a) Whether the preliminary objections by the parties are merited**

19. To be addressed first is the respondent's preliminary objection dated February 20, 2023 and filed in response to the applicant's application dated December 19, 2022. It is ideally challenging the courts jurisdiction on account of section 560 of the *Insolvency Act* which stipulates that once a company is placed under administration, no execution may proceed against the company unless with leave and permission of either the administrator or the court. The second line of challenge, is that the application



was filed in contempt of the Court of Appeal orders which had pronounced stay on all execution against the respondent. Lastly, that the application is based on material non-disclosure and suppression of material facts.

20. However, before delving into the merits thereof, it is imperative to remind ourselves the pertinent principles established in our jurisprudence as to what amounts to a preliminary objection. In the case of *Oraro v Mbaja* [2005] 1KLR 141, the court observed that anything that purports to be a preliminary objection must not deal with disputed facts or derive its foundation from factual information which stand to be tested by rules of

### **Evidence.**

21. In the *locus classicus* case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, a superior court observed thus:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated;

“A preliminary objection is in the nature of what used to be a 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

22. Taking cue from the above decision, a preliminary objection should always be on a point of law apparent on the face of the pleadings without an extensive analysis of facts and circumstances, which, if argued at a preliminary stage, might dispose of the suit. It usually implies that the facts as pleaded are correct but save for the legal barrier to the sustenance of the suit.
23. In the present case, the preliminary objection challenges the jurisdiction of the court, which in this court's view, is sustainable. As for whether it is merited, the first ground of challenging the court jurisdiction is premised on section 560(1) of the *Insolvency Act* which reads as follows:-
- a) A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the court;
  - b) A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the court; if the court gives approval—subject to such conditions as the court may impose;
  - c) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the court; and,



- d) A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the court."

24. According to the respondent, the applicant filed the instant application without consent of either the administrator or leave of the court while completely being aware that the respondent is under administration. However, this court's view, having carefully read through the notice of motion dated December 19, 2022, find it does not seek to attach or otherwise execute against assets owned by the respondent company per se. It seeks to preserve assets which are believed to be beneficially owned by the respondent company so that whether or not the applicant may escalate the execution on the subject premises is an issue to be addressed on a different platform. The court is therefore not persuaded that the applicant ought to have sought court's leave or permission of the administrator before filing the application dated December 19, 2022. The order of prohibition merely seeks to stop the transfer, alienation, renting, possessing, further charging, and registration of property known as title No Nairobi/Block 92/259 (previously LR No 5884/16 before conversion) until the case by the applicant is fully considered and concluded. Consequently, the first ground under the preliminary objection challenging the court's jurisdiction is found not meritorious enough to dispose the applicant's case at preliminarily stage.
25. The second line of challenge is that the application was filed in contempt of the Court of Appeal orders which had pronounced stay of execution against the respondent. This court has considered the application dated December 22, 2021 filed by the respondent pursuant to which the stay orders were allegedly issued by the Court of Appeal. In its view, the stay was against execution which might arise from the ruling delivered on December 10, 2021 in High Court Insolvency Cause No E049 of 2021 but not the decree herein dated March 25, 2021. Consequently, this court finds no violation of the stay of execution dictated by the Court of Appeal since the same was against a ruling dated December 10, 2021 and not the decree issued in favour of the applicant on March 25, 2021. Likewise, this ground fails.
26. The last ground in challenging the court's jurisdiction is based on material non-disclosure and suppression of material facts. According to the respondent, the applicant failed to disclose the pendency of a ruling by the Court of Appeal wherein it is seeking a review of the award by reducing it downwards. So that, if the application succeeds, the decree awarded to the applicant is likely to be affected substantially. In this court's view, these are factual issues which cannot be argued as pure points of law. A preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to a contest in a way or manner that can be proved by way of evidence. In the result, the court finds the preliminary objection dated February 20, 2023 without merit and the same is hereby declined.
27. The other two notices of preliminary objections are dated April 12, 2023; being the one filed by the applicant in response to the interested party's joinder application and the other by the proposed interested party in response to the applicants application dated December 19, 2022. The two notices of preliminary objection raise a similar ground that the issues herein revolve around the property known as title No Nairobi/Block 92/259 and can only be adjudicated by the Environment and Land Court by dint of article 162(2)(b) of the Constitution of Kenya.
28. Environment and Land Court is a statutory creation of the Constitution of Kenya under the provisions of article 162 (b) vested with jurisdiction under the Environment and Land Court Act to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land. In the present case, none of the parties have raised environmental issues and neither are they disputing on



the use, occupation and or title to subject property being Nairobi/Block 92/259. The applicant and the proposed interested party are both merely asserting their rights arising from a contractual relationship, hence this court has jurisdiction to adjudicate on the same. The two preliminary objections even dated the April 12, 2023 are therefore misguided and without merit.

#### **b) Whether the proposed interested party should be enjoined to these Proceedings**

29. The *Black's Law Dictionary*, 9<sup>th</sup> Edition at page 1232 defines an interested party as a party who has a recognizable stake (and thereafter standing) in the matter. Similarly, the 'Mutunga Rules', the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, legal notice No 117 of 2013, defines an 'interested party' as: -

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.”

30. Order 1 rule 10(2) of the *Civil Procedure Rules* provides on joinder of parties and particularly states as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”

31. This court associates itself with the decision by the Supreme Court in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others*, petition No 15 as consolidated with No 16 of 2013 [2016] eKLR, where the superior court held in that an application for joinder of interested party, the applicant must show:-

- a) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- c) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

32. Justice Munyao, of the Environment and Land Court while addressing the jurisprudence on joinder of interested parties in the case of *Skov Estate Limited & 5 others v Agricultural Development Corporation and another* [2015]eKLR, expressed as follows:-

“The applicant in an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That becomes important if he has to show that the issues before the court cannot be effectively adjudicated upon in his absence. Being affected by the order of the court is not enough. The applicant must show that in addition to being affected the



reliefs which will be granted will not be fully decided upon because an important element of fact, which he has, shall miss if he is not added to the proceedings.”

33. This court wishes not to reinvent the wheel and instead reiterates the principles as outlined in the authorities cited above. It is against that backdrop that the court will consider whether or not the proposed interested party has established a stake in the present suit, whether he will be affected by the decision of the court, and lastly, whether his interests will not be well articulated in his absence from the proceedings.
34. On the first question as to whether the proposed interested party has a direct interest or stake in the proceedings, the interested party submitted that he is a co-owner of subject parcel of land being Nairobi/Block 92/259. Undoubtedly, it is clear that the proposed interested party has proprietary rights over the parcel of land in question and is more likely to be affected by the court’s decision. Therefore, since the proposed interested party is not a director or shareholder to the respondent company, he is a necessary party to defend and guide the court on his portion of share in the subject parcel of land. As a result, I am inclined to uphold the request to joining the interested party to these proceedings.

### **c) Whether an order of prohibition can issue as proposed by the Applicant**

35. The applicant sought an order of prohibition to issue stopping the transfer, alienation renting, possessing, further charging, registration of any further dealings and or otherwise dealing with all that property known as title No Nairobi/Block 92/259 and registered in the names of Bipinchandra Bhaichand Sanghrajka, Vinaychandra Bhaichand Sangrajka and Jaysukhlal Bhaichand Sanghrajka pending further orders of this honourable court. The genesis of seeking these orders is that the owners of the said parcel of land are directors of the respondent company and they siphoned the company’s monies to finance the completion of a project for the construction of town houses on their private parcel of land leaving the company with no assets to attach in execution of the decree entered in favour of the applicant. As such, since the project was facilitated with funds liable to attachment in execution of a decree issued in favour of the applicant, the applicant has beneficial rights in the end projects.
36. To counter the submissions by the applicant, the respondent submitted that the execution is contra the provisions of section 560(2) of the *Insolvency Act* and its also tainted with material non-disclosure. However, when addressing the preliminary objection by the respondent, the court considered the merits in those submissions, and does not wish to reproduce the same here.
37. However, in considering whether to prohibit and stop the eminent sale of property issue, the applicant ought to establish the basic principles guiding a successful plea for a temporary injunction. More specifically, the applicant ought to establish a *prima facie* case, likelihood to suffer substantial loss beyond pecuniary compensation and that the balance of convenience tilts in his/her or her favour.
38. This court is persuaded that in this case, the applicant has met those basic principles. In showing that a judgment was entered in its favour for Kshs 4,497,776,260.35 and when he moved to execute the same by way of garnishment, the respondent’s directors commissioned the funds held by the respondents to other private projects and eventually walked the respondent to path of insolvency, the applicant established a *prima facie* case. Therefore, the applicant has every right to follow up and trace the funds and or employ any other or possible legal right to realize the fruits of its judgment.
39. As regards substantial loss, the court is persuaded by the applicants submissions that upon being placed under administration, the respondent company is left with minimal assets to address the debt owed to the applicant, and therefore it might not realize the fruits of its judgment if it is not allowed to pursue the acclaimed rights over the projects undertaken with the respondent/judgment-debtor’s



funds. Similarly, for the above-mentioned reasons, the court is as well persuaded that the balance of convenience tilts in favour of the applicant/decreed holder.

40. Arising from the above observations, this court finds that the applicant has made out a case for the grant of prohibition order sought.

**d) Whether the applicant has made a case for piercing the respondent's corporate veil.**

41. The applicant/decreed-holder submitted that the respondent director's conduct in moving funds held in the company's bank accounts for private projects established that there is no clear legal distinction between the directors and the company. Hence the company is merely being used as a vehicle to evade the execution of the subject decree. That on this ground, the applicant/decreed holder has sought that the court lifts the corporate veil and summon the directors to show cause why they should not be held liable to pay the debt owed by the respondent/judgment-debtor. The respondent on the other hand has clung on the hurdles placed under section 560(1) of the *Insolvency Act* which in its view the applicant had to first jump over before moving for execution. Further, the respondent has lamented that the applicant is guilty of material non-disclosure especially in failing to reveal
42. However, it is to be remembered that in the judicial precedents pronounced since the decision in the case of *Salmon and Salmon and Co Ltd* [1897]AC 22HL, courts have upheld the doctrine of lifting the corporate veil and limited liability of a company. That notwithstanding, there have been instances in law that have had effect of piercing or lifting the corporate veil in recognition of the fact and reality that the business of a company, as an artificial entity, is carried on by and for the benefit of living persons. In the case of *Jones & another v Lipman & another* [1962] IWL 833, it was held:-

“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or proper or illegal acts. This act of removing the façade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil.”

43. It then follows that the corporate veil of a company can be pierced to see what is happening behind it, and such would arise on allegations of fraud and improper conduct on the part of the shareholders and/or the controllers of the company.
44. In this case, the applicant/decreed-holder alleges that in an attempt to evade garnishment and lawful execution, the directors and shareholders of the respondent company have fraudently withdrawn all funds held by the company and commissioned the same on private projects for the development of town houses on a parcel of land owned by the directors and shareholders of the company. In this court's view, it would be an act of dishonesty to withdraw all funds held in a company for private use once one is alerted of an impending execution on the company. Such acts of dishonesty are committed by the company through its directors and shareholders who are shielding themselves from their legal obligation to pay debt using the corporate veil.
45. For that reason, this court would have been inclined to order for the lifting of the corporate veil of the respondent/judgment-debtor, but for the fact that the respondent company has been placed



under administration, which is equally a mode of execution. The said prayer is thus held in abeyance pending further directions with regard to a report on the management of the company's assets by the administrator.

46. For the above-stated reasons and, for avoidance of doubt, the following orders issue:-

- a) The respondent/judgment-debtor's application dated February 20, 2023 be and is hereby dismissed with orders as to costs to follow the main cause.
- b) An prohibitory order do issue stopping the transfer, alienation, renting, possessing, further charging, registration of any further dealings and or otherwise dealing with all that property known as title No Nairobi/Block 92/259 (previously LR No 5884/16 before conversion) situated within Nairobi County and registered in the names of Bipinchandra Bhaichand Sanghrajka, Vinaychandra Bhaichand Sangrajka and Jaysukhlal Bhaichand Sanghrajka pending further orders of this honourable court.
- c) The prayer for lifting the corporate veil of the respondent/judgment-debtor and summoning of its directors to show cause why they should not be held liable to pay the decretal sum is hereby held in abeyance pending further directions of this court.
- d) Jaysukhlal Bhaichand Sanghrajka be and is hereby enjoined to this suit as an interested party.
- e) Costs as to the application dated December 19, 2022 shall be in the main cause whilst each party shall bear its own costs for the application dated February 2, 2023.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF JUNE, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Njeru holding brief for Mr. Martin Gitonga

M/S Asli counsel for Respondent

Mr. Githinji holding brief for Mr. Allen Gichuhi counsel for Applicant

Court Assistant – Martin/Sakina

