Goerge Miyara t/a Miyare & Company Advocates v Elsek & Elsek Construction Limited & another (Civil Appeal 200 of 2019) [2023] KEHC 27598 (KLR) (1 August 2023) (Ruling)

Neutral citation: [2023] KEHC 27598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 200 OF 2019

F WANGARI, J

AUGUST 1, 2023

BETWEEN

GOERGE MIYARA T/A MIYARE & COMPANY ADVOCATES .... DECREE HOLDER

AND

ELSEK & ELSEK CONSTRUCTION LIMITED ..... JUDGMENT DEBTOR

AND

DIAMOND HOUSING LIMITED ..... OBJECTOR

RULING

1. The history behind this application is that the Decree Holder is an advocate who was engaged in defending the Judgment Debtor. Like big briefs, once the work was done, the client was done. The client was not going to pay and would not pay. According to the court documents, the instructions came from Aziz Shahame through several of their addresses including aziz.shahame@elsek-elsek.com

2. This matter arose from Nairobi HC Misc. 356 of 2015- Elsek & Elsek Construction Limited versus PCEA Registered trustees. The matter arose after Mombasa HCCC 109 OF 2011. Eventually, a Bill of Costs for Ksh. 4,134,727.70 was served upon the J.D. and on 7/2/2020, the Deputy Registrar taxed the same at Ksh. 922,662.76. On 10/2/2020The J.H filed an application for entry of judgment. The J.D/ client filed a Notice of Preliminary Objection dated 26/2/2020. Parties field submissions.

3. The court entered judgment in favour of the D.H on 17/12/2021 for Ksh. 922,66.76 plus costs for the application. A decree was extracted on 13/2022. On 23/5/2022, the Applicant filed an application for execution for a sum of Ksh 1,219,300.76.

4. Warrants were issued and the same resulted to the Objector Company filing this application dated 2/6/2022 seeking to lift the Warrants of Attachment and Sale issued. The application was supported by

the affidavit of David Musinda Ngowa, who describes himself as the finance manager of the Objector. The Objector is said to have leased the suit property from one Zahid Iqubal Dean. The property is situated in land parcel number Mombasa/ block 111/736/MN. They have a hotel known as Kilifi Pearl Beach Resort.

5. They stated they procured an array of movable assets. They were carrying out business till they were disturbed by auctioneers on 27/5/2022 by Makini Auctioneers.

6. The clincher was at paragraph *7*, which I shall quote verbatim, 'The Objector was appalled and taken aback by their said notice as it had no knowledge of the existence of the suit between the Decree Holder and the Judgment Debtor.

7. The Respondent through Esther Mwikali Advocate filed a 21-paragraph Affidavit. In the affidavit, the Respondent stated as follows;

    a. The Objector is part of the conglomerate owned by Osman Erdinc Elsek and is part of Elsek group of companies.

    b. The companies are inextricable connected and are in reality part of one concern.

    c. Osman Erdinc Elsek, is the sole director and beneficial owner of the Judgment Debtor.

    d. She lays down a web of several companies where Osman Erdinc Elsek is big stake holder in at least by having a controlling stock. These companies were incorporated in a short span of time.

8. The J.H deponed that the Objector Company is owned by the Director in the J.D Company, and went on to show various addresses which are shared by the companies. In a further affidavit dated 30/9/2022 the Objector responded to the above and stated that the J.D Company and the Objector Company are two distinct legal personalities.

Analysis

9. The difficulties I have with the Objector is that they have come to equity with unclean hands. Once a party has soiled his hands, he is not befitting the remedies sought. The Applicant came with one set of facts and when caught, switched to another.

10. The stated that they knew nothing of the case. They learnt of it the first time when attachment was done. This meant they are not related parties. When this was brought out, the Applicant stated that the parties are separate legal entities. This shift was to hoodwink the court in order to get away with some order for stay.

11. In the case of Alice Njoki Mugo v KCB Bank Kenya Limited & another [2020] eKLR The court stated as follows;

> '14. Having made a determination that the Plaintiff contradicted herself in her pleadings before the Thika Chief Magistrate's Court matter with what she pleaded in this matter it becomes clear that the Plaintiff approached this court seeking equitable relief with unclean hands. He

who comes to equity must come with clean hand: see the case Caliph Properties Limited -v- Barbel Sharma and Another (2015) e KLR as follows:

> "Kyangaro v. Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126 as cited in Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145 stated:
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> > " Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.'

12. This court has a duty to exercise its discretion in favour of one of the parties, in view of conflicting evidence. However, the Objector has already shown that he did not want to disclose that the J.D and Objector are parties of the business arrangement by Osman Erdinc Elsek, who is the sole brain behind the Objector company.

13. In dealing with the brain behind the company, it is not the corporate veil that is pierced, but disentangling the corporate web. There was not evidence annexed that showed that the attached goods were bought by the Objector.

14. In the case of Stephen Kiprotich Koech v Edwin K. Barchilei; Joel Sitienei (Objector) [2019] eKLR, Justice M. Mbaru stated as follows;

> " The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached. So, a mortgagor can bring an objection on the ground that his interest in the property, viz, the equity of redemption cannot be attached and sold in execution of a decree against the mortgagee. See Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR;
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> The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.
>
> (1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
>
> (2) that the objector holds that property on his own account.

15. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, the court stated as follows;

> " 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In

Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
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> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

16. The Objector failed to produce evidence of ownership. Further, in any case, there is common ownership that is undisclosed. The purported goods which were bought were not shown to be owned by the Objector.

17. The Objector's submissions deal with different grounds from those filed in court. A party is bound by its pleadings. A party cannot come to court for one case and prove another. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows; -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> "....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
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> 12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'

18. In the case of Salomon v Salomon [1897] AC 78, the house of lords stated as follows;

> " The company is at law a different person and altogether from the subscribers to the memorandum 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 trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

19. This however, does not mean that equitable interests cannot be created. In this case, it is one party moving from one company and creating a web of deceptions to avoid paying creditors. On the strength of the evidence before the court, I am satisfied on a balance of probability that the Objector did not prove their case.

20. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

21. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    i. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    ii. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

22. In the case of In Re Estate of M'Mugambi M'Mbiro-Deceased [2022] eKLR, the court stated as follows;

> " 11. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:
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> > "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."
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> 12. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:
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> > "Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
> >
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

23. The objector has thus not proved their case. I dismiss the application dated 2/6/2022.

Determination

24. The upshot of the foregoing is that I make the following orders: -

    a. the Application dated 2/6/2022 is lacks merit and is accordingly dismissed.

    b. The warrants issued Makini be renewed for purposes of collecting goods that were attached.

    c. costs to the Decree Holder/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 1ST DAY OF AUGUST, 2023.

F. WANGARI

JUDGE

In the presence of:

M/S Ochieng Advocate h/b for the Mutuku Advocate D.H/ Respondent

Objector/ Applicant present

Abdullahi, Court Assistant