



**Lubullelah & Associates Advocates v Zadok Furnitues Systems
Limited (Commercial Miscellaneous Application E055 of 2021)
[2023] KEHC 22296 (KLR) (Commercial and Tax) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E055 OF 2021
JWW MONG'ARE, J
SEPTEMBER 18, 2023**

BETWEEN

LUBULLELAH & ASSOCIATES ADVOCATES PLAINTIFF

AND

ZADOK FURNITUES SYSTEMS LIMITED DEFENDANT

RULING

1. Upon extracting the decree on 14/10/2022, the Advocate/decreed-holder, Lubullelah & Associates Advocates, proclaimed the Respondent's goods in satisfaction thereto, which goods included M/V Registration No. KCQ 789L, which vehicle is registered in the name of the Respondent herein. Subsequently, three applications were filed by the parties.
2. On 2/12/2022, the decree-holder filed an application seeking to lift the corporate veil of the judgment-debtor. This application was brought under Order 22 Rule 5 of the Civil Procedure Rules and supported by the affidavit of Anthony Milimu Lubullelah and the grounds set on its face. The said application seeks orders of the court to lift the corporate veil and allow the examination of the directors of the judgment-debtor to ascertain if there exist assets belonging to the Company, the judgment-debtor herein, capable of satisfying the decree herein.
3. The judgment-debtor opposed the said application. The judgment-debtor argued that there was no basis laid for summoning of the its director since the attached goods were sufficient to satisfy the judgment debt save for the undervaluation of the attached Motor Vehicle, whose value was declared as Kshs.2,000,000/- by the Auctioneers on proclamation and yet the AA valuation had place the value of the said motor vehicle at Kshs.12,350,000/- as at September 2022. The Respondent submitted that the Motor Vehicle, if sold at market rates, was sufficient to pay off the decretal amount which stood at



Kshs.3,300,394/-. The judgment-debtor urged the Court to dismiss the application by the Applicant as the attached goods were sufficient to satisfy the decretal sum.

4. The second Application was filed on 19/11/2022 by Swanya & Company Advocates objecting to the proclamation and attachment of the office equipment among other goods by the decree holder. The objector argues that the said office furniture and office equipment including computers in the said office are tools of trade for the Advocates legal practice and cannot legally be attached in line with Section 44(1) of the Civil Procedure Act, which excludes items used in pursuit of ones trade from being attached during execution by a decree-holder.
5. In opposing the application by the objector, the decree-holder stated Victor Swanya Ogeto who is the sole proprietor of the business known as Swanya & Company Advocates is also the majority shareholder of the Judgment debtor. Therefore, the decree-holder argues that, the said Victor Swanya Ogeto is holding the proclaimed assets in trust for the judgment-debtor and that it's an act of collusion by the judgment-debtor and the said objector to deny the decree-holder the fruits of its judgments. The decree-holder urged the court to dismiss the objection application as no material had been placed before the court to prove ownership of the proclaimed goods by the objector as alleged. The decree-holder urged the court to dismiss the application and allow the execution proceedings to proceed.
6. The third application was filed by the judgment debtor on 19/1/2023 seeking for leave to file a reference out of time to challenge the ruling of the Registrar on the taxed Bill of costs by the decree-holder whose decision had been rendered on 7/1/2022. The judgement-debtor averred that its advocates, at the time of taxing the said Bill of Costs, failed to advise or notify it of the ruling of the court and as such could not file its reference in the time allowed by the law. The judgment-debtor urged the court not to punish it for the errors or oversight of its advocates and grant it the leave to challenge the Bill of Costs as taxed by the taxing master. The judgment-debtor confirmed to have been present during the proceedings of the taxation but claimed not to have been notified by its advocates of the Ruling date.
7. In opposing the said application, the decree-holder submitted that the said application was untenable because the court having rendered its decision and caused an entry of judgment to be done, became functus officio by operation of the law. The court therefore lacked the requisite jurisdiction necessary to grant leave or extend time for purposes of filing a reference. The decree-holder urged the court to dismiss the application.

Analysis and Determination:-

8. I have considered carefully the rival arguments in the three applications and I have identified the following issues for determination; to wit:-
 - a. “Whether the Applicant has made a case for lifting of the corporate veil of the judgment-debtor to warrant an order for examination of the director of the judgment-debtor”.
 - b. Whether the objector has established a claim to ownership of the attached goods.
 - c. Whether the application for leave to file a Reference out of time is merited.”
9. In considering “Whether the Applicant has made a case for lifting of the corporate veil of the judgment-debtor to warrant an order for examination of the director of the judgment-debtor” I have considered the arguments put forth by the decree-holder in support of the application herein. I also note that upon receipt of the execution warrants the decree-holder proceeded to instruct a firm of Auctioneers who, upon conducting due diligence, were able to establish the registered offices of the judgment debtor.



10. It is alleged that during service, the judgment-debtor's registered offices were occupied by a different company and that the said company had operated from the said premises for fourteen years prior and did not who the judgment-debtor was. However, the Auctioneer succeeded in tracing assets and goods associated or belonging to the judgment-debtor and did proclaim assorted goods which included a Motor Vehicle registered in the name of the judgment-debtor being motor vehicle registration Number KCQ 786L. The said motor vehicle had initially been registered in the judgment-debtors name but was subsequently registered jointly with a company known as My Credit Limited.
11. The decree-holder was apprehensive that the known assets and goods of the judgment-debtor were being placed beyond the reach of the decree-holder, hence the need to lift the veil and hold the directors liable for the debts of the company. In its argument opposing the application, the judgment-debtor urged the court to dismiss the application as the same was premature since upon proclamation the decree-holder had not attached the goods but had instead filed an application. The judgment-debtor argued that the attached motor vehicle was the property of the judgment-debtor and if sold, its value could be used to offset the judgment debt as the same was valued in excess of 12 million shillings while the judgment debt was for Kshs.3 million.
12. Courts have held that a company being a separate legal entity from its subscribers and directors as established by the English Case of *Salmon v. Salmon*, there is need to tread carefully in granting orders seeking to lift the corporate veil. Under order 22 rule 35, the [*Civil Procedure Rules*](#) provides as follows:-

“Where a decree is for payment of money, the decree-holder may apply to the court for an order that-

 - a. The judgment-debtor
 - b. In the case of a corporation, any officer thereof; or
 - c. Any other person

Be orally examined as to whether any or what debts are owing to the Judgment –debtor and whether the judgment debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person and for the production of any books or documents.
13. While the law has set the parameters upon which a director or an officer of the judgment-debtor maybe summoned, the power to do so must be exercised where a good foundation has been laid for the orders sought. In the case before me, I note that the decree-holder was able to establish property, including a motor vehicle, belonging to the judgment-debtor and proclaimed the same. I note even from the subsequent objection application there is no dispute as to the fact that the motor vehicle which is a valuable item is the property of the judgment debtor.
14. I therefore agree with the judgment-debtor that the application to lift the corporate veil of the judgment-debtor and examination the director of the judgment-debtor thereto is premature at this time. The decree-holder should first proceed and complete the process of execution by advertising the attached goods for sale. It is only, in my view, after concluding this phase of execution, if the debt is not fully discharged, that the decree-holder can individually pursue the members of the judgment-debtor company. The application is therefore dismissed for want of merit.
15. On the second issue as to “Whether the objector has established a claim to ownership of the attached goods.” I note from the proceedings that the objector only lays a claim to the office equipment attached alongside the motor vehicle Registration Number KCQ 786L. The objector, is also the director of the



judgment debtor and being a lawyer in private practices also operates the law firm known as Swanya & Company Advocates. During the oral submissions the objector reiterated and confirmed to the court that there was no objection brought to lay claim to the attached motor vehicle and that the same remained the property of the judgment debtor despite the joint registration with My Credit Limited. The objection was therefore limited to the other attached goods that included office furniture and computers. In opposing the application, the decree-holder reiterated that the objector had not discharged the onus of proof as set out under order 22 rule 57 of the Civil Procedure Rules. As was held in the case of *Simba Colt Motors Ltd –vs- Lustman & Company* (1990) HCCC No. 729 of 2002 that:-

“The purpose of Rule 57 is to provide an objector with an opportunity to establish his claim to the attached movable property. The Rule casts the onus of proof on the Objector to prove that the property belonged to him and not, as submitted before me, the decree-holder to prove that the property belonged to the judgment-debtor.”

16. To discharge the above burden of ownership, the objector attached receipts and invoices for the purchase of the computers and office furniture and urged the court to find that despite the interrelatedness of the objector’s proprietor who is also the director and majority shareholder of the judgment-debtor, the said Victor Swanya Ogeto was not a party to the proceedings herein as the same were between the judgment-debtor, a separate legal person from its directors. The objector urged the court to hold that these items were tools of trade as provided for under Section 44 of the Civil Procedure and therefore incapable of being attached.
17. I have considered the rival arguments put forward by the decree-holder and the judgment-debtor that due to the shared ownership of the two business entities, it is possible that goods of the judgment-debtor are comingled with goods of the objector and that therefore the argument that the objector holds the same in trust for the judgment-debtor. I note in order to prove ownership of the attached computers and office furniture the objector availed invoices and delivery notes as proof separate ownership of these items away from the judgment-debtor. I find and hold that the objection application is partly successful and I will allow it in part. Since the objector has not laid a claim to the motor vehicle attached herein, the same is available to be sold in execution of the decree herein, I will allow the objection in so far as the same relates to the attached office furniture and computers and direct that the disposal of the motor vehicle proceed as by law allowed.
18. The final issue identified in the application of 19/1/2023 is “Whether the application for leave to file a reference out of time is merited.” From the record the judgment-debtor has brought this application ostensibly seeking leave to challenge the Ruling of the taxing master on the Bill of Costs, leading to the execution proceedings dealt with earlier in this application. The judgment-debtor/client argues that had it been made aware of the outcome of the Bill of Costs by its advocates on record, it would have filed a reference to set aside the same and avoid the execution process now ongoing. The judgment-debtor lays the blame on its advocates and urges the court not to punish the judgment-debtor for the actions or omissions of its legal counsel. In response, the decree-holder argues that the application for leave is bad in law as the same is brought outside the timelines set by the *Advocates Act* and is also not in conformity with the procedure set out in the Advocates Remuneration Order.
19. I have perused the record and note that Application herein was filed almost 7 months after the judgment on the taxed costs was entered by the court. The *Advocates Act*, Section 11 provides as follows:-
 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
20. The above provisions of the Advocates Act set out the procedure of filing a reference to a certificate of taxation. A perusal of the Court record herein clearly demonstrates that the application for leave to extend time does not take into account the provisions of the Advocates Act cited above and is therefore, having been filed 7 months after the said Ruling, incompetent before this court.
21. In conclusion, I find and hold that the applications have no merit and dismiss the same.
22. Costs follow the event. In this matter there are three separate applications brought by the parties to the suit from either side. Seeing that some have partly been successful, each party shall bear their costs of the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Lubullelah for the Advocate/Decree-Holder.

No appearance for the Client/Judgment-Debtor.

