



Idenya v Duchess Park Development Ltd; Homefix Limited (Objector) (Civil Suit 165 of 2016) [2022] KEHC 64 (KLR) (Commercial and Tax) (4 February 2022) (Ruling)

Neutral citation: [2022] KEHC 64 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 165 OF 2016
A MABEYA, J
FEBRUARY 4, 2022**

BETWEEN

PAMELA MANDELA IDENYA PLAINTIFF

AND

DUCHESS PARK DEVELOPMENT LTD DEFENDANT

AND

HOMEFIX LIMITED OBJECTOR

RULING

1. Before Court are two applications. The first one is dated 29/1/2021 and was filed by the objector while the second one is dated 19/4/2021 and was filed by the plaintiff.
2. The first application was brought inter alia under Order 22 rule 51 & 52 and Order 50 of the Civil Procedure Rules. In the application the objector sought an order to lift the warrants of attachment and proclamation against its vehicle namely KKHMA 868K (hereinafter 'the vehicle') be lifted.
3. The application was premised on the grounds that the objector's vehicle had been proclaimed for attachment; that the defendant company and the objector company are distinct entities therefore the objector should not be made subject to this suit and its assets should not be attached.
4. The plaintiff opposed the application via a replying affidavit sworn on 5/5/2021. She averred that the vehicle was attached at the defendant's and objector's premises. That Daniel Agili Ojjo, who swore the objector's supporting affidavit is a director of both the objector and the defendant.



5. Further, that the defendant had registered its properties under different names to evade attachment and execution. That the objector had not demonstrated any direct, indirect or remote relation with the attached property to justify the objection proceedings herein.
6. The second application was brought inter alia under Order 22 rule 35 of the *Civil Procedure Rules* and Article 159(2) of the *Constitution of Kenya*. In it the plaintiff sought for the lifting of the corporate veil of the defendant and the objector; Mr. Daniel Ojijo Agili, being the shareholder and director of both defendant and the objector to personally attend court to be examined as to whether the defendant has any property or means of satisfying the decree herein and to produce any books of account and documents relating to operations of the defendant between the years 2015 to date.
7. Further, that the said Daniel Ojijo Agili do personally pay the decretal amount due to the plaintiff or be imprisoned in civil jail if the court issues the above orders and he fails to comply with them.
8. The application was premised on the grounds that a consent decree was entered on 18/2/2019 where the Court ordered the defendant to pay the plaintiff a sum of Ksh.7,560,000/-. That an amount of Ksh.4,523,583.53 remains unpaid to date. That warrants for attachment of movable property and sale of property in execution of the decree were issued to Nextgen Auctioneers. However, the auctioneers have been unable to trace any assets belonging to the defendant and efforts to execute the decree have not yielded any fruit.
9. It was further contended that the said Daniel Ojijo Agili is a director and shareholder of both the defendant and objector. And, that the defendant has hidden its property by registering them under other names to evade execution of the decree.
10. It was further contended that the defendant and the objector are using the corporate veil to protect themselves from complying with court orders. That it is important therefore for the said Daniel Ojijo Agili to appear in court in order to be examined as to the operations and means of the defendant to satisfy the outstanding decretal amount.
11. The objector opposed the second application through its grounds of opposition dated 11/5/2021. It was essentially contended that the orders sought are unattainable as the objector company and the defendant company are distinct entities.
12. On its part the defendant opposed the second application vide replying affidavit sworn on 13/5/2021 by its director Daniel Agili Ojijo. He averred that the plaintiff had not provided sufficient reasons why the corporate veil of the defendant should be lifted and why he should be personally summoned to court in order to be examined. That the defendant company undertakes to pay the balance of the decretal amount once the economic environment improves; that the only connection between the objector and defendant company was that he was a shareholder and director in both entities.
13. He further denied the plaintiff's allegation that he has hidden the defendant's properties so as to avoid enforcement of the court decree.
14. The Court has considered the entire record. The first issue for determination is whether the warrants of attachment of the vehicle should be lifted. In its application dated 29/1/2021 the objector claimed that the vehicle belongs to it and produced a logbook marked as 'HFL-2' in its supporting affidavit.
15. A look at the logbook reveals that the proprietor of the property was I & M Bank Limited and the objector. That the vehicle was registered on 27/2/2017.



16. Under Order 22 rule 51(1) of the Civil Procedure Rules, an objector that claims to have a legal or equitable interest in any property attached in execution of a decree may give notice to the court and the decree holder of his objection.
17. While the logbook is prima facie proof of ownership, the Court is not 100% sure whether the ownership has changed hands since the registration in 2017. The objector did not attach the results of a recent search from NTSA in their application nor a sale agreement to show proof of purchase.
18. It would therefore be prudent that a current search verification should have been carried out and produced.
19. The second issue for determination is whether the corporate veil of the defendant and the objector companies should be lifted so as to have the said Mr. Daniel Ojjo Agili, the shareholder and director of both entities personally attend court to be examined as to whether the defendant has any property or means of satisfying the decree herein.
20. Order 22, rule 35 of the Civil Procedure Rules states:
 - 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.”
21. The plaintiff prayed to have Daniel Agili Ojjo, the director of both the defendant and objector, be examined in court on whether the defendant has any property or means of satisfying the decree and to produce the defendant’s books of account.
22. Without delving into the issue of lifting the corporate veil, I find that Order 22, rule 35 quoted above, directly gives the court the power to summon an officer of a corporation to court to be orally examined in order to find out the corporation’s means of satisfying the decree.
23. Daniel Agili Ojjo has himself admitted to being the director of both entities. The plaintiff claimed that the said Mr. Ojjo has fraudulently transferred assets belonging to the defendant to other entities to avoid attachment and execution.
24. The decree has never been fully satisfied despite the fact that it was entered on 18/2/2019. The defendant’s only excuse is that the pandemic has brought an economic downturn on it. A rather flimsy excuse.
25. In the circumstances the Court finds that Mr. Ojjo should be summoned to Court and examined as provided for under Order 22, rule 35.
26. The upshot is that prayer 4 the application dated 29/1/2021 is granted and prayer 3 is denied. However, the plaintiff is ordered not to sell the vehicle until a current search is carried out and the results thereof filed in Court to verify ownership. Parties to bear their own costs.



27. In the application dated 19/4/2021, prayer numbers 5, 6 and 7 are granted while prayer 4 is not granted. Costs are awarded to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

