



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 71 OF 2004**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD.....APPELLANT/OBJECTOR**

**VERSUS**

**OMARI MZEE SEGA.....RESPONDENT/PLAINTIFF**

**AND**

**KENYA CO-OPERATIVE CREMERIES LTD.....DEFENDANT**

**JUDGMENT**

1. Vide Plaintiff dated 6/8/1998, the Respondent filed a suit for negligence against the Defendant herein. An interlocutory Judgment was entered, thereafter formal proof resulted to Judgment issued on the 28/3/2000. Having obtained Judgment, the Respondent proceeded to execute against the Defendant, but upon realizing that the Defendant was no longer in existence, he proceeded to attach the Appellant's property

2. The appellant filed Objection Proceedings to the attachment claim ownership of the attached goods. The Appellant/objector stated that vide Sale Agreement dated 12/4/2001 between the Defendant and Kenya Commercial Bank (being the legal Chargee of properties owned by Defendant company) the subject properties were transferred to the Defendant company. Subsequently, on the 24/6/2003 the Ministry of Co-operative development took over Kenya Co-operative Creameries (2000) Limited then, the Appellant was incorporated and took over the assets and liabilities of Kenya Co-operative Creameries (2000) Limited.

3. The Appellant also stated that they were bona fide purchasers for value without notice of any defect and assumed good title so that the Defendant Company ceased to exist and any claim against it would have to be expressed against the official receiver.

4. The Respondent replied to the Application by stating that the Appellant did not produce any logbook or certificate issued by the Registrar of Motor vehicles to show its rights of ownership and that all the assets and liabilities of the Defendant were transferred to it.

5. After hearing objection proceedings initiated by the Appellant the trial court delivered its ruling dismissing the objection and observed as follows:-

“...there is no company known as KCC Limited under receivership. The objection is only meant to frustrate the Plaintiff and delay execution.”

6. That decision has triggered the current appeal in which the Appellant has raised 8 grounds of appeal challenging the decision of the trial Court.

**SUBMISSIONS**

7. The Court on 30/4/2019 directed that the Appeal be canvassed by way of written Submissions.

**Submission by Appellant**

8. **Mr. Mreka**, Learned Counsel for the Appellant submitted that the registration of the Appellant on the 26/6/2003 made it a complete separate legal person from any other entity and its assets were separate from the assets of any other person. Also, that the Appellant and the Defendant are unrelated and by the time of the impugned Ruling, the Defendant was non-existent since a winding up order had already been

issued on the 25/2/2003 in the case of Nairobi Winding up Cause No.1 of 2002 and gazetted on the 14/3/2003. Therefore, the trial Magistrate made a grave error in holding that Assets and liabilities belonging to the Defendant were transferred to KCC 2000 and finally to the Appellant.

9. Counsel, further submitted that the Respondent's claim ought to have been made through the official receiver. He relied on the case of **James Ndungu Wanderi vs. Joseph Muigai Wanene (2007) Eklr**, where the Court held that where a winding up order has been made, to claim against the debtor, a leave of Court has to be obtained.

#### **Submissions by the Respondent**

10. **Mr. Waweru**, Learned Counsel for the Respondent submitted that the Appellant failed to prove that the goods transferred to it by the Defendant and KCC 2000 belonged to it as it had been stated that KCC limited was taking over assets and liabilities belonging to the Defendant.

11. **Mr. Waweru**, further submitted that the KCC 2000 Limited purchased the Defendant while still in receivership in April 2001 before the winding up order was issued and therefore acquired its assets and liabilities. Therefore, the Appellant purchased a company that had acquired the Defendant's assets and liabilities

#### **ANALYSIS AND DETERMINATION**

12. As this is a first appeal, the Court is required to analyse and re-evaluate all the evidence on record then draw independent conclusions. However, there is a caveat; that I neither saw nor heard the witnesses and as such, nuances as to demeanor are best observed by the trial court ( See **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, and **Williamson Diamonds Ltd v Brown [1970] EA 1**.)

13. I have considered the grounds of appeal, the pleadings and evidence in the lower court, the submissions by learned Counsel for both parties together with the cited case and statute law. From the record of Appeal and submissions by parties, the single issue for determination is:-

***Who between the objector/Appellant and Respondent have equitable or legal interest on the attached goods?***

14. Objection proceedings are governed by **Order 22 Rule 51** of the Civil procedure Rules which provides;

**51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.**

**(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.**

**(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.**

15. The Appellant had the burden of proving its claim that it was entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree. What evidence was tendered by the Appellant/Objector before the trial court?

16. The Appellant/objector stated that pursuant to the issuance and gazette of the winding order of the Defendant on the 14/3/2004, the Defendant ceased to exist and any adverse claims against it would have been expressed through the official receiver. The Appellant produced both the winding up order and the Gazette Notice as evidence.

17. The Appellant went further to state that it is a separate and distinct legal entity from the Defendant. Therefore, it is not liable to debts incurred by the Defendant.

18. On the part of the Respondent, he insisted that nothing really changed as the government owned the Defendant and still owns the Appellant for the benefit of a farmer. That may or may not be so, but in my view, the fact in law remains that the Defendant and the Applicant are distinct and separate legal entities. This principle of law was considered in the case of **OMONDI VS NATIONAL BANK OF KENYA LTD & OTHERS [2001] IEA**, where the Court stated:

**“As regards whether the Plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the Defendants' advocates that they do not. It is a basic principle of Company law that the Company has a distinct and separate personality from its Shareholders and Directors even where the Directors happen to be the sole Shareholders (see Solomon and co. Ltd [1897] AC. The property of the Company is distinct from that of its Shareholders and the Shareholders have no proprietary rights to the Company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the Company has capacity to take action to enforce its legal rights.”**

19. It is trite law that a company is, in law, a separate legal entity distinct from its members. The judicial precedents cited since the decision in the case of **Salmon and Salmon and Co. Ltd (1897) A.C. 22 HL**, courts have upheld the doctrine of the corporate veil and limited liability of a company. However, courts have in certain instances pierced the corporate veil to see what is happening behind it and, if there is

evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the directors or shareholders of the company.<sup>20</sup> In this case, the trial Magistrate pierced the corporate veil of the Appellant without being formally moved by the Respondent. The decision of the trial Magistrate was thus clearly erroneous in so far as it failed to hold sacrosanct the separate and distinct entity between the objector/Appellant and the judgment debtor.

<sup>20</sup> The upshot is that, I find that the Applicant/Doctor I do order the decision of the trial court set aside and in its place. However, I substitute an order allowing the Appellant objection with costs. I also award the costs of this Appeal to the Appellant to be paid by the Respondent as the person who opposed the objection proceedings at trial and the appeal here.

**Dated, signed and delivered this 14th day of May, 2020.**

**D.O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes