



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 66 OF 2017

CHAI TRADING CO. LIMITED.....APPELLANT

VERSUS

1. MULI MWANZIA

2. KENYA TEA DEVELOPMENT AGENCY LIMITED

3. MADISON INSURANCE CO. (K) LIMITED.....RESPONDENTS

J U D G M E N T

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

“There is not a dispute that the objector was not a party to the suit and further that the defendant judgment debtor holds the majority shareholding in the objector. Simon Gikanga who swore the affidavits supporting the objector’s position was the one who received the summons to enter appearance in the suit on behalf of the 1st defendant. Moreover, it is evidence that the objector changed its name to Chai Trading Company Ltd after the institution of the suit. Both the defendant and the objector share the same premises. In the circumstances, the objector and the defendant are largely one and the same entity (see the High Court’s observations in a similar case of Malindi Air Serves Ltd vs Prestige Air Services Ltd (2000)eKLR cited upshot is that although the objector has a legal and/or equitable interest in the attached goods, it is one and the same company as the defendant. The plaintiff thus rightly attached the property in question. Consequently, the objection is hereby dismissed with costs to the plaintiff”.

2. That decision has triggered the current appeal in which the appellant has raised 9 grounds of appeal challenging the decision of the trial court.

3. That objection was instituted by a Notice Of Objection and Notice Of Motion both dated 30/12/2015 and filed simultaneously in which the appellant prayed in the main for an order:-

“THAT a permanent injunction be and is hereby issued restraining both the Plaintiff and Johnstone K. Muli t/a Kithemu Auctioneers (the Auctioneer) either by themselves, their servants, employees and/or assigns from attaching selling by way of public auction or any other way the moveable property listed in the Proclamation issued to the Objectors on 22nd December 2015 by the said Auctioneer pursuant to a warrant of attachment of moveable property in execution of a decree for money dated 21st December 2015”.

4. That application was supported by an affidavit sworn by one SIMONA KANGA and was premised on the fact that the goods which had been proclaimed and disclosed in the proclamation dated 21/12/2015 did not belong to the judgment debtor but to the Appellant as objector before the trial court. With the leave of the court the Appellant filed a further Affidavit in which it sought to assert and prove its ownership and title to the goods by exhibiting documents as follows:-

i. Certificate of change of name.

ii. Invoices and delivery notes issued by Spaceman Solutions Ltd for the supply of computers and accessories.

iii. Invoices and delivery notes issued by copycat limited for the sale of a photocopier and accessories.

iv. Other invoices and receipts for sale of the other office accessories and equipment.

v. Logbook for an equipment called fork lift registration no. KHMA 902A.

vi. Letter dated 20.9.2011 from UAP Provincial insurance co. ltd to co-op bank ltd, as financiers, showing that the fork lifts Reg. Nos. KHMA 404A and KBN 765V were insured by that insurer.

5. Those same documents had been filed in a bundle of documents dated 30.12.1015 and filed simultaneously with the objection proceeding. One may say that that document was unnecessary had the Objector opted to annex and exhibit those documents to the Affidavit in Support of the application instead of treating the Notice Of Objection and the Notice of Motion as a plaint filed pursuant to Order 4 Rule 1 as read with Order 3 Rule 2 of the Civil Procedure Rules. That would have further obviated the need for the further affidavit as well. This was not however a point of contestation before the trial court and I wish to say no more on it because the parties appear to have taken all material presented in their arguments before the court

6. In opposition to the objection proceedings, the plaintiff/decree- holder filed the Replying Affidavit sworn on the 11/02/2016. The gist of the opposition was to the effect that objection was frivolous vexatious and an outright abuse of the court process being based on falsehood to deny the decree-holder his fruits of litigation. The decree-holder then proceeded to assert that the summons to enter appearance, when served, were received and acknowledged by one Simon Gikanga using the stamp impression of GENERAL MANAGER, CHAI WAREHOUSING LTD, that the objector shared same address with the judgment debtor. It was then contended that the attached goods belonged to the judgment debtor and not the objection who had wholly failed to establish title and ownership to the goods and that the good belonged to the judgment debtor as the holding company of the objector.

7. It is the Replying Affidavit together with the Affidavit in support, the list of documents by the objector as well as the further affidavit that formed the pleadings on the objection proceedings upon which the issues would be drawn for determination by the court.

8. On the basis of such materials the parties did file written submissions by which the application was canvassed and determined by the court. The objections submissions were dated 21/11/2016 while those by the decree-holder/Respondent were dated 15/12/2016.

9. By its said submissions the objector raised the point that the attached goods did not belong to the judgment-debtor which was separate and distinct from the objector and additionally that the objector used the same for their day-to-day business and that the objector was a stranger to the proceedings giving rise to the decree and therefore the execution process. The evidence elicited from the cross-examination of the deponent of objector affidavit was submitted to have shown that the objector and the judgment debtor were separate and distinct from each other.

10. On whether or not the objection was entitled to the relief sought the decision in Patrick *King'ori Waruguongo vs James Nderitu & Anotehr [2014] eKLR* was cited for the proposition of law that it was the objector duty is to establish ownership and that merely that the goods were found in the premises of the judgment debtor did not negate evidence of title if sufficiently availed. It is of note that even though the fact that the attached goods were said to have tools of trade to the objector and thus immune from attachment, no submissions were offered in that regard. On the submissions offered the objector urged that the objection proceedings be allowed with costs at 14%.

11. An additional submission was made to the effect that having been served with a notice of objection the decree-holder never filed nor served a Notice Of Intention To Proceed and the court was thus invited to deem the decree-holder not to have challenged the objection proceedings. The decision in *Registered Trustee of Kenya Episcopal Conference vs Preps International Limited [2009] eKLR* was cited for the proposition of law that in the absence of a notice of intention to proceed, the court should lift the attachment.

12. For the judgment-creditor, submissions were offered to the effect that the evidence elicited at cross examination of the deponent of the objector's affidavits revealed that the objector not only changed names during the pendency of the suit but also that the 1st judgment debtor became the single most shareholder of the objector with a total of Kshs.15,249,999/= out of Kshs.15,249,999 shares, that the address of the 1st judgment-debtor share the same address as the objector and lastly that the person who received summons using the stamp of Chai Warehousing Limited was the same person swearing Affidavits on behalf of the objector. It was also submitted that Annexure SG 1 showed that the objector is wholly owned by Kenya Tea Development Agency Ltd a fact confirmed by the local purchase orders.

13. The decision in *Malindi Air Services Ltd vs Prestige Air Services Ltd [2000]* was then cited for the proposition of the law that a change of name by a judgment-debtor should not hoodwink the court as to the true owner of the attached goods.

14. Additional submissions were offered that the fact that the objection was wholly owned by the Kenya Tea Development Agency Ltd was enough for the court to allow the attachment to proceed and that it was the duty of the objector to prove that the property did not belong to the judgment debtor.

15. On proof of proprietary legal interests it was submitted that save for the forklift Registration No. KHMA 902A there was no proof of ownership of the other fork lift KHMA 404A contrary to the provisions of Section 6(5) of the Traffic Act as read with Section 5(1) of Hire Purchase Act as well as Section 19(1) of the stamp duty Act. The contention is that the hire purchase agreement had not been registered and no stamp duty had been paid. It was thus contended that ownership had not been proved as the documents were not admissible in evidence.

16. Lastly, it was urged and submitted that the court finds that motor vehicle KHMA 404A and KBN 765U were liable to attachment because no document was found to have been exhibited to prove ownership. The decision in *Fidelity Commercial Bank Ltd vs Agri Tools Limited [2004] eKLR* was cited for the proposition of law that a chattel subject of an unregistered hire purchase agreement is subject to attachment. On these points the decree-holder/Respondent prayed that the objector be dismissed with costs. It is those submissions which the trial court considered and rendered its decision herebefore quoted.

17. In this appeal the Appellant has raised some 9 grounds of appeal which essential fault the trial court for finding that the Appellant, as objector, had not discharged its onus of proof; that there was error on the court in finding that the objector and the judgment-debtor were one and the same person when indeed the two companies are separate entities and lastly that the trial court failed to consider the decisions cited to him and the submissions offered.

18. I have given due consideration to the record of appeal filed as well as the submissions offered in this appeal as highlighted by counsel. Being appreciative of the fact that in objection proceedings the task of the court is to determine who between the objector and the judgment-debtor have equitable or legal interest on the attached goods, I will narrow down the issue for determination to that issue essentially then consider the incidental issues as to whether a holding company and its subsidiary are one and the same entity and the other issue of what orders should have been made on costs.

19. However, before I proceed thus, I need to comment on the manner the objection was presented and argued. It is apparent from the prayers sought that the objector was content to seek a permanent injunction in the objection proceedings. However when parties argued their cases it would appear that the parties left it to court to decide, on the material presented, who was the owner of the attached goods.

20. In my view, an objector seeking to raise an attachment should essentially seek a declaration as to the ownership of the goods even if one was to be intent on getting a permanent injunction. I say one must seek a declaration as to title because the words of Order 22 Rule 51 demand so. The provision says one must claim to be entitled to or to have a legal or equitable interest in the attached goods. It might be necessary to reproduce that provision here:-

Objection to attachment [Order 22, rule 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.

21. The second reason, I think an injunction by itself may not suffice is that to this court an injunction would only follow to protect an established and declared equitable or legal interest or title and must thus be premised on such interest being proved. The neater and tidy prayer to make in an objection application is that the *'whole or part of the attached property belong to the objector and not the judgment-debtor'*.

22. The third issue I need to commend upon is the other requirement that the court takes an action to bring to the attention of the decree-holder the fact of the objection and requiring him to take a stand by conceding of resisting the objection. While waiting for the intimation by the decree-holder, and I believe to sustain the object and substratum of the objection proceedings, the court is clothed with discretion and jurisdiction to order stay of execution for a period not exceeding 14 days. The duty of the court to call upon the judgment creditor to intimate his options is couched in mandatory terms and, in my view, is intended for case management goals so that no much judicial time is expended where the decree holder concedes to the objection. That action by the court is equally important as the time keeper for the calculation of the 7 days period within which the judgment-creditor must resist the objection or else the attachment is raised by the court. In this matter, it is not clear if the court ever complied with Order 22 Rule 52 and if the decree-holder ever made any intimation to so proceed.

23. To this court, this should have informed the basis of an inquiry by the court before delving into hearing the application because if there was no intimation then there was no foundation to consider the Replying Affidavit. The Replying Affidavit according to the Rules should essentially be premised on the intimation. Those requirements of the Rules ought not to be seen as mere technicalities. They are not because they go towards furthering the need to use the courts time efficiently.

24. Had the court insisted on compliance with Rule 52 by the decree-holder it would have separated the property the decree holder concedes were exempt from attachment as shown at paragraph 2 page 3 of the written submissions. The trial court is reminded that the requirement for intimation by the decree-holder is obligatory and should never be overlooked.

25. now on the merits and substance of the appeal. Both sides have laid premium on the evidence elicited during the cross examination of the deponent to the objectors Affidavits taking rival positions as to what that witness said. It would thus be necessary to reproduce what the record at trial bear out. I have appreciated the concerns by Ms waihenya Advocate that the proceeding as typed did not reveal that which took place during cross examination and thus taken trouble to compare the handwritten notes with the certified proceedings. I have failed to note any inconsistency at all. The cross examination went as follows:-

“SIMON GITIBA GIKANGA Male Adult Sworn States In English in

Cross Examination by Mr. Mutubia

I swore an affidavit in support of our application dated 30th December 2015. Am the General Manager of the Objector herein I also filed a further affidavit dated 16th February 2016.

I know Richard Mukuva. He is our employee as Warehouse Assistant. I don't know if he testified herein. Exhibit marked “SG2” annexed to my supporting affidavit reads “K.T.D.A MANAGEMENT SERVICES LTD” our company offices are in KTDA LTD MIRITINI COMPLEX, Mombasa our company was initially called K.T.D.A. Mombasa LTD. The name changed to Chai Tea Trading Ltd. KTDA LTD represents tea farmers. This company holds the majority shares in Chai Trading Company”.

26. Court record must be presumed authentic and I have no reason to doubt the one before me. From those proceeding, the witness said very little to add or subtract from his depositions in the two Affidavits save that KTDA ltd holds majority shares in the objector. That is the evidence that seems to have carried the day in the decision by the trial court. As said before the task of the court was to determine whose goods were the subject of the objection. The standard of proof remained on a balance of probabilities. That balance to this court, being a first appellate court, having reviewed the evidence, was sufficiently discharged and the trial court was so satisfied when it said:-

“The upshot is that although the objector has a legal and/or equitable interest in the attached goods, it is one and the same company as the defendant”

27. What the trial court did was to pierce the corporate veil of the objector apparently being guided by the High court decision cited being **Malindi Air Services Vs Prestige Air Services Ltd(2000)eKLR** . A reading of that persuasive decision show that the judge found as a fact that that a director of the judgment debtor one Tarjinder Singh Kalsi had acted fraudulently and in bad faith in in manouvres to defeat an attachment. I find no relevance of that decision to that fact of this case at all. Additionally even the fact of change of name was not shown to have been intended to defeat the interests of the decree-holder. I cannot infer that intention because the change was not from the name of the judgment debtor to that of the objector. Rather, the change was from **KTDA Mombasa Limited** which is different from **Kenya Tea Development Agency Limited**. I may only add that some material ought to have been availed to show mala fides but none was ever availed.

28. The last question to consider is whether a majority or a holding company is one and the same as the company in which the shares are held. I entertain no hesitation to uphold the age old principle of company law that a company is separate and distinct from its directors, shareholders and promoters. In **Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor.(2014) eKLR**. **Gikonyo J**, while appreciating the importance, relevance and rationale of that principle said:-

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. ”

29. The principle holds even where a company is wholly owned by a holding company. It would not therefore matter and the trial court ought not to have been swayed by the fact that the objector was related to the judgment debtor by shareholding or sharing of office and other facilities. The court of appeal while settling this issue in **Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited [2016] eKLR** said:-

“In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned judge. The authority that she cited, RE: SOUTHARD LIMITED [1979] 3 ALL ER 565 is quite apt:

“ ... a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.” (Emphasis added)

30. The decision of the trial court was thus clearly erroneous in so far as it failed to hold sacrosanct the separate and distinct entity between the objector and the judgment debtor.

31. The upshot is that I do order the decision of the trial court set aside and in its place I substitute an order allowing the appellants objection with costs. I also award the costs of this appeal to the Appellant to be paid by the 1st Respondent as the person who opposed the objection proceedings at trial and the appeal here.

Dated, signed and delivered this 12th day of March 2019.

P J O OTIENO

JUDGE