



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 285 OF 2009

PAUL STUART IMISON.....DECREE HOLDER

-VERSUS-

JODAD INVESTMENTS LTD.....JUDGMENT DEBTOR

RULING

1. Paul Stuart Imison (Paul) obtained Judgment in this case against Jodad Investments Limited (Jodad) on 9th June 2017 for Kshs. 9,939,302.59 with interest at 14%, if that amount was not paid within 28 days of that Judgment. That Judgment was not paid and Paul's subsequent attempt to execute by attachment and sale of moveable goods of Jodad did not yield any money in settlement of the decretal amount.
2. Before me for determination in this ruling is the Notice of Motion dated 20th December 2017. It is filed by Paul. The two prayers in that application are:
 - a) *That a Prohibitory Order be issued on all that piece of land situated in the city of Nairobi, the Nairobi Area containing by measurement one decimal one seven six (1.176) hectares or thereabout and being Land Reference Number 1169/576 (original Number 1160/560/2 as delineated on Land Survey plan 177782 against the Defendant and or Judgment Debtor, or his agent, assignee or any other person whatsoever from transferring or charging the aforesaid property in any way or against any other person from taking any benefit from such purported transfer or charge.*
 - b) *That in execution of the decree issued herein by this honourable Court dated 3rd November 2017, the aforesaid property be sold and proceeds be paid to the decree holder herein.*
3. The application is based on Order 22 Rule 48 (2) of the Civil Procedure Rules (the Rules).
4. To support that application Paul deponed in his affidavit, dated 20th December 2017, that Jodad was indebted to him and that the subject property was registered in Jodad's name. He annexed to his affidavit a Certificate of Title showing that ownership.
5. In a Replying Affidavit, Sworn by Calvin Cottar (Calvin), one of the Directors of Jodad the debt of Jodad to Paul was not denied but it was further deponed that the subject property was sold and transferred on 15th December 2014 to an entity called Tekeleza Limited. Calvin annexed a copy of the Certificate of Title showing the up-to-date ownership of the subject title.
6. Paul by his Further Affidavit, dated 11th June 2018, deponed that since the value of the subject property is around Kshs. 50 million Jodad should have been in a position to settle its indebtedness to him. Further that Calvin and his wife Louise Cottar are currently residing on the subject property and operating thereof their business Nineteen Twenties Safari Camps Limited.
7. Paul, further by his said affidavit made reference to the Directorship/shareholding of Tekeleza Limited which revealed that Calvin was a Director and Shareholder of one (1) ordinary share while his wife Louise Cottar was a Director. Paul also deponed that Calvin, his wife Louise and Calvin's sister Tana Cottar were Shareholders with 4,000 each shares in Jodad, the Judgment Debtor Company.
8. The search carried out by Paul over Tekeleza Limited revealed that the majority Shareholder of that Company, with nine (9) ordinary shares was a Company known as Ziegler Management SA based in British Virgin Islands. Paul deponed that when the subject property was sold to Tekeleza Ltd, on 15th December 2014, Ziegler Management SA had not obtained the right of excluding its acquisition of the entire issued share capital of Tekeleza Ltd from the competition Commission of Kenya.

ANALYSIS AND DETERMINATION

9. As stated herein before, Paul obtained Judgment against Jodad. It is that Judgment Paul seeks to recover by his present application. Although that is sought by the application before me Paul by his subsequent affidavits and by his written submissions seeks an Order for this Court to lift the corporate veil. But which corporate veil does he seek lifting is not clear. This because the Judgment he seeks to execute is against Jodad. The property which he seeks to have a prohibitory Order issued over and subsequently seek an Order for its sale is now registered in the name of Tekeleza Ltd. So which veil does Paul wish to have lifted. If the veil he seeks to have lifted is that of Jodad where will that take him. Does he then wish to execute the decree against the Directors/Shareholders of Jodad? If that is what Paul seeks then I would respond by saying that those are not the prayers before me?

10. If what is sought is the lifting of the veil of Tekeleza Ltd such an Order would be contrary to Constitutional provision of Article 50. Article 50 (1) of the Constitution requires that all be afforded a fair hearing, amongst others. Tekeleza Ltd. is not a party to this case. It has not been heard.

11. Paul has extensively attempted to show that the Directors of Jodad are also some of the Directors of Tekeleza Ltd. That may or may not be so but the fact in law remains that Jodad and Tekeleza Ltd are distinct and separate legal entities. This principle of law was considered in the case **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.”

12. The Court of Appeal pronounced itself to this principle and I recently had the opportunity to refer to that pronouncement in unreported case namely, **IN THE HIGH COURT OF KENYA NAIROBI MILIMANI COMMERCIAL & TAX DIVISION INSOLVENCY PETITION NO. 25 OF 2018 IN THE MATTER OF UCHUMI SUPERMARKET LTD** as follows:

“Court of Appeal in the case Hannah Maina T/A Taa Flower vs Rift Valley Bottlers Limited [2016] eKLR had to decide an appeal on similar fact, to those before me. In that case Hannah Maina, the Appellant, supplied flowers to Riva Flora Limited, a Company which was subsidiary of Rift Valley Bottlers Limited, the respondent in the appeal. Riva flora Limited was declared insolvent. Hannah maina sought to enforce the debt of Riva Flora Limited against the respondent. The Court of Appeal held as follows:

“As regards the issue of privity of contract, it is true the appellant had contracted with Riva and not the respondent. 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 ER564 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.”

13. It therefore matters not that Jodad transferred the property to Tekeleza Ltd nor does it matter that the Directors and or Shareholders of both companies are common. Over and above that, it is not a light thing to do, to lift the corporate veil, as Paul attempt to do herein. The veil cannot be lifted merely because a Company has similar Directors and or Shareholders.

14. Further Paul approached this Court, by his application, seeking that the Court do issue a prohibitory Order over the subject property. Order 22 Rule 48 of the Rules provides:

“Where the property to be attached is immovable, the attachment shall be made by an Order prohibiting the Judgment-Debtor from transferring or charging the property in any way, and all persons from taking any benefits from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory Order or inhibition against the title to the property.”

15. A prohibitory Order under the above Rule cannot issue when the subject property, as in this case, is not registered in the Judgment Debtor’s name. So even on that ground, the application fails.

16. There being no reason advanced why costs should not follow the event I will award the costs to the Judgment Debtor.

17. In conclusion I grant the following Orders:

a) The Notice of Motion dated 20th December 2017 is hereby dismissed.

b) The costs of that Notice of Motion are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE DECREE HOLDER

..... FOR JUDGMENT DEBTOR