



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 56 OF 2012**

FREIGHT FORWARDERS KENYA LIMITED.....PLAINTIFF

-versus-

ELSEK & ELSEK (K) LIMITED..... DEFENDANT

ELSEK & ELSEK CONSTRUCTION LIMITED.....OBJECTOR

**RULING**

**Introduction/ Background**

1. The Plaintiff filed this suit on 6th March 2012 seeking judgment against the Defendant for: Kshs. 4,312,867.40; US\$ 44,499.85; disbursement charges plus VAT on the stated outstanding amounts at the rate of 3% cumulative for every period of 45 days from 24th January 2012 to the date of payment; and costs of the suit.
2. The Defendant despite being served did not enter appearance. On 23rd March 2012, the Plaintiff requested for judgment against the Defendant in default of appearance which judgment was entered by this court's Deputy Registrar on 28th March 2012.
3. On 20th April 2012, the Defendant filed a Notice of Motion application in which it requested to be allowed liquidate the decretal amount by way of monthly installments of Kshs. 600,000/= until payment in full. The Application was heard by Mwongo, J. who by a ruling delivered on 21st December 2012, ordered that the Defendant to settle the decretal amount of Kshs. 8,665,944/= within a period of 12 months in four equal consecutive installments.
4. The Defendant defaulted to pay the decretal amount as ordered by the court and the Plaintiff proceeded to extract Warrants of Attachment and Sale on 29th January 2013. That prompted the Defendant to move to court by a Notice of Motion dated 5th February 2013 in which it sought stay of execution and the setting aside of the said Warrants of Attachment and Sale. The basis upon which the Defendant sought stay was that as at the date the court delivered the ruling of 21st December 2012, the Defendant had paid to the Plaintiff a total of Kshs. 3,500,000/= which the Plaintiff had failed to factor in before extracting the Warrants of Attachment and Sale. The said application was heard, again by Mwongo, J. who in a ruling read on his behalf by Muriithi, J. on 25th September 2014 found that even if the Plaintiff had paid Kshs. 3,500,000/=, one year had since elapsed and the Defendant should have, within that one year, made good the balance of Kshs. 5,155,944.16. The court ordered the Defendant to pay the outstanding amount of Kshs. 5,155,944.16 within 21 days of that ruling.
5. The Defendant only made part payments of the said outstanding amount but did not pay the whole balance as ordered by the court. On 13th November 2014, the Plaintiff made an Application for Execution of the decree indicating that the amount due to the Plaintiff from the Defendant including costs and interest stood at Kshs. 7,140,871.17. According to the Schedule attached to that Application for Execution, in addition to the said Kshs. 3,500,000/= earlier paid, the Plaintiff

- had made additional payments of Kshs. 1,600,000/- as follows: Kshs. 600,000/= paid on 8th April 2013; Kshs. 400,000/= paid on 13th May 2013; and Kshs. 600,000/= paid on 25th July 2013.
6. Warrant of Attachment of Property and Warrant of Sale of Property were issued to Kinyua & Co. Auctioneers on 13th November 2014. The said Auctioneer then served the Defendant with a Proclamation of Attachment of Movable Property dated 25th November 2014 (“the Proclamation”) in which the Auctioneer attached the following items: assorted machinery, four office desks; ten chairs, two air conditioners; and three bookshelves.
  7. Before the proclaimed items could be removed to the Auctioneer's premises for sale, Elsek & Elsek Construction Limited, (“the Objector”) filed a Notice of Motion dated 15th January 2015 in which it prays that the court do make a finding that the attached movable properties are not available for attachment in execution of the decree passed in this suit and that the court be pleased to lift the attachment levied on the attached movable properties. It is that application that is up for consideration.

### **The Objector's Case and Submissions**

8. The application is premised on the following grounds:
  - i. That the listed movable properties so attached by Kinyua & Co. Auctioneers are the properties of ELSEK & ELSEK CONSTRUCTION LIMITED the Objector herein which has equitable and/or legal interest over the same properties.
  - ii. That the Objector will suffer immense prejudice and great financial loss if the attachment herein is not raised by this Honourable Court.
  - iii. That the properties herein belong to the Objector.
  - iv. That the Objector having not been a party to this suit and there being no judgment against the Objector, the Objector cannot be called upon to make good of the judgment in court.
  - v. That it is only fair, just and in the interest of justice that this Honourable Court grants the orders sought herein.
9. The Objector's case is that the items proclaimed by the Auctioneer belong to it and not to the Defendant/Judgment Debtor. The Objector produced in evidence a copy of a lease agreement entered into by the Objector and Ravjibhai & Company Limited on 23rd August 2010 to demonstrate that it is the tenant in the premises where the subject items were proclaimed and therefore the items belong to it.

### **The Plaintiff's Response and Submissions**

10. The Plaintiff opposed the application through a Replying Affidavit sworn by RAJESH JAYSUKHLAL CHUDGAR on 2nd February 2015 and a Further Affidavit sworn by the same deponent on 9th February 2015.
11. The Plaintiff's case is that the Defendant and the Objector are part of the same group of companies which proclaim themselves as Elsek Elsek Group of Companies that also includes other businesses. The Plaintiff produced copies of print-outs from various web pages of Elsek Elsek Group of Companies to prove the same.
12. The Plaintiff also produced in evidence a letter dated 5th February 2015 from Assistant Registrar of Companies showing that the shareholders of the Defendant are Osman Erding Elsek and Deniz Elsek both of whom hold 5,000 shares each. The Plaintiff further produced another letter dated 3rd February 2015 also from the Assistant Registrar of Companies showing that the shareholders of the Objector are Osman Erding Elsek who holds 8,000 shares and Deniz Elsek who holds 2,000 shares. The Plaintiff therefore contended that the principal shareholders and directors of the Defendant and the Objector are the same. The Plaintiff further contended that the two companies operate from the same head office and share the same factory premises. That although the premises in which the factory is housed are leased out to the Objector, the said premises are used to manufacture and supply products marketed by all members of Elsek Elsek Group of Companies, including the Objector.
13. According to the Plaintiff, the operation and affairs of the Defendant and the Objector are

deliberately structured in order to use statute and the legal concept of distinct corporate personality to avoid, defraud and frustrate creditors of the companies.

### **The Objector's Rejoinder**

14. In rejoinder, the Objector stated that although the principal shareholders and directors of the Defendant and the Objector are the same, the two companies are registered as separate entities. The Objector produced copies of the respective certificates of incorporation of the Objector and the Plaintiff to show that the two companies are separate legal entities.
15. The Objector submitted that the Plaintiff and the Objector do not operate in the same premises. The Objector produced copies of two documents to prove the same. The first document is a copy of what the Objector calls a lease agreement for the Defendant's separate premises. The said document is however not a lease agreement. It is a licence given to the Plaintiff by Mombasa Trade Center Limited to use car parking space Bay 331 at Mombasa Trade Center, Parking Tower. The other document produced by the Objector is a letter dated 26th March 2012 in which Real Estates Limited invited Elsek N. Elsek Marketing Limited to enter into a lease of a property on Plot No. 1207/Sec I/MN. That letter, however had nothing to do with either the Plaintiff or the Objector and therefore does not support the Objector's claim that the Defendant is operating at separate premises from the Objector.
16. The Objector stated that Elsek Group is not not a company by itself rather it is a group made up of several independent companies operating in different offices. The Objector however did not denounce the print-outs produced by the Plaintiff showing that the Objector and the Plaintiff operate from the same factory.

### **The Issues for Determination**

17. The main issue for the court's determination is whether the Objector has discharged the burden of proving that it is entitled to or has legal or equitable interest in the items listed by the Auctioneer in the Proclamation dated 25th November 2015.

### **Analysis and Determination**

18. Order 22 rule 51(1) of the Civil Procedure Rules 2010 provide that:

***“Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 parties to the decree-holder, of his objection to the attachment of such property.”***

19. In the case of **ARUN C. SHARMA V ASHANA RAIKUNDALIA T/A A. RAIKUNDALIA & CO. ADVOCATES & 4 OTHERS [2014] eKLR**, Gikonyo J. discussed the above Rule and stated that:

***“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”***

20. Has the Objector proved that it is *entitled to or has a legal or equitable interest in the whole or part of any property attached in execution of the decree? In order to answer that question, I will start by making refernce to the decision of Nambuye, J. (as she then was) in the case of **MICHAEL KWENA v RAZA PROPERTIES LIMITED & ANOTHER [2008] eKLR** where the learned Judge quoted extensively from another case decided by Ringera, J. (as he then was) as follows:*

**“There is also the case of *KENYA OIL COMPANY LTD. VERSUS FUAD MAHMOUD MOHAMED AND FUEL MOGULLS’ SERVICES LTD. AND ABDUL REHMAN ABDALLA SALEEM AND MARIVAN RASHID AND MARIAM FUAD MAHMOUD* as 1st, 2nd and 3rd objectors. It was decided by Ringera J. on 16th day of December 2003. The reasons for objection start at page 2 line 3 from the bottom. The first objector claimed that he was a tenant and some of the goods proclaimed on 31.10.2003 by the court broker namely the generator, the supermarket, stock, desks, chairs, disco systems and all kitchen utensils belong to him as a tenant.**

**In support of the claim the 1st objector annexed an undated lease agreement executed on 15.10.2002 whereby he took tenancy of the business comprising a restaurant and discotheque situated on plot Kwale/TIWI/2394 for a term of 5 years and 1 month with effect from 1.10.2002...**

**At page 7 of the ruling line 7 from the top, the learned Judge, as he then was reiterated that the burden of proof is on the objector to establish a legal or equitable interest in the property subject to the execution on a balance of probability.**

**After due consideration the learned Judge went on to make the following findings in respect of each objection:-**

**(1) The fact that the first objector is a tenant of the restaurant and discotheque does not in any way establish that the goods attached there from belong to him. More over the goods are not mentioned in the lease agreement as belonging to the tenant. Neither had the tenant produced any document to prove that they belong to him.”(emphasis mine)**

21. *It is therefore clear that the burden of proof is on the Objector to establish, on a balance of probability, a legal or equitable interest in the property subject to the execution. I do not think that the Objector herein discharged that burden. The Objector produced a lease agreement for land known as Land Reference Number 580 (Original Number 535/5) of Section V Mainland North. First, the lease does not show that it relates to the factory where the items proclaimed by the Auctioneer were. Secondly, the goods in issue are not mentioned in the lease agreement as belonging to the Objector. Thirdly, as was rightly pointed out by Ringera, J. in the case of **KENYA OIL COMPANY LTD (supra)**, the fact that the Objector is a tenant in the premises where the items were proclaimed does not in any way establish that the items attached therefrom belong to it.*
22. *The proclaimed items consisted of machinery, air conditioners and furniture. Companies are known to maintain proper documentation and records. This is especially because companies are subject to certain procedures such as auditing, filing of annual returns and preparation of balance sheet and profit and loss account. These procedures require a company to keep its records and documents such as receipts and inventory of assets in a safe and accountable way as to be available when required. While it is excusable that a company may not have receipts or records of its furniture especially if the furniture were acquired in the distant past, I find it unrealistic and nearly unacceptable that the Objector did not produce a single receipt to demonstrate ownership of the proclaimed machinery. The Objector did not even produce an inventory to show that the proclaimed items are part of its assets.*
23. *The Objector denied that it operates from the same premises with the Defendant. However, the Objector did not convince me on that score. As already observed before in this Ruling, the document attached to the Objector's affidavit is not a lease agreement but a license to use a car park space at Mombasa Trade Center, Parking Tower. It cannot be true that the Defendant was running its affairs in the car park. That document therefore fails to demonstrate that the Defendant was carrying on business at premises separate from the Objector.*
24. *The other document produced by the Objector to demonstrate that the two companies were operating at separate places is a copy of the letter dated 26th March 2012 which belongs to a different company known as Elsek N. Elsek Marketing Limited. That letter was an invitation to the*

said company to lease Property on Plot No. 1207/Sec I/MN. It has no relationship whatsoever with the Defendant and does not show that the Defendant was doing business at premises separate from the Objector. In my view, the fact that the Objector was able to produce that document only serves to prove the Plaintiff's allegation that the Objector and the Defendant are operating as part of a group known as Elsek Elsek Group of Companies. How else did the Objector obtain that document unless Elsek N. Elsek Marketing Limited, like the Defendant and the Objector, operate under one group?

25. The Objector strenuously submitted that it is a separate legal entity from the Defendant and it cannot make good the Defendant's debts even if the directors and shareholders of the two companies are the same. I am aware of the concept of separate legal entity of companies as enunciated in the case of **SALMON v SALMON (1897) A.C. 22 (H.L.)**. However, precedence shows that courts frown upon parties who deliberately and mischievously use the said concept and statute to run away from responsibility. In the case of **MIEMA ENTERPRISES LTD v NJOKA TANNERS LTD [2007] eKLR**, Warsame J. (as he then was) held that:

***“Having heard the submissions of both Advocates and having read the various material presented, I am satisfied that the objection has no legal basis. I hold that there is no evidence to show that the 2nd Objector owns the machinery that were attached by the Plaintiff. I am satisfied beyond doubt that the goods attached are the property of the Defendant disguised in a manner to defeat the claim of the Plaintiff. It is my decision that the objection is based on distortion, deceit and deception with view to obstruct the cause of justice. This court has the eyes, mind and ears to see through that deceit and deception...”***

***It is my firm decision that the 2nd Objector is using the Company's Act as an Instrument to commit fraud and more so to run away from its obligation towards creditors. I think it is right to say that the Directors of the Defendant Company and the 2nd Objector are one and the same. They are using the legal protection given to them under the statute to defraud creditors by engaging in multiple companies. In the premises the objection of the 2nd objector is dismissed with costs.”***

26. While adopting the holding in **MIEMA ENTERPRISES LTD** above, Koome, J. (as she then was) in the case of **CHART ENGINEERING ENTERPRISES LTD v ATTRACTING SUPPLIES LTD [2009] eKLR**, was even more profound when she stated that:

***“Going by the evidence before this court, beginning with the affidavit in support of the objection, which is blatantly sworn by the Director of both the defendant and the objector, the correspondence between the judgment creditor and the defendant, which is also written by Geoffrey Githuka, and the records from the Registrar of Companies that show Geoffrey Githuka is a director of both the defendant and the objector, all this lends credence to the submission that this application is meant to use the statute to defraud creditors. Mr. Geoffrey Githuka has used the objector where he is also a director to cause confusion, run away from responsibility of paying the creditors using the Companies Act as an instrument to commit fraud.***

***This court is well aware of the ancient rule founded in the case of Salmon vs. Salmon that a company is a separate entity from its directors. In this case I find Geoffrey Githuka who is a majority shareholder of the objector and being the director of the defendant with his wife, is deliberately and mischievously using the statute to run away from responsibility. I wholly agree with the decision of my brother Warsame J. in the ruling delivered in Milimani Misc. civil Application No.552 of 2005 Mema Enterprises Limited Versus Njoka Tanners Limited and Evangeline Wanjira Njoka and Another.”***

27. I started by giving a crisp history of this matter. The history shows that the Defendant did not

*object to the Plaintiff's claim. The Defendant made proposal and applied to court to liquidate the claim by installments. However, the Defendant appears not to have been serious with the court when it made such request as it was simply buying time but soon disappeared from the scene immediately the court ordered it to pay the outstanding amount of Kshs. 5,155,944.16 within 21 days of that order. I am convinced that the Defendant has now resurfaced through the Objector and now wants to hide through the veil of incorporation to defeat the Plaintiff's claim. The directors and shareholders of the two companies are the same people and it is clear to me that although the two companies are separate legal entities, those directors and shareholders made the decision to bring in the Objector to these proceedings so as to obstruct execution.*

28. I entirely agree with the above decisions in **MIEMA ENTERPRISES LTD (supra)** and **CHART ENGINEERING ENTERPRISES LTD (supra)** that the court should not shut its eyes, ears and mind and fail to see through a deceit and mischief aimed at obstructing the cause of justice.

### **CONCLUSION**

29. In the end, the Notice of Motion dated 15th January 2015 is hereby dismissed with costs to the Plaintiff.

Dated and delivered at Mombasa this 9<sup>th</sup> day of July 2015.

**MARY KASANGO**

**JUDGE**

9.7.2015

Before Justice Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

For Objector:

**Court**

Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**