



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 60 OF 2007

BETWEEN

ZINGO INVESTMENT LIMITEDAPELLANT

AND

MIEMA ENTERPRISES LIMITED RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Milimani, Nairobi (Warsame J.)
dated 22nd March*

in

H.C. MISC. APPL. No. 552 OF 2005)

JUDGMENT OF THE COURT

1. Pursuant to the orders made on 3rd March, 2015 before a bench comprising Nambuye, GBM Kariuki and Ouko, JJ.A, the parties were to file written submissions and the judgment date was given as 22nd May, 2015. Two of the judges in the bench have since been posted out of Nairobi and the judgment was not delivered as scheduled. The appeal was listed on 21st September, 2015 before a new bench comprising Visram, Mwilu and Otieno-Odek, JJ.A. and the parties waived their right to oral highlight of the written submissions. Accordingly, the bench comprising Visram, Mwilu and Otieno-Odek, JJ.A has considered the written submissions as filed and hereby proceeds to deliver the judgment.
2. This appeal arises from objection proceedings in the matter of enforcement of a foreign judgment and in the matter of a limited liability company as a separate legal entity.
3. The respondent, *Miema Enterprises Limited*, obtained judgment and decree against *Njoka Tanners Limited* (judgment debtor) in Tanzania at the High Court in Dar-es-Salaam in Case No. 60 of 2000. The judgment was registered in Kenya at Milimani High Court Misc. Application No. 552 of 2005. The respondent decree holder thereafter executed the decree in Kenya against the judgment debtor, Njoka Tanners Limited.
4. In executing the decree, the respondent visited the registered offices of Njoka Tanners Limited

situated on Plot No. 3804/EMBU in Embu Town in the Republic of Kenya. Upon visiting the premises, the respondent did not find Njoka Tanners Limited but found Mr. Njoka in the premises operating a business under the name and style of **Zingo Investments Limited**, the appellant company herein. The respondent traced the physical premises of Zingo Investments Limited to Nairobi along Lunga Lunga Road on LR No. 209/8628 which title is registered in the name of the appellant company.

5. At the Nairobi premises LR No. 209/8628, the respondent found a vehicle registration no. KAL 643, Mitsubishi Pick up and other machines which were previously located at Embu Njoka Tanneries Limited and the machines were being used on the premises. The respondent attached the motor vehicle, machinery and other goods and the appellant lodged objection proceedings at the High Court. The Ruling delivered in the objection proceedings is the subject of this appeal.
6. The directorship and shareholding of Njoka Tanners Limited and the appellant Zingo Investment Limited is as follows: The shareholders of Njoka Tanners Limited are:
 - i. Robert Njoka Muthara – 1,260,000 shares
 - ii. Evangeline Wanjira Njoka – 1,260,000 shares
 - iii. Industrial and Commercial Development Corporation (ICDC) - 1,250,000/=

There was a subsequent change in the directorship of the Njoka Tanners Limited to replace **Evangeline Wanjira Njoka** with **Mohammed Kaitany** representing ICDC.

7. The shareholders and directors of Zingo Investment Limited are **Robert Njoka Muthara**, **Evangeline Wanjira Njoka** and **Fina Bank Limited**. Mr. Robert Njoka Muthara and Ms Evangeline Wanjira Njoka are husband and wife.
8. The trial court (Warsame, J. as he then was) by a Ruling dated 22nd March 2007 dismissed the objection proceedings lodged by the appellant as the 2nd objector. In dismissing the objection proceedings, the learned judge expressed himself as follows:

“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 a view to obstruct the cause of justice....Indeed, the assets of the defendant company is (sic) held by this dummy company called Zingo Investment Limited in order to defeat or derail the liabilities that had accrued to the company. The way Mr. Muthara and his wife are changing and setting up companies is a clear reflection or manifestation of persons engaged in unlawful activities.....There are two vehicles i.e. KAL 644V and KAL 645 V which were proclaimed by the auctioneer. The two objectors have not shown any evidence to show the ownership of the two vehicles. As things stand, there is no valid objection against the proclamation done by the auctioneer.... I hold the attachment of the two vehicles to be valid hence the plaintiff is at liberty to proceed as it deems fit.”

9. The appellant in its Memorandum of Appeal to this Court raises the following grounds of appeal:

“i. The learned judge erred in law and fact in dismissing the objection proceedings when he knew or ought to have known that the evidence tendered proved that the appellant owned the Nairobi premises LR No. 209/8628 situate along Lunga Lunga Road where the attachment and

proclamation of the assets was made.

- ii. *The learned judge erred in law and fact in finding that the shareholding of the appellant was the same as that of the Njoka Tanners Limited and ignored that ICDC was a shareholder in the appellant company.*
- iii. *The learned judge erred in law in holding that Mr. Muthara and his wife were engaging in unlawful activities and was hiding under the guise of incorporation of a new company to commit and perpetuate fraud against the creditors of Njoka Tanners Limited when there was no evidence adduced to prove the assertion.*
- iv. *The learned judge erred in law and in fact by deciding that the appellant was using the Companies Act as an instrument to commit fraud and to run away from its obligations towards creditors when he knew or ought to have known that there was no application to lift the corporate veil of the appellant company and similarly there was no application to lift the corporate veil of Njoka Tanners Limited.*
- v. *The learned judge decided the objection proceedings against the weight of evidence and submission by the appellant.*

10. At the hearing of this appeal, the firm of **Kinyua Muriithi & Co. Advocates** represented the appellants while the firm of **Meenye & Kirima Advocates** represented the respondents. Pursuant to the directions of this Court, the appeal was urged by way of written submissions filed by all parties.

11. The appellant in its written submissions cited the case of **Solomon -v- Solomon (1897) AC 22** emphasizing that Zingo Investment Limited is a separate and distinct legal entity from Njoka Tanners Limited and the trial court erred in law by ignoring the concept that a company is a separate legal entity from its shareholders; that the trial court erred in law in treating Mr. Robert Njoka Muthara and Evangeline Wanjira Njoka as one and the same as the appellant company; the judge further erred in law by treating Mr. Robert Njoka Muthara and Evangeline Wanjira Njoka as one and the same as Njoka Tanners Limited; that had the learned judge followed the decision in **Solomon -v- Solomon (1897) AC 22**, he would have found that Mr. Robert Njoka Muthara and Evangeline Wanjira Njoka were individuals and separate persons from the two companies.

12. In support of the submission that the trial court made a decision against the weight of evidence on record, the appellant submitted that all the goods proclaimed were on its premises Land Reference No. 209/8628 and the trial court ignored this material fact; that the court further erred in ignoring that there was a debenture in favour of FINA BANK Limited over the goods and machinery found on LR No. 209/8628; that the trial court ignored the documents exhibited and tendered by the appellant in the form of import invoices for the equipment, bill of lading and business licenses/permits which demonstrate that the appellant had legal and proprietary interest over the proclaimed goods; that the learned judge erred in law in making findings that there was deceit, distortion and deception and that Mr. Muthara and his wife were engaged in unlawful activities. It was submitted that there was no evidence in support of these statements and findings by the trial court.

13. In opposing the appeal, the respondent in its written submissions stated that the documents tendered by the appellant were mere proforma invoices, bill of lading and customs and excise duty payment slip; that these documents were not proof of ownership; that the bill of lading and customs and excise receipts were in the name of another company, to wit African Leather Limited which is a different entity from the appellant; that no documents in proof of title or ownership were tendered by the appellant to prove its proprietary interest in any of the goods proclaimed and attached; that some of the invoices tendered by the appellant to prove its ownership to the attached goods bear a date for the years 2002 and 2003 which years are prior to the incorporation of the appellant company which was incorporated on 1st September 2003. (See invoices at pages 62 to

66 of the record). It was further submitted that there is no documentary evidence to show that the appellant company ordered for or purchased the goods proclaimed. With regard to the shareholding by ICDC, the respondent submitted that the appellant and Njoka Tanners Limited are the key players in the whole saga and the introduction of ICDC by the judgment debtor (Njoka Tanners Limited) is a continuation of the saga; that after running down the judgment debtor company and closing its factory in Embu and carting away its plant, machinery and equipment to Nairobi, Mr. Muthara and his wife Evangeline registered the appellant as sole shareholders and directors; that Mr. Njoka has a Power of Attorney from his wife to generally act in all their undertakings and this demonstrates that both were acting in cahorts and concert to run away from the respondent creditor.

14. We have taken into account the grounds of appeal, the written submissions by counsel and considered the decision in **Solomon -v- Solomon (1897) AC 22**, and the law. We remind ourselves that this is a first appeal. As a first appellate court, it is our duty to subject the evidence and material tendered before the High Court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this. (See **Selle vs. Associated Motor Boat Company (1968) E.A. 123**).

15. The extent to which a court can pierce a corporate veil is discussed at **Paragraph 90 of Halsbury's Laws of England 4th Edition** (supra) that:

“90. Piercing the corporate veil.

Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. (Emphasis ours).

16. The decision in **Mugenyi & Company Advocates -v- The Attorney General [1999] 2 EA 199** shows that corporate veil may be lifted where the private company is founded on personal relationship between the members.

17. In the instant case, our review of the evidence on record shows that Mr. Robert Muthara Njoka had the power of attorney to generally act for his wife Evangeline Njoka. The record shows that Mr. Robert Muthara Njoka was the *alter ego* of both the appellant and judgment debtor companies; he was the controlling mind of the two companies; he was not only a common shareholder and director but armed with the Power of Attorney from his wife, he was the mind, controlling person and the one responsible for the strategies and running of the commercial undertakings of the two companies including borrowings and settlement or non-settlement of creditors.

18. The evidence on record discloses that Mr. Robert Muthara Njoka was the alter ego of the two companies and consequently the legal position enunciated at **paragraph 90 of Halsbury's Laws of England 4th Edition** is applicable, that in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. Based on this legal proposition, we find that the trial court did not err in piercing the corporate veil of the appellant company and Njoka Tanners Limited and what came to be seen standing high and tall was the hand, mind and the controlling influence of Mr. Robert Muthara Njoka armed with a power of attorney from his wife Evangeline Njoka. He was the alter ego and the controlling mind of the appellant and judgment debtor companies.

19. In the persuasive High Court case of **Akiba Bank Ltd v. Jetha & Sons Ltd (2005) ECLR** it was correctly held that for an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of decree. In **Dubai Bank (K) Ltd v. Come- Cons Africa Ltd and Impak Holdings Co Ltd (2012) eCLR** the High Court correctly expressed itself thus:

“Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings, but simply decide whether or not the objector has interest legal or equitable in the attached property , it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see Chatabhai M. Patel & Another HCCC No. 544 Of 1957 (Lewis) On 8/12/58 Hcu (1958) 743. (Emphasis added).

20. In the instant case, did the appellant objector establish on a balance of probability his proprietary interest on the attached goods? There was no evidence tendered before the trial court by the appellant to prove its ownership or entitlement to the two motor vehicles that were proclaimed and attached. In its written submissions, the appellant has not referred to the two motor vehicles. The trial judge in arriving at his decision in relation to the two vehicles expressed that there are two vehicles i.e. KAL 644V and KAL 645 V which were proclaimed by the auctioneer; that the two objectors had not shown any evidence to show the ownership of the two vehicles. On our part, we are satisfied that the evidence on record does not demonstrate that the appellant objector had any interest, proprietary or otherwise, in relation to the two motor vehicles and we affirm the finding, holding and decision of the trial judge relating to the two vehicles.

21. It is the appellant’s contention that it had established its proprietary interest in the attached goods by submitting copies of proforma invoices, bill of lading as well as customs and excise payment slips. It is also the appellant’s contention that the fact that the proclaimed machinery were found on its premises was proof that it had interest in the proclaimed goods.

22. We have noted that the invoices submitted by the appellant pre-date its incorporation; the bill of lading is in the name of African Leather Limited which is a company different from the appellant objector. It is our considered view that in the absence of proper documents of ownership like receipts, invoices, delivery notes and purchase documents, the appellant’s objection should fail. (See **Scanhouse Press Ltd -vs- Times New Services Ltd & Another Civil Case No 412 of 2008; Charles Muraya Ndegwa -vs- Nahashon Gatere & Another Civil Case No 29 of 2005**).

23. It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant’s goods are proclaimed and this cannot be the law. (See **Nairobi HC Misc. Civil App. No 802 of 2010 Arun C. Sharma -v- Ashana Raikundalia t/a A.R. Raikundalia & Co. Advocates & others**). For the foregoing reasons, it is our finding that the appellant’s contention that the trial court ignored its title document and further ignored that the goods were proclaimed on its premises are not valid grounds to sustain objection proceedings. We find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 6th day of November, 2015

ALNASHIR VISRAM

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR