



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 554 OF 2015

TONY BEN OLANG AKELLO.....CLAIMANT

VERSUS

RURAL DEVELOPMENT SOLUTIONS LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Respondent/Applicant's Notice of Motion Application dated 24TH May 2021. It seeks the following orders **THAT**:

1. Spent

2. This Honourable Court makes orders baring SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE from disposing Motor Vehicle Registration Number KBZ984T (Mitsubishi Canter) owned by RURAL DEVELOPMENT SOLUTIONS pending the hearing and determination of this suit.

3. SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE, Directors of the Respondent/Judgement Debtor be directed to table before this Honourable Court the list of assets of the judgement debtor at the time of dissolution.

3. This Honourable Court makes an order for the attendance in Court and examination of SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE directors of the Respondent/Judgement Debtor for production of books of account or documents for purposes of satisfying the decree herein.

4. In default of the said directors complying with the above orders, this Honourable Court be pleased to order that the said directors be held personally liable to pay the Plaintiff/applicant the decretal sum and costs herein in the sum of Kshs.6,304,110/= plus accrued interest.

5. Costs of this application be provided for.

2. The application is supported by the affidavit of **TONY BEN OLANG' AKELLO** the Applicant/Decree Holder and on the following grounds;

a. **THAT** ma SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNGATSO, SISSEL AUSTARA RENE are Directors of the Respondent Company.

b. **THAT** the Respondent is indebted to the Claimant in the sum of Kshs.6,304,110/= plus interest as at 9th April, 2021.

c. **THAT** the Respondent was **dissolved on the 12th July, 2019, assets distributed between the directors** to fraudulently defeat the execution of the decree and the aforesaid directors are vicariously liable for the acts or omissions of the Respondent/judgement debtor.

d. **THAT** the Honourable Court issued stay orders where after hearing both parties, the objection application was dismissed paving way for execution which revealed that in the course of stay, the Defendants disposed the company assets.

e. **THAT** Plaintiffs judgement remains unsettled despite order and efforts by the auctioneers.

f. **THAT** it is in the interest of justice that the Honourable Court issues the sought orders.

3. The Application was opposed vide a Replying Affidavit sworn on 10th June 2021 by **Svein Rene**; a Director of the Respondent/Judgment Debtor. In it he avers that the Respondent as sued herein is a non-existent company dissolved vide gazette notice dated 12th July 2019 and that the Applicant is deemed to be in the know about the situation to the effect that there are no known assets of the said company. That as at the time of dissolution, the Respondent had nil assets and the dissolution was anchored on the financial improprieties of the company. Therefore, there are no assets to be tabled in Court as prayed.

4. Mr. Rene states that he had been served with the warrants of attachment of movable property on behalf of the Respondent, on 5th June 2021. However, the motor vehicle Registration No. KBZ 984T Mitsubishi Canter had been sold to one Mr. ELISHA KIPSANG MELI on the 15th May, 2019 on agreed terms and conditions between the Respondent and the said purchaser.

5. The affiant avers that upon conducting a search on the National Transport & Safety Authority (NTSA) motor vehicle search platform, the Motor vehicle was registered in the name of JULIUS KIMELI KITUR who is the current owner.

6. Further the affiant swears that the Motor vehicle registration number KBQ 872P that the judgment creditor attached was at the time of attachment serving as a security to the Sidian Bank Kenya Limited for a loan facility which the Respondent was unable to pay. As a result of the foregoing, he avers that there are no assets to be tabled in Court as prayed.

Applicant's Submissions

7. The Applicant submitted that while dismissing Mr. Svein Rene's (the Objector) application dated 17th November 2020 on 9th February 2021, the Court found that *"the proclaimed goods are registered under the Judgement debtor"*. That this was a clear demonstration that the allegation by the Respondent that he sold Motor Vehicle Registration KBZ 984T Mitsubishi Canter on 15th May, 2019 is a ploy meant to mislead this Court.

8. The Applicant submitted that the Directors entered into a Mutual Separation Settlement Agreement with the Claimant with clear intentions of not fulfilling the same and were thus bent on denying the Claimant what was rightfully his hence they should be held personally liable to make good the decree.

9. He relied on the provisions of Section 897(4), (5) and (6) of the Companies Act, 2015 on the liability of each director, managing officer and member of the company which continues and may be enforced as if the company had not been dissolved. He submitted that dividing the assets of the Respondent and by the Respondent's discretionary dissolution, the debt is due and owing by the directors as if the company had not been dissolved.

10. The Applicant relied on the case of **Ahmed Shakeel Shabbir v Samuel Musaa Ndolo [2016] eKLR** where the Court, while dismissing the appeal, found the Director personally liable for impropriety and frustrating the Respondent for the longest time in a bid to exhaust him so that he can let go of his claim.

11. He concluded by urging the Court to find the directors personally liable for the decretal sums and to penalise Svein Rene for being deceitful under oath.

Respondent's Submissions

12. The Respondent submitted that the prayers sought are in capable of enforcement in light of the dissolution of the Respondent, relying on the case of **Fort Hall Bakery supply Co. v Fredrick Mungai Hangoe [1959] E.A 474** where the Court held that a trading enterprise that had not been registered had no legal existence and was incapable of maintaining the action. The Judge stated thus: -

"A non-existent person cannot sue, and once the Court is made aware that the plaintiff is non-existent and therefore incapable of maintaining the action, it cannot allow the action to proceed."

13. The Respondent also relied on the case of **Emmanuel Sichangi Chonge and 2 others v Funuel Walekwa & Another (2014) eKLR** where the Learned Judge held that under Section 338 of the Companies Act, any person interested is at liberty to apply to Court within 2 years to declare the dissolution void. Failure to do so, anything done in the name of the company is null and void and of no consequence and a plaintiff who brings the said company to Court lacks locus standi.

14. On the allegations of hiding of assets of the company, the Respondent submitted that no evidence of the same has been tabled before this Court to attest to such an allegation. The said statement is therefore malicious vexatious, scandalous and devoid of any merit. It relied on the provisions in **Bullen Leake and Jacobs Precedents of Pleadings** that fraud must be distinctly pleaded and proved.

15. On the mutual settlement agreement, the Respondent submitted that the former directors acted in their capacities as agents for the company. They had not issued any personal guarantees and cannot be held to be personally liable for the Respondent, since the Respondent was a distinct legal person separate from the former directors.

16. They submitted that the threshold for lifting of the corporate veil has not been established as contemplated by law. In this regard, they relied on the case of **Ancient Mumo Kalani v Nairobi Business Ventures Limited [2020] eKLR**.

17. The Respondents submitted that the claimant's application is full of wild allegations devoid of any supporting evidence. There is no legal basis upon which the application is premised. That the Respondent died a legal death through dissolution and is a non-entity and no legal action can lie against a non-existent party. They relied on the case of **Gusii Mwalimu Investment Co. Ltd v Gusii Mwalimu Savings Credit Co-op Society Ltd [2017] eKLR**.

18. They concluded that the claimant has not proved his application on a balance of probability and urged the Court to find as such.

Determination

19. I have considered the application herein together with the grounds and affidavit in support thereof. I have further considered the Respondent's replying affidavit in application thereto and the submissions filed by the parties. The issue for determination is whether the Applicant is entitled to the orders sought.

20. Section 897(4), (5) and (6) of the Companies Act provides for liability of directors upon dissolution of a Company as follows –

(4) As soon as practicable after striking the name of the company off the Register, the Registrar shall publish in the Gazette a notice that the company's name has been struck off the Register and the date of the striking off.

(5) On publication of the notice, the company is dissolved.

(6) Despite subsection (5)—

(a) the liability (if any) of each director, managing officer and member of the company continues and may be enforced as if the company had not been dissolved; and

(b) nothing in this section affects the power of the Court to liquidate a company the name of which has been struck off the Register.

21. In the instant case, SVEIN RENE and all the other persons named in the application were Directors and Shareholders of the Respondent.

22. The said SVEIN RENE, in his objection application dated 17th November 2020 deposed in the supporting affidavit at paragraph 6 that he was one of the directors of the Judgment Debtor before it was dissolved. It is also evident from the record that the said SVEIN RENE testified at the hearing of this suit as one of the Directors and Shareholders of the Judgment Debtor.

23. In the objection proceedings, the said SVEIN RENE produced a copy of the Registration Certificate for Motor Vehicle KBZ 984T which was at that time registered in the name of the Respondent.

24. In the certificate of search produced by the Applicant/Decree Holder dated 10th November 2020, the Judgment Debtor was still reflected as the owner of the said motor vehicle.

25. The said SVEIN RENE has now produced another certificate of search dated 26th January 2021 in which the name of the owner is **Julius Kimeli Kitur**. He further produced an agreement for sale dated 18th March 2019 between the Judgment Debtor and one **ELISHA KIPSANG MELI** for transfer of the said motor vehicle.

26. No explanation has been given of the relationship between **Elisha Kipsang Meli** and **Julius Kimeli Kitur**.

27. Further, there is no explanation as to how the Judgment Debtor whom the said SVEIN RENE has deposed was dissolved on 12th July 2019, could have transferred the motor vehicle to Julius Kimeli Kitur between 10th November 2020 and 26th January 2021 when it was no longer existence.

28. It is trite that a person can only pass a title that he has and that one cannot pass a valid title if his title is defective. In this case, Julius Kimeli Kitur could not have received a valid title from the Judgment Debtor which was non-existent. I thus find that the registration of Julius Kimeli Kitur as owner of Motor Vehicle Registration No. KBZ 984T is defective.

29. In any event the said Julius Kimeli Kitur has not filed any objection to the attachment of the said motor vehicle. Further, the Directors of the Respondent cannot object to attachment of the same if they have already disposed of the motor vehicle and no longer own the same.

30. Having admitted in his affidavit sworn on 17th November 2020 that the Directors of the Judgment Debtor distributed the property among themselves, they are personally responsible for the debts they were aware of at the time of such distribution. This suit was filed before the dissolution.

31. The said SVEIN RENE testified on behalf of the Judgment Debtor and was thus aware of the proceedings against the company by the decree holder at the time of dissolution of the company which was voluntary. No notice was given to the Court of the said dissolution.

32. As provided under Section 897(6) of the Companies Act, the directors are personally liable for the debts of the company.

33. For the foregoing reasons, the application herein succeeds and I make the following orders –

i. **This Court hereby issues orders barring SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE from disposing Motor Vehicle Registration Number KBZ 984T (Mitsubishi Canter) owned by RURAL DEVELOPMENT SOLUTIONS.**

ii. **SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE, Directors of the Respondent/Judgement Debtor be and are hereby directed to table before this Court the list of assets of the judgement debtor at the time of dissolution.**

iii. **This Court hereby issues an order for the attendance in Court and examination of SVEIN RENE, MAX JOACHIM SEIFERT, EUNICE ADHIAMBO, DANSON LIGARE LUNG'ATSO, SISSEL AUSTARA RENE, Directors of the Respondent/Judgement Debtor for production of books of account and documents for purposes of satisfying the decree herein on a date to be taken at the Registry by the Applicant/Decree Holder and served upon each of the Directors.**

34. The Applicant's costs of this application shall be part of the decretal sum herein.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue 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 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE