



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 477 OF 2014**

(Before Hon. Lady Justice Maureen Onyango)

**ABDULKARIM ALI MOHAMED..... CLAIMANT/DECREE HOLDER**

**VERSUS**

**COAST MAIL COMPANY LIMITED.....RESPONDENT/JUDGMENT DEBTOR**

**COAST MAIL (MOMBASA) LIMITED.....OBJECTOR**

**RULING**

1. Judgement in this case was entered on 12<sup>th</sup> July 2019 and a decree dated the same date issued on 6<sup>th</sup> October 2020. Thereafter the Claimant commenced execution process.

2. On 19<sup>th</sup> October 2020, a warrant of sale of property in execution of decree for money was issued to OKUKU AGENCIES AUCTIONEERS for the sum of Kshs.366,900/-. On 22<sup>nd</sup> October, 2020 the auctioneer proclaimed the goods set out in the proclamation.

3. Coast Bus (Mombasa) Limited, the Objector herein, filed Notice of Motion Application dated 28<sup>th</sup> October 2020 seeking the following orders:

i. Spent.

ii. THAT pending the interpartes hearing of this application, this Honourable Court may be pleased to order stay of execution by way of proclamation and attachment of the Objector's proclaimed property.

iii. THAT this Honourable Court may be pleased to order that the Decree holder through his agents including OKUKU AGENCIES AUCTIONEERS or any other Auctioneers be precluded from proclaiming or having proclaimed, attaching, or selling the Objector's property in answer of the Decree of this Honourable Court

iv. THAT this Honourable Court may be pleased to order that the warrants of proclamation and attachment and the consequent notices issued against the Objector be raised and/or lifted.

v. The Costs of this application be provided for.

4. The Application is supported by the affidavit of OGONGA NIXON JEREMIAH and further based on the grounds THAT:

a. The Judgment Debtor is not the Objector herein.

b. The proclaimed chattels and vehicles are the property of the Objector who is not a party to this suit

c. The Judgment Debtor has no interest and/or claim whatsoever over the said property and hence the same cannot be attached in satisfaction of the Decree issued against the Judgment Debtor.

d. The Decree Holder has demonstrated mischief and calculated lye in proclaiming the Objectors property undervalued at an estimate of a huge amount of Kshs.3,336,000/= in attempt to execute his decretal amount of Kshs.366,900/=.

5. The Decree Holder opposed the application vide a Replying Affidavit by himself sworn on 2<sup>nd</sup> February 2021. In it, he avers that the application is vexatious and an abuse of the court's time and as such, urged the court to dismiss it. He states that contrary to the averments in the Supporting Affidavit, the proclamation notice is addressed to the Judgment Debtor herein Coast Mail Company Limited but the author of the said proclamation inadvertently omitted the name "Mail".

6. The affiant however states that both the Judgement Debtor and the Decree Holder share a director who is also a majority shareholder in both companies. He avers that the proclaimed property was at the Judgement Debtor's registered office and that as a former employee, he can attest that both the Judgement Debtor and the Objector share the same offices and facilities.

7. The decree holder avers that it is clear that the judgement debtor and the Objector; being majorly owned by the same person, are in a mission to evade honouring payment of the decretal amount and as such denying justice to the decree holder. He therefore concludes that this application is not in the interest of justice as he stands extremely prejudiced and that justice would be delayed. He urges the court to dismiss the application.

### **Objector's Submissions**

8. Counsel for the Objector submitted that the crux of the matter is whether execution can issue against a company for the debts of another owing to a link by its directors and/or shareholders. He submitted that a company, once incorporated, attains a separate legal entity from its shareholders/directors. He made reference to the provisions of Section 19(a) of the Companies Act to bolster his argument.

9. Counsel submitted that the above is the position in the celebrated case of **Salomon v Salomon (1897) AC 78** which was adopted by the Court of Appeal in the case of **Victor Mabachi & Another v Nurturn Bates Ltd NRB [2013] eKLR**,... that, "*[A company] as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.*"

10. Counsel submitted that the proclaimed assets including motor vehicles KBK 062J and KBE 888E are not the property of the Judgment Debtor. He added that what the Decree Holder is asking from the Court is to lift the corporate veil of the objecting company so that the decretal amount against the Judgment Debtor may be executed on the Objector as against its shareholder.

11. He acknowledges that while there are instances where the corporate veil may be lifted to expose the directors, this case does not fall within the circumstances laid down in **Mugenyi & Company Advocates v The Attorney General [1999] 2 EA 199** following **Palmer's Company Law Vol. 1 (22 ed)**.

12. Counsel submitted that the Decree Holder's conduct, statement on his knowledge of the Objector Company and his past relationship with it demonstrates with clarity that he knows the Objector as a separate entity from the Judgment Debtor with distinct business description. In addition, the lifting of the corporate veil would only get to the majority shareholder in the Judgement Debtor and not to other companies including the Objector (Coast Bus (Mombasa) Limited and Coastair Safaris Mombasa Limited which own motor vehicles KBK 062J and KBE 888P respectively.

13. Counsel further maintained that the decree holder has not sought any orders to lift the corporate veil of the Judgement Debtor. That the argument that the companies are linked to one majority shareholder is an attempt to thrive on the Claimant's own wrong doing. He added that a party is bound by its pleadings in which it obtained judgement against the Judgement debtor and cannot casually traverse to execute the Judgment against other entities without the leave of the Court. He relied on the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR**.

### **Decree Holder's Submissions**

14. Counsel for the Decree Holder submitted that the onus of proving ownership of the buses which had been ran from the Judgment Debtor's office fell on the Objector. He added that the significance of the same becomes apparent because the proclamation notice does not, beyond describing what is attached, identify the goods with any specification.

15. Counsel stated that the Objector had also not explained why those buses operated from the Judgement Debtor's office. He placed reliance on the holding in the case of **Chart Engineering Enterprises Ltd v Attracting Supplies Ltd [2009] eKLR** citing Warsame J. in **Miema Enterprises Ltd v Njoka Tanners Ltd [2007] eKLR** thus:

"It is my firm decision that the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> Objector is dismissed with costs."

16. Counsel submitted that the objection is only meant to frustrate the process of execution and ought not to be allowed on the strength of the averments by the Objector. He relied on the case of **Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others [1993] eKLR** where Kuloba J. held that:

"The burden is on the Objector to prove and establish his right to have attached property released from the attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied.

i. That the property was not when attached, held by the Judgment- Debtor for himself or by some other person in trust for the

Judgment- Debtor, or.

ii. That the Objector holds that property on his own account.

“But where the court is satisfied that the property was, at the time of attachment, held by the Judgment Debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment-Debtor or that ownership has changed whereby the Judgement-Debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the court shall dismiss the objection.”

17. Counsel submitted that pursuant to Order 22 Rule 53 of the Civil Procedure Rules, the court has power to either allow the objection by raising the attachment in whole or in part and/or dismissing the same. Additionally, he submitted that as per Order 22 Rule 51, the Objector is required to demonstrate that it has equitable interest in the whole of or part of any property attached in execution of the decree. As such, he stated that the argument that one of the buses belongs to Coast Air Safaris Mombasa Limited is baseless and unfounded since there is no objection filed on the same.

18. Counsel concluded that the Objector is under an obligation to demonstrate legal or equitable interest and given that it did not do so, the attachment is valid and lawful. He urged the court to dismiss the objection on grounds that the Objector had failed to discharge its burden of proof that all the attached property belongs to it

### **Analysis and Determination**

19. Having carefully considered the Application together with the Supporting Affidavit thereon, the Replying Affidavit and the attached documents and submissions by both Counsels, the issues for determination are:

a. Whether the Objector has proved that the goods proclaimed in execution of the decree herein belong to it or the Judgment Debtor;

b. Whether the Application dated 28<sup>th</sup> October 2020 is merited.

20. The Objector’s Counsel submitted that the Judgement Debtor and itself are separate legal entities and as such the proclaimed chattels belong to the Objector who was not a party to the initial suit that paved way for this. Counsel also submitted on the principal of law relating to separate legal personality of a company and argued that the argument brought forth by the Decree Holder of the similarity in directorship offends the same principle.

21. The Decree Holder on the other hand while holding the above position, stated in his Replying Affidavit that the Auctioneers had erroneously omitted the name “Mail” in the proclamation notice. He also submitted that while the Judgement Debtor deals with Mail services and the Objector deals with passenger services; they share the same office.

22. While the Decree Holder has tried to justify his position before this court, I have to agree with the Objector that the concept of separate legal entity is protected in our laws. It matters not that the directorship is exactly the same or the offices are one and the same; the Judgement Debtor and the Objector are two separate legal entities.

23. The Objector has attached two logbooks in its application; one for KBK 062J in its name and the other for KBE 888P belonging to Coast Air Safaris Mombasa Limited. While the former proves ownership by the Objector, the latter vehicle belongs to a party which is a stranger to the instant application.

24. I accordingly order the lifting of the proclamation on KBK 062J only. The proclamation on KBE 888P and all the other items in the proclamation are sustained as the Objector has not demonstrated that it has any proprietary or equitable interest in the same.

25. The costs of these proceedings shall be borne by the Judgment Debtor.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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**