



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 724 OF 2016

PATRICK M. MUTUA AND 19 OTHERS.....CLAIMANTS

VS

HABO GROUP OF COMPANIES LIMITED.....RESPONDENT

AND

HABO AGENCIES LIMITED.....1ST OBJECTOR

AWANAD ENTERPRISES.....2ND OBJECTOR

ALI HASSAN.....3RD OBJECTOR

RULING

1. This ruling flows from three objection applications filed by the Objectors on 4th July 2019.
2. By its application, the 1st Objector asks the Court to make a finding that motor vehicle registration number KBQ 653Z, attached and proclaimed by Five Eleven Traders Auctioneers, in the proclamation dated 28th June 2019, is solely owned by the 1st Objector and/or that the said Objector has an equitable interest in the said motor vehicle.
3. The 1st Objector's application, which is supported by the affidavit of Elias Ochieng is based on the following grounds:
 - a) That the listed motor vehicle registration number KBQ 653Z attached by Five Eleven Auctioneers belongs to the 1st Objector and not the Respondent;
 - b) That the 1st Objector will suffer great and immense financial loss if the attachment is not stopped.
4. The 2nd Objector's application, seeks a finding that motor vehicles registration number KHMA 967A (Roller/Grader/Crane), KCC 289D (Mercedes Benz), KHMA 4751 (Top loader) and KBG 218, attached by Five Eleven Auctioneers belong to the 2nd Objector.
5. The application, which is supported by the affidavit of Roselyn Mulatya is premised on the following grounds:
 - a) That the listed motor vehicles registration number KHMA 967A, KCC 289D, KHMA 4751 and KBG 218, attached by Five Eleven Auctioneers belong to the 2nd Objector and not the Respondent;
 - b) That the 2nd Objector will suffer great and immense financial loss if the attachment is not stopped.
6. The 3rd Objector, Ali Hassan asks the Court to make a finding that motor vehicle registration number KBU 792E belongs to him. His application is based on the following grounds:
 - a) That motor vehicle registration number KBU 792E belongs to the 3rd Objector and not the Respondent;

b) That the 3rd Objector will suffer great and immense financial loss if the attachment is not stopped.

7. The Objectors therefore ask the Court to stop the entire attachment by Five Eleven Auctioneers.

8. On 18th July 2019, the Claimants filed Notices of Intention to Proceed with Execution under Order 22, Rule 54 of the Civil Procedure Rules, together with replying affidavits sworn by the 1st Claimant, Patrick M. Mutua.

9. In response to the objection by the 1st Objector, Mutua depones that except with regard to item number 5 on the schedule of movable property, the 1st Objector has not demonstrated to the Court why execution should not proceed.

10. Mutua further depones that the 1st Objector is a shareholder of the Respondent and that Hezron Awiti Bollo and Monica Anyango are shareholders of both the 1st Objector and the Respondent. He relies on the definition of employer in the Employment Act, 2007 which includes shareholders and directors.

11. With respect to the objection by the 2nd Objector, Mutua depones that except with regard to items 4 and 5 in the schedule to movable property, the 2nd Objector has not demonstrated to the Court why execution should not proceed.

12. He adds that the shareholders who are relatives, are common in both the 2nd Objector and the Respondent. He points out that Augustine Omondi is a shareholder of the Respondent and that Bernadict Velani Awiti who is a shareholder of the 2nd Objector, is a close relative of Hezron Awiti Bollo who is a shareholder of the Respondent.

13. Regarding the objection by the 3rd Objector, Mutua depones that the logbook annexed to the supporting affidavit shows that the subject motor vehicle is owned by Tuff Steel Limited and not by the 3rd Objector.

14. Mutua maintains that the 3rd Objector does not have legal and/or equitable interest in the attached property.

15. Having read the applications and supporting affidavits by the three Objectors alongside the Claimants' responses, it seems to me there are two separate issues raised:

a) First, whether the Objectors have established a legal or equitable interest in the attached property;

b) Second, whether the Claimants have made a case for lifting of the corporate veil with respect to items registered in the names of the respective Objectors.

16. On the first issue, the Court is guided by Order 22, Rule 51(1) of the Civil Procedure Rules which provides as follows:

51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property.

17. Indeed, the objection proceedings are brought under this very provision. As held in *Patrick King'ori Waruguongo v James Nderitu & another [2014] eKLR* and *Chai Trading Co. Limited v Muli Mwanzia & 2 others [2019] eKLR* in objection proceedings, it is always the objector's duty to establish ownership of the subject property. It is therefore not enough for an objector to state that the property does not belong to the judgement debtor, they must show by cogent evidence that they themselves have a definite interest in the said property.

18. From the Proclamation of Attachment, dated 25th June 2019, all the attached items are motor vehicles, whose ownership would ordinarily be evidenced by log books.

19. From the evidence on record, ownership of the following motor vehicles was established before the Court:

a) Motor vehicle registration number KBQ 653Z (item number 5 on the Proclamation of Attachment) registered in the name of the 1st Objector;

b) Motor vehicle registration number KHMA 967A (item number 4 on the Proclamation of Attachment) registered in the name of the 2nd Objector;

c) Motor vehicle registration number KCC 289D (item number 6 on the Proclamation of Attachment) registered in the name of the 2nd Objector.

20. The Objectors did not produce any evidence to certify their alleged interest in the following motor vehicles:

a) KHMA 475A (item number 1 on the Proclamation of Attachment);

b) KHMA 691H (item number 2 on the Proclamation of Attachment);

c) KBG 218(item number 3 on the Proclamation of Attachment).

21. Further, the logbook of motor vehicle registration number KBU 792E (item number 3 on the Proclamation of Attachment) to which the 3rd Objector lays a claim, is in the name of a company known as Tuff Steel Limited, whose shareholders and directors were not disclosed to the Court. At any rate, the 3rd Objector did not establish any interest either legal or equitable in the subject motor vehicle.

22. It follows therefore that the Objectors having failed to establish any interest in items 1,2,3 and 7 in the Proclamation of Attachment, their objection thereon must fail and is disallowed.

23. I now turn to the second issue which has to do with the Claimants' plea to the Court to lift the corporate veil from the 1st and 2nd Objectors and in effect find that items number 4, 5 and 6 on the Proclamation of Attachment, which are registered in the names of the said Objectors, are available for attachment to satisfy the Respondent's debt to the Claimants.

24. In urging their case, the Claimants made reference to the decision in *Zingo Investment Limited v Miema Enterprises Limited [2015] eKLR* where the Court of Appeal cited with approval the following excerpt from **Paragraph 90 of the Halsbury's Laws of England (4th Edition)**:

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 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.

25. The Claimants also relied on the decision by my brother **Rika J** in *Kenya Hotels and Allied Workers Union v Sheshe Beach Resort T/A Tabora Enterprises Limited & 2 others [2015] eKLR* where it was affirmed that by statutory definition, an employer includes an agent, foreman, manager or factor of such person.

26. It is not in doubt that the Court may, in appropriate cases, lift the corporate veil to find shareholders, directors or managers liable for the actions of a body corporate. This is however, not what the Claimants are asking the Court to do; what they are pursuing is a blanket declaration that the assets of the 1st and 2nd Objectors are available for settlement of the Respondent's debts. The Court found no legal basis for allowing such a plea.

27. Moreover, the Claimants did not lay before the Court any evidence to suggest that incorporation of the 1st and 2nd Objectors was precipitated by a desire to avoid legal liability either to them or to any other party. In the circumstances, the Court finds no justification to allow the sale of the 1st and 2nd Objectors' assets, who were not a party to the proceedings, and therefore had no opportunity to defend themselves.

28. Arising from the foregoing findings, I make the following orders:

a) The 1st Objector's application as far as it seeks a declaration that motor vehicle registration number KBQ 653Z (item number 5 on the Proclamation of Attachment) belongs to the 1st Objector and not to the Respondent is allowed;

b) The attachment on motor vehicle registration number KBQ 653Z is hereby lifted;

c) The 2nd Objector's application as far as it seeks a declaration that motor vehicles registration number KHMA 967A (item number 4 on the Proclamation of Attachment) and KCC 289D (item number 6 on the Proclamation of Attachment) belongs to the 2nd Objector and not to the Respondent is allowed;

d) The attachment on motor vehicles registration number KHMA 967A and KCC 289D is hereby lifted;

e) The 3rd Objector's application is dismissed.

f) Execution with regard to the following motor vehicles may proceed:

i) KHMA 475A (item number 1 on the Proclamation of Attachment);

ii) KHMA 691H (item number 2 on the Proclamation of Attachment);

iii) KBG 218 (item number 3 on the Proclamation of Attachment);

iv) KBU 792E (item number 7 on the Proclamation of Attachment).

g) Each party will bear their own costs.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyange Sharia for the Claimants

Mr. Wameyo for the Objectors