



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 287 OF 2018

POAPAY KENYA LIMITED..... PLAINTIFF

VERSUS

AVL CAPITAL HOLDINGS LIMITED.....1ST DEFENDANT

INSTACASH HOLDINGS LIMITED.....2ND DEFENDANT

ANDREW THUO KANYUTU.....3RD DEFENDANT

AND

AVL CAPITAL LIMITEDOBJECTOR/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 10th May 2019, brought under the provisions of; section 3A of the Civil Procedure Act, (cap 21) of the Laws of Kenya, Order 22 Rule 51(2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. The Objector (herein “the Applicant”), is seeking for orders that “the proclamation of attachment of movable property dated 2nd April 2019, issued pursuant to a warrant of attachment dated 7th March 2019, in execution of the decree of the court passed on 22nd February 2019 and all consequential action/order thereto be set aside and the costs of the application be provided for”.

3. The application is premised on the grounds on the face of it and an affidavit dated 10th May 2019, sworn by a director of the Applicant; John Owen Kageche Kimani. He deposed that, the Plaintiff’s (herein “the Decree holder”) Advocates instructed Clear Real Auctioneers to execute the decree herein whereupon, on 2nd April 2019, the Auctioneers proclaimed the Applicant’s property and served the Applicant, at its premises located on L.R. No. 209/7148 Lower Hill Duplex Apartments Number 24, Nairobi, with a notice of proclamation. The notice indicates that; the attachment arose from the decree of the court passed on 22nd February 2019, with respect to a suit; Nairobi High Court Civil Suit Number 298 of 2018.

4. The Auctioneers proclaimed inter alia; Motor Vehicle Registration Number; KBU 888V, office furniture and equipment, which belong to the Applicant who is not a party to the suit. The Applicant thus argues that, its property is wrongfully proclaimed, and it stands to suffer irreparable loss and damage should the Auctioneers proceed with the intended attachment of the proclaimed property.

5. However, the Application was opposed vide grounds of opposition dated 20th May 2019, that as drawn, it is ex facie, bad in law,

misconceived, incompetent, vexatious, mischievous and an abuse of the court process and ought to be dismissed in limine. That, the Applicant is indolent and guilty of laches, due to the inordinate and unexplained delay in moving the court, to warrant favourable discretion from the court.

6. Further, the 1st Judgment debtor and the Applicant are one and the same entity, as the former is trading as the latter, and the Applicant has always received court process on behalf of; the 1st Judgment debtor without any objection. It is manifestly apparent on the face of the motion that, the 1st Judgment debtor through the Applicant wants to defeat justice by filing numerous applications. In any event, the Applicant has not attached any registration documents from the Registrar of Companies to illustrate its existence. In the circumstance therefore, the Applicant is a non-entity that cannot sue or be sued.

7. That the Decree holder is in possession of a regular Judgment, and the court will not usually set aside the judgment unless it is satisfied that, there is a defence on merit, as held in the case of; *Patel vs E.A. Cargo Handling Services Limited (1974) E.A. 25*. Hence, the application should be dismissed with costs.

8. The Decree holder also filed a replying affidavit dated 20th May 2019, sworn by its director; Charity Kariuki, wherein she reiterated the contents in the grounds of opposition, save to add that; without prejudice thereto, if in any event, the Applicant is a registered entity distinct from the 1st Judgment debtor, the Applicant has not conducted itself as such. That

when the Decree holder served the 1st Judgment debtor with the demand letter dated 12th February 2018, the Applicant never protested nor denied/refused service, but received the same by stamping with their official stamp.

9. Further there is extensive email communication on record between the Decree holder's Advocates and the 3rd Judgment debtor who is a director of the 1st and 2nd Judgment debtors on the payment of the monies owed. The email address of the 3rd Defendant is shown on these correspondence is akanyuru@avlcapital.com, thus the 3rd Judgment debtor has never raised any objection to owing the decretal sum herein.

10. That, it is instructive to note that all the defendants are housed in one office space; at Lower Duplex Apartments, office No. 24 and share a common reception area and receptionist, as can be confirmed from the previous returns of service filed in court.

Further all the summons and other court process were received and stamped with the stamp ostensibly belonging to the Applicant, which also received the warrants of attachment and proclamation notice. Hence the need to lift the corporate veil, and see through the deliberate and mischievous actions of the Applicant and the Judgment debtors.

11. Further, the Applicant and the Judgment debtors have colluded to frustrate the Auctioneers by closing their offices and hiding the proclaimed items making it difficult for the Auctioneers to attach them. The Applicant has therefore approached the court with dirty hands and this court being a court of equity should not allow the collusion to make the seat of justice dirty.

12. The receipts and invoices of some of the office furniture the Applicant purports to produce are selectively chosen and if viewed from a superficial perspective, one may fail to see that, the said invoices were addressed to; AVLC Group, which comprises of the 1st Judgment debtor and the Applicant company. In any event, the Applicant is not AVLC Group and therefore the purported receipts do not represent the items proclaimed by the Auctioneers. Further, the attached motor vehicle does not belong to the Applicant.

13. In the circumstances therefore, the Applicant has not brought forth evidence that the proclaimed items belong to it to the exclusion of the Judgment debtors. This is supported by inter alia, an invoice dated 9th October 2013, addressed to the 3rd Judgment debtor. Therefore, the court should not allow the application as that would be tantamount to assisting the defendants run away from their legal obligations which is not right.

14. However, the Applicant filed a further affidavit dated 17th June 2019, sworn by the deponent John Owen Kageche Kimani, who termed the contents of the replying affidavit as misplaced, bad in faith and an attempt to mislead the Honourable court.

15. He reiterated the averments in the affidavit in support of the application, save to add that, it is duly incorporated under the Companies Act Cap 486 (now repealed) Laws of Kenya, thus it is a legal entity with the capacity to sue and be sued and carrying out distinct functions separate from the 1st judgment debtor's, therefore it has a right of audience before the Honourable court.

16. That indeed the demand letter was received in the Applicant offices by the receptionist in his absence and upon further scrutiny of the document, he realized that he was a stranger to all the information contained therein and was therefore not in any position to respond to the same. Further to the above and without prejudice to the foregoing, it was up to the Decree holder to rectify the error and regularize its position and serve AVL Capital Holdings Limited; the correct party sued.

17. The email correspondence by Andrew Kanyutu, the 3rd Judgment debtor, were written in his capacity as a director of the 1st Judgment debtor and not as a director of the Applicant as claimed. The mere fact that he did not deny that the 1st Judgment debtor was indebted to the Decree holder does not transfer this liability to the Applicant despite his capacity as a director in both companies.

18. Further the Applicant has been hosting the 1st Judgment debtor in its premises as the 1st Judgment debtor is yet to secure office space. The lease agreement for the premises is exclusive to the Applicant. The mere fact that the office space is shared does not justify the proclamation and attachment of the Applicant's property. The issue of lifting the corporate veil should not be visited as the distinction between the two companies is very clear.

19. That, it was upon the Decree holder to establish the right party to effect service upon and the Applicant should not suffer as a result of its mistake. The Applicant denied the allegation of

closure of its offices and averred that, it has continued to carry on its business despite the looming threat by the Auctioneers to attach the assets. Further, it has suffered serious inconveniences that has affected its business and caused loss of income, been embarrassed and its brand tarnished as a result of the illegal threats by the Auctioneer to attach its goods in the presence of its clients.

20. The Applicant denied approaching the court with dirty hands as alleged and stated that, in fact it is, the Decree holder attempting to mislead the court by perpetuating falsehoods in order to trump over its rights and that Decree holder is basing its argument on unsubstantiated facts and should not be allowed to mislead the court. The receipts produced clearly bear the stamp of the Applicant and the allegations purporting that, AVLC Group; comprises both the 1st Judgment debtor are mere speculations, the Honourable court should not place reliance thereon.

21. The motor vehicle registration number KBU 888V is in the process of being purchased by the Applicant and the transfer of the log book in its name has not been effected. The Decree holder was in such a hurry to proclaim goods without establishing the actual ownership as the motor vehicle is neither registered under the 1st Judgment debtor, a clear indication that the process is spurious and not in good faith. Further, the said receipt dated 9th October 2013 was addressed to Andrew Kanyutu in his capacity as a director of the Applicant.

22. In further response, the Decree holder filed a supplementary affidavit dated 13th August 2019, sworn by Charity Kariuki, wherein she states that; on or about the month of October 2016, the 3rd Judgment debtor approached the Decree holder for a further loan and the Decree holder insisted on some form of collateral before money was advanced. On the 7th November 2016, the 3rd Judgment debtor availed one Mr. Simon Ngeti Manambo and a log book of a motor vehicle, a Land Rover station wagon of registration number KBU 888V.

23. That Mr. Manambo agreed to have his motor vehicle used as collateral and surrendered the original logbook, and produced Kenya Revenue Authority Copy of records, copy of his national ID and KRA Pin confirming that he was the owner of the motor vehicle and even signed a form of transfer of ownership of motor vehicle. As such, the Decree holder is justified in attaching the said motor vehicle as the same was used as collateral by the 3rd Judgment debtor in borrowing money from the Decree holder.

24. The Applicant has admitted that it been hosting the 1st Judgment debtor in its premises and that, the Applicant all along received not just one document but all court documents on behalf of the 1st Defendant debtor, until delivery of the judgment. That in any event and without prejudice to the foregoing, none of the receipts attached is of the goods proclaimed by the Decree holder.

25. The parties disposed of the application by filing submissions whereupon the Applicant submitted in a nutshell that, it has proved legal and equitable interest in the proclaimed goods

as evidenced by several receipts produced showing ownership of the items proclaimed and a lease agreement for apartment number

24, situated on Lower Hill Duplex on L.R. Number 209/7148/2 Nairobi to prove the premises belong to it

and not the 1st Judgment debtor as claimed by the Decree holder in its pleadings.

26. That, Order 22 Rule 51 of the Civil Procedure Rules, 2010 allows a party with any legal or equitable interest in either whole or part of the property attached in execution of a decree to apply to court to object such attachment. Therefore, it has a right of audience before the court since its rights to ownership of property has been infringed. The action by the Decree holder to attach its property goes against the spirit of; Article 40(1) of the Constitution of Kenya,

27. Further it has proved its legal existence by tendering its certificate of incorporation, PIN certificate and its shareholding structure. That there is no law estopping a party from acting as a director in more than one company. Further, going by the seriousness and gravity placed on the court's documents, it was almost obvious that there was no choice but to receive them, but that does not detract the fact that Decree holder consistently served the wrong party, AVL Capital Limited and yet party sued is AVL Capital Holdings Limited.

28. That the only circumstance under which the court is inclined to lift the corporate veil is among other instances, where there is proof of fraudulent and improper acts by the directors or shareholders as held in the case of; Salomon vs Salomon & Co. (1897) and Joel Ndemo Ongáu & Another vs Loyce Mukunya (2015) eKLR, where paragraph 90 of Halsbury's Laws of England 4th Edition is referred to and states: -

"90. 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 also in all cases where the character of the company, or the nature of the person who controls it, is a relevant feature. In such a 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. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced."

29. However, the Decree holder submitted that, there is no evidence produced in court to prove the Applicant's registration in Kenya. In any case, the Applicant has not tendered any evidence to prove to this court that it has a legal or equitable interest in the whole of or part of any property attached in execution of the decree. The motor vehicle log book attached to the Objector's application and marked as JOK-3 belongs to one Simon Ngeti Manambo, who is not the Objector in this matter.

30. Further, all the invoices and receipts attached by the Objector from the pages 23 to 27 of the Objector's notice of motion are all addressed to different persons and/or entities AVLC Group and Andrew Kanyutu who is the 3rd Respondent.

31. I have considered the arguments advanced by the parties herein and I find that the main issue to determine is whether the Applicant has proved that, the assets proclaimed do not belong to the 1st Judgment debtor. First and foremost, I note from the proclamation of attachment of; movable property served upon the Applicant by the Auctioneer that, the goods proclaimed include; the motor vehicle registration number, KBU 888V, office furniture and/or equipment comprising of; office chairs, computers, photocopier machine, office desks, laptops, cooker, microwave, fridge and cabinets.

32. The Applicant has in proof of ownership produced a copy of a log book of the motor vehicle. I have considered the same and I note that, the motor vehicle KBU 888V is; a Land Rover, station wagon, registered in the name of; Simon Ngeti Manambo of, P.O. Box 5692-00100. Therefore, it is clear that, this motor vehicle is not registered in the name of the Applicant or the 1st defendant/Judgment debtor. A log book is prima facie evidence of ownership of the motor vehicle. Therefore, the Applicant has no locus standi in the given circumstances to protest against the attachment thereof. The only person with such locus standi is the registered owner Simon Ngeti Manambo and he has not protested.

33. In fact, it suffices to note that, the decree holder has deposed that, Mr. Manambo pleaded the motor vehicle as a collateral security for a loan advanced to the 3rd defendant/Judgment debtor. These averments have not been rebutted by either Mr. Manambo nor the Applicant. All that the Applicant alleges is that, it is in the process of acquiring the said motor vehicle without evidence thereof. That argument is neither here nor there. Even if it was, as matters stand, the Applicant has no right to claim legal or

equitable ownership of a motor vehicle not in its name. To that extent, its claim is so far as that motor vehicle is concerned, fails.

34. As regards the office equipment, I note that, the Applicant has produced inter alia;

(a) an invoice dated 19th March 2013, from Furniture Elegance Limited, in relation to one (1) piece of Fire Proof Mechanical safe. However, there is no correspondence receipt in proof of purchase of the same. Even then, the safe is not among the items proclaimed.

(b) Goods issue note No. 911, issued on 23rd October 2015, issued to AVLC Group, in relation to; Desktop HP 3500PC and Monitor HP 18.5 TFT. As can be noted, that document is not issued in the Applicant's names. It is also not signed by all the required signatories: the issuer, recipient, the authorizing officer nor the accounts or security personnel. Again, only AVLC Group, can claim the proprietary rights in that desktop and/or monitor.

(c) A credit invoice No. 910, in the name of AVLC Group Limited dated 23rd October 2015, the details thereof are same as those in the goods issue note under (b) above. The two documents were issued by, Bestbuy Jubilee.

(d) An invoice addressed to Andrew Kanyutu dated 9th October 2013, giving details of various equipments/items and the respective quoted unit price(s). A perusal thereof reveals that, none of the goods proclaimed are included in that invoice. The invoice relates to items relating to "access control system with employees locking data using cards or fingerprint technology." They include; access panel with card and code unit; system cables, network lot, power supply unit, rechargeable battery, press to exit button, automatic door return, magnetic lock, door bracket, staff access card and labour charges. It has nothing to do with office equipments herein. Similarly, it is not even addressed to or issued to the Applicant herein.

(e) A delivery note dated 14th October 2010, addressed to AVL Capital Limited for delivery of HP Laser Jet all in one Milson printer. The same is received by the Applicant. This item in the name of the Applicant and if proclaimed it should be released forthwith.

35. Therefore, the only items that should be exempt and returned to the Applicant are those proved by receipts produced. The receipts should provide proper particulars to identify those items in terms of serial numbers, make, brand and so on. If there is no proof of ownership of any items and there is no claimant, then the same can be disposed of. For clarity, the items to be reconsidered are those supported by the invoice produced and marked "JOK" attached to the Applicant's further affidavit and the delivery note from Rohen Technologies.

36. All in all, based on the analysis above, the Applicant has not established a good root of title to the goods proclaimed by the Plaintiff/Decree holders. The persons named in the various documents produced where applicable, have not objected to the proclamation. In that case, the application and the prayers therein cannot be granted.

37. In that case, all issues raised in relation to the legal status of the Applicant and/or AVL Group do not arise. I have operated on the Applicant's own averment and proof that, it is a legal and separate entity from the 1st Defendant, thus the two companies are separate and independent, save for a common director who is the 3rd Judgment debtor. I have also bought the Applicant's submissions that, the Decree holder has not proved that AVL Group Comprises of the 1st Defendant and/or the Objector.

38. Be that as it were, as aforesaid, I find that the Applicant has not proved that all the items proclaimed belong to it. I Therefore do not grant the order sought for under paragraph 4 of the application, to stay or set aside the proclamation of attachment of movable property dated 2nd April 2019. Finally, in the given circumstances of the case, I make no orders as to costs.

39. It is so ordered.

Dated, delivered and signed in an open court this 19th day of May 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Karanja for Ms. Kaguatha for the Applicant

Mr. Ashioya for the Respondent

Delivered via virtual communication



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