



Ludaava v Bonito Hotels Limited; Tbh Hotel Limited (Objector) (Cause 3 of 2020) [2024] KEELRC 13594 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 3 OF 2020
DN NDERITU, J
DECEMBER 19, 2024**

BETWEEN

PETER ADAMS LUDAAVA CLAIMANT

AND

BONITO HOTELS LIMITED RESPONDENT

AND

TBH HOTEL LIMITED OBJECTOR

RULING

I. Introduction

1. In a notice of motion dated 1st December, 2024(the application), the objector/applicant is seeking orders that –
 - i. This honourable court be pleased to set aside the garnishee order nisi order issued on 28th November,2024 in respect to bank account number 0103671000395* domicile at Sidian Bank Kilimani branch, pending the hearing and determination of this application inter partes.
 - ii. This Honourable court be pleased to issue an order restraining any decree holder(s) claiming through Bonito Hotels Limited from attaching the objector’s account for full or part satisfaction of any decree issued against Bonito Hotels Limited.
 - iii. The cost of this application be provided for.
2. The application is expressed to be premised under Sections 3A & 3 of the *Civil Procedure Act*, Order 22 Rule 53, & Order 51 Rule 1 of the Civil Procedure Rules. It is based on the grounds on the face of it.
3. The application is supported with the affidavit sworn by Mbeja Obonyo Joseph on even date with several annexures thereto.



4. In opposition to the application, the claimant filed his replying affidavit sworn on 3rd December, 2024, and the further affidavit sworn on 9th December, 2024. All the affidavits are accompanied with annexures thereto.
5. In response to the claimant's replying affidavit of 3rd December, 2024, on 6th December, 2024 the objector filed a further affidavit sworn by Mbeja Obonyo Joseph on 5th December, 2024.
6. On 4th December, 2024, when the matter came up in court for directions, the court directed that the application be canvassed by way of written submissions.
7. Counsel for the objector filed written submissions on 7th December, 2024. The claimant's counsel filed on 13th December, 2024.

II. Evidence

8. In the supporting affidavit and further affidavit by Mbeja Obonyo Joseph, the company secretary of the objector, it is deposed that the objector is a distinct and separate legal entity and not a subsidiary of the respondent/judgment debtor.
9. It is deposed that the objector is neither holding any funds for and on behalf of the judgment debtor nor under any obligation to settle its debts. It is further deposed that the objector is neither an agent of the judgment debtor nor does it operate the account at Sidian Bank on behalf of the judgment debtor.
10. It is deposed that bank account number 010367100039** domicile at Sidian Bank Kilimani Branch (subject bank account), now frozen, is owned and operated by the objector and not the judgment debtor and thus the same should not be attached in satisfaction of the decree.
11. It is deposed further that the claimant/judgment creditor erroneously and in bad faith attached the objector's bank account without any legal or factual justification or authentication, and that unless the garnishee order nisi issued on 28th November, 2024 is lifted the objector will suffer loss and prejudice.
12. It is deposed further that the 4th Garnishee (Sidian Bank (K) Limited) in its relying affidavit to the garnishee proceedings sworn on 2nd December, 2024 (MOJ1) confirmed that it had no customer in the name of the judgment debtor nor an account held or operated in that name.
13. It is further deposed that the judgment debtor does not own any share(s) in the objector for it to qualify as a subsidiary. It is deposed that the Tourist Hotel Bungoma and TBH Hotel Limited are different and distinct entities as the former was incorporated in the year 2018. while the objector came into existence upon incorporation in 2023. It is thus deposed that the objector could not have existed as Tourist Hotel Bungoma before its incorporation.
14. It is deposed that having a common shareholding in companies should not be construed as establishing a case of a holding and or subsidiary company as the two entities are separate and distinct. It is further deposed that even the objector and the judgment debtor were a holding and subsidiary company, the two are distinct legal entities and one cannot be sued or held to account or liable for the breaches of the other.
15. It is deposed that in the absence of an application for lifting the corporate veil, having common shareholding between companies does make one legal entity liable for the debts of the other.
16. In the replying and further affidavits by the claimant/judgment creditor, the claimant deposes that the objector was previously known as Tourist Hotel Bungoma at the time this cause was filed and the claimant was the general manager, thereat. It is deposed that the objector was registered on 30th



June, 2023 way after the judgment herein was delivered and the respondent defended the claim as its subsidiary.

17. It is deposed that the directors of the respondent and those of the objector are similar and hence the objector is deliberately misleading the court. It is further deposed that the claimant's employment contract was made by the respondent which was then trading in the name of the objector. It is deposed that the letter sending the claimant on compulsory leave had been signed by one of the directors of the objector, who was also a director and manager of the respondent.
18. It is further stated that the objector's main shareholder acknowledged that the respondent's Board of Directors was also the manager of Tourist Hotel Bungoma, and all these documents were produced in court and no appeal has been preferred.
19. It is deposed that the major shareholder of the objector submitted documents to the claimant for the incorporation of the entity Tourist Hotel Bungoma, a process that was finalized after the claimant had exited his employment.
20. It is deposed that in a different suit against the respondent in ELRC No. 4 of 2019, the respondent issued post-dated cheques bearing the subject bank account number 010367100039** in settlement of a decree dated 2nd February, 2022. It is deposed that the respondent was still using the account to run Tourist Hotel Bungoma before the objector was registered on 30th June, 2023.
21. It is further deposed that the directors of Tourist Hotel Bungoma and those of the objector are similar and that Tourist Hotel Bungoma is the account holder with the 4th Garnishee, an account that was running at the time the claim was filed until it was determined.

III. Submissions

20. Ms. Awuor, Advocate for the Objector, identified the single issue for determination in this application to be – Whether the objector's application is meritorious.
21. It is submitted that according to the provisions of Order 22 rule 51(1) of the Civil Procedure Rules any person claiming a legal or equitable interest in part or whole of any property attached in execution of a decree can institute objection proceedings.
22. Citing Arun C. Sharma Versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others (2014) eKLR, it is submitted that the burden of proof on the existence of a legal or equitable right to any property lies with an objector and upon discharging that burden the same, a judgement debtor has no claim over the property. It is submitted that the bank account number 010367100039** domicile at Sidian Bank Kilimani Branch belongs to the objector, a position that has been confirmed by the 4th Garnishee, Sidian Bank (K) Limited. It is submitted that despite the contention that the decree holder and the objector are associated by virtue of having common shareholders/Directors, that is not enough legal reason for attaching the funds in the objector's account. To buttress this assertion, counsel urges the court to be persuaded by the reasoning in Paul Stuart Imison v Jodad Investments Ltd (2019) eKLR and find that the corporate veil cannot be lifted merely because a company has similar directors and or shareholding.
23. Relying on an extract in 'Principles of Law of Evidence, 2nd Edition (Repealed 2004) at 374, the court is urged to find that the objector has adduced sufficient evidence to demonstrate that the judgment debtor does not own any share in the objector and thus its not its subsidiary under the Companies Act. It is submitted that a holding company is distinct from a subsidiary company and neither can be sued for the breaches of the other. It is submitted that even if Tourist Hotel Bungoma and the objector



were the same entity, the pre-incorporation contracts done by promoters cannot be enforced against the company upon its incorporation.

24. It is submitted that the objector is the owner of the bank account subject of this application and the same is not operated by the objector as an agent, employee, or servant of the judgment debtor. Citing *Chatabhai M. Patel v Chaprabhi Patel (1958) EA 743* and *David Muhenda & 3 Others v Margret Kamuje, Succession Cause No. 9 of 1999*, it is submitted that the objector has adduced sufficient evidence that the subject bank account does not belong to the judgment debtor. It is submitted that the judgment has no legal or equitable interest in the said bank account.
25. On the other hand, the claimant's/decree holder's counsel submitted globally in reply to the objector's counsel stating that the respondent has in the past used the subject bank account to run its day to day activities among them paying decree holders who sued the respondent/judgment debtor. It is submitted that the respondent is still managing the objector and thus the reason why cheques from the objector were drawn to settle decrees.
26. It is submitted that the respondent in a bid to defeat justice, registered the objector to forestall the payment of the negotiated settlement to the decree-holder. Counsel invites the court to be persuaded by the reasoning in [*Douglas Mbugua Mungai v Harrison Munyi -Civil application no. Nai.167 of 2010*](#) and consider the circumstances of the case wholly in the interests of justice. It is further submitted that the objector actively participated in the cause from the onset and before the claim was amended it had instructed the same counsel to represent it and the respondent. The court is urged to be persuaded by the reasoning in *Chase International Investment Corporation and Another v Laxman Keshra and Others (1978)KLR 143[1976-80]1 KLR 891* and equitably find in favour of the claimant.
27. It is submitted that since the judgment debtor has all along managed the objector and even intended to settle other decrees from the subject bank account, the court should be inclined to find in the claimant's favour and allow its garnishee application dated 25th November, 2024 with costs.

IV. Analysis & Determination

20. The court has carefully heard the application, the affidavit in support, the affidavits in response, and the written submissions by counsel for both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the objection proceedings are meritorious; and, Who should meet the costs of this application.

V. The Threshold

20. Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024, provides that the Civil Procedure Rules are applicable in execution proceedings in this court.
21. Objection proceedings are provided for under Order 22 Rule 51(1) of the Civil Procedure Rules which provides as follows –

“ Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 parties and to the decree-holder, of his objection to the attachment of such property.”
20. This provision invites objectors to lay a basis of their entitlement to the property attached in execution. Courts have held that an objector has the burden to prove his or her claim to the said property as against the judgment creditor pursuing execution after a judgment and a decree of a court.



21. In *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* [1993] eKLR the court stated that –
- “The burden is on the objector to prove and establish his right to have the 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 –
- (1) that the property was not, when attached, held by the judgement-debtor for himself, or by some other person in trust for the judgement-debtor; or
 - (2) that the objector holds that property on his own account.”
20. The import of the above is that the objector has the burden of proving its legal or equitable interest in the subject frozen bank account domicile at Sidian Bank(K) Limited.
21. In considering whether the objector has proved its claim on a balance of probabilities as per law required in civil matters the court has considered the evidence tendered in support of the ownership of the bank account. It is noted that the objector’s name is TBH Hotel Limited, while the judgment debtor’s is Bonito Hotels Limited. Prima facie, these are two separate and distinct entities. The claimant alleges that the objector was previously known as Tourist Hotel Bungoma and that he was employed as its General manager. No evidence has been adduced in the form of a certificate of change of name to prove that the objector and Tourist Hotel Bungoma are one and the same entity. Indeed, the claimant concedes that the objector was incorporated on 30th June, 2023 after the judgment had been passed in this cause.
22. There exists no agreement or an undertaking between the objector and the judgement debtor for the objector to settle any decree on its behalf. The alleged previous settlement of a decree using the objector’s cheques does not equate to or mean that the objector is responsible for the settlement of all the judgment debtor’s debts, the present one included.
23. No evidence was adduced by the claimant/decree holder to show that the funds held by the objector in the subject bank account were funds belonging to the judgment debtor or that such funds were moved between accounts of the judgment debtor and the objector to avoid settling the decree issued in favour of the claimant. Further, no evidence was availed to demonstrate and prove that the entity known as Tourist Hotel Bungoma and the objector are one and the same entity.
24. The claimant/decree holder acknowledges that the subject bank account belongs to the objector yet he is asking the court to direct the judgment debtor to use the funds belonging to the objector to settle the decree in his favour. There is no established factual or legal basis upon which the court may make such an order.
25. Having common shareholding between two companies does not mean that one entity is a subsidiary of the other. The common directorship between the judgment debtor and the objector is that of James Israel Olubayi. A limited liability company is a separate legal personality from its shareholders and the directors as per the principle in *Salomon v Salomon & Co Ltd* [1897] AC 22. The directors only act as agents of the company. There is no bar for the same person to be a director in many a company nor does such multi-directorship or shareholding make the companies associates or subsidiaries. Limited liability companies are distinct and separate entities from the shareholders or directors and they are in essence juridical persons.
26. The alleged settlement of a decree to one Michael Otieno Ouma by the judgment debtor using the objector’s cheques was effected in the year 2024 as evidenced by the copies of cheques produced by



the claimant. As of that time, the objector herein had already been incorporated on 30th June, 2023. It cannot be said that the subject bank account existed when the claimant filed this suit and that the account was transferred to the objector after incorporation. The subject bank account has been in the objector's name and in the absence of any convoluted change, then the objector has proven that it is the owner and operator of the account, distinct from the judgment debtor.

27. The objector has thus laid out a proper basis to warrant the court to lift the garnishee order nisi issued on 28th November, 2024 that froze funds in bank account number 0103671000395* domicile at Sidian Bank Kilimani branch that is in the objector's name. The objection by the objector is therefore upheld.
28. As for the prayer seeking for a blanket order to restrain any decree holder claiming through Bonito Hotels Limited from attaching the objector's account or property for full or part satisfaction of any decree issued against Bonito Hotels Limited, the court finds the prayer to be vague and ambiguous as no particulars have been provided. The court thus declines to grant such an order.

VI. Order

20. The court has said enough in demonstrating that the objector has demonstrated and proved that the subject bank account does not belong to the judgment debtor as to allow for execution of the decree against the funds therein. The court orders that –
 - i. The objection by the objector is therefore upheld.
 - ii. The garnishee order nisi issued on 28th November, 2024 is hereby set aside and discharged.
 - iii. This ruling also settles the application dated 25th November, 2024 against the 4th garnishee and the same is dismissed.
 - iv. There is no order as to costs in the objection proceedings and also in the application against the 4th garnishee that has been disallowed above.
 - v. The 4th garnishee is hereby discharged from these proceedings.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 19TH DAY OF DECEMBER, 2024.

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DAVID NDERITU

JUDGE

