

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY**

AT MWANZA

HC. MISC. CIVIL APPLICATION NO. 58 & 59 OF 2005

***(Arising from Misc Civil Appl. No. 56/2004 and Kenya Civil
Case No. 577/2000)***

**1. ILULA COMPANY LIMITED }
2. ROCK BEACH HOTEL LTD }APPLICANTS**

Versus

NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT

RULING

L. B. MCHOME. J

I have decided to consolidate Miscellaneous Civil Applications No. 58 and 59 of 2005. They arise from Miscellaneous Civil Application No. 56 of 2004. No. 56 of 2004 was an application for the Registration of the Judgment/ Order of the High Court of Kenya issued on the 9th day of December 2003 between National Oil Corporation of Kenya, the Plaintiff and Majige Joseph Company Limited, Defendant/ Respondent. The application was granted ex parte. It was an application by the applicant, National Oil Corporation of Kenya to execute, in Tanzania, a decree issued against the Respondent Majige Joseph Company Limited, by the High Court of Kenya, Nairobi.

No sooner had the attachment process started being issued than were these two objection applications filed. These are the applications No. 58 of 2005 between Rock Beach Hotel Limited, Applicant/ Objector and National Oil Corporation of Kenya Ltd, Respondent; And Application No. 59 of 2005 which is between Ilula

Company Limited, Applicant/ Objector and National Oil Corporation of Kenya, Respondent.

In Miscellaneous Civil Application No. 59 of 2005, the Applicant, Ilula Company Limited is objecting to the attachment of its property, namely farms Nos. 14, 18, and 19 situated in Ilula, Kwimba District. The applicant contends that he is not indebted to the Respondent, the said National Oil Corporation of Kenya in the sum decreed against the judgment debtor, Majige Joseph Company Ltd or at all. That the applicant has copies of the title deeds to the said farms, which he annexed to his affidavit.

Rock Beach Hotel Limited's application is No. 58. It is an objection to the attachment of Plot No. 3 Block X and Plot No. 50, Block X Capri point, Mwanza City. The affidavit of Michael Lushinje is attached in support of the objection. The objection is that the attached houses belong to the applicant, Rock Beach Hotels Limited, and not the judgment debtor, Majige Joseph Company Limited. That the applicant is not indebted to the said National Oil of Kenya Corporation in the sum decreed against the said Majige Joseph Company Limited or at all and that the warrant of attachment was not properly levied, as the applicant's property is not liable to attachment. In reply to the applications by Rock Beach Hotel Limited and Ilula Company Ltd the respondent filed a counter – affidavit of one Lois Allela to the effect that the prohibitory order issued by this court in respect of the properties known as Plots No. 14, 18, 19 to be found at Nyangwale Village at Misungwi and the houses on Plot No. 50 Block X and Plot No. 3 Block X to be found at Capri Point in

Mwanza City was proper and enforceable against the proprietary interests held in the said properties. That the deponent of the counter affidavit, has conducted a search at the Business Registry and Licence Agency "BRELA" located in Dar es salaam and established that:-

- (a) Rock Beach Hotel Ltd was incorporated with three subscribers: Joseph Majige, Jane Majige and Tungu Majige of similar address holding 50, 25 and 25 shares respectively.
- (b) The said Michael Joseph who stands in the position of majority shareholder of Rock Beach Hotel Ltd is the same person known as Joseph Majige, shareholder in the company known as Majige Joseph Company Ltd.
- (c) Rock Beach Hotel Ltd's address in P.O. Box 10773 Mwanza, the same used by Majige Joseph Ltd and Joseph Majige.

That as far back as 1998 Michael Lushinje signed in his capacity as an authorizing officer of and/ or on behalf of Majige Joseph Ltd, orders thereby demonstrating the close relationship and/ or association in control in respect of the companies known as Rock Beach Hotel Ltd and Majige Joseph Ltd.

Finally that basing on the facts revealed in respect of Rock Beach Hotel Ltd and its common shareholding with Majige Joseph Company LTD and further the fact of similar control special circumstances exist indicating that the objector company is a mere façade meant to frustrate the Respondent's efforts at executing the decree in its favour.

A similar counter –affidavit was filed in respect of Misc. Application No. 59 of 2005, by the same deponent to the effect that:-

- (a) On search conducted by the deponent at the Business Registry and License Agency "*BRELA*" Located in Dar es salaam Ilula Company Ltd was incorporated with two subscribers: Michael Joseph of P. O. Box 10773 Mwanza and M. Mukembo of Similar address holding 70 and 30 shares respectively.
- (b) The said Michael Joseph who stands in the position of majority shareholder of Ilula Company Ltd is the same person known as Joseph Majige shareholder in the company known as Majige Joseph Company Ltd.
- (c) That Ilula Company's address is P. O. Box 10773 Mwanza, the very same address used by Majige Joseph Ltd and Joseph Majige.

That there is close relationship and/ or association in control in respect of the companies known as Ilula Company Ltd and Majige Joseph Ltd.

That the objector company is a mere façade meant to frustrate the Respondent's efforts at executing the decree in its favour.

In his written submission the learned counsel for the applicant Mr. Nasimire submits that the parties in Civil Suit No. 577 of 2000 are the National Oil Corporation of Kenya Limited and Majige Joseph Company Limited. The property sought to be attached in Misc. Civil

Application No. 58 of 2005 belongs to and is actually registered in the name of Rock Beach Hotel Limited.

Likewise in Application No. 59 of 2005 he submits that farms Nos. 14, 18 and 19 at Ilula Kwimba belong to Ilula Company Limited. He contends that as neither Rock Beach Hotel Limited nor Ilula Company Limited is a party to the suit so no property of either company may be attached in satisfaction of the said decree since also neither company is a judgment debtor in the said suit.

Mr. Nasimire continues to submit that it is uncalled for and misguided for the Respondent to contend that Rock Beach Hotel Limited and Ilula Company Limited are one and the same thing as Majige Joseph Company Limited simply because Joseph Majige is a majority shareholder in all these three companies. He contends that it is not true that the objector company is a mere facade meant to frustrate the efforts at executing the decree. He submits that the three companies were floated long before the case giving rise to the present objection proceedings was filed. Secondly he argues that a company is a separate legal entity from the members who constitute it. So the debts of one of its directors are not the liability of the company. He cited the case of Bright Communications Ltd V. Nyakutonya NPF Company Limited (Civil Revision No. 9 of 1995 Mwanza Registry unreported)

In reply the Learned Counsel for the respondent, Mr. Malongo submits that Majige Joseph Limited and Ilula Company Limited are in fact the same and are under the control of the same people and the property attached are being held by the applicant in trust of the

judgment debtor. So he prays that the objection should be disallowed under Order XXI Rule 57 (1) and section 68 (e) of the Civil Procedure Code 1966.

He submits further that this is a clear case for the court to lift the corporate veil as the devise of incorporation has been used for improper purposes. Mr. Malongo further contends that this application has been filed for the sole purpose of delaying the respondent from enjoying the fruits of the decree, as the applicant was aware of the debt due to the Respondent since 2003.

On similar lines the Learned Counsel for the Respondent argued Application No. 59 of 2005.

In a rejoinder to the Respondent's submission Learned Counsel for the applicant submits that these three companies are different if not distinct legal entities. He continues submitting that there is no scintilla of evidence that the applicant is holding the properties in trust for the judgment debtor.

On the lifting of the veil of incorporation there is no evidence, he argues, that the devise of incorporation is used for some improper purpose e.g. to avoid some legal obligation, such as transferring property to a certain company for that purpose. Learned counsel submits that the judgment debtor was incorporated on 10/11/95 while the applicant company was incorporated on 30/07/99, even before this suit was instituted.

On delay the learned counsel for the applicant submits that there is no delay as these objection proceedings were filed on 1/7/2005 while the applicant was served with a notice to settle the decretal sum only on 24/6/2005, within only one week!

It is undisputed that some of the directors and shareholders of the judgment debtor are also directors and shareholders of the objectors or applicants in these two applications. The learned counsel for the applicants submits that each company is a separate legal entity and so the debts of one of its directors are not the liability of the company. I agree with him.

Order XXI Rule 58 of the Civil Procedure Code 1966 provides: -

"The claimant or objector must adduce evidence to show that at the time of the attachment he had some interest in or was possessed of the property attached."

From the affidavits of the applicants and the annexed title deeds the claimants or objectors have proved that they are the owners of the property attached. That is Plot No. 50 Block X Capri Point and Plot No. 3 Block X Capri Point Mwanza City are registered in the name of the applicant Rock Beach Hotel Limited. The Certificate of Occupancy, Annexure B to the affidavit, is proof of this. The other applicant, Ilula Farm is the owner of the three farms attached at Kwimba. The Certificates of Occupancy attached are also proof of this. There is no evidence that the attached property belongs to the judgment debtor.

Nor is there evidence that the applicants are in possession of the attached property in trust for the judgment debtor, Majige Joseph Company Limited.

The respondents argue that this is a case for "*lifting the veil*" of corporateness as the device of incorporation has been used for some improper purpose. But I agree with the applicant's argument that the attached property has never belonged to the judgment debtor and been transferred to the applicants with a view to defeat the respondent's decree. It is undisputed that both the judgment debtor and applicant companies were incorporated even before the main suit No. 577/2000 was filed in the High Court of Kenya.

On the delay I agree with the applicant that under the proviso to Order XXI Rule 57(1) of the Civil Procedure Code 1966 it is about the filing of the claim or objection. Where the objection is unnecessarily delayed the court shall not investigate it. These objection proceedings were not delayed at all, as the applicant has stated in his rejoinder to the reply by the respondents. They were filed within a week of service of the notice to settle the decretal sum.

One thing which puzzles me is why the decree holder did not apply to attach any property of the judgment debtor himself. In fact the records shows there were two defendants, the second one being "*Trust Bank Tanzania*". No warrant of attachment was issued against the second defendant, the Trust Bank of Tanzania, either.

Be that as it may but the applicants/ objectors have proved before this court that they are the exclusive owners of the attached

property; that they are not holding it in trust for the judgment debtor; that the judgment debtor is not the owner of the attached property and that the applicants are not parties to the Kenya High Court Civil Case No. 577 of 2000. It has not been proved that the debts of the judgment debtor Majige Joseph Company Limited are the debts or liability of the applicants, Rock Beach Hotel Limited and/ or Ilula Company Limited.

For these reasons I allow these applications and I order that the attachments on the properties to, wit, Farms Nos. 14, 18 and 19 at Ilula Kwimba and Plot No. 3 Block "X" and Plot No. 50 Block "X" Capri Point, Mwanza City be raised immediately and handed over to the applicants/ objectors, Ilula Company Limited and Rock Beach Hotel Limited, respectively.

The respondent will bear the costs of these applications.

AT MUSOMA

20/11/2007


L. B. MCHOME

JUDGE

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JUDGE

Date: 21/12/2007

Coram: F. W. Mgaya.— DR

For Applicant: Present

For Respondent: Represented by Chamani for Malongo

B/C: P. Alphonse - RMA

COURT:

The judgment of the Court is delivered to the parties in chambers in my presence this 21/12/2007 in the presence of the applicant and the respondent.


F. Mgaya

DR

21/12/2007