THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 0693 - 2013

(Arising from Miscellaneous Application No. 48 of 2013)

(Arising from Civil Suit No. 28 & 29 of 2011)

DAVID BAINGANA ::: APPLICANT

VERSUS

SDV TRANSAMI ::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This application seeks this court to set aside, this court's order to execute against David Baingana, Applicant hereof. It arises out of Civil Suit No. 28 and 29 of 2011. In suit 28 of 2011, the Respondent SDV Transami (Uganda Limited, sued Investpro Holdings Ltd.

The background which emanated from the pleadings of the summary suit where that the Respondent being a logistics company, cleared and transported goods that belonged to Investpro Holdings. Investpro Holdings made some payment leaving an outstanding balance of US$ 44,583.01. Payment was not forthcoming so the Respondent sued.

The situation was the same in CS 29 of 2011 save that the sum sought in this case was $ 111,414.09.

On the 20th April 2011 the Respondent and Investpro Holdings entered consent in favour of the Respondent for US$ 44,583.01 with costs in respect of CS 28 of 2011 and on the 20th April 2011, the Respondent and Investpro Holdings Ltd together with its fellow defendant Kalsons Agrovet Concerns Ltd entered into consent in favour of the Respondent in the sum of $ 106,346.60. This sum was to be paid in the amount each of the defendants had admitted.

Payment was not forthcoming so the Respondent filed Miscellaneous Application No, 49 of 2013 and 48 of the same year. In these applications, the Respondent sought to execute against the Directors of the now applicants. The main ground was that the judgment debtors had no known assets or property which could be attached by the now Respondent, to sale and recover the decretal sum.

On the 27th day of April, the learned Judge granted the application in these words;

> *"Leave is hereby granted that the execution orders in Civil Suit No. 028 of 2011 passed against the Respondent be executed against the Directors of the Respondent company as under Order 29(2) of the Civil Procedure Rules".*

It is in my opinion right at this stage to reproduce order 29(2) under which the learned Judge granted the application. The order 29 rule 2 deals with service on corporation in these words;

> *"Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served*
>
> *a) On the secretary, or on any director or other principal officer of the corporation; or*
>
> *b) By leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation caries on business."*

A similar order was made in respect of MA 49 of 2013.

Execution proceedings were commenced against the directors to Investpro Holdingsand Kalson Agrovet Concerns Ltd. The directors were aggrieved thus this application seeking court to set aside, the orders of court and the execution resulting from them.

The application is grounded on the following:-

1. That the applicant David Baingana and John Nsamba are directors of the Judgment debtor.

2. That the judgments were not entered against them since no suit existed in which they were defendants.

3. That no order was granted lifting the veil.

4. That the procedure under which execution was ordered against the applicant was illegal and or irregular.

When the matter came up for hearing, it was agreed that application No. 693 of 2013 and 639 be consolidated.

Counsel for the Respondent opened his submission, with a preliminary objection seeking court to dismiss the application. He contended that the order that the applicant sought to set aside was in respect of a matter that came up before my brother Judge. That since the matter was rightly before the Judge, and he heard the application to be executed against the directors, the only option was to appeal. That since the applicant had not sought a review, the matter was wrongly before this court and should be dismissed.

In reply Mr. Ojambo for the applicant submitted that an appeal could only be done by those who had been party to the earlier proceedings. That since the applicants had not been party to the suits or applications from which the order complained of arose, they could not appeal. He further submitted that this was not an application for review.

I shall first consider whether the application that sought execution against the applicants was brought under the right procedure.

There is no doubt that the suits were brought against the companies namely; Investpro Holdings Ltd and Kalson Agrovet Concerns Ltd.

There is also no dispute that the two defendant companies lost and decrees against them in the sums of US$ 106,346.60 and US$ 44,583.01 were extracted.

What is in issue though is that instead of execution being leveled against them, the Respondent directed the execution against the applicants who were directors of the Judgment debtors.

It is settled law that the directors could face execution proceedings where it was shown that the defendant company was nothing more than a clock, a creature of the directors, a device and a sham, a mask which they had before their faces in an attempt to avoid recognition by the eye of equity. In this case the court would be, protecting the judgment creditor against fraudulent directors, **Nile Bank Ltd V Gomba Machinery and General Equipment Ltd** [1992]1 KALR 67.

The corporate veil can be lifted at any stage including execution in appropriate cases; **Corporate Insurance Company Ltd V Saveman Insurance Brothers Ltd** [2002]1 EA 41.

The applicants complaint was that since there was no application to lift the veil execution could not be levied against them.

While a company is a person on its own, its relationship with the directors can be likened to a human body. Companies as Lord Denning said in **HL Bolton Co**. **V** **T J Graham and Sons** [1956]3 All ER 627.

> *"have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in*

accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be personal fault of the company. That is made clear in ***Lord Haldane's Speech in Lennard's Carrying Co. Ltd V Asiatic Petroleum Co. Ltd*** *[1915]AC 705 at 713, 714.*
So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty."

In coming to the foregoing, the learned Judge relied on the words of the court in **R V ICR Haulage Ltd** [1944]1 All ER 691 at page 695 said;

"Whether in any particular case there is evidence to go to a jury that the criminal act if an agent, including his state of mind, intention, knowledge or belief is the act of the company… must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

It is from the above, that we can deduce the intention of the company. In the instant case, the applicants were directors with full control of the company affairs. They appeared in court on the 29th February 2012 and in no uncertain terms told court how they were going to pay the decretal sum. That reflected the company's mind which they represented and whose mind they directed as it was under their control. Their state of mind was the company's state of mind. Their guilt was the companies' guilt.

In the instant case, the Judgment creditor searched and failed to find any company assets to attach. He filed an application to enable the applicants to attend. Service was effected as proved by the affidavit of service. The application suggested that the applicants were the only persons in effectual control of the companies, and therefore could disclose any books or documents regarding the Respondent debts and any properties or means of satisfying, the decretal sum.

The refusal to attend court can only be interpreted as hiding the truth of the companies affairs from court.

The application was not defended and I find no reason to fault my brother Judge. While the word veil was not used, its existence can be clearly read in the words of the court when the Judge wrote

> *"It is for orders that the execution be made against the directors as prayed in the motion because the Respondents have no known assets or property of the companies. The application is not defended and I find no reason not to allow it. I accordingly allow the application with costs."*

The applicants were in full control of the companies which negated the need of the Respondent to prove that they were responsible for the failure of the Judgment debtor to meet its debts and or the whereabouts of the company assets. Since the assets could not be found, the only persons who knew the whereabouts or canceled them were these applicants.

Their staying away from court did not help matters, but instead left them exposed to make good the judgment debts.

Lastly, since matters of execution could not be made subject of a fresh suit, the procedure that was adopted was the most appropriate. For the above reasons, I find no merit in the application which I dismiss with costs.

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David K. Wangutusi

JUDGE

Date: 04 - 12 - 2013