



REPUBLIC OF KENYA



KENYA LAW

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**Kenjap Motor Limited v Zeki Wanjala t/a Zeki Motors Ltd; Awaili (Objector)
(Civil Case 74 of 2016) [2024] KEHC 9183 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 74 OF 2016
PN GICHOHI, J
JULY 31, 2024**

BETWEEN

KENJAP MOTOR LIMITED PLAINTIFF

AND

ZEKI WANJALA T/A ZEKI MOTORS LTD DEFENDANT

AND

NELSON AWAILI OBJECTOR

RULING

1. By a Notice of Motion dated 2nd October 2023, the Objector seeks Orders:-
 1. That this Honourable Court be pleased to lift the corporate veil of the Plaintiff herein.
 2. That this Honourable Court be pleased to make orders for the personal attendance of H R, AR v GAM and E K, all directors and managers of the Plaintiff to attend court to show cause why they should not be punished for contempt of court on a date scheduled by this Honourable Court.
 3. That the costs of this application be borne by the Plaintiff.
2. The grounds are on the face of that application supported by the Affidavit sworn 2nd October 2023 by Nelson Awili. He states that this Court delivered a ruling on 5th July, 2023 in the presence of Counsel for the Plaintiff directing, inter alia, that the Motor Vehicle Registration Number KBY 743N be released to the Objector (the Applicant herein) forthwith. That the Order arising from the Ruling was also served upon the Plaintiff and the Plaintiff's Counsel.



3. He further, depones that the Plaintiff has to date refused, failed and/or ignored the Court Order and continues to be in disobedience which disobedience is punishable by law. He states that the authority and powers of this Court is being unlawfully challenged by the Plaintiff herein. It is his averment that it is necessary to punish the cited contemnors so as to uphold the dignity and authority of this Court.
4. Upon being served , the Plaintiff filed both a Replying Affidavit sworn by Darius Ngugi Mbugua on 12th April 2024 in his capacity as the the legal service manager of the Plaintiff. He states that judgment in this matter was delivered 14th May 2020 in favour of Plaintiff/Respondent for sum of KShs. 36,120,000.
5. He depones that the Plaintiff has never been served with the with the Order issues on 5th July 2023 and 28th October 2020. Though there was an affidavit of service by one Samuel Gekanana purporting to have served the Order dated 6th July 2023 upon upon the plaintiff who declined service, no such Order was been attached. Further , he depones that the copy of the order allegedly served upon the firm of Frank Mwangi & Co. Advocates who acknowledged receipt was not attached.
6. It is further depones that the Plaintiff is not capable of complying with the orders issued on 5th July 2023 as motor vehicle KBY 743N is in the custody of the Objector who has admitted the same in his application dated 3rd April, 2023.
7. It is his averment that the Plaintiff has never transacted with the Objector in respect of the subject motor vehicle and he is a stranger to it and to these proceedings.
8. He further avers that no contract of sale has been evidenced by the Objector to demonstrate any dealings with the Plaintiff or the Defendant and further, the directors of the Plaintiff have never been served with the orders issued on 5th July, 2023. He therefore urges the Court to dismiss the application herein.
9. The Plaintiff also filed a Preliminary Objection also dated 12th March 2024. Terming the application fatally defective, he seeks that the application be struck out with costs to the Plaintiff for being *Res Judicata* for offending the the mandatory provisions of section 7 of the *civil procedure Act*.
10. This Court directed that the application and the Preliminary Objection be heard together.

Plaintiff' Submissions

11. In submissions dated 15/4/2024, Counsel for the Plaintiff emphasised the contents of his Affidavit and the Preliminary Objection.
12. Maintaining that the application herein is *Res Judicata*, Counsel submits the prayers sought in this application are similar/ identical to the ones that had been sought by the Defendant in the application dated 17/04/2023 which was heard and determined vide a ruling dated 05/07/2023.
13. In regard to whether this Court should issue an order for the personal attendance of Haviradan Ramjivarsani, Arumairajarishi Vedanaya Gam and Ellen Kagiri, all directors and managers of the Plaintiff to attend court to show cause why they should not be punished for contempt of court on a date scheduled by this Honourable Court, Counsel maintains that service was not done.
14. He submits that Contempt proceedings are quasi criminal in nature and it entails a person being sent to prison for the said offence, hence proper service of the Court Order is paramount in these proceedings.



He relied on the case of *Africa Management Communication International Limited v Joseph Mathenge Mugo & another* [2013] eKLR where A. Mabeya J held :-

“In my view, it was vital for the Plaintiff to demonstrate that Victoria Cecilia Karanja was personally served with that order or had knowledge of the same. I am guided by the fact that contempt proceedings are akin to criminal proceedings. A person may be sent to prison thereby lose his or her liberty for that offence. For that reason, it is very important that such a person is shown to have had notice of the order and had the opportunity to obey the same but failed to do so. In the instant case, it is unclear whether Victoria Cecilia Karanja had knowledge of the order or was personally served with the Order. In absence of such proof, I do not think that any good case has been made for her committal.”

15. Counsel therefore submits that Ellen Kagiri alleged to have been served is not a Director in the Plaintiff Company as per the CR 12 annexed by the Objector/ Applicant as "NA2". He further submits that no evidence was tendered by the Objector to show that the Order was served upon the Plaintiff's directors Haviradan Ramji Varsani, and Arumairajarishi Vedanaya Gam whom he seeks to be found in contempt of court orders.

16. Counsel further submits that prayer 2 and 3 of the application herein do not state precisely which orders the Plaintiff should be found in contempt and therefore, the prayers sought are vague and incapable of being issued. In support of that argument, Counsel relies on the case of *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 where the Court of Appeal held that:

“The courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.

17. In conclusion therefore, counsel urges the Court to dismiss the application with costs.

Objector's Submissions

18. Their submissions are dated 11th April 2024. After highlighting the background of this application, Counsel embarked on the two issues for determination that is:-

1. Whether the application is *Res Judicata*.
2. Whether this Honourable Court should lift the corporate veil and order the personal attendance of the named persons to show cause why they should not be punished for contempt of court.
3. Who should bear the costs of this application.

19. On the first issue, Counsel submits the ruling dated 5th July, 2023 which the Plaintiff refers to is a ruling relating to three different applications where the Judge keenly specified orders relating to each application.



20. Counsel further submits that in the application dated 3rd April, 2023, where the objector was a party, he did not seek any orders relating to the matters in the present application and hence these issues have not been heard on merit.
21. Counsel submits that the orders relating to lifting of the corporate veil in mentioned judgement related to a different vehicle and therefore a totally different subject matter that was presented by a different party. On this issue, Counsel cites, among others, the case of *Abmed Ismael Adan & 9 others v Regional Co-Coordinator, North Eastern Region (NER) & 4 others* [2017] eKLR where George Dulu J held that:
- “The person who claims that something is *Res Judicata* has to demonstrate what is covered by that *Res Judicata*. Same parties can litigate in court over various matters arising at various times, and a mere similarity does not create *Res Judicata*.”
22. As to what amounts to a matter being directly and substantially the same Counsel cites the case of *Kibundi v Mukobwa & another* [1993] eKLR where it was held;
- “..... A matter cannot be said to have been directly and substantially in issue in a suit unless it was alleged by one party and denied or admitted either expressly or by necessary implication by the other. Whether a matter was directly and substantially in issue in a former suit is to be determined by reference to the pleadings, the issues and judgement. ”
23. Counsel therefore submits that the Objector has not in any other matter made the prayers as in this application nor has the same been defended. He therefore surges the Court reject the objection on *Res Judicata*.
24. On whether actions of the Plaintiff amount to contempt of court, Counsel submits that the orders of 5th July 2023 were that the the Motor Vehicle Registration Number KBY 743N be released to the Objector who is the Applicant herein and that the orders were issued in the presence of Counsel for the Plaintiff and later served on the plaintiff and his Counsel and therefore, the issue of service was not doubtful.
25. Further , he submits that the terms of the orders were very clear and binding to the Plaintiff and by deliberately failing to release the motor vehicle despite the knowledge of the orders, the Plaintiff is in contempt of Court and that this Court has powers to intervene. For that argument, he places reliance on the *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015]eKLR where the Court of Appeal held:-
- “We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not...The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the *constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.”
26. On whether the corporate veil should be lifted and the three named persons i.e directors and a manager should be ordered to show cause, Counsel submits that the actions of the Plaintiff are being carried out by its directors and managers respectively.



27. That from the CR-12 annexed to the application, the persons named as directors are the ones sought to be cited while the manager, Ellen Kagiri even represented the company at the hearing and she testified that three (3) motor vehicles (including the objector's motor vehicle) were fully paid for.
28. On lifting of the veil, Counsel cited several cases including the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR where the Court of Appeal held that;
- “The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”
29. Counsel submits that the company has been used for improper and illegal purposes which is to illegally hold the subject motor vehicle which is an unpaid court judgement. He therefore urges the Court to lift the corporate veil. In conclusion, he urges the Court to allow the Objector's application as prayed.

Determination

30. This Court has considered the application, affidavits, the preliminary Objection, the submissions by the parties and the authorities cited therein. Further, this Court has pursued the entire Court record, the judgment and the rulings delivered therein. The broad issues that arise herein are:-
1. Whether the application herein is *Res Judicata*.
 2. Whether the Objector should be granted the orders sought herein.
31. No doubt, in the judgment delivered by Rachel Ngetich J on 14th May 2020, was between the Plaintiff herein and the Defendant. Several vehicles including M/V. Reg. No. KBY 743 N featured. In the Counter -Claim, the Defendant urged the Court to order the Plaintiff to reconcile accounts with the Defendant's , that the Plaintiff be barred from demanding payment from 3rd Parties and to release log books for several motor vehicles. One of them was M/V. Reg. No. KBY 743 N.
32. The Court found that the Plaintiff was entitled to repossess the motor vehicles to recover the balances as per the agreement between them since the Defendant had failed to demonstrate he had paid the balances owing.
33. Ultimately, the Court gave following final orders:-
1. Judgment is entered for the for the Plaintiff against the defendant for Kshs. 36,120, 000.
 2. Defendant's counterclaim is hereby dismissed.
 3. Interest on 1 above at Court's rate from the date of filing this suit.
 4. Costs of this suit to the Plaintiff.
34. Thereafter, it is apparent several applications were filed in this file. In particular, and of relevance to this application, is captured in the Ruling dated 5th July 2023 by T. Odera J. Going by the introduction part of the Ruling , it is apparent that three applications were the subject of the ruling as the Court stated:-

“This ruling relates to three applications viz: one, a notice of motion (hereafter called the “first application”) dated 3rd April 2023 filed by the Objector – Nelson Awili on 5th April



2023, two, another notice of motion (hereafter called the “second application”) dated 17th April 2023 filed by the judgment debtor/ Applicant, Zeki Wanjala T/A Zeki Motors on 18th April 2023, and the Preliminary objection dated 8.5.2023 filed by the Objector ...”

35. In her analysis and while referring to the Judgment by R. Ngetich J and the subsequent ruling by R. Ngetich J dated 28/10/2020, T. Odera J found that M/V Reg. No. KBY 743 was fully paid and cannot be subject of repossession for non- payment. Subsequently and while upholding the objection, the Court held:-

“...I will say more on this issue other than to declare the said repossession of the motor vehicle KBY 743 N to be illegal and order its release to the Objector forthwith.”

36. In answer therefore, to the issue as to whether the application herein is *Res Judicata*, the parties have aptly cited the case law on that doctrine. Further, the threshold for proving the applicability of the doctrine of *Res Judicata* was restated in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR, where the Supreme Court held at paragraph 86:-

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *Res Judicata*. For *Res Judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

37. In this application, the issue here is lifting of the corporate veil so that the Plaintiff’s directors can answer for failure to obey the Court Orders. It is therefore plain and it cannot be overemphasised, that this matter is not *Res Judicata*.

38. On the issue of service of the orders or knowledge of the said orders, the record shows that the ruling of 5th July 2023 was delivered in the presence of “Akango for objector / applicant, Jeruto for Defendant/ Applicant and Njoroge for Mr. Mwangi for the for the Respondent.”

39. The *Civil Procedure Act* holds the party, the Advocate and the court to take deliberate steps towards expeditious disposal of civil disputes. To be specific, the Act provides under Section 1A:

- (1) The overriding objective of this *Act* and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the *Act* and, to that effect,



to participate in the processes of the Court and to comply with the directions and orders of the Court.”

40. The Plaintiff’s attempt to cling onto the fact that there was no order attached to the affidavit of service is futile in the circumstances.
41. It is true that Contempt of Court Proceedings are drastic but it is also drastic and untenable that Court Orders issued in the presence of parties and/or their advocates should be ignored.
42. Further, it is also futile for persons to hide behind the corporate veil. A company is run by individuals. That is why it is critical for them to attend Court and show cause why the orders, which have not been set aside or reviewed, should not be complied with. That in itself promotes the rule of law, enhances public confidence on the justice system and protects interest of parties before the court.
43. For those reasons the court makes the following orders:-
 1. The Preliminary Objection is dismissed.
 2. The Corporate veil of the Plaintiff be and is hereby lifted.
 3. Notice be and is hereby issued on Havirada Ramjivarsani, Arumairajarishi Vedanaya Gam and Ellen Kagiri to attend Court and show cause why they should Not be punished for contempt of court.
 4. Costs of the application are awarded to the Objector.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JULY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Njoroge for Mr. Mwangi for the Plaintiff

Ms Mungai for Mr. Akang’o for the Objector /Applicant

Ruto Court Assistant

