



**Onenga v Dima College Limited & another (Petition 577 of 2017) [2022] KEHC 15476 (KLR)  
(Constitutional and Human Rights) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 577 OF 2017  
HI ONG'UDI, J  
NOVEMBER 18, 2022**

**BETWEEN**

**PHYLIS KEMUMA ONENGA ..... PETITIONER**

**AND**

**DIMA COLLEGE LIMITED ..... DEBTOR**

**AND**

**DIMA DRIVING SCHOOL LIMITED ..... OBJECTOR**

**RULING**

1. The objector herein filed the Notice of Motion dated 15<sup>th</sup> June 2022 seeking the following orders:-
  - i. & (ii) Spent.
  - iii. That the attachment herein by ICON Auctioneers be lifted forthwith.
  - iv. That the costs of this application be borne by the petitioner & the Auctioneers.
2. The application is supported by the following grounds:
  - i. That the attachment herein as shown by the proclamation dated 13<sup>th</sup> June, 2022 was carried out at premises owned by the objector Dima Driving School Limited.
  - ii. That the equipment on the aforesaid demised property belong to the objector Dima Driving School Limited which is different from the Judgment debtor and are no way related to one another.
  - iii. That the attachment of properties of the Objector will cause more harm to the institution which uses it's attached goods for operation of day to day business.



3. It is further supported by the affidavit of Mundia Geteria the director of Dima Driving School Limited the Objector. He avers that the objector's office equipment and property were proclaimed by the decree-holder on 13<sup>th</sup> day of June 2022, as per the proclamation "GM1". He annexed a certificate of incorporation of the objector (GM2) which is a separate entity from the judgment debtor. He denies being a party to the suit or having knowledge of the same. He therefore prays for the lifting of the execution.
4. The Petitioner/decreed-holder filed a replying affidavit dated 4<sup>th</sup> July 2022. She deponed that Mundia Geteria is the director of both the Judgment debtor and the Objector. She annexed communication between her counsel and the Judgment debtor's counsel (PKO1 & PKO2). She further deponed that the attached properties belong to the Judgment debtor and not the Objector. That nothing in form of a logbook or receipt were annexed to confirm the ownership of the equipment and motor vehicles. She further deponed that Mundia Geteria has given falsehoods to the Court, having deliberately transferred the vehicles to his names (PKO 3a & 3b), to avoid execution.

### Submissions

5. The Objectors submissions were filed by Njeru, Nyaga & co. advocates and are dated 21<sup>st</sup> July 2022. Counsel submits that the Judgment debtor and the objector are separate legal entities. That the objector is a single director company while the judgment debtor was incorporated long before the amendment of the *Companies Act* allowing for single director companies. He relied on the cases of:
  - i. Abdulkarim Ali Mohamed v. Coast Mail Company Limited & another Nairobi ELRC No. 477 of 2014.
  - ii. New Kenya Co-operative Creameries Ltd vs. Omari Mzee Segal and another Mombasa CA No. 71 of 2004, to argue his case.
6. He submitted that distinct and separate legal entities cannot be compelled to settle each others debts. He adds that the decree holder has accepted that the Judgment debtor and Objector are two different entities. Counsel submits that the scenes of operation of the two entities are different as the objector is situated along Ndemi Road in Kilimani area of Nairobi as indicated in the proclamation (GM1) whereas the Judgment debtor used to operate along River Road in Central business district. He has relied on Boleyn Magic Wall Panel Ltd –vs. Nesco Services Ltd & another Machakos SMCCC No. 1605/2017 to support his case.
7. The petitioner /respondent's submissions by Omongo Gatune & company advocates are dated 15<sup>th</sup> August 2022. Counsel relied on the respondent's replying affidavit, and submitted that the objector did not avail any receipts, logbooks, or sale agreement to confirm ownership. That there was no nexus between the registered company and the proclaimed items. Counsel contends that the records (PKO 3a & 3b) confirm that the ownership of the two vehicles had moved from the Judgment debtor to Mundia Geteria to defeat execution. Secondly that in his affidavit he does not depone to owning the two vehicles. He accuses the objector of coming to court with unclean hands.
8. Counsel contends that the two authorities cited by the objector are inapplicable because in Abdulkarim Ali Mohamed (*supra*) there was lifting of the attachment as motor vehicle KBK 062J was registered in the Objector's name. The rest of the other items and motor vehicle KBE 888P were not proved to be in the Objector's name. Similarly in Boleyn Magic Wall Panel Ltd the attachment was partially raised where evidence and or proof of ownership was adduced. However in the current matter counsel argues that no proof of ownership of the proclaimed items has been exhibited. He relied on the case of *Stephen Kiprotich Koech v. Edwin K. Barchilei; Joel Sitienei, (Objector)* 2019 eKLR in support of this argument.



## Analysis and Determination

9. Objection to attachment is governed by Order 22 Rule 51(1) of the Civil Procedure Rules which provides:-

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 the parties and to the decree-holder of his objection to the attachment of such property.”

10. Having considered, the application, affidavits, submissions and the law I find the issue falling for determination to be whether the objector has proved that it has a legal or equitable interest in whole or part of the items attached.
11. I first of all wish to point out that the Judgment debtor herein (Dima College Ltd) did not file any response to the application herein.
12. The proclamation document (GM1) shows the attached office equipment and two motor vehicles. The attachment was allegedly done at Dima College at Ngong Road. The Objector has annexed a certificate of incorporation showing that Dima Driving School Ltd (Objector) was registered on 9<sup>th</sup> March 2021.
13. The petitioner/respondent produced NTSA copies of records for the two attached vehicles (KCE 308X and KAE 002P) as (PKO a & b). The two documents show the details of the registered ownership of the motor vehicle. The registered owner is Mundia Njeru Geteria P.I.N No. A000114838F. The documents do not show ownership by any other person / persons or body /bodies besides Mr. Mundia Geteria. There is no record of any transfer/transfers, as claimed by counsel for the Petitioner/ respondent. No document has been placed before this Court to show that the two vehicles were ever owned by the Dima College Ltd (Judgment debtor).
14. Section 8 of the *Traffic Act* provides;

“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle.”

There is no evidence placed before this Court to rebut the evidence showing Mr. Mundia Geteria as the owner of the two proclaimed vehicles namely KCE 308X & KAE 002P.

15. It was stated by D.O. Chepkwony J in *New Kenya Co-operative Creameries*

“It is trite law that a company is, in law, a separate legal entity distinct from its members.”

The Judgment debtor (Dima College Ltd) and the Objector (Dima Driving School Ltd) are two different entities. The petitioner /respondent has submitted that Mr. Mundia Geteria is the director of each of these entities. Mr. Geteria has deponed to being the director of the objector only. Besides the petitioner/respondent’s averment there is nothing on record showing who the director of Dima College Ltd (a totally different entity) is.

16. There is a dispute as to exactly where these items were attached from. The proclamation shows it was at the Dima College Ltd at Ngong road, Ndemi road. On the other hand the director of the Objector depones that the items were attached at the premises of the Objector on 13<sup>th</sup> June 2022. Does the premises on Ngong road belong to the Judgment debtor or Objector? The person who did the



proclamation of the goods i.e. the Auctioneer would have been better placed to explain to this court where exactly he did the attachment from. He ought to have sworn and filed an affidavit.

17. Also referred to by the Petitioner/respondent is a communication between the lawyers of the Judgment debtor and those of the Judgment creditor. In the email print out dated 7<sup>th</sup> June 2022 (PKO2) counsel for the Judgment debtor in response to the letter by counsel for the petitioner/respondent dated 6<sup>th</sup> June 2022 stated thus:

“We are in receipt of your letter dated 6<sup>th</sup> June, 2022 and have appraised our client of its contents. We are taking instructions and shall revert in due course.”
18. In the replying affidavit the Petitioner/Respondent seems to suggest that the Objector was in touch with counsel for the Judgment debtor who was taking it’s instructions. This is far from the truth because Kinoti & Kibe & co. advocates appear for the Judgment debtor and not the Objector. When counsel Kinoti talked of appraising his client he was referring to the Judgment debtor and not the Objector.
19. Besides the motor vehicles, the rest of the attached items are office equipment and they have no special marks on them. Having been proclaimed at the same place with the two vehicles it means they were in the same premises, and belong to the Objector.
20. Under Sections 107 and 108 of the *Evidence Act*, an Objector has the burden of proving and establishing his right to have the attached property released from the attachment. See *Pre cast Portal Structures vs. Kenya Pencil Company Ltd & 2 others* [1993] eKLR.
21. My finding is that the Objector has satisfied this Court that a part of the proclaimed items belong to Mundia Geteria while others belong to the Objector. There is no evidence of any of them belonging to the Judgment debtor. The Judgment debtor and the Objector are two separate legal entities and must be treated as such.
22. The upshot is that the application dated 15<sup>th</sup> June 2022 has merit and is allowed with costs to be borne by the Petitioner/respondent.

Orders accordingly.

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI.**

**H. I. ONG’UDI**

**JUDGE OF THE HIGH COURT**

