



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Case 152 of 1995**

**DUNCAN KAMBA KATABWA :::::::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**KITUI EASTERN BUS SERVICES:::::::::::::::::::::::::::::1<sup>ST</sup> DEFENDANT**

**JOHN KITANA SAMUEL VELALA:::::::::::::::::::::::::: 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 29.4.2008, I delivered a Judgment in this matter and specifically stated as follows:-

*“ ... Judgment must be entered in the sum of Kshs. 783,000/= only in favour of the Plaintiff. Costs of the suit and interest thereon shall also be paid to the Plaintiff as prayed in paragraphs (b), (c) and (d) of the Plaintiff.”*

2. For avoidance of doubt paragraphs (b), (c) and (d) of the Plaintiff related to “**costs of the suit**” and “**interest**” on the principal sum of Kshs. 783,000/= and “**interest**” on costs.

3. The parties to whom judgment had attached are :-

“i. Kitui Eastern Bus Service described in the Plaintiff dated

24.3.1995 at paragraph 2 as “*a bus company...incorporated in Kenya under the Relevant Provisions and having its registered offices in Kitui within the Republic aforesaid and its address is care of Post Office Box Number 17, Kitui.*”

ii) Katana Samuel Velala said to have been employed by Kitui Eastern Bus Service at all material times.

4. I see from the record that on 30.4.2008, M/S Kerandi, Manduku & Ondabu Advocates acting for the Plaintiff addressed a Notice of Entry of Judgment to the following:-

i) John Kitana Velala

P.O. Box 17

KITUI

ii) The Managing Director

Kitui Eastern Bus Service Ltd

P.O. Box 17

KITUI

5. One Peter Nyamosi, in an affidavit sworn on 23.5.2008 deponed that he served the said Notice on 2.5.2008 upon “Mr. Ali and Mr. John Kitana Velala, the Directors of Kitui Eastern Bus Services Defendant Company herein” at their Mombasa Maize Millers Offices. He deponed further that “the said Mr. Ali and Mr. John Kitana Velala the Defendant Company’s Directors were not known to me there before.”
6. In the Application for execution of decree on record which is undated, the persons against whom the decree was sought to be executed are noted as:-
- i) Kitui Eastern Bus Service and
  - ii) John Kitana Samwel Velela
7. In the Warrant of Sale of Property dated 5.6.2008, the sum to be recovered is noted as Kshs. 2,004.480/= and the execution was against “Kitui Eastern (B) Service Co. Ltd”.
8. On 2.7.2008, Shamim Salim and Salim Sheikhan objected to attachment of their properties on grounds that “they are strangers to any entity known as KITUI EASTERN BUS SERVICE” and that the properties the Auctioneers attempted to attach belonged to Shamim Salim by virtue of Kadhi’s Court case No. 72/2008.
9. On the same day, one Francis Mwangangi filed an objection to the attachment and one of the reasons for doing so was that “motor vehicle No. KBB 333 G belongs to the objector” i.e himself and he had nothing to do with Kitui Eastern Bus Service.
10. The above background is important because the Application before me is dated 10.7.2008 and is premised on Order XXI Rule 56 of the Civil Procedure Rules which provides as follows:-
- “Should the attaching creditor, in pursuance of a notice issued under rule 54 intimate to the court and the objector that he proposes to proceed with the attachment, the objector shall take proceedings to establish his claim within 10 days of service upon him of such intimation.”*
11. The prayers now sought under that Rule are:-
- a) *That the Honourable Court be pleased to raise the attachment of goods as attached by Jogan Dries Services and shown in a proclamation issued thereof on 6<sup>th</sup> June 2008.*
  - b) *That the Kshs. 200,000/= paid to Jogan Dries Services be refunded to the objectors.*
  - c) *That the costs of this application be provided for.*
12. In the Supporting Affidavit sworn on 10.7.2008 by Shamim Salim and in submission by Mr. Assa Nyakundi for the Applicants, it is the Objectors’ case that they had nothing to do with Kitui Eastern Bus Service or the suit and that their properties were not available for attachment in satisfaction of the decree. Attached to the Supporting Affidavit is an order dated 14.5.2008 in which the properties in Shamim Salim’s house are declared to be personal property under Islamic Sharia Law.
13. In his Replying Affidavit, Duncan Kamba Katabwa and in submissions by Mr. Ondabu, his advocate, it is his response and of relevance to the matter before me, that the Applicants are not entitled to the orders sought as they have not come to court with clean hands and that the Application is intended to delay the execution process and deny the Plaintiff the fruits of his judgment lawfully obtained.
14. For my part, the Application is one that should take little of the precious judicial time in my hands for the following reasons:-
15. I have elsewhere above detailed out the simple fact that the Judgment-debtors are Kitui Eastern Bus Service and John Kitana Velala. Nowhere in the record and nowhere in all the affidavits that I have seen is there a connection between that entity and person and Shamim Salim and Salim Sheikhan, the objectors. I have elsewhere above indicated that the Notice to execute was served on one Mr. Ali, Managing Director of Kitui Eastern Bus Services Ltd as well as John Kitana Velela. How then do the objectors come in? How does one Francis Mwangangi also become connected to the decree as nothing at all has been exhibited so to show? It was said from the bar, rather hesitatingly and for obvious reasons, that the objectors were directors or partners in Kitui Eastern Bus Service and the attachment was proper. The issue is beyond debate because if that entity as is pleaded is a limited liability company, the law is more than clear that

directors' properties cannot be attached in execution of its debts. *Lord Machnaghten* said this in the famous case of Salomon vs Salomon & Co. Ltd [1987] AC 22; 66 L. J Ch.35

*“The company attains maturity at its birth. There is no period of minority- no interval of incapacity... The company at law is a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are the managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.”*

16 Although the law is this clear, it is less than clear what Kitui Eastern Bus Service is. If it is not a limited liability company, and it is a partnership, I have not seen any evidence as to who its partners are. Again, all that Mr. Ondabu had to say when I posed the question was, *“we cannot find its records.”* If so, how then could the objectors be its partners and the fact is denied very strongly on oath? Order XXI Rule 44(1) of the Civil procedure Rules provides as follows:-

*“Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.”*

16. There is no explanation nor evidence before me that the attachment made in this case was against partners of Kitui Eastern Bus Services as *“such”* partners and not in any other capacity.

17. Compare the position of the decree-holder with that of the objectors who have shown that the household goods proclaimed are by order of a Kadhi's Court, the property of Shamim Salim under Islamic Sharia Law and that motor vehicle KBB 33G belongs to Francis Mwangangi and no one else. I say this because a valid court order in **KCC 72/2008** is on record and has not been challenged. Similarly, a copy of the registration particulars for KBB 333 G is on record and it shows that the vehicle belongs to Francis Mwangangi. That document has not been challenged. In fact, in the course of submissions, Mr. Ondabu presented me with a copy of an Affidavit sworn by Jogan Dries Services, licensed Auctioneers and attached to it is evidence of the ownership of KBB 333G by Francis Mwangangi. What is his connection with the suit herein? I have seen none.

18. Before concluding, I wish to state that the conduct of the decree-holder, his advocate and the Auctioneers have left me tongue tied. I say this because in the Affidavit sworn by the Auctioneers, one Joseph Nderitu, the reference is to CMCC No. 152 of 1995 at the High Court in Machakos! With that deceptive document, he obtained a breaking order into the objectors' matrimonial home with the assistance of Administration Police Officers and purported to execute the decree. Why would a magistrate issue those orders in Nairobi on a file that is before this court? Further, the persons against whom the breaking order was to be issued were clearly unconnected to the decree which was being executed and the illegalities in this suit were thence perpetuated three –fold?

19. This is a fit case where the objectors have established their claim under order XX1 Rule 56 aforesaid and I will allow the Application dated 10.7.2008 in terms of prayers (a) and (b) thereof with a further and specific order that in view of what I have stated above, motor vehicle Registration KBB 333G be released to its lawful owner forthwith at no cost to any of the objectors herein. Failure to do so will attract strong sanctions of this court to the Auctioneer and the Decree –holder.

20. Costs of this Application and any costs attendant to the attachment shall be paid by the decree-holder.

21. Orders accordingly.

Dated and delivered at Machakos this 12<sup>th</sup> day of August 2008.

**Isaac Lenaola**

**Judge**

In the presence of: **Mr Nyakundi for Objectors**

**N/A for Plaintiff**

**Isaac Lenaola**

**Judge**