



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Dangerous Goods Specialists Limited & another v Western Heights  
Kenya Limited & another (Commercial Appeal E323 of 2023)  
[2025] KEHC 4004 (KLR) (Commercial and Tax) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E323 OF 2023**

**MN MWANGI, J**

**MARCH 21, 2025**

**BETWEEN**

**DANGEROUS GOODS SPECIALISTS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**KAMLESH TAANK ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WESTERN HEIGHTS KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CRESCENT AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling and orders of Senior Resident Magistrate  
Hon. Rawlings Liluma Musiega delivered on 17th November 2023 in  
Nairobi Milimani Chief Magistrate's Court Civil Cause No. E604 of 2023)*

**JUDGMENT**

1. The plaintiffs (appellants) filed a suit in the lower Court against the defendants (respondents) vide a plaint dated 21<sup>st</sup> July 2023 seeking an order of permanent injunction restraining the defendants from interfering with their property, including selling, transferring, or distressing for rent, an order of mandatory injunction compelling the 2<sup>nd</sup> respondent to release motor vehicle registration No. KBU 492N to the 2<sup>nd</sup> appellant, a declaration that the 1<sup>st</sup> respondent's actions in levying interest on unpaid rent and charging 16% VAT instead of 14% are illegal, an order for accounting & compliance to determine the correct outstanding rent. They also prayed that they be issued with proper tax receipts and that they be provided with a credit note for VAT overcharges and costs of the suit.
2. The appellants' case was that the 1<sup>st</sup> appellant was a tenant in the 1<sup>st</sup> respondent's property known as Western Heights in Westlands, Nairobi from November 2016 to August 2020 under an unwritten



agreement. They averred that rent was paid via cheques, with the respondents issuing invoices and Electronic Tax Receipts (ETRs). However, due to financial difficulties caused by the COVID-19 Pandemic, the 1<sup>st</sup> appellant vacated the said premises in August 2020. The appellants contended that the respondents claimed rent arrears totaling to Kshs.656,371.00 including 16% VAT and interest, which they disputed as illegal and claimed that VAT should have been charged at 14% as per [Legal Notice No. 35 of 2020](#).

3. The appellants alleged that the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent to seize the 2<sup>nd</sup> appellant's motor vehicle Reg. No. KBU 492N for rent arrears. They asserted that the 2<sup>nd</sup> appellant is not personally liable for the 1<sup>st</sup> appellant's debts, making the suit motor vehicle's attachment unlawful. They also stated that the auction that was scheduled for 26<sup>th</sup> July 2023 lacked a proper proclamation notice and it violated the Auctioneers Rules, 1997. The appellants contended that the 1<sup>st</sup> respondent failed to issue proper invoices and ETRs, preventing rent payment. They stated that the 1<sup>st</sup> appellant was willing to deposit the disputed Kshs.616,180.00 in Court, pending the hearing and determination of the suit before the lower Court.
4. The plaint was accompanied by a Notice of Motion application under Certificate of Urgency dated 21<sup>st</sup> July 2023. In the said application, the appellants sought for orders of temporary injunction restraining the respondents from selling the 2<sup>nd</sup> appellant's motor vehicle registration No. KBU 492N or any other assets under the [Distress for Rent Act](#). They also sought for directions for the deposit of the sum of Kshs.616,180.00 being held by the 1<sup>st</sup> appellant and an order lifting the attachment of the 2<sup>nd</sup> appellant's motor vehicle Reg. No. KBU 492N by the 2<sup>nd</sup> respondent. They also prayed for the said vehicle to be returned to the 2<sup>nd</sup> appellant unconditionally.
5. In opposition to the application, the respondents filed a replying affidavit sworn on 15<sup>th</sup> August 2023 by Ms Diana Ahono, an Advocate of the High Court of Kenya and learned Counsel for the respondents. She averred that on 29<sup>th</sup> May 2023, the appellants were issued with a demand letter for Kshs.656,871.01 being rental arrears owed to the 2<sup>nd</sup> respondent. She stated that the appellants responded to the said letter on 30<sup>th</sup> May 2023 and admitted being tenants and owing the 1<sup>st</sup> respondent rental arrears. She further averred that due to non-payment of the said arrears, the 2<sup>nd</sup> respondent issued the appellants with a proclamation notice on 28<sup>th</sup> June 2023, followed by a notification of sale after the 14-day period expired. She contended that the 2<sup>nd</sup> appellant refused to sign the notification of sale and surrender the suit motor vehicle's keys, leading to forced towing.
6. Ms Ahono claimed that in as much as the 2<sup>nd</sup> appellant reported the aforesaid seizure as a robbery, the execution was lawful. The respondents stated that the appellants were not entitled to an order for injunction as they never proved the debt nor showed sufficient reason for the Court's intervention. The respondents asserted that in the event that the orders sought therein were granted, they stood to suffer prejudice as the continued delay negatively impacted on their recovery of Kshs.656,391.01. They stated that if the Court therein was inclined to grant the orders sought, the appellants ought to pay Kshs.150,000/= in costs and deposit the entire debt in a joint interest-earning account.
7. In a ruling delivered on 17<sup>th</sup> November 2023, the Trial Court found that the appellants had not made out a case to warrant being granted the orders sought in the application dated 21<sup>st</sup> July 2023 and dismissed the said application.
8. The appellants herein being dissatisfied with the said ruling filed a Memorandum of Appeal dated 23<sup>rd</sup> November 2023 raising the following grounds of appeal –
  - i. That the learned Magistrate erred in law and fact by dismissing the plaintiffs' application dated 21<sup>st</sup> July 2023 and finding that the same was not merited;



- ii. That the learned Magistrate erred in law and fact by failing to consider the plaintiffs' application, the supporting affidavit to the application, the plaintiffs' supplementary affidavit, and submissions in support of their application dated 21<sup>st</sup> July 2023;
  - iii. That the learned Magistrate erred in law and fact by finding that the 2<sup>nd</sup> plaintiff/applicant failed to prove by evidence that the motor vehicle Reg. No. KBU 492N Make Nissan Wingroad belonged to him, the motor vehicle that had been attached by the 2<sup>nd</sup> defendant/respondent on the express instructions of the 1<sup>st</sup> defendant/respondent while on the contrary, the 2<sup>nd</sup> plaintiff/applicant had provided a copy of his logbook to the Trial Court as proof of ownership, facts that were not disputed at all by the defendants/respondents;
  - iv. That the learned Magistrate erred in law and fact by failing to find that the plaintiffs/applicant had failed to prove that they had established a prima facie case to warrant the issuance of an injunction while disregarding the plaintiffs/applicants' evidence presented including the fact that the 1<sup>st</sup> plaintiff/applicant had already offered to pay the rental arrears owed to the 1<sup>st</sup> defendant/respondent by way of cheque which offer was rejected by the 1<sup>st</sup> defendant/respondent;
  - v. That the learned Magistrate erred in law and fact by dismissing the plaintiffs/applicants' application dated 21<sup>st</sup> July 2023 and in turn finding that the 2<sup>nd</sup> plaintiff/applicant who is the Managing Director of the 1<sup>st</sup> plaintiff/applicant who is separate and distinct from the 1<sup>st</sup> plaintiff/applicant which is a legal person and recognized as such before the law, is responsible for the debts owed by the 1<sup>st</sup> plaintiff/applicant contrary to the principles of company law and the holding in the locus classicus case of *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22;
  - vi. That the learned Magistrate erred in law and fact by failing to find that the plaintiffs/applicants failed to prove the irreparable loss that would be occasioned to them while on the contrary, the dismissal of the application dated 21<sup>st</sup> July 2023 meant that the defendants/respondents can further attach personal properties belonging to the 2<sup>nd</sup> plaintiff/applicant even though the 1<sup>st</sup> plaintiff/applicant was and is willing to settle the rental arrears owed to the 1<sup>st</sup> defendant/respondent; and
  - vii. That the learned Magistrate erred in law and fact by failing to find that the balance of convenience tilted in favour of the plaintiffs/applicants while the balance of convenience did tilt in favour of the plaintiffs/applicants as the 1<sup>st</sup> plaintiff/applicant had offered to deposit the disputed amount of Kshs.616,180.00 owed to the 1<sup>st</sup> defendant/respondent in Court as security pending the hearing and determination of the suit and further was willing to settle the outstanding arrears owed by paying the 1<sup>st</sup> defendant/respondent who rejected the same.
9. The appellants' prayer is for the appeal to be allowed with costs, for the ruling and orders of the Senior Resident Magistrate Hon. Rawlings Liluma Musiega delivered on 17<sup>th</sup> November 2023 to be set aside in its entirety and for the application dated 21<sup>st</sup> July 2023 to be allowed as prayed.
  10. This Appeal was canvassed by way of written submissions. The appellants' submissions were filed on 22<sup>nd</sup> April 2024 by the law firm of MJD Associates Advocates. This Court however notes that the respondents despite having been given an opportunity to file written submissions in opposition to the instant Appeal, did not file any.



11. Mr. Onyancha, learned Counsel for the appellants submitted that no evidence was provided to prove that the 2<sup>nd</sup> appellant was a tenant of the 1<sup>st</sup> respondent. He contended that being the Managing Director of the 1<sup>st</sup> appellant did not automatically make the 2<sup>nd</sup> appellant a tenant. He challenged the lower Court's dismissal of the injunction application on grounds that the 2<sup>nd</sup> appellant did not adduce evidence in support of the allegation that the suit motor vehicle belonged to him, and not to the 1<sup>st</sup> appellant. Counsel asserted that the appellants produced a logbook of the suit motor vehicle as annexure KT-9b, which shows that the 2<sup>nd</sup> appellant is the registered owner of the said motor vehicle. He cited the provisions of Section 8 of the Traffic Act and the case of Cyprian Masafu Wanyonyi Wekesa v Jaswinder Singh Enterprises Ltd [2006] eKLR, and argued that the respondents failed to disprove the 2<sup>nd</sup> appellant's ownership of the vehicle or show defects in his title.
12. Mr. Onyancha relied on the case of Giella v Cassman Brown & Company Ltd [1973] EA 358, and asserted that the appellants had established grounds for an interlocutory injunction. He referred to the Court of Appeal case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, and maintained that the appellants had demonstrated a prima facie case with a probability of success before the Trial Court. He submitted that since the 2<sup>nd</sup> appellant's motor vehicle was sold for the 1<sup>st</sup> appellant's debt, he intends to seek damages from both the 1<sup>st</sup> appellant and the respondents. He submitted that damages alone would not be sufficient compensation for the loss, and as such, the balance of convenience tilted in favour of the appellants.

### **Analysis And Determination.**

13. I have examined the Record of Appeal and given due consideration to the written submissions by Counsel for the appellants. Being the 1<sup>st</sup> appellate Court, I have the duty to analyze and re-evaluate the evidence adduced before the Trial Court and reach my own independent conclusion. That was the holding by the Court in the case of Selle v Associated Motor Boat Co. [1968] EA 123, where it was held as hereunder –

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions.....”

14. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010. The principles of interlocutory injunctions were laid down by the Court in the case of Giella v Cassman Brown & Co. Ltd (supra) where it held that –

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

15. The Court of Appeal in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra), considered what constitutes a prima facie case as hereunder –

So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation



or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

16. The appellants filed an application seeking an order for temporary injunction restraining the respondents from selling the suit motor vehicle, directions for the deposit Kshs.616,180.00 by the 1<sup>st</sup> appellant, and an order for lifting of the attachment of the 2<sup>nd</sup> appellant's motor vehicle Reg. No. KBU 492N by the 2<sup>nd</sup> respondent and for the said vehicle to be returned to the 2<sup>nd</sup> appellant unconditionally. The appellants' case is premised on the fact that the 2<sup>nd</sup> appellant is the registered owner of the suit motor vehicle and he was neither a tenant of the 1<sup>st</sup> respondent nor was he in his personal capacity indebted to the said respondent. It was contended that the respondents had no right to attach the suit motor vehicle for purposes of selling it so as to recover a debt owed to the 1<sup>st</sup> respondent by the 1<sup>st</sup> appellant.
17. On perusal of the annexures attached to the affidavit in support of the appellants' application dated 21<sup>st</sup> July 2023, it is evident that the appellants produced a copy of the suit motor vehicle's log book as annexure KT-9b, which shows that the 2<sup>nd</sup> appellant was the registered owner of the said motor vehicle. I therefore agree with the Counsel for the appellants that the Trial Court erred in concluding that the 2<sup>nd</sup> appellant failed to adduce any evidence in support of the allegation that the suit motor vehicle belonged to him. Although the Trial Court found that the respondents did not dispute the 2<sup>nd</sup> appellant's ownership of the suit motor vehicle, the said Court justified the attachment of the said motor vehicle by asserting that as the 1<sup>st</sup> appellant's Director, the 2<sup>nd</sup> appellant was also a tenant of the 1<sup>st</sup> respondent.
18. It is not in contest that the 2<sup>nd</sup> appellant is the Managing Director of the 1<sup>st</sup> appellant, which was a tenant of the 1<sup>st</sup> respondent and there is a dispute over rental arrears. It is however trite law that a company is a separate legal entity from its members and shareholders, and it is capable of suing and being sued in its own capacity. This position was echoed by the Court in *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & another* [2014] eKLR as hereunder -

It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd V Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.

19. In the premise, this Court finds that the respondents' justification of the attachment of the suit motor vehicle was not only misplaced but had no basis in law. I am persuaded that the appellants had in the Trial Court established a prima facie case with a probability of success, and I agree with the appellants that the Trial Court erred in finding otherwise.
20. On the issue of damages, in as much as the value of the suit motor vehicle can be easily determined from its valuation, if the appeal herein is not allowed, the 2<sup>nd</sup> appellant being the registered owner of the suit motor vehicle and not being indebted to the 1<sup>st</sup> respondent, will be deprived access to his property contrary to the provisions of Article 40 of *the Constitution* of Kenya.



21. Further, it is trite that where there is a breach of the law, an applicant cannot be compelled to accept damages as recompense. This was the Court's finding in the case of Kanorero River Farm Ltd and 3 others v National Bank of Kenya Ltd [2002] 2 KLR 207 quoted by the Court in Beatrice Wathanu Waithaka v Kenya Women Micro-Finance Limited & another [2019] eKLR, where it was held that –

I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.

22. In view of the analysis that I have made and the applicable law, I find that there was a breach of the law on the part of the respondents. The appellants therefore stand to suffer loss and damage that cannot be adequately compensated by an award of damages in the event that this appeal is not allowed.
23. In the circumstances, it is my finding that the balance of convenience tilts in favour of the appellants.
24. In conclusion, I find that the Trial Magistrate erred in fact and law in finding that the appellants had not made out a case for being granted an order of temporary injunction. The upshot is that the appeal herein is merited.
25. The final orders are that-
- i. The Ruling and Orders by Hon. Rawlings Liluma Musiega Senior Resident Magistrate, made on 17<sup>th</sup> November 2023 are hereby set aside in their entirety;
  - ii. The application dated 21<sup>st</sup> July 2023 is allowed as drawn; and
  - iii. Costs of this appeal and the application dated 21<sup>st</sup> July 2023 are awarded to the appellants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF MARCH 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Onyancha for the appellants

No Appearance for the respondents

Ms B. Wokabi – Court Assistant

