



**Ril Logistics Limited & another v Kyaka (Civil Appeal
E062 of 2021) [2024] KEHC 6742 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E062 OF 2021
GL NZIOKA, J
JUNE 6, 2024**

BETWEEN

RIL LOGISTICS LIMITED 1ST APPELLANT

AL-ASHDARN MANDELA MULANDA 2ND APPELLANT

AND

BENARD MUMO KYAKA RESPONDENT

*(Being an appeal from the decision of Honourable L. Sarapia (PM)
delivered on 22nd September 2021, vide Naivasha CMCC No. 529 of 2016)*

JUDGMENT

1. The appeal herein arises from the decision of the trial court in Bernard Mumo Kyaka vs Evans Mugendi Marandu & Rovin Investments Limited CMCC No. 529 of 2016 at Naivasha and in particular a notice of motion application dated 11th March 2021.
2. The application was brought by Objectors (herein “the appellants”), under the provisions of section 1A, 1B, 3A, 34, 38 & 63 (e) of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 22 Rule 51 & 52, and Order 51 (1) of the Civil Procedure Rules, the *Auctioneers Act* and Rules, and the inherent jurisdiction of the court.
3. The appellants were seeking for the following orders:
 - a. That this application be certified urgent and heard ex-parte in the first instance.
 - b. That there be a stay of execution of the decree and/or order of 21st October 2020 and/or stay of execution of the judgment and decree in this matter including a stay of attachment, advertisement for sale and sale of goods



proclaimed by Philip Mwaura T/A Gillette Auctioneers on 5th March, 2021 pending inter parties hearing and determination of this application.

- c. That the proclamation or attachment of the 5th March 2021 by Philip Mwaura T/a Gillette Auctioneers in execution of the decree and/or order of 21st October 2021 and any subsequent action by the auctioneer or decree-holder be declared illegal, irregular and unlawful and be set aside.
 - d. That costs be provided for.
4. The application was based on the grounds thereon and affidavits of the even date sworn by Benard Wanyama and Al-shdarn Mandela Mulanda.
 5. The deponents aver that on 5th March 2021, Philip Mwaura T/A Gillette Traders Auctioneers proclaimed their vehicles in execution of a decree in favour of the decree-holder (herein “the respondent”) to recover Kshs. 1,463,255.77 plus auctioneer’s fees of Kshs. 279,231.70.
 6. That, the proclamation included a schedule of vehicles and attached assets as follows: -
 - a. Motor vehicle registration No. KBA 753A Scania
 - b. KBS 665K Scania
 - c. KCE 702N Axa
 - d. KAX 702J Mercedes Benz
 - e. Four shipping containers
 7. The 1st appellant averred that it is the absolute owner of motor vehicles being registration No(s). KBA 753A Scania and KBS 605K Scania, while the 2nd appellant averred that it is the absolute owner of motor vehicles being registration No KAX 702J.
 8. That it was not a party to the claim by the plaintiff (herein “the respondent”) and neither was it a judgment debtor.
 9. The appellants argued that they are not the judgment debtor(s) in the lower court suit and neither do the judgment debtor(s) have any legal or equitable interest/ownership in the proclaimed vehicles. Therefore, the vehicles were not available for proclamation or attachment.
 10. The appellants termed the proclamation and any subsequent action that undertaken by Gillette Traders Auctioneers as unlawful, illegal and irregular. Further, a search in respect of motor vehicle KCE 702N revealed the owner as Samuel Owino Omondi.
 11. Further the Auctioneer did not follow the provisions of the *Auctioneers Act*. That in the circumstances, it is only fair that the orders sought be granted.
 12. However, the application was opposed by the respondent vide a replying affidavit he swore dated 6th April 2021 wherein he deposed that he was the one who pointed out the vehicles to the Auctioneers as he used to work for the 2nd appellant’s company and is aware that both appellants’ companies have same directors.
 13. That, his advocate did a search at the Registrar of Companies that revealed the following details: -
 - a. Rovin Investment Limited
Directors: Vincent Mulondo Watako-----600 shares



Rodah Kirui-----400 shares

Apell Alloys Kwengu----- secretary

b. RIL Logistics Limited

Directors: Rodah Kirui ----- 1 share

Cyrene Projects Limited-----1 share

Gilbert Nyamweya Omoke-----Secretary

c. Cyrene Projects Limited

Directors: Rodah Kirui

Vincent Mulondo Watako

14. Further, the registered office and postal address of all the three (3) companies is Finance House, Loita Street L.R. No. 209/1326, and Postal address 24627 Nairobi.
15. Furthermore, that Rodah Kirui is a shareholder in all three companies while Vincent Mulondo Watako appears in Rovin Investment and Cyrene Projects Limited. Therefore, they have interests in both appellants' company.
16. The respondent maintained that, the 2nd defendant has proprietary interest in the proclaimed motor vehicles and has been trying to avoid compensating him. Additionally, the directors of the two companies are advocates of the High Court of Kenya, and their law firm represented the 2nd defendant in the trial court and High Court where Kshs. 800,000 was ordered as security but the defendants never paid.
17. The application was disposed of by filing of submission and upon considering the same, the trial court delivered a ruling dated; 22nd September 2021, and disallowed it on the ground that if the veil of incorporation is lifted on the companies it will reveal that, all the companies herein are related.
18. The appeal herein was canvassed vide filing of submissions. The appellants filed submissions dated, 11th January, 2023 and argued that the trial court erred by failing to make a finding that the attachment of their property was irregular and unlawful.
19. That the appellants' companies are distinct legal entities from the 2nd defendant, as evidenced by the Certificate of Incorporation produced by Benard Wanyama and CR. 12 Search form and results produced by the respondent.
20. That the appellants further produced evidence in the form of copies of registration certificates and NTSA copy of records showing that motor vehicle registration No(s). KBT 753A Scania, KBS 665K Scania and KBX 702J are owned by the 1st and 2nd appellant respectively.
21. Furthermore, Benard Wanyama produced copy of records from NTSA showing that the motor vehicle registration KCE 702N is owned by Samuel Omondi.
22. That, had the auctioneer conducted a search before the wrongful attachment, he would have established that the judgment debtors have no legal or equitable interest in the attached property.
23. The appellants faulted the trial Magistrate for holding that sharing of an address, shareholding and a common director is justifiable to lift the corporate veil to deny the appellants the ends of justice.
24. That, the appellant companies are distinct legal entity from the 2nd defendant/judgment-debtor and each has its own assets and liabilities. The appellant relied on the quote from the book "The Principles



- of Commercial Law by Kibaya Laibuta and the case of; Salomon vs Salomon & Co. LTD (1897) A.C. 22 ” where the court stated that, once a company is legally incorporated it must be treated like any other independent person with rights and responsibilities and that, the motives of the promoters of a company are irrelevant in discussing the rights and liabilities.
25. The appellants further argued that liabilities of the 2nd defendant/judgment debtor cannot be transferred to the appellants by the mere fact that they have common directorship between them. Furthermore, there was no evidence adduced to show the appellants’ companies and 2nd defendant/judgment debtor share a brand, and in any case, that cannot override the principle of distinct and separate personality of a company.
 26. The appellants relied on the case of; Styles industries Limited vs Kenya Revenue Authority & another (2019) eKLR where the court allowed the plaintiff’s application stopping KRA from attaching its goods to recover tax arrears owed by another company that had common directors, shared a postal and physical address, and in the same business and brand name.
 27. That the court in afore case stated that, the law is clear that a company is a legal entity on its own and therefore liabilities cannot be transferred to another company by the mere fact of common directorship, physical or postal address.
 28. The appellants submitted that the trial court dealt with and pronounced itself on Objections proceedings as though it constituted of an application for lifting the corporate veil. That lifting the corporate veil was not an issue before the court, and in any event the trial court lacked jurisdiction to determine it.
 29. The case of; Job Mbaluka vs Pegrume Ltd (2015) eKLR was cited where the court dismissed an application for lifting the veil of incorporation sought for in Objection proceedings and stated that it cannot make an order without a substantive application for lifting the veil.
 30. Lastly the appellants submitted, although the trial court held that the attachment of the appellants’ goods was irregular and unlawful, the trial court failed to award them costs. That, it is settled law that costs follow the event and the court has to give reasons for not awarding costs to a successful party. The appellants urged the court to award them the costs in both the trial court and appellate court.
 31. However, the respondent in submissions dated 3rd November, 2023 argued that the evidence produced in the trial court showed there is a clear connection between the appellants and 2nd defendant/Judgment debtor due to shared registered office, address and director.
 32. That, the judgment debtors having refused to settle the judgment amount, the learned trial Magistrate was right in holding the doctrine of corporate personality has exceptions especially where it is used to frustrate the ends of justice.
 33. Finally, the respondent submitted that, there is no reason why the 2nd appellant was part of the appeal taking into account that he is not a director in either of the defendants’ companies, and that the ruling in the trial court was in his favour.
 34. At the conclusion of the arguments by the respective parties and in considering the appeal, I recognize the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.



35. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

36. To revert back to the matter herein, I find that there is no dispute that, the respondent sued the defendants/judgment debtors vide CMCC No. 507 of 2015 Edward Mumo Kyaka -vs- Evan Mugenda Marangu & Rovin Investment Limited. That, judgment was entered in his in the sum of Kshs. 1,208,000 as evidenced by the judgment of the trial court dated 3rd October 2017 delivered by Hon. Esther K. Kimilu PM.

37. The evidence reveals that the decree holder commenced execution and proclaimed appellants’ motor vehicles as stated herein. Apparently the the respondent was served with a notice of objection to the proclamation and attachment pursuant to; Order 22 Rule 52 of the Civil Procedure Rules, but elected to proceeded with the execution. It is not in dispute that the subject motor vehicles are not registered in the names of the 2nd defendant/judgment debtor.

38. However, the issue is whether, the trial court arrived at the correct finding by holding that by sharing directors and address, the appellants and 2nd defendant/judgment debtor are liable for each other’s liability under the exception to the principle of lifting the veil of incorporation.

39. In arriving at that decision, the learned trial magistrate stated as follows:

“There are exceptions to the doctrine of separate corporate personality as argued by the objectors. One of the exceptions applies where it is demonstrated that the corporate veil is or has been employed improperly to frustrate the ends of justice. From the details of shared shareholdings, business brand, address, and same directors of the 2nd defendant and 1st objector, it appears to this court that the parties are improperly using the corporate veil to deny ends of justice, (see Vihiga Farmers Co. Ltd vs Nathan Indombeo (2018), e KLR”

40. Having considered the arguments and/or submissions of the parties, I concur with the submissions of the appellants that, there was no application before the trial court by the respondent to lift the veil of incorporation upon the 1st appellant’s company. To have done so, with due respect, the trial court took into account extraneous matters thus arriving at a wrong decision.

41. Furthermore, the mere fact that, two limited liability companies have common shareholding does not displace the celebrated principle in the case of; Salomon -vs Salmon & Co. Ltd (1897) A.C that, an incorporated company is a legal entity separate from its shareholders. If indeed, an incorporated company is separate from its shareholders, how separate can it be from another incorporated company.



42. In the case of Style Industries Limited vs Kenya revenue Authorities & another HCCOM No. 75 of 2019, this court pronounced itself on the issue of shared directors of two companies and stated as follows:

“

“41. The general principles of company law states that the legal consequences of incorporation of a company is to make it a separate and independent legal entity from its own shareholders and/or directors (See Salmon vs Salmon & Co’ s case). Therefore, the two subject companies herein shall be treated as such.”

The court went to state:

“44. I do appreciate the argument by the 1st Respondent and indeed there is very high possibility that the two companies may have common shareholders/directors and/or interests. However, the law is clear, a company is a legal entity on its own. The concept of lifting of the veil of incorporation does not involve substitution of liability of one company with the other. It involves finding out the real owners of the suspect company and/or the real existence of the company. The liabilities of Stripes Industries Limited cannot be transferred to Styles Industries Limited by mere fact of common directorship, physical or postal address.”

43. Pursuant to the aforesaid it is the finding of this court that appellants are not liable to settle the judgment debt in favour of the respondent as against the 2nd defendant/judgment debtor.

44. But even so, the trial court also held that, the attachment and auction of the appellants properties was irregular and unlawful for want of compliance with Order 22 Rule 51-53 of the Civil Procedure Rules. However the trial court did not then declare the same as null and void and/or ordered for the settling aside.

45. In the given circumstances, I set aside the decision of the learned trial magistrate dated 22nd September 2021 and allow the application dated 11th March 2024 in terms of prayers 3 and 4. The costs of the appeal herein are awarded to the appellants

46. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF JUNE 2024

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Mituga for the Appellant

Mr. Owuor for the Respondent

Ms Ogutu -Court assistant

