



Kenjab Motors Limited v Wanjala t/a Zeki Motors; Awili (Objector) (Civil Appeal 74 of 2016) [2023] KEHC 20184 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 74 OF 2016**

**TA ODERA, J
JULY 5, 2023**

BETWEEN

KENJAB MOTORS LIMITED PLAINTIFF

AND

ZEKI WANJALA T/A ZEKI MOTORS DEFENDANT

AND

NELSON AWILI OBJECTOR

RULING

Introduction

1. This ruling relates to three applications viz: one, a notice of motion (Hereafter called “first application”) dated 3rd April 2023 filed by the Objector – Nelson Awili on 5th April, 2023, two, another notice of motion (hereafter called “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 8.5.23 filed by the Objector on its part claimed that he bought the aforesaid Motor Vehicle from the judgment debtor /defendant at Ksh.320,000.00 and that the Plaintiff at paragraph 10 of its plaint confirmed receiving the full purchase price of Ksh.320,000/= from the defendant.
2. A Perusal of the plaint at the said paragraph 10 confirms that the judgment/ debtor was given 38 vehicles to sell and 3 had been paid for. Further that judgment debtor paid Ksh.580, 000/= for Motor Vehicle in question but had not collected the Log Book. Paragraph 14 of the Judgment also confirms the contention by the objector that motor vehicle KBY 743 N was amongst the 3 which had been paid for in full but the log books had not been collected. The issue of the payment for the said 3 motor vehicles was reaffirmed by Hon Justice Ngetich in her ruling dated 28.10.20 at paragraphs 24, and 39 and that the said 3 vehicles were exempt from repossession. The judgment at paragraphs 43 and 44 also refers to 35 vehicles. It is thus clear that motor vehicle KBY 743 N was fully paid for and it cannot be



subject to repossession for non-payment. Thus the argument that the objector has failed to produce a sale agreement between himself and the judgment debtor does not arise. I proceed to uphold the objection.

3. decree holder /respondent . (herein after referred to as the P.O)

Pleadings

4. The first Application is brought under Certificate of Urgency pursuant to Order 51 Rule 1, Order 22 Rules 51 and 52 of the Civil Procedure Rules wherein the Objector is seeking for orders:-
 1. Spent.
 2. That this Honourable Court be pleased to order that Motor Vehicle Registration Number KBY 743 N belongs to the Objector and is exempt from enforcement of decree/Judgement of the Honourable Court delivered on 14th May, 2020 and the Logbook be released to the Objector.
 3. That the Costs of this Application be provided for and the same be borne by the Plaintiff/ Respondent.
5. The Application is premised on grounds on its face and supported by an affidavit sworn by the Objector Nelson Awili on 4th April, 2023. He deposed that on 11th December, 2020 he bought Motor Vehicle Registration Number KBY 743 N from the defendant at a consideration of Ksh.320, 000.00.
6. He averred that the plaintiff at paragraph 10 of the plaint confirmed receiving the full price of Ksh.320,000.00(Kenya shillings three hundred and twenty thousand only) from the defendant for Motor Vehicle Registration Number KBY 743N
7. It was his deposition that that the proceedings of this Honourable Court at paragraph 14 confirms that PW1 Ellen Kagiri testified that three Motor Vehicles, to wit, KCA 647 W, KBY 743 N and KBV 099Z had been fully paid for but log books had not been collected.
8. He deposed that the Honourable Court delivered Judgement on 14th May, 2020 in favour of the Plaintiff for Ksh.36,130,000.00(Kenya Shillings thirty six million one hundred and twenty thousand only) being the value of thirty five Motor Vehicles listed as numbers 1-0 and 1-15 respectively, excluding KCA 647W, KBY 743 N and KBV 099Z.
9. He deposed that notwithstanding the Judgement the defendant has sought to repossess Motor Vehicle Registration Number KBY 743 N from the Objector through BEMAC AUCTIONEERS and that such attachment/repossession flies in the face of the aforesaid Judgement and thus is illegal.
10. He contended that he is the legal owner of Motor Vehicle Registration Number KBY 743 N and the Plaintiff has no claim whatsoever over the same.
11. He asserted that it is in the interest of justice that the Plaintiff be ordered to release the said motor vehicle Number KBY 743 to him together with surrender it's logbook.
12. Darius Ngugi Mbugua the Plaintiff's/Applicant's Legal Services Manager swore a Replying Affidavit in opposition to the Application on 8th May, 2023. He deposed that pursuant to a written sale agreement dated 3rd July, 2014 the plaintiff sold Motor Vehicle Registration Number KBY 743 N to the defendant herein at a Consideration of Ksh.580, 000/= but the defendant did not pay for the Motor Vehicle as agreed.



13. He averred that to date the subject Motor Vehicle belongs to and still registered in the names of the plaintiff.
14. He contended that the plaintiff has never transacted with the objector in respect to the Motor Vehicle and he is a total stranger to it.
15. It was his averment that no contract of sale has been evidenced by the objector to demonstrate any dealings with the plaintiff at all and that the defendant having failed to pay the Plaintiff, lacked the requisite title or locus to sell the Motor Vehicle to a third Party.
16. He contended that the plaintiff is entitled to exclusive possession, use and enjoyment of the Motor Vehicle and objector's claim, if any, can only lie against the Defendant and not the Plaintiff.
17. He prayed that the Application be dismissed with Costs.
18. The Second Application is brought under Section 5(1) of the Judicature Act, Cap 8, Order 40 of the Civil Procedure Rules, Section 39 (6) (1), Section 42(6)(2) (a) and 7(1) of the Civil Procedure Rules, Sections 1A, 1B, 3A and 65(1) of the Civil Procedure Act Cap 21. The Applicant is seeking for Orders:-
 1. That pending hearing and determination of this Application inter partes, Motor Vehicle Registration No. KBN 333Y be released to Vitalis Atero Orango on a running attachment.
 2. That the Honourable Court do and is hereby orders that the Corporate Veil of the Plaintiff is lifted and that the Plaintiff's Director(s) are liable for criminal actions and/or contempt of the Orders of Court issued on 31st March, 2023.
 3. That the Honourable Court do and hereby finds and/or orders that the Plaintiff's Directors are in breach and/or contempt of the Court Orders issued on 31st March, 2023 and the Court Orders that they be committed to Civil Jail for a period of six months.
 4. That Cost of this Application be awarded to the Applicant.
19. The Application is predicated on grounds on its face and supported by an affidavit of the Respondent, Zeki Wanjala sworn on 17th April, 2023. He deposed that on 31.3.23, the court herein granted interim stay of execution orders of the judgement dated 14th May, 2020 pending the hearing and determination the Application dated 20th October, 2020 and that the said order was served on the Respondent and its counsel herein physically and the same was received on 31st March, 2023.
20. He contended that despite the aforesaid orders, the respondent instructed BEMAC Auctioneers to attach the suit Motor Vehicle and that the said Auctioneers on 12th April, 2023 did reposes the suit Motor Vehicle outside the 30 days' period stipulated in its letter dated 20th February, 2023 and as such the repossession was invalid.
21. He averred that Respondent's behavior is inimical to the Dictates of the Rule of Law in so far as it constitutes refusal to honour court orders and that such behavior by the Respondent and its agents has exposed unsuspecting 3rd parties who have purchased Motor Vehicle from applicant herein which were sourced from the respondent to untold inconvenience as their vehicles were snatched from them on the highways without notice and driven to unknown destinations.
22. It was his further averment that the 3rd party herein, Vitalis Atero Orango against whom the Respondent is purporting to execute the Judgement against by repossessing the Suit Motor Vehicle is not a party to this suit.



23. The Plaintiff/Respondent opposed the application through a Replying Affidavit sworn by its manager one Darius Ngugi Mbugua on 8th May, 2023. He averred that pursuant to a sale agreement dated 12th June, 2014 the plaintiff sold Motor Vehicle Registration Number KBN 333Y to the defendant at a consideration of Ksh.2,700,000/= but the defendant/applicant did not pay as agreed.
24. He deposed that subsequently the respondent filed the instant suit against the defendant/applicant for recovery of the amount owing on account of the said Motor Vehicle amongst others and that Judgement thereto was delivered by the Honorable Court on 24th May, 2020 in favour of the Plaintiff/ Respondent for a sum of Ksh.36,120,000/= .
25. He deposed that the Honourable Court at paragraph 56 of the aforesaid judgment also found that the plaintiff was lawfully entitled to repossess the vehicles sold to the defendant/applicant for recovery of all the outstanding balances.
26. He stated that the defendant/applicant filed an application dated 14th June, 2020 seeking for stay of execution and enlargement of time to institute an appeal against the judgment and vide a ruling delivered on 20th December, 2020 the Court granted the Defendant/Applicant stay of Execution on grounds that the Plaintiff do pay half of the decretal amount and to deposit the other half in a joint account in the names of both Counsel on record.
27. He averred that the Defendant/Applicant has failed and or neglected to comply with the terms of the ruling to date and that the court is functus officio since no appeal has been preferred against its Judgment.
28. He contended that the Plaintiff/Respondent is entitled to execute the judgement of the Honourable Court against the defendant/applicant.
29. He stated that as at the time of repossession of the subject Motor Vehicle herein no court order had been served upon the directors of the plaintiff/respondent and / or against M/S Bemac Auctioneers and the purported stamp appearing on the defendant's annexure ZW (I) is unsigned and a total forgery.
30. It was his deposition that the annexure marked as DMN (iv) is the affidavit of Samuel Gitau of M/ S Bemac Auctioneers confirming that no court order had been served upon him as at the time of repossession of the subject Motor Vehicle and that in the circumstances, the instant application is totally unmerited and amounts to an abuse of the court process.
31. He averred that having sold the subject Motor Vehicle to a Third Party, one Vitalis Atero Orango, the defendant/applicant lacks the requisite locus to file the instant application.
32. He deposed that the said Third Party Vitalis Atero Orango has filed a similar Application in Eldoret CMCC No.490 of 2015 seeking similar orders and he is thus a vexatious litigant hell bent on abusing the Court's process.
33. He prayed that the Application be dismissed with costs.
34. The Respondent/ decree holder also filed a Notice of Preliminary Objection dated 8th May 2023 urging the court to strike out the Applications dated 3rd April 2023 and 17th April, 2023 on the following grounds:-
 1. That the Judgement in this matter was delivered on 14th May, 2020 in favour of the Plaintiff
 2. That no Appeal has been preferred against the Judgement and the same has not been reviewed and or set aside.



3. That following from the above pronouncement the Honourable Court is Functus officio.
4. That the Application cannot thus be entertained by the Honourable Court.
5. That the Applicants lack the requisite Locus Standi to institute the Applications.
6. That the Applications are an abuse of the Court's Process.

Submissions

35. The Parties through their respective Counsel made oral submissions on 10th May, 2023.
36. The Counsel for the Applicant also filed written submissions with respect to the Application dated 24th March, 2023 but the said application is not subject of this ruling.

Objector's Submissions

37. The Counsel for the Objector reiterated the averments contained in the Objector's supporting affidavit. In addition he submitted that following objection application by another purchaser Justice Ngetich vide the ruling of 28th October, 2020 clarified that the said three vehicles I.e KCA 647W , KBY7743N and KBV 099V were exempt from repossession and that no appeal has been filed against the Judgement and Ruling.
38. He argued that the Attachment is contemptuous and the plaintiff should be ordered to release the Motor Vehicle and Log Book. He asserted that the Replying Affidavit by the Darius Mbugua displays a copy of log book retained by the Plaintiff despite the court orders to release the same. He asserted that court orders are not made in vain.
39. Regarding the averments that the court is functus officio and that the objector lacks locus standi, the counsel for the objector submitted that the same do not arise as Order 22 Rule 51 of the Civil Procedure Rules provides that any person who claims interest in property subject to execution has a right to lodge objection proceedings in the same file where the judgement was entered.
40. He argued that the preliminary objection is unmeritorious and that if the application is allowed the plaintiff should bear the costs of the same for breaching the court orders and for illegal attachment, and for retaining possession of the Motor Vehicle Registration Number KBY 743 N without a valid cause.
41. The counsel urged the court to allow the objector's application and to find that the affidavit of Darius is a perjury as he suggests that the Motor Vehicle has not been paid for contrary to the Judgment and Ruling of the court.

Judgment debtor/Applicant's Submissions

42. The Counsel for the judgment debtor/Applicant similarly reiterated the averments contained in the Applicant's Affidavit sworn on 17th April, 2023 and and urged the Court to grant the Orders sought by the Applicant.
43. On preliminary objection, the Counsel for the Applicant submitted that the Applicant's recourse is in this Court and prayed that the Plaintiff be restrained from executing the Judgment and directed to obey the stay of execution orders in place.



Decree holder/Respondent's Submissions

44. the Advocate for the Plaintiff/Respondent submitted that this court is *functus officio* as it delivered its judgement on 14th May,2020 and neither an appeal has been preferred against the said judgement nor an application for review or setting aside of the same has been filed.
45. He argued that the court can only entertain this matter if an application under Section 99 *CPA* has been made. He contended that the orders sought cannot be granted unless the Applicant files separate proceedings. To buttress his submissions, he relied on the cases of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR & *ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba* [2020] eKLR.
46. With regard to the Application dated 3rd April, 2023, the counsel for the Respondent submitted that an objector must prove legal or equitable interest of the attached Subject Motor Vehicle as per the Provisions of Order 22 Rule 51(2) of the *Civil Procedure Rules*,2010. He submitted that the Objector herein has not demonstrated ownership.
47. In regards to the Application dated 17th April,2023, the Counsel for the Respondent submitted that the same defeats the object of Section 6 of the *Civil Procedure Act* as there is a similar Application filed by Vitalis Adero in Eldoret case No.490 of 2016 seeking same relief.
48. He contended that if the defendant sold the subject Motor Vehicle to a third party then he has no *locus standi* to institute this Application. He also contended that no order was served upon the Auctioneer.
49. In regards to the prayer of lifting the Plaintiff's Corporate veil, the counsel averred that the Company's Directors are different from the Company and that the court has not been told whether the Plaintiff is being used as a shield to perpetuate an illegality. He submitted that the threshold for lifting the corporate veil has not been met. In support of this position he referred this court to the cases of *Africa Management Communication International Limited v Joseph Mathenge Mugo & another* [2013] eKLR & *Asbit Patani & 2 others v Garden Chambers Limited* [2019] eKLR.

Analysis and determination

50. Having considered the applications, the responses filed thereto together with the Respondent's Notice of Preliminary Objection and submissions on record, it is my considered view that the following issues crystalize for determination: -
 1. Whether this Court is *functus Officio*;
 2. Whether the Applicant's Application dated 17th April,2023 is sub judice;
 3. Whether the objector has established legal and/or equitable interests over Motor Vehicle Registration No. KBY 743 N;
 4. Whether the corporate veil should be lifted and the Respondent's directors and the auctioneer be held personally liable for disobeying court orders;
 5. Who should bear the costs? &
51. I will deal with the issues in seriatim.



Whether this Court is functus Officio

52. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 which reads: -
- “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
53. The doctrine of functus officio was also considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that -
- “Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
54. Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio in the following terms-
- “Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
55. The Plaintiff’s/Respondent’s Counsel asserted in his oral Submissions that this court having delivered its Judgement on 14th May,2020 and being no appeal against it or an application for review/setting aside this Court is functus officio.
56. The Counsel for the Objector submitted that in view of provision of Order 22 Rule 51 this court is not *functus officio* whereas the Applicant’s Counsel argued that the Applicant’s recourse is in this Court.
57. It is not contested that on 14th May, 2020 this Court entered judgment in the sum of Kshs. 36,120,000/= in favor of the Plaintiff/Respondent as against the Defendant/Applicant, dismissed the Defendant’s/Applicant’s Counterclaim and awarded the Plaintiff/Respondent Costs and Interest of the suit.
58. It is also undisputed that subsequent to the delivery of the aforementioned Judgement the Applicant lodged a notice of Appeal on 4th June, 2020 and an application dated 12th June,2020 seeking inter alia stay of execution of the aforesaid Judgement. Hon Justice Rachel Ngetich vide a ruling dated 20th December,2022 granted stay of execution on condition that the Defendant/Applicant do pay the Respondent half of the decretal amount and the other half to be deposited in a joint interest earning Account in the name of both advocates. The record shows that only the Plaintiff/Respondent was present during delivery of this Ruling.
59. The applicant has filed an application dated 24th March, 2023 seeking inter alia interim stay of execution of judgment delivered on 14.5.2020 and extension of orders of stay issued on 20th December, 2022 for reasons that ruling of 20th December, 2022 was delivered in their absence and without notice.



60. Order 22 Rule 51 of the Civil Procedure Rules, 2010 provides: -

- “ 51 Any person claiming to be entitled to or to have a legal or equitable interest in
- (1) the whole 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 this objection to the attachment of such property.
 - (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached”.

61. In the case of Leisure Lodges Limited vs Japhet S. Asige & another [2018]eKLR where the court at para 25 held:-

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

It is clear that order 22 of the civil procedure rules provides for objection proceedings which follow delivery of a judgment incase the judgment is not satisfied within the requisite time .The Court also has jurisdiction to grant retains stay pending appeal,setting aside of judgment and review amongst other reliefs . It is thus my considered view also that the Court is not *functus officio* on the issue of Objection Proceedings.”

Whether the Applicant’s Application dated 17th April, 2023 is sub judice

62. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, had occasion to pronounce itself on the subject of subjudice. It aptly stated: -

“The term ‘*sub-judice*’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”



63. In the case of *David Ndi & others versus Attorney General & others* [2021] eKLR, a bench of five Judges *inter alia* stated;
- “The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...”
64. The subjudice principle is captured in Section 6 of the *Civil Procedure Act*, which provides as follows: -
- “6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”
65. The basic purpose of subjudice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is aimed to prevent multiplicity of proceedings and the possibility of contradictory verdicts by two courts in respect of the same relief.
66. I will now apply the principles set out above to the instant matter.
67. The Plaintiff/Respondent submitted that that the Third Party Vitalis Atero Orango has filed a similar application to the Application dated 17th April 2023. The plaintiff annexed the said Application.
68. I have perused that application. it is dated 19th April and the said third party is seeking the following orders:-
- i. That the Honourable Court do find that the 1st Defendant and Bemac Auctioneers to be in contempt of court and sentence them to a fine or imprisonment for a period of 6 months or to both.
 - ii. That Motor Vehicle KBN 33Y Toyota Prado be released to the Applicant as a matter of purging the Contempt.
 - iii. That costs be provided for.
69. In the above Application the third party averred that the defendant/applicant herein was an in contempt of court orders issued by Eldoret Chief’s Magistrate Court on 24th March, 2018.
70. The application dated 17th April 2023 was instituted by the judgment debtor /Applicant herein and not the said third party Vitalis Odero. The applicant herein contends that the Plaintiff/Respondent is in breach of this Court orders issued on 31st March 2023. The Applicant is also seeking for an order of lifting of Plaintiff’s Corporate Veil. The orders of contempt sought therefore are in regards to different court orders issued by different courts. Further there is no prayer for lifting of corporate veil of the plaintiff’s directors in the said application by the Third Party.
71. In the premises, it is my considered view that the reliefs sought are not similar and therefore the Application dated 17th April, 2023 is not sub judice.



Whether the objector has established legal and/or equitable interests over the proclaimed Motor Vehicle Registration No. KBY 743 N

72. The rationale of objection proceedings is traced Order 22 rule 51(1) of the *Civil Procedure Rules* which provides as follows;

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

73. The objector must therefore adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. In the case of *Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others* [1993] eKLR the Court held that:-

The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

- (1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
- (2) that the objector holds that property on his own account.

74. Also in the case of *Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the court held as follows;

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”

75. The Objector on its part claimed that he bought the aforesaid Motor Vehicle from the judgment debtor /defendant at Ksh.320,000.00 and that the Plaintiff at paragraph 10 of its plaint confirmed receiving the full purchase price of Ksh.320,000/= from the defendant.

76. I have seen the record herein. the record herein and I note that the issue repossession motor vehicle registration numbers KBY 743 N, KBV 099Z & KCA 647W was dealt with by Justice Ngetich in her judgment dated 14.5.20 and she further clarified in her ruling dated 28.10.22 on objection proceedings that” 10. on perusal of the judgment which I delivered on 14. 5.22. I confirm that the plaintiff had confirmed in evidence adduced that 3 vehicles registration numbers KCA 647 W, KBY 743 N & KBV 099Z had been paid for but the log books note collected.11. There is no doubt that the 3 vehicles should not be part of attachment to satisfy the decree in this case.”

77. The respondent did not appeal against the said ruling. The court has already pronounced itself on the issue of attachment of the said vehicles which include KBY 743 N and it is not clear why the decree holder/respondent repossessed the said vehicle despite the said orders of Hon Justice Ngetich. The applicant thus does not have to prove ownership of the said vehicle or privity of contract.

78. I will not say more on this issue other than to declare the said the said repossession of motor vehicle KBY 743 N to be illegal and order it’s release to the objector forthwith.



79. On purjury, Mr Akango for the objector urged this court to consider the affidavit of Mr Darius Ngugi Mbugua dated 8.5.23 as purjury as he suggested that the vehicle herein had not been paid for against the judgment and ruling. This issue was not responded to by the respondent. It has emerged that the said Mr Darius was economical with the truth when he deposed that the vehicle had not been paid for against the findings in the judgment and ruling of Justice Ngetich but as to whether the same amounts to purjury is a matter for a criminal court to determine since purjury is a criminal offence and every accused person has a right to be heard .
80. On the issue of contempt in the application dated 17.4.23, and told this court that the interim stay ordered dated 27.3.23 issued in application dated 24.3.23 were served upon respondent and his counsel but they opted not to comply with the same and respondent blatantly instructed the auctioneer to repossess the vehicle . I have seen the return of service of R.R Mwetich a court process server dated 11.4.23 indicating that he served both the respondent and their counsel Frank Mwangi and co advocates with the stay order dated 27.3.23 via their respective email address on 31.3.23 . The same orders was also served physically by Onyango Henry Obonyo on 31.3.23 upon the respondent in their Nakuru Yard and the received copy with the stamp of respondent is duly filed . the respondent submitted that the stamp is a forgery but did not mention the email service. The process server was not called for cross-examination. I find that the respondent and it's counsel on record were duly served.
81. The Respondent having been duly served with the order ought to have stopped any further action by the auctioneer. The Court orders for interim stay were to remain in force until the Application in question was heard interpartes. The auctioneer repossessed the Subject Motor Vehicle during the existence of the orders for stay. It is trite law that court orders are not issued in vain and the dignity of the court must be maintained at all times .Failure or disobedience to comply with court orders is tantamount to disrespecting the court and this ought not to be taken lightly. In the case of *Republic v Kenya School of Law & 2 others Ex Parte Juliet Wanjiru Njoroge & 5 Others* [2015] eKLR it was held inter alia:
- “ ... Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal”.
82. In the circumstances therefore, it is my considered view that the Repossession of the Subject Motor Vehicle was illegal and the respondent was in contempt of express court orders dated 27 .3.23 .
83. On lifting of the veil, the judgment debtor/applicant prayed for lifting of the corporate veil of the respondent due to the aforesaid contempt. The decree holder/ respondent responded that the judgment debtor is not entitled to lifting of the veil orders as it has not met the threshold of the company being used as a shield to perpetuate illegality for the same as was held in the case of *Africa management Communication international Limited vs Joseph Mathenge and another* eKLR (2013) and *Ashit patani vs Garden chambers Limited* HCA 819 of 2019 (2019) eKLR.
84. In the celebrated case of *Salomon vs. Salomon* (supra) and *Jones & Another vs. Lipman & Another* [1962] 1 WLR 833 it was held that whereas a registered company is a legal person separate from its members this veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Therefore, if a company is thought to be a mere cloak or sham, a device or a mask which the defendant holds to his face, in an



attempt to avoid recognition by the eye of equity, the court will grant summary judgement even against the person behind the said company.

85. The Applicant has demonstrated that the company was used for improper and illegal purpose of disobeying the court orders dated 27.3.23 and so I proceed to lift the corporate veil of the respondent herein as prayed. I find the directors of the respondent guilty of contempt of court.
86. As regards the auctioneer, the judgment debtor/applicant sought for his comittal to civil jail. The applicant told the court that he served the respondent and his counsel on record. The auctioneer Samuel Gitau swore an affidavit dated 8.5.2023 saying he was not served with the orders and he proceeded to repossess the vehicle procedurally and legally. There is no mention of service to the auctioneer by the applicant and so I find no fault on the part of the applicant as he was not served with the order and he acted on instructions of the respondent.

Who should bear the costs?

87. By virtue of Section 27 of the *Civil Procedure Act*, it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. In the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 that it stated:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

88. It is trite law that costs follow event. The objector is successful in the Application dated 3rd April, 2023 and as such I award costs to the applicant.
89. Regarding the second Application, the Applicant successfully proved that the Respondent was in contempt of court orders issued on 24th March, 2023 and the veil has been lifted. I award costs to the applicant / judgment debtor.
90. The preliminary objection dated 8.5.23 has been overruled and so I award costs to respondents.

Conclusion and Disposition

90. I order that: -
1. The Application dated 3rd April, 2023 is merited and it is hereby allowed with costs to the objector. The motor vehicle registration number KBY 743 N be released to objector forthwith.
 2. Application dated 17th April, 2023 be and is here by allowed to the effect that the attachment of the Subject Motor Vehicle KBN 333 Y was unlawful and illegal. I order that it be released to the applicant forthwith. I also lift the corporate veil of the respondent. Costs to /the applicant/ Judgment =
 3. - debtor.
 4. The preliminary objection dated 8.5.23 is hereby overruled with costs to the judgment debtor and objector.



T.A. ODERA - JUDGE

5.7.2023

Delivered virtually in open court at Nakuru in the presence of;

Akango: I am present of objector/applicant.

Jeruto: I am for defendant/applicant.

Njoroge h/b for Mr Mwangi for respondent.

Court Assistant; Nancy Bor

T.A. ODERA - JUDGE

5.7.2023

Jeruto: I seek directions on application dated 24.3.23. It came up when the file was pending ruling. I seek extension of the interim orders

Njoroge: I seek 30 days stay of execution pending filling of an intended appeal.

Akango: We oppose the application. There is nothing to be stayed. The orders are for unlawful attachment t6o be lifted. Allowing the application would be to countenance the illegality. No appeal has been filed against the judgment of Hon Justice Ngetich. The application is devoid of merit mischievous and abused of the process of the court. We urge the court to dismiss it.

Jeruto: I am equally opposing the application for stay. The ruling is on release of illegally attached vehicles and for lifting of the corporate veil.

Njoroge: Order 42 of the Civil Procedure Rules provide for stay pending appeal. We seek stay of release the vehicles pending appeal.

ORDER

I have heard the parties herein. The orders sought to be stayed are for release of vehicles illegally attached .the applicant has not shown that it will suffer substantial loss if the orders are not granted. I agree with counsel for the objector that allowing the stay would amount to perpetuating the said illegality. I decline to grant the stay orders. Application date d 24.3.23 be canvased by way of written submissions.

Respondent is granted 21 days to respond to the submissions by applicant. Mention 9.10.23. Interim orders are extended.

T.A. ODERA - JUDGE

5.7.2023

