



Ambasa Bus Services Ltd & another v SA (Suing as a next friend and father to AS) (Civil Appeal E078 of 2023) [2024] KEHC 13942 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E078 OF 2023
EM MURIITHI, J
NOVEMBER 7, 2024**

BETWEEN

AMBASA BUS SERVICES LTD 1ST APPELLANT

BROTHERS INTELLEX INVESTMENTS LTD 2ND APPELLANT

AND

SA (SUING AS A NEXT FRIEND AND FATHER TO AS) RESPONDENT

*(Being an appeal from the Ruling of Honourable L. Mutai
(CM) delivered on 11/5/2023 in Isiolo CMCC No. 8 of 2018)*

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued Moyale Liner Bus Services Ltd and Dikaya Abdulahi Bagaja, the Defendants in the trial court (hereinafter referred to as the Judgment Debtors) vide a plaint dated 17/10/2017 seeking special damages of Ksh. 2,612,562 general damages for pain, suffering and loss of amenities, loss of future earning capacity and reduced earnings, future medical expenses of Ksh. 150,000 every five years together with costs and interests.
2. The trial court delivered its judgment therein awarding the Respondent Ksh. 6,606,250. The Appellants, the Objectors in the trial court, filed an application dated 3/3/2023 seeking stay of execution and discharge of their properties from any further proclamation, attachment and/or public auction. In its impugned ruling dated 11/5/2023, the trial court rendered thus;

“Accordingly, the Objector has anchored his claim on two folds; that there is no claim between them and the DH and that the proclaimed goods belong to them. On the 1st fold, the Objector claims that there is no claim between the Objectors and the DH, however, it is undisputed that there are links between the Objectors and the JD. The Plaintiff has stated that one Isaack Maalim Abdullai is the director/shareholder of both the JD and the



1st Objector and that one Mohamed Ali Osman is a director/shareholder of both the JD and the 2nd Obejctor hence this beats the argument that there was no claim between the Plaintiff and the Objectors. It is undisputed that the 1st and 2nd Objectors are directly affected by this matter in one way or the other. As such, I find that the Objectors are guilty of material non-disclosure hence they were out to mislead this Court and I find their assertions as untruthful. On the 2nd fold; they claim that the goods proclaimed are theirs and not for JD, however, as I have held above, the motor vehicles attached belong to the directors of the JD. On his part, the DH has deponed that the directors of JD have formed dummy companies in order to evade settling the amount owed to him, that the vehicles attached directly belonged to the JD and they were proclaimed to settle the decretal amount. As such, I am of the considered view that the Objectors have not proved their case to the required standard which is on the balance of probabilities and I proceed to disallow the application. The upshot of the above is that the application by way of Notice of Motion dated 3rd day of March, 2023 is hereby dismissed with costs.”

3. Aggrieved by the said dismissal of their application dated 3/3/2023 vide the ruling of 11/5/2023, the Appellants filed a memorandum of appeal in this court on 31/5/2023 raising 3 grounds as follows:
 1. The learned magistrate erred in law and fact by failing to come to a rudimental conclusion that a company is a separate legal entity from its directors and/or agents.
 2. The learned magistrate erred in law and fact by holding that two distinct companies independently incorporated can be legally termed as one as long as they share one common director.
 3. The learned magistrate erred in law and fact by ordering execution to proceed against the appellants who have never been parties in the primary suit

Submissions

4. The parties fully relied on their respective submissions filed in the trial court in respect of the application dated 3/3/2023 and judgment was reserved.

Issue for Determination

5. The issue for determination is whether the trial court erred in refusing to stay the execution of its decree by reason of an erroneous attachment. On first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Determination

6. Section 44 (1) of the [*Civil Procedure Act*](#) provides for property liable to attachment and sale in execution of a decree as follows:

“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.”



7. The instances when the corporate veil of incorporation can be lifted were extensively highlighted by the Court of Appeal in *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another* (2018) eKLR, as follows;

“In our view, the learned Judge was right to lift or pierce the veil of incorporation to ensure justice and equity to all parties prevails. Further, the law is that courts will disregard the veil of incorporation where it is apparent that the device of incorporation is used for some illegal, fraudulent or improper purpose. See *Mugenyi & Company Advocate v The Attorney General* (1999) 2 EA 199. In the present instance, Mr. Baiya claimed that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent’s account. Why would Mr. Baiya, a director in the 2nd respondent and who definitely had full knowledge of its affairs (that it had no attachable assets or financial means to satisfy the decree) insist that the decree be settled by it? We draw the same inference as the 1st respondent that the same was meant to defeat the satisfaction of the decree, an improper purpose warranting the court to go behind the veil of incorporation. This is especially since the benefit of the works carried on by the 1st respondent was realized and continues to be enjoyed by the appellant. Surely in the circumstances of this case, the appellant did not expect a court of equity to shut its eyes to the 1st respondent’s plight and leave it without a remedy. The appellant incorporated the 2nd respondent and then had it enter into an agreement with the 1st respondent knowing well that it had no financial means or assets to meet the obligations related with the contract. In the absence of any reasonable excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2nd respondent’s veil of incorporation for purposes of ensuring justice to both parties.”

8. It is urged that the Respondent has attached properties wholly owned by the Appellants, who were not parties to the primary suit before the lower court. It is further urged that the nexus between the Judgment Debtors and the Appellants herein is the outright common directorship/shareholding, office location and postal address. The record reveals that indeed the Appellants were not parties to the primary suit and the attached properties to wit motor vehicle Registration Nos. KCX 187 B, KDH 264 M and KCU 175 C are registered in the name of the 1st Appellant while KCD 477 K is registered in the name of the 2nd Appellant. The court notes that the directors and/or shareholders of the Judgment Debtors are Mohamed Ali Osman, Isaack Mohamed Ibrein and Isack Maalim Abdulai. The court further notes that Isack Maalim Abdulai is a director and/or shareholder of both the Judgment Debtors and the 1st Appellant whilst Mohamed Ali Osman is a director and/or shareholder of the Judgment Debtors and the 2nd Appellant.
9. Without any evidence of the winding up of the Judgment Debtors, the Appellants’ proper course would have been to move the court under Order 22 Rule 35 of the Civil Procedure Rules to examine the Judgment Debtors as to their properties as follows:

“Where a decree is for the payment of money, the decree-holder may apply to the court for an order that —

- (a) the judgment-debtor;
- (b) in the case of a corporation, any officer thereof; or



- (c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.”

10. Faced with a similar situation, this court in *Bundi v Tiger Electronics & Motorbike Ltd (Miscellaneous Civil Application E015 of 2024)* [2024] KEHC 9016 (KLR) (25 July 2024) (Ruling) reiterated that:

“As counseled by the Court of Appeal in *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another* (supra), it would be a failure of justice for this court to shut its eyes and leave without a remedy an Applicant holder of a legal decree, which the Respondent through its directors has deliberately made inexecutable, or incapable of satisfaction. It is for these kinds of situations that the remedy of lifting of corporate veil exists! But such legal action may only arise if the relevant Company was in existence, and that was the situation in the *Githunguri Dairy case and Bamburi Special Products Ltd. V Remax Construction Limited (Mshila, J.) 2020 eKLR*, both cited by the applicant.”

11. In the present, this court finds that the attachment of properties solely owned by the Appellants, who are separate legal entities and non-parties to the primary suit is illegal and void ab initio. The purported justification for the alleged attachment on account of shared directors and/or shareholders is far-fetched and overstretched.
12. This court, therefore, finds that the trial court erred when it allowed execution by way of attachment of the motor vehicles legally owned by the Appellants to proceed, and this plain error justifies this court’s interference with the exercise of discretion by the trial court. See *Mbogo v. Shah (1968) EA 93*.

Orders

13. Accordingly, for the reasons set out, the court finds that the Appellants’ appeal has merit and it is allowed in the following terms:
1. The ruling of the trial court dated 11/5/2023 is hereby set aside.
 2. The appellant shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. K. Muriuki for the Appellant.

Mr. Otieno Kevin for the Respondent.

