

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CIVIL APPEAL NO. E023 OF 2025**

<b>NICODEMUS</b>	<b>GATOHO.....</b>	<b>1<sup>ST</sup></b>	
<b>APPELLANT</b>			
<b>LILIAN</b>	<b>MUKETHI.....</b>	<b>2<sup>ND</sup></b>	
<b>APPELLANT</b>			
<b>ALFRED</b>	<b>GITUMA.....</b>	<b>3<sup>RD</sup></b>	
<b>APPELLANT</b>			
<b>ONESMUS</b>	<b>KAMENYWA.....</b>	<b>4<sup>TH</sup></b>	
<b>APPELLANT</b>			
<b>ESTHER</b>	<b>MUTHONI.....</b>	<b>5<sup>TH</sup></b>	
<b>APPELLANT</b>			
<b>STEPHEN</b>	<b>WAMBUGU</b>	<b>KAHUNYO.....</b>	<b>6<sup>TH</sup></b>
<b>APPELLANT</b>			
<b>KEVIN</b>	<b>DAN</b>	<b>OSURI.....</b>	<b>7<sup>TH</sup></b>
<b>APPELLANT</b>			
<b>CHARLES</b>	<b>KABUGI</b>	<b>KARIERI.....</b>	<b>8<sup>TH</sup></b>
<b>APPELLANT</b>			

**SAMUEL MBOGO NYAMBURA.....9<sup>TH</sup>**

**APPELLANT**

**MANCHESTER TRAVELLERS COACH LTD.....10<sup>TH</sup>**

**APPELLANT**

**-VERSUS-**

**MAJABU NAMHIZI JUMANNE & LIZZIE MUPA**

**KOMBO (Both suing on behalf of the estate of**

**OMAR JUMA NAKAR(Deceased).....1<sup>ST</sup>**

**RESPONDENT**

**WILSON WACHIRA MWANGI..... 2<sup>ND</sup>**

**RESPONDENT**

**BEAVERLINE MAANCHESTER**

**TRAVELLERS LTD.....3<sup>RD</sup>**

**RESPONDENT**

***(Being an appeal from the ruling of Hon. C. K. KITHINJI***

***(PM) in Voi CMCC No. E181 of 2022 delivered on 11<sup>th</sup>***

***February 2025)***

**JUDGMENT**

- 1) The respondents filed a fatal accident claim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this appeal.

2) The appellants who are objectors filed objection proceedings to stop the 1<sup>st</sup> and 2<sup>nd</sup> respondent from attaching the objector's motor vehicles listed in the notice of motion dated 13/9/2024 as follows;

KBW 235Z, KBX 996Z, KCN 781E, KCR 366P, KCA 704U, KXC 163S, KBL 423E, KDP 8064, KCM 293V, KCB 196Y, KDE 601L, KCY 147G, KDH 157J, KCP 865W.

3) The trial court found that there were two applications with similar affidavits.

4) The affidavits were sworn on the same date by the same person NICODEMUS GATOHO who described himself as the Managing Director (MD) of Manchester Travelers Coach Ltd.

5) The court also found that in one of the affidavits the said NICODEMUS GATOHO maintains that he is the registered owner of motor vehicle registration no. KCA 704U, motor vehicle registration no. KCY 163S is in the name of Kevin Dan Osuri.

6) That motor vehicle registration no. KBL 423E is in the name of Esther Muthoni, KCB 196Y is in the names of Alfred Gituma and Onesmus Kamenywa, motor vehicle KDH 157J is the name

of Nicodemus Gatoho, Charles Kabugi Kariri Samuel Mbogo Nyambura.

- 7) Motor vehicle registration no. KCD 865W is in the name of Lilian Mukethi and motor vehicle registration no. KDP 306V is in the name of Stephen Wambugu Kahunyo.
- 8) The registrations of the other motor vehicles were not indicated.
- 9) In the next affidavit NICODEMUS GATOHO annexed copies of log books and searches with NTSA showing motor vehicle KBW 235Z and KCN 781E are in the names of Manchester Travelers Coach Ltd, KDP 806V is registered under Stephen Wambugu and KCD 865W under Lilian Mutetui.
- 10) The trial court found that the affidavit in support of the application dated 13/9/2024 is not specific but only alludes to the mode of operation and use of the motor vehicles.
- 11) The trial court dismissed the objection application on the basis that the whole arrangement was calculated to defeat the ends of justice and to obstruct the realization of the fruits of judgment.

12) The objectors have appealed against the said ruling on the following grounds;

- i. That the learned trial magistrate gravely erred in law and in fact by failing to appreciate the fact that he objectors/appellants are the bonafide owners of the subject motor vehicles sought to be attached in satisfaction of the trial court judgment which was against the 2<sup>nd</sup> and 3<sup>rd</sup> respondent herein whilst the appellants were never parties therefore their properties or vehicles are incapable of attachment thereby arriving at wrong decision.***
- ii. That the trial magistrate erred in law and fact by failing to appreciate the fact that be a member of a SACCO such as the 2<sup>nd</sup> respondent is a government requirement and the same does not amount to ownership by the Sacco as the same are individually owned by the objector appellants thereby arriving at a wrong decision.***

- iii. That the learned trial magistrate erred in law and fact by failing to consider that a company is a different entity from its directors or shareholders and therefore the applicants herein should not have to pay for the company's debt thereby arriving at a wrong decision.**
- iv. That the trial magistrate erred in law and fact by failing to consider the evidence that proved that the vehicles in question belonged to individuals being the appellants herein and registered under objectors / appellants but operating under the 3<sup>rd</sup> respondent as a Sacco which is a government policy and a Sacco is just an umbrella company and in this particular case did not own the objectors vehicle thereby arriving at a wrong decision.**
- v. That the trial magistrate erred in law and fact by failing to appreciate the appellants evidence that they owned the suit vehicles and not the Sacco and equally failed to consider that though a Sacco**

***can own vehicles no evidence was adduced that the vehicles in the matter were owned by the Sacco being the 3<sup>rd</sup> respondent thereby arriving at a wrong decision.***

***vi. That the trial magistrate erred in law by failing to consider that saccos cannot be vicariously liable for the acts and omissions of the vehicles falling under their flee since they do not shoulder their burdens thereby arriving at a wrong decision.***

***vii. That the learned trial magistrate erred in law and in fact in implying evidence without proof that the suit vehicles were not owned by the 3<sup>rd</sup> respondent whilst an evidence had been adduced by the appellants to the effect that the vehicles were actually owned by the appellants and no contrary evidence had been adduced to call for a rebuttal of search evidence by the respondents thereby arriving at an erroneous decision.***

***viii. That the trial magistrate erred in law and infant by entering into the arena of the dispute as***

***between the parties by holding that the deponent of the affidavit one Nicodemus Gatoho was not supposed to do so thereby misapprehending the fact since the deponent represents the Sacco and equally the owners of the vehicles/appellants as he is involved in the day to day operations of the vehicle thereby arriving at erroneous decision.***

***ix. That the trial magistrate erred in law and in fact by holding that the appellants had not carried out recent searches to the suit vehicles whilst no contrary evidence had been presented to challenge the evidence portrayed on the log books hence entered into the arena of the dispute instead of deciding the case on merit and or the available evidence by the parties.***

***x. That the learned trial magistrate erred in law and in fact by ignoring material factors or evidence adduced by the appellants, considered irrelevant matters and failed to consider relevant matters.***

***xi. That the learned trial magistrate erred on law and fact by placing undue weight to frivolous and vexations arguments by the respondents herein while totally ignoring the argument of the applicants herein thereby arriving at a wrong decision.***

- 13) The parties filed written submissions as follows; The appellants in this appeal are challenging a trial court's decision that permitted the attachment of their vehicles.
- 14) The appellants were never parties to the original suit, which resulted in a judgment entered solely against the 2nd and 3rd respondents.
- 15) The appellants submitted that their private property is not available for attachment under any lawful execution process, as execution can only be levied against property belonging to a judgment debtor.
- 16) The appellants substantiated their claim of ownership by producing registration documents, logbooks, and official NTSA records.

- 17) It is contended that the trial magistrate erred in law and fact by disregarding this clear documentary evidence in favor of what are termed speculative assertions by the respondents.
- 18) The appellants invoke the duty of the first appellate court, as established in precedent like *Selle v Associated Motor Boat Co.* and cited in *Njenga v Mungai*, to re-evaluate the evidence and draw its own conclusions, not being bound by the lower court's findings of fact.
- 19) The submissions further emphasize the legal principle that a third-party's properly proved ownership of attached property renders the attachment untenable, referencing *Odhiambo v Omole*.
- 20) A significant point of contention is the trial court's apparent presumption that because the vehicles operated under the 2nd Respondent SACCO, they were owned by that SACCO.
- 21) The appellants argue this is legally and factually incorrect, citing cases such as *Kimani & Others v Kangemi Matatu Owners SACCO* and *Kangemi Matatu Owners SACCO Society Ltd v Momanyi* to support the position that a SACCO's regulatory role does not convert privately owned vehicles

into its property, nor does membership automatically impose vicarious liability.

22) Additionally, the appellants invoke the cardinal principle of corporate law from *Salomon v Salomon & Co. Ltd*, asserting that a company is a distinct legal entity and its debts are not the debts of its shareholders.

23) As there was no evidence presented to warrant piercing the corporate veil, the trial court erred in holding the appellants liable for the debts of the 2nd and 3rd respondents.

24) Concluding that the trial court's ruling was based on errors of law and a misapprehension of facts, the appellants submit that their appeal is merited.

25) On the issue of costs, they submit that costs should follow the event, and with no special circumstances shown to justify a departure from this principle, they pray that the appeal be allowed with costs

26) the 1st Respondent submitted that this appeal arises from a ruling delivered on 11th February 2025 by the learned trial magistrate in Voi CMCC No. E181 of 2022, wherein the trial court dismissed two objection applications filed by the

Appellants, both dated 13th September 2024, with costs to the 1st Respondent.

27) The background to the matter is that the 1st Respondent had sued the 2nd and 3rd Respondents seeking compensation following the death of Omar Juma Bakari in a road traffic accident on 24th July 2022 involving motor vehicle registration number KDD 699G belonging to the 2nd and 3rd Respondents.

28) Judgment was entered in favour of the 1st Respondent for Kshs.3,958,035/= plus costs and interest on 11th October 2023, and by the time warrants of attachment were issued on 2nd September 2024, the decretal sum stood at Kshs.4,687,296/=.

29) The insurer, Messrs Directline Assurance Company Ltd, settled Kshs.3,000,000/= under the Insurance (Motor Vehicles Third Party Risks Act), leaving a balance of Kshs.1,687,296/=: which the 1st Respondent sought to execute against the 2nd and 3rd Respondents directly.

30) It was this execution process that prompted the two objection proceedings filed by the firm of Kanyi Kiruchi &

Company Advocates on behalf of the 1st to 9th Appellants, and by Ngethe Ndung'u & Associates Advocates on behalf of the 10th Appellant.

31) I have carefully considered the pleadings, the record of appeal, and the written submissions filed by the respective parties.

32) The issues for determination in this appeal are as follows;

- (i) Whether the trial court properly evaluated the evidence on record in dismissing the objection proceedings;
- (ii) Whether the appellants herein, as objectors, discharged their legal burden of proving ownership of the attached motor vehicles to entitle them to the protection of the law against execution; and
- (iii) Who should bear the costs of this appeal?

33) This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court and to draw its own conclusions, while always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

- 34) As was stated in the locus classicus case of *Selle v Associated Motor Boat Co.* [1968] EA 123, an appellate court is not bound to accept the findings of fact by the lower court but must reconsider the evidence, evaluate it itself, and draw its own conclusions.
- 35) Guided by this principle, this court has subjected the entire record to a fresh and exhaustive examination.
- 36) The gravamen of the appellants' appeal is that they are the bonafide registered owners of the motor vehicles that were proclaimed in execution of a decree that was lawfully issued against the 2nd and 3rd respondents only.
- 37) The appellants contend, and rightly so, that execution can only be levied against the property of a judgment debtor.
- 38) It is a well-established principle of law, rooted in the concept of a distinct legal personality as enunciated in the celebrated case of *Salomon v Salomon & Co. Ltd* [1897] AC 22, that a company is an entity separate and distinct from its shareholders and directors.

- 39) Consequently, the debts of the 3rd respondent, Manchester Travellers Coach Ltd, are not automatically the debts of its individual directors or shareholders.
- 40) For a decree-holder to attach the personal property of directors, they must successfully pierce the corporate veil by demonstrating that the company was a sham or was being used for a fraudulent purpose.
- 41) In the instant case, there was no such evidence tendered before the trial court to warrant this exceptional course of action.
- 42) The procedure for objecting to the attachment of property in execution of a decree is governed by Order 22 Rule 51 of the Civil Procedure Rules.
- 43) The burden of proof in such proceedings lies squarely on the objector to demonstrate, on a balance of probabilities, that they have a legal or equitable interest in the attached property.
- 44) To successfully challenge an attachment of any property in execution of decree, an objector must prove, on a balance

of probabilities, that he is entitled to or to have a legal or equitable interest in the whole or part of such property.

- 45) The appellants herein sought to discharge this burden by producing copies of logbooks and official searches from the National Transport and Safety Authority (NTSA).
- 46) These documents, prima facie, indicated that the motor vehicles in question were registered in the names of the individual appellants and not the 3rd respondent judgment-debtor.
- 47) The trial court, in its ruling, expressed scepticism about the appellants' claim of ownership, pointing to the fact that the supporting affidavits were sworn by the same person, Nicodemus Gatoho, who described himself as the Managing Director of the judgment-debtor company.
- 48) The court also noted inconsistencies in the affidavits regarding the ownership of certain vehicles and formed the opinion that the "whole arrangement was calculated to defeat the ends of justice."
- 49) While the trial court's concerns about the potential for abuse are understandable, this court finds that the learned

magistrate erred in law and fact by substituting the clear documentary evidence of registration with mere suspicion and speculation.

50) Registration under the Traffic Act and the NTSA is the primary evidence of ownership of a motor vehicle.

51) The appellants tendered this evidence, and it was not rebutted by any contrary documentary evidence from the respondents.

52) Furthermore, the trial court appeared to have been influenced by the fact that the vehicles operated under the umbrella of the 3rd respondent, a SACCO.

53) However, this fact alone is not dispositive of the issue of ownership.

54) The requirement for public service vehicle operators to belong to a SACCO or a company is a regulatory measure aimed at streamlining the transport industry.

55) This regulatory framework does not, by operation of law, transfer ownership of the vehicles from the individual members to the umbrella organization.

- 56) The SACCO remains a separate entity, and its members retain ownership of their individual assets.
- 57) The fact of membership and operation under a SACCO's license does not convert private property into communal or corporate property.
- 58) Having re-evaluated the evidence, this court finds that the appellants successfully discharged their burden of proof.
- 59) They produced documentary evidence from the NTSA demonstrating their registration as owners of the motor vehicles listed in the objection application.
- 60) In the absence of any evidence to the contrary, or any proof that these registrations were a sham designed to defeat existing or anticipated decrees, the trial court was bound to uphold the objection.
- 61) The learned trial magistrate therefore erred in dismissing the objection proceedings.
- 62) To allow the attachment to proceed in the face of unchallenged proof of third-party ownership would be to sanction a grave injustice and sanction the attachment of

property belonging to persons who were not parties to the suit and are not judgment-debtors.

63) In the result, this appeal is merited and is hereby allowed.

The ruling delivered on 11th February 2025 in Voi CMCC No. E181 of 2022 is hereby set aside.

64) Consequently, the objection proceedings dated 13th September 2024 are allowed, and the attachment of the motor vehicles listed therein is hereby lifted with immediate effect.

65) Regarding the costs of this appeal and the proceedings before the lower court, the general principle is that costs follow the event, as stipulated in Section 27 of the Civil Procedure Act.

66) The successful party is ordinarily entitled to costs unless the court, for good reason, orders otherwise.

67) The respondents herein, by seeking to attach property that did not belong to the judgment-debtor, necessitated these proceedings.

68) Consequently, the appellants, having successfully vindicated their proprietary rights, are entitled to the costs

of this appeal and the costs of the objection proceedings in the subordinate court.

69) However, the said costs to be born by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in this appeal for reasons that the objection proceedings would not have been necessary if they had settled the claim.

**Dated, Signed and Delivered online via Microsoft Teams at Voi this 18<sup>th</sup> March, 2026.**

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**A. N. ONGERI**

**JUDGE**

**In the presence of:**

**Court Assistant: Mabishi/Millicent**

..... **for the Applicant**

..... **for the Respondent**