

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURT

CIVIL SUIT NO. E165 OF 2016

**PAMELA MANDELA IDENYA..... PLAINTIFF/DECREE
HOLDER**

VERSUS

**DUCHESS PARK DEVELOPMENT
COMPANY LIMITED.....
DEFENDANT/JUDGEMENT DEBTOR**

AND

HOMEFIX LIMITED.....

OBJECTOR/APPLICANT

RULING

1. This matter comes up for a Ruling in respect of 2 applications. One is by the objector seeking to lift the attachment against the Objector's goods. The other is by the Plaintiff seeking to lift the corporate veil of the Defendant.

Background Facts

2. The application under a Certificate of Urgency by way of a Notice of Motion dated 29.1.2021 is filed by one Objector. It seeks following orders:
 1. *Spent.*
 2. *Spent.*
 3. *THAT that the warrants of Attachment and Proclamation levied against the Objector's vehicle namely KKHMA 868K be hereby raised or lifted.*
 4. *THAT a prior search verification ought to be conducted before proceeding with any further intended leveled execution.*
 5. *THAT costs of this application be provided for.*
4. The application is opposed by the Plaintiff through an affidavit of **HEZBON OWINO OPIYO** Counsel for the Plaintiff, sworn on 5.5.2021.
5. The 2nd application is equally under a Certificate of Urgency. It is brought by way of a Notice of Motion dated 19.4.2021. It seeks the following orders:
 1. *Spent.*
 2. *THAT this Honourable Court be pleased to order the instant application herein be simultaneously heard together with the Objector's Application dated 29.1.2021 and served upon us on the 12.4.2021.*
 3. *THAT this Honourable Court be pleased to order that Caterpillar KHMA registration Number 868K which was attached at the Defendant's premises not to be released to the Objector until the hearing and determination of this application.*
 4. *THAT this Honourable Court be pleased to order that the corporate veil of Defendant/Judgment Debtor*

herein, Duchess Park Development Co. Limited and the Objector, Homefix Limited be lifted.

5. *THAT DANIEL OJJO AGILI being the shareholder and director of the Defendant/Judgment Debtor company and of the Objector Company do personally attend court and be examined as to whether the Defendant/Judgment Debtor has any property or means of satisfying the decree herein.*
 6. *THAT DANIEL OJJO AGILI being the shareholder and director of the Defendant/Judgment Debtor company herein be compelled to attend and appear before this Honourable Court and produce such all and any book of accounts and documents relation to operations of the Defendant's company between the year 2015 to date and be orally examined as to its means of satisfying the decree herein.*
 7. *THAT in default of the said DANIEL OJJO AGILI complying with the above court orders, he be ordered to personally pay the decretal amount due to the plaintiff or to be imprisoned and committed to civil jail for a period of not less than six (6) months.*
 8. *THAT the costs of this application be provided for.*
6. The application is opposed by the Defendant through the Replying Affidavit of **DANIEL AGILI OJJO** sworn on 13.5.2021.
 7. This suit was filed by the Plaintiff against the Defendant. The Plaintiff sought a sum of Kshs.8,400,000/= plus interest and costs for breach of contract. This arose from a deposit paid towards a house that was not delivered. The Defendant opposed the suit and filed a defence.

8. Subsequently, the parties entered into a mediation and came up with an agreement on 12.7.2018. A consent judgment was recorded on the suit and a decree issued on 18.2.2019. The Defendant/Judgment Debtor was to pay the Plaintiff/Judgment Creditor a sum of Kshs. 7,560,000/=.
9. Warrants of attachment and sale were issued against the Defendant/Judgment Debtor attachable assets, to recover a sum of Ksh.4,523,583.53 then outstanding. This led to the attachment of a Caterpillar registration number KHMA 868K.
10. The Objector has reacted to the attachment claiming that the Caterpillar belongs to it and not to the Defendant. This is opposed by the Plaintiff. On the other hand, the Plaintiff has initiated post judgment execution processes. She wishes to proceed against the directors of the Defendant in execution of the judgment in her favour. This is opposed by the Defendant. It is submitted that **DANIEL OJJO AGILI** is a common director of the Defendant as well as the Objector.

Issues for Determination

11. The Court has perused the two applications, the responses, the submissions filed as well as the oral highlights by Counsel for the parties. It frames four (4) issues for determination;
 - a) *Whether the attachment against the Objector's vehicle namely KHMA 896K ought to be lifted.*
 - b) *Whether the corporate veil of the Defendant and the Objector ought to be lifted.*
 - c) *Whether DANIEL AGILI OJJO being a Director of the Judgment Debtor/Defendant ought to be summoned to appear in court for cross-examination as to the assets of the Defendant/Judgment Debtor.*

- d) *Whether in default of complying with orders of attachment the Court should order that DANIEL AGILI OJJO to personally pay the decretal amount due or be committed to civil jail for a period of six (6) months.*

Analysis

12. The procedure for lifting an attachment at the behest of an Objector is provided for by **Order 22 Rule 52 and 53 of the Civil Procedure Rules**. It states as follows:

52. Stay of execution [Order 22, rule 52.]

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

53. Raising of attachment [Order 22, rule 53.]

Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation

received from the attaching creditor and shall make such order as to costs as it shall deem fit.

13. The Court is persuaded by the decision in **KCB Bank Kenya Limited v Ndungu & 2 others [2025] KEHC 6732 (KLR)** relating to objection proceedings. **E. Muriithi J.** stated as follows;

“The regime of rules for dealing with objections to attachment of property in execution of decree of court is set out particularly in Order 22 Rules 51-55 of the Civil Procedure Rules as follows:

“[Order 22, rule 51.] Objection to attachment

51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of 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 his 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.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

[Order 22, rule 52.] Stay of execution.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall

call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

[Order 22, rule 53.] Raising of attachment.

53. Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.

[Order 22 rule 54.] Notice of intention to proceed

54. If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.

[Order 22, rule 55.] Power to order property attached to be sold and proceeds to be paid to person entitled.

55. Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such

sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.”

26. The Appellant was therefore required to demonstrate to the court that it had an interest, legal or equitable in the attached motor vehicle registration number KCL940B.

27. I respectfully agree with F. Gikonyo, J. in Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] KEHC 1412 (KLR) on the test under Order 22 Rule 51 (1) of the Civil Procedure Rules that:

“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. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”

28. The question that this court must ask is whether the objector/appellant established a legal or equitable interest in the whole or part of the motor vehicle registration number KCL940B attached in execution of the decree. The Appellant produced a search of the subject motor vehicle and a copy of the logbook thereof both showing that the subject motor vehicle was registered in the joint names of the Appellant and the 3rd Respondent.”

14. When it comes to enforcement of judgment by way of summoning directors to Court to explain the assets of a

company, the Court relies upon the provisions of **Order 22 Rule 35 of the Civil Procedure Rules** which state as follows:

35. Examination of judgment-debtor as to his property [Order 22, rule 35.]

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.

15. The Court is persuaded by the decision in **Margaret Soares v Jane Otieno [2014] KEHC 6225 (KLR)**. **F. Gikonyo J.** laid out the principles applicable as follows;

“Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under Order 22 rule 35 is circumscribed within the purpose set out in the rule. That is;

...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.

I, therefore, take the view that, as long as the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery ...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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the Respondent, that the Applicant must establish; 1) the debtor's debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor's identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the Applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor's known properties. The second thing; any person may be summoned under the rule, and such

person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule.”

a) Whether the attachment against the objector’s vehicle namely KHMA 868K ought to be lifted.

16. The Court notes that as soon as the motor vehicle was proclaimed, the Objector filed a Notice of Objection dated 29.1.2021. This was thereafter followed by the Notice of Motion under consideration.
17. The Objector maintains that the attached motor vehicle belongs to it and not to the Defendant. It has attached a logbook to stake its claim. It shows the motor vehicle is fully owned jointly between **I & M Bank Limited** and **Home Fix Limited**. The Court was referred to the case of **Akiba Bank Limited vs Jetha & Sons Limited [2005] eKLR**. This is to the effect that once an Objector proves its interest in the vehicle by way of a logbook, the attachment ought to be lifted. It is also deponed that the Objector is not the Defendant. That the law presumes and holds that the Defendant and the Objector are legally separate and distinct corporate entities. None should be held liable for the debts of the other.
18. The Plaintiff’s response is that it fell upon the Objector to demonstrate that at the date of attachment, the motor vehicle belonged to it and not to the Defendant. The Plaintiff relied upon the decision of **Mbaru J**, in **Stephen Kiprotich Koech vs Edwin K. Barchilei & Joe Sietenei (Objector) [2019] eKLR**. The Court held that production of a Kenya

Revenue Authority Registration book was not sufficient proof of ownership.

19. The Court notes that save for the logbook produced by the Objector, the Plaintiff has not produced any document or proof of ownership to tie the motor vehicle to the Defendant.
20. The Court refers to **Section 8** of the **Traffic Act** which states as follows:

8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

21. This presumption of ownership has not been countered by the Plaintiff. The Court cannot at this stage ignore this statutory presumption that the motor vehicle is presumed to be owned by the Objector and the Bank. Looking at it in another way, there is no proof that the motor vehicle is owned by the Defendant/ Judgement debtor.
20. The Court is persuaded that Registration Certificate number K 277055 Y for motor vehicle KHMA 868 K shows the owners as **I & M Bank Limited** and **Home Fix Limited**. The Plaintiff did not discharge the burden of proof once the Objector shifted it upon her. The Court is persuaded to follow the decision in **Akiba Bank Limited vs Jetha & Sons Limited [2005] eKLR**. It holds that the Objector has established its legal interest in the attached motor vehicle. The attachment thus ought to be lifted.

b) Whether the corporate veil of the Defendant and the Objector ought to be lifted.

21. To this Court, the prayer for lifting the corporate veil at this juncture is premature. In the ordinary sequence of events, the Directors of the defendant ought to be summoned to appear in Court first. They are to bring the relevant books of accounts and explain as to the whereabouts of the assets of the Defendant. This is a tool to allow the Judgment Creditor trace or discover the whereabouts of the Judgement Debtor's attachable assets.
22. It is only after that public examination of directors that the Court can be invited to lift the corporate veil depending on the information obtained during this process.
23. To order the lifting of the corporate veil without offering the directors of the Defendant a chance to be heard is to condemn them unheard. It is also to jump the gun so to speak.
24. The Court follows the decision of **F. Gikonyo J.** in **Margaret Soares v Jane Otieno [2014] KEHC 6225 (KLR)**.

c) Whether DANIEL AGILI OJJO being a director of the Judgment Debtor/Defendant ought to be summoned to appear in Court for cross-examination as to the assets of the Defendant/Judgment Debtor.

25. The Court is guided by the provisions of **Order 22 Rule 35** as stated above.
26. The Plaintiff avers that **DANIEL AGILI OJJO** is a director of both the Defendant and the Objector. This is not denied by the Defendant.
27. The Court has noted that a Decree has already been issued by the Court. DANIEL OGILI OJJI is a proper person to be

examined as to the status of the Defendant. This is because he is a director. The Court follows the decision of **F.Gikonyo J.** in **Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited [2015] KEHC 5964 (KLR).**

d) Whether in default of complying with orders of attachment the Court should order that DANIEL AGILI OJJO to personally pay the decretal amount due or be committed to civil jail for a period of six (6) months.

28. The Court is not persuaded that it should issue this prayer at this juncture. Such a prayer can only be issued after the public examination of the director of the Defendant. Such orders can only issue after the lifting of the corporate veil. As for now this is premature.
29. As to costs, the same follows the event and are awarded at the discretion of the Court. With the lifting the attachment, the Objector is entitled to costs of the application. For the examination of the directors of the Defendant, the issue of cost will have to wait the outcome of the cross examination and any subsequent proceedings.

Determination

30. The Objector's application by way of a Notice of Motion dated 29.1.2021 is allowed in the following terms:
1. *THAT that the warrants of Attachment and Proclamation levied against the Objector's vehicle namely KHMA 868K be and are HEREBY raised or lifted.*
 2. *THAT costs of this application be borne by the Plaintiff/Decree holder.*

31. The Plaintiff/Decree holder's application by way of a Notice of Motion dated 19.4.2021 is partially allowed in the following terms:

1. *THAT DANIEL OJJO AGILI being the shareholder and director of the Defendant/Judgment Debtor company and of the Objector Company do personally attend court and be examined as to whether the Defendant/Judgment Debtor has any property or means of satisfying the decree herein.*
2. *THAT DANIEL OJJO AGILI being the shareholder and director of the Defendant/Judgment Debtor company herein be compelled to attend and appear before this Honourable Court and produce such all and any book of accounts and documents relation to operations of the Defendant's company between the year 2015 to date and be orally examined as to its means of satisfying the decree herein.*

32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
16TH DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Miss Wambua holding brief for Mr. Opiyo for the Plaintiff/Decree Holder.

N/A for the Defendant/Judgement Debtor.

Miss Oсли holding brief for Mr. Nyamagwa for the for the Objector/Applicant.

Mr. Peter Wabwire - Court Assistant.