



**Twaweza Apparel (EPZ) Limited v Okoth & another (Appeal
E012 of 2023) [2025] KEELRC 198 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E012 OF 2023
M MBARŪ, J
JANUARY 30, 2025**

BETWEEN

TWaweza APPAREL (EPZ) LIMITED APPELLANT

AND

PAULINE ADHIAMBO OKOTH 1ST RESPONDENT

HANTEX GARMENTS (EPZ) LIMITED 2ND RESPONDENT

*(Being appeal from the ruling of D.O. Mbeja delivered
on 17 June 2022 in Mombasa CMELRC 331 of 2019)*

JUDGMENT

1. The appeal arises from the ruling on 17 June 2022 in Mombasa CMELRC No.331 of 2019. The appellant seeks that the verdict be set aside and substituted with an order allowing the appellant's objection application dated 1 December 2021 with costs.
2. The appellant filed an objection application dated 1 December 2021 seeking a stay of execution of the judgment delivered on 8 September 2021 and that the Warrants of Attachment and Proclamation dated 26 November 2021 be set aside. The application was filed because the appellant is a separate entity from the 2nd respondent, the judgment debtor, against whom judgment had been entered. However, the 1st respondent, the claimant, had commenced execution proceedings against the appellant, hence the objection proceedings.
3. The learned magistrate delivered a ruling on the application and held that the appellant was hiding behind the motion of a separate legal entity when, in fact, it was operating together with the second respondent as one legal entity. They share a standard address, and nothing was credible to stop the court from lifting the corporate veil. The court dismissed the application.



4. Aggrieved, the appellant filed this appeal because the learned magistrate erred in law and fact in finding that the appellant and the 2nd respondent are the same legal entity and that the appellant was a subsidiary thereof without evidence. In any event, a subsidiary company is a distinct legal entity from its holding company, especially in employment contracts and the privity of contract thereof. The court failed to find that the appellant had a legal and equitable interest in the proclaimed property and that the property belonged to it. There was evidence that the appellant, as the objector, had acquired the attached goods by paying Ksh.19,000 000 to the 2nd respondent; the attached goods were in the appellant's premises, Warehouse Nos 1 to 10 on LR No.1043/111/54, which premises the appellant is entitled to occupy under a lease of 5 years from Mazeras Kenya (EPZ) Limited. The appellant undertakes its business on the premises.
5. Other grounds of appeal are that the trial court failed to find that the attachment and threatened sale of the proclaimed property were unlawful because the appellant was not a party to the proceedings between the respondents in ELRC Cause No.331 of 2019 and has no lawful obligation under the decree dated 25 November 2021 to pay the 1st respondent the decretal sum. The judgment was not against the appellant.
6. The appellant and 1st respondent attended and agreed to address the appeal through written submissions.
7. The 2nd respondent did not attend despite being served with the appeal.
8. The appellant submitted that judgment in Mombasa Cause No.331 of 2019 was delivered on 8 September 2021 against the 2nd respondent and not the appellant. However, the 1st respondent commenced execution proceedings against the appellant, leading to objection proceedings through an application dated 1 December 2021. The appellant is a separate legal entity from the 2nd respondent. Evidence of such separation is the license issued to the appellant by the Export Processing Zone Authority on 6 September 2021, the Certificate of Incorporation issued by the Registrar of Companies on 7 August 2020 and the lease between the appellant and Mazeras Kenya EPZ Limited in 2020. Despite these facts and evidence, the trial court dismissed the objection proceedings and allowed execution. The basis was that the appellant and 2nd respondent shared a postal address, which is insufficient proof that these are two distinct companies as held in *Job Mbaluka v Pegrume Limited* [2015] eKLR that the employer is different in employment. In the case of *Ril Logistics Limited & Another v Kyaka* [2024] eKLR, the court held that having common shareholders and a shared address does not strip the company of its legal personality that is distinct from others.
9. The appellant submitted that the trial court erred in lifting the corporate veil without jurisdiction, which is a preserve of the High Court. There was no application for such lifting of the corporate veil. Under the *Companies Act*, only the High Court is given the power to lift the corporate veil of a company as held in *Post Bank Credit Limited (in Liquidation) v Nyamangu Holdings Limited* [2015] eKLR. The decision to lift the corporate veil should not be taken lightly, as it opens the directors or members to personal liability. Despite the appellant submitting evidence that it held the legal and equitable title to the attached goods, the trial court failed to appreciate it and dismissed the objections.
10. The appellant submitted that it was not the employer of the 1st respondent and not a party to proceedings in Mombasa ELRC Cause No.331 of 2019 to be held liable to settle the judgment against the 2nd respondent. Because the appellant and the judgment debtor shared a postal address, there is no sufficient reason to assign liability. Under Order 22 rule 52, the 1st respondent was by notice in writing to intimate to the court and all parties the process of attachment, which was not adhered to as held in *Siso Limited v Caroline Wanjihia t/a C. W. Wanjihia & Co. Advocates & another* [2015] eKLR. Under Order 22 Rule 53, the court has no option but to raise the attachment if the attaching



creditor fails to issue notice under Rule 52. In this case, the 1st respondent could not issue notice to the appellant. The trial court was unable to consider such a matter.

11. The 1st respondent submitted that the appellant settled the decretal amount awarded to the 1st respondent by consent dated 13 September 2024. The trial court adopted the consent as judgment. However, the appellant indicated it would proceed on appeal.
12. The appellant and the 2nd respondent have the same representation as the 2nd respondent. The alleged execution proceedings against the wrong party are not correct upon the appellant's settlement of the decretal sum. Despite the appellant filing objection proceedings under different advocates, the same advocates for the 2nd respondent attended court to prosecute the application. In the case of *Gichuki Kingara & Company Advocates v Mugoya Construction & Engineering Limited* [2013] eKLR, the court held that no fiduciary relationship exists between two or more clients of the common advocate. Any knowledge received from each client and their common advocate is separate. However, the advocate, having acted for one client against the other in a subsequent action concerning the same matter, has acquired confidential information. As such, the conflict of interest is apparent.
13. The appeal is improper as it is filed by advocates who are on record for the 2nd respondent. Such is collusion between parties to defeat justice.
14. The appellant has not discharged the duty of establishing the legal or equitable title to the attached property. The purported production of the certificate of incorporation dated 7 August 2020 shows the suit herein already existed. There was no notice of change of advocates to allow the appellant and the 2nd respondent to be in different locations. The proclaimed goods are the joint properties of the appellant and 2nd respondent. The attached property is not transferred to the appellant but a loan facility advanced by the 2nd respondent. The assets were moved during the pendency of the matter before the lower court as proof of joint interest as held in *Boleyn Magix Wall Panel Ltd v Nesco Services Limited' Roleyn International (K) Limited (Objector)* [2021] eKLR. The burden of proof to any particular fact lies on the person who wishes the court to believe in its existence.
15. In this case, based on the record, the appellant and the 2nd respondent are the same, and the appeal herein is meant to defeat justice and should be dismissed with costs.

Determination

16. This is a first appeal. The court is required to reexamine the record, reassess, and make conclusions.
17. The challenged ruling in this appeal resulted from objection proceedings initiated by the appellant through an application dated 1 December 2021.
18. Pending the appeal hearing, the appellant filed an application dated 3 May 2024 seeking to set aside orders issued on 29 May 2023, where the appeal was dismissed for want of attendance.
19. In the ruling delivered on 13 June 2024, the court directed parties to address the provisions of Section 17 of the *Employment and Labour Relations Court Act* and Rule 8 of the Employment and Labour Relations Court (Procedure) Rules (ELRC Rule). No parties have addressed such a matter in the written submissions.

As a court of record, it is necessary to revisit such matters.

20. Section 17 of the *Employment and Labour Relations Court Act* allows parties the right to file an appeal from the court's orders.



21. Rule 8 of the then-applicable ELRC Rules allowed a party to file an appeal within 30 days from the date of the decision, order, or judgment. Such provisions are meant to regulate the orderly functioning of the court and secure justice for the parties.
22. These provisions of Section 17 of the ELRC Act and the ELRC Rules are not far removed from what portends under the *Civil Procedure Act* and the rules thereto. A party seeking to file an appeal must do so within the timelines allowed under statute. If such a party is out of time, there are mechanisms and procedures for seeking more time.
23. The impugned ruling leading to this appeal was delivered on 17 September 2022.
The Memorandum of Appeal was filed on 14 February 2023.
24. The appeal was filed after the limitation period provided by Section 17 of the ELRC Act and Rule 8 of the ELRC Rules.
The appeal is incompetent for all intents and purposes.
25. The appeal cannot stand for being filed out of time and without leave.
26. This is not a technicality that the court can cure through whatever means possible on the face of Section 79G of the *Civil Procedure Act*, read together with Section 17 of the ELRC Act and Rule 8 of the ELRC Rules. See *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] KECA 131 (KLR); *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] KEHC 5378 (KLR); and *Kenya Hotel Properties Limited v Attorney General & 5 others* [2021] KESC 49 (KLR).
The appeal is incompetent.
27. On the substantive issue of the objection proceedings before the trial court, the appellant settled the decretal sum awarded to the 1st respondent by consent dated 13 September 2024. This matter is not challenged. The consent was adopted as part of the trial court record.
The purpose of the consent and settlement was to resolve the matter.
28. Is the execution against the appellant instead of the 2nd respondent lawful?
29. The objection proceedings are subject to the application dated 1 December 2021 following execution proceedings and attachment of properties that the appellant asserts are its property, not that of the 2nd respondent as the judgment debtor.
30. In the supporting affidavit of Aye Soe dated 1 December 2021, he avers that the attached properties included sewing machines, compressors, backup generators, office equipment, sewing and operating machines, assorted clothes, and other tools of trade. He attached the proclamation.
31. In support of the averments that the attached goods and properties belong to the appellant, the lease agreement with Mazeraz Kenya (EPZ) Limited, Certificate of Incorporation, and payment slips were attached to Mazeraz Kenya Epz Limited. There is no material to confirm that the attached goods and properties, including sewing machines, compressors, backup generators, office equipment, sewing and operating machines, assorted clothes or assorted other tools, were the goods and properties of the appellant. The fact that there is a shared address with the 2nd respondent is insufficient to infer ownership of the appellant.
32. The fact that the second respondent did not participate in these proceedings in itself accounts for that much. The attached goods and properties cannot be removed from the second respondent by the simple fact that the appellant asserted a lease and certificate of incorporation and that it had made



payments thereof. That alone cannot extricate the second respondent from liability to pay the decretal and the execution proceedings.

33. The appellant has challenged the trial court's lifting of the corporate veil. The case is that such a matter is a preserve for the High Court under the *Companies Act*. To the extent that the lifting of the corporate veil should only arise after the court is satisfied that that is the only option to secure lawful orders, the trial court erred in making inferences that that process is necessary. Indeed, as submitted by the appellant, lifting the corporate veil should be done in exceptional cases. Courts should uphold rather than lift the corporate veil of a company, except where evidence is adduced to show fraud or improper conduct of directors or that the company was incorporated as a vehicle to commit crimes as held in *Jocelan Consultants Ltd v County Developers Limited* [2019] KEHC 1250 (KLR).
34. Indeed, the trial court should determine whether the court will lift the veil after examination under order 22, rule 35 of the Civil Procedure Rules. Such then calls for an application by the parties seeking the lifting of the corporate veil before the court can do so suo motto. In this case, the trial court did not need to overreach and apply for such a position before being moved under the appropriate provisions of the law and for good cause. An order seeking to lift the corporate veil should be issued first. See *Daniel Ogare v Herne Limited; Gopal Dhanji Patel (Applicant)* [2021] KEELRC 535 (KLR).
35. The appeal found incompetent is hereby dismissed with costs to the 1st respondent. The ruling delivered on 17 June 2022 in Mombasa CMELRC 331 of 2019 is hereby confirmed.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

