



REPUBLIC OF KENYA



KENYA LAW
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Thoebald v Osani Community Health and Development Centre (Cause E005 of 2023) [2025] KEELRC 734 (KLR) (10 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 734 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E005 OF 2023
JK GAKERI, J
MARCH 10, 2025

BETWEEN

DR. AKILI BANGA THOEBALD CLAIMANT

AND

OSANI COMMUNITY HEALTH AND DEVELOPMENT CENTRE RESPONDENT

RULING

1. Before the Court for determination is the applicant's Notice of Motion dated 27th November, 2024 filed under Certificate of Urgency seeking orders that –
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to Order that the proclamation dated 20th November, 2024 by M/S Victoria Blue Services Auctioneers is unlawful, null and void.
 4. The items proclaimed on 20th November, 2024 by M/s Victoria Blue Services Auctioneers agents of the Decree Holder belong to the objector.
 5. The Respondent/Judgment Debtor has no legal or equitable interest in the items proclaimed on 20th November, 2024.
 6. Costs of this application be provided for.
2. The Notice of Motion is expressed under Article 43(1) of *the Constitution* of Kenya 2010, Sections 3A, 44(1) and 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 22 rules 51 and 52 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Justus Brian Omondi sworn on 27th November, 2024, who deposes that the Victoria Blue



Services Auctioneers proclaimed the Objector's goods on 20th November, 2024 without justification as the goods do not belong to the judgment debtor, the respondent, as the matter was filed against Osani Community Health and Development Centre which was Ordered to pay Kshs.950,950 with costs of Kshs.259,440 total Kshs.1,210,390.

3. The affiant deposes that the judgment debtor and the objector are separate and distinct entities and the objector is the legal and/or equitable owner of the proclaimed goods and was not party to the proceedings and is under no obligation to satisfy the decree issued and the attachment will proceed if no orders are granted.

Response

4. By a Replying Affidavit of the claimant sworn on 13th December, 2024, the affiant deposes that the instant application is an afterthought and an abuse of the court process and ought to be dismissed as the Judgment/Debtor is attempting to defeat execution as the directors of the Judgment Debtor and the Objector are the same as evidenced by CR12 and the directors of the Judgment Debtor are shadowing behind another company owned and operated by them.
5. That the Objector was registered on 31st July, 2024, 12 days after the Judgment of this court and the Judgment/Debtor disingenuously transferred the goods proclaimed to the Objector and had formally sought a grace period to settle the decree.
6. That the Judgment Debtor and the Objector are one and the same as Mr. Brian Justus Omondi, the deponent of the Supporting Affidavit is a director of the Judgment Debtor not the Objector.
7. That the goods proclaimed were properly proclaimed and the process should be completed, and the instant application dismissed.
8. In the Further Affidavit of Beryl Linda Akinyi sworn on 18th February, 2025, the affiant deposes that she is a director of the Objector and the Objector stood to suffer irreparable damage if the application is not allowed.
9. That the Objector has no interest of defeating execution.
10. That the Objector acquired legal interest in the proclaimed goods 3 months after the Objector acquired the proclaimed goods and the contract was entered into 5 months before the notice.
11. That the Objector was agreeing to help the Judgment Debtor settle the decretal sum.
12. That the words Osani Community Health and Development Centre appearing on the Objector's letter head does not connote the Objector.
13. That Mr. Brian Justus Omondi had authority to plead on behalf of the Objector and the Judgment Debtor and the Objector are distinct legal entities.

Applicant's submissions

14. As to whether the Objector has an equitable interest, the applicant submits that it has and cites Order 22 rule 51(1) of the Civil Procedure rules and the Court of Appeal decision in Southern Bell Ltd V National Social Security Fund Board of Trustee [2023] KECA 1170 (KLR), on the applicable test as well as the sentiments of the court in Precast Portal Structures V Kenya Pencil Co. Ltd & 2 Others [1993] eKLR, on the burden of proof, to urge that the Objector provided a copy of the agreement of purchase of the business and thus had an equitable interest in the items proclaimed.



15. Reliance was also made on the sentiments of the court in Stephen Kiprotich Koech V Edwin Barchilei: Joel Sitienei Objector [2019] eKLR to urge that as at the date of attachment, the objector had a legal interest in the goods.
16. Concerning whether the objection is an attempt to frustrate the claimant's enjoyment of a regular judgment, the Objector argues that the proclamation was obtained 3 months after the Objector came into existence and thus could not have been formed to frustrate a future event it had no knowledge of.
17. Reliance was also made on the decision in Rubo Kimngetich Arap Cheruiyot V Peter Kiprop Rotich [2006] eKLR and Mwangi V Kenya Commercial Bank [2023] KEHC 1349 (KLR) to urge that the Objector could not have come into existence to frustrate the decree and proclamation.
18. The respondent had not filed submissions by the time the court retired to prepare this ruling.

Analysis and determination

19. It is common ground that judgment was entered on 18th July, 2024 in favour of the claimant/Judgment Creditor herein against Osani Community Health and Development Centre, where the claimant worked, with costs taxed to Kshs.259,440.00.
20. It is equally not in contest that the instant application was precipitated by the proclamation of attachment dated 18th October, 2024.
21. The Objector/Applicant's case is that it has a legal and equitable interest in the proclaimed items and stood to suffer irreparably if the proclamation continued.
23. The respondent's case is simply that the Objector/Applicant and the Judgment Debtor/respondent are one and the same and in any case the Objector/Applicant had agreed to shoulder the burden if accorded time to stabilize the operations of the organization.
24. The law that governs Objector proceedings is well settled as captured by Order 22 Rule 51(1) of the Civil Procedure Rules, that the Objector is bound to prove a legal or equitable interest in the proclaimed goods or property and the test was succinctly captured by the Court of Appeal in Southern Bell Ltd V National Social Security Fund Board of Trustees & 4 Others (Supra) that:

For a person to properly bring himself within the ambit of Order 22 Rule 51(1) of the Civil Procedure Rules, he has to meet certain conditions.

First, he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Secondly, he must prove that attachment of his property has been levied in execution of the said decree.

Thirdly, he must prove that he is entitled to or has a legal or equitable interest in the whole or part of any property attached in execution of the decree”
25. Additionally, it is essential for the Objector to demonstrate that it holds the items, goods or property on its own account and the goods or property was not held by the judgment debtor.
26. In sum, it behooves the Objector to establish that the proclamation was being levied against a person other than the Judgment Debtor and in respect of items or goods or property over which the Objector has a legal and/or equitable interest.



27. In the instant case, the Objector/Applicant provided a copy of Sale Agreement dated 1st August, 2024, between Osani Community Health and Development Centre Ltd (the vendor) and SEHHAT AL BADAN Community Hospital Ltd (the purchaser).
28. Under the agreement, the vendor agreed to transfer and sell the business together with the assets except liabilities, as a going concern and the purchaser agreed to purchase the same.
29. The agreement is signed by unidentified persons in the presence of BERYL for the vendor and Justus for the purchaser.
29. The purchaser did not stamp the agreement or seal it.
30. On the face of the agreement, it is unclear as to the capacity of the signatories. Were they directors or shareholders of the companies or who were they?
31. Tactfully, the purchaser did not take up liabilities of the business and the agreement made no provision of how and by whom they would be settled or satisfied. This was critical as by 1st August, 2024, the judgment against the vendor had already crystallized into liability and no provision appear to have been made yet the vendor sold all its assets to the purchaser.
32. On cross-examination, RWI confirmed that he was the Managing Director of the respondent company and the claimant was its employee.
33. Notably, RWI swore the Supporting Affidavit in support of the instant application as a director of the company.
34. On ownership and directorships, while the Objector/Applicant is owned by Beryl Linda Akinyi Otieno and Shifa Taqwa Holdings Ltd, the Judgment Debtor is owned by Beryl Linda Akinyi Otieno and Justus Brian Omondi Mac Obiero.
35. Relatedly, Mr. Justus Brian Omondi Mac Obiero is a director of Shifa Taqwa Holdings Ltd.
36. While Shifa Taqwa Holdings Ltd was registered on 16th August, 2021, Sehhata Al Badan Community Hospital Ltd was registered on 31st July, 2024 less than two (2) weeks after the judgment. The respondent was registered on 8th November, 2018.
37. Simply, Beryl Linda Akinyi Otieno and Justus Brian Omondi Mac Obiero, the owners and directors of Osani Community Health and Development Centre Ltd transferred their business to Beryl Linda Akinyi Otieno and Shifa Taqwa Holdings Ltd.
38. Shifa Taqwa Holdings Ltd is a one person company owned by Macbi Foods and Investments Ltd and its sole director is Mr. Justus Brian Omondi Mac Obiero; which would appear to suggest that Macbi Food and Investments Ltd belong to Mr. Justus Brian Omondi Mac Obiero.
39. Undoubtedly, the Objector/Applicant has demonstrated that its application meets the test in Order 22 Rule 51(1) of the Civil Procedure Rules as it has the legal interest in the proclaimed assets, it was not the respondent in the suit and had possession of the items as at the date of proclamation and was holding the items on its own account, as held in Southern Bell Ltd V National Social Security Fund Board of Trustees (Supra) and Precast Portal Structures V Kenya Pencil Co. Ltd & 2 Others (Supra).
40. It is trite law that a registered company is an incorporated association, a body corporate, a legal person distinct and separate from its members and directors or employees, with own rights and subject to obligations, with capacity to contract, sue or be sued own property and perpetual succession, as



captured by the locus classicus sentiments of Lord Macnaghten in *Salomon V Salomon & Co. Ltd* [1897] A.C 22 as follows:

...the company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by the Act...”

40. This principle was applied in *Lee V Lee’s Air Farming Co. Ltd* [1960] UKPC 33.
41. The principle of corporate or legal personality of a company may however, be qualified in many instances, where the veil of incorporation is lifted or disregarded and regard had to the shareholders or directors, or economic realities often referred to as “piercing the corporate shell” or lifting the veil of incorporation” or drawing aside the veil of incorporation. This is intended to facilitate justice.
42. Both the provisions of the *companies Act* and courts of law recognize instances in which the veil of incorporation may be lifted such as holding and subsidiary companies, fraudulent trading, group enterprises, evasion of legal obligation, fraudulent or illegal conduct, taxation and company residence among others.
43. In the instant case, shareholders of Osani Community Health and Development Centre Ltd transferred the company’s assets to Sehhat Al Badan Community Hospital on 1st August, 2024, a company formed a day earlier, twelve (12) days after a judgment against the respondent and without making provision for the liquidation of the sum awarded by the court.
44. As indicated elsewhere in this ruling, Mr. Justus Brian Omondi Mac Obiero and Berly Linda Akinyi Otieno transferred the business to another company, which they also owned to avoid pre-existing legal obligation by Osani Community Health and Development Centre Ltd.
45. The two cannot seek refuge under the rule in *Salomon V Salomon & Co. Ltd* (Supra), as doing so would facilitate the evasion of a pre-existing legal obligation by the Judgment Creditor, to the claimant.
46. This is one of the instance where the veil of incorporation of Sehhat Al Badan Community Hospital Ltd ought to be lifted as was the case in *Jones V Lipman & Co. Ltd* [1960] IWLIR 832 where the court lifted the veil of incorporation to prevent Mr. Lipman from using his company to evade a pre-existing legal obligation.
47. The fact that the Objector/Applicant was registered shortly after the judgment and the respondent’s business was transferred on the following day leaves little doubt that the shareholders of Osani Community Health and Development Centre Ltd were trying to evade a pre-existing legal obligation, something the court cannot countenance.
48. According to Russell J in *Jones V Lipman & Co. Ltd* (Supra)

The defendant company is the creature of the 1st respondent a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity”
49. The foregoing sentiments apply on all fours to the facts of the instant case, as Mr. Justus Brian Omondi Mac Obiero and Berly Linda Akinyi Otieno are using Sehhat Al Badan Community Hospital Ltd to avoid legal obligation owed to the claimant.



50. Finally, the Objector/Applicant's unsigned letter dated 20th November, 2024, 2 whose contents it did not deny shows that the owners and directors of the two companies were essentially the same, which would explain why the Board of directors of the Objector/Applicant offered to offset the liability of their other company.
51. In conclusion, having found that the Objector/applicant was incorporated to enable the shareholders of Osani Community Health and Development Ltd evade a pre-existing legal obligation, the principle of legal personality cannot avail the Objector/Applicant in this instance.
52. Consequently, the Objector/Applicant's Notice of Motion dated 27th November, 2024 is bereft of merit and it is accordingly dismissed.
53. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 10TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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