



REPUBLIC OF KENYA



KENYA LAW
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**Abunda v Brandworld Communications Limited (Cause E897 of 2022)
[2023] KEELRC 3004 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3004 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E897 OF 2022
L NDOLO, J
NOVEMBER 23, 2023**

BETWEEN

SETH ABUNDA CLAIMANT

AND

BRANDWORLD COMMUNICATIONS LIMITED RESPONDENT

RULING

1. By his Notice of Motion dated 28th August 2023, the Claimant seeks the following remedies:
 - a. An order directing the Respondent to furnish security to satisfy the decree that may be passed herein, cumulatively estimated at the sum of ksh 4,211,522, before judgment;
 - b. An order lifting the veil of incorporation of both Brandworld Communications Limited and Prochem (EA) Limited so that Kirimi Rintaugu, Susan Wamuyu Kanafunzi and Catherine Nthenya Kimeu, who are directors of the Respondent, be made personally liable;
 - c. An order attaching motor vehicle registration numbers KCG XXXX registered in the name of Brandworld Communications and KBY XXXN registered in the name of Prochem (EA) Limited, before judgment;
 - d. Unconditional leave to the Claimant to amend his Statement of Claim dated 23rd November 2023, as per the attached draft;
 - e. An order restraining the named directors from further transferring or dealing with the Respondent's shares and assets.
2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:



- a. That the Claimant worked for the Respondent and was unfairly terminated without reasonable cause in September 2020. Thus, the additional causes of action are almost time barred;
 - b. That the cause of delay in filing the application was due to various attempts at mediation and negotiations between the parties;
 - c. That as part of his job, the Claimant held the asset register and as from 2020, he found out on advice from his friend, that the assets belonging to Brandworld Communications Limited are being transferred to other parties. For instance, motor vehicle registration number KBY XXXN, which belonged to Brandworld Communications Limited now belongs to Prochem (EA) Limited, with the same directors as the Respondent;
 - d. That the Respondent has transferred almost all its assets and is now remaining with only one motor vehicle registration number KCG XXXX;
 - e. That Kirimi Rintaugu, Susan Wamuyu Kanafunzi and Catherine Nthenya Kimeu are directors and shareholders in both Brandworld Communications Limited and Prochem (EA) Limited;
 - f. That the Respondent's directors have fraudulently and mischievously transferred some of the Respondent's assets to another company where they are also directors and this renders the Respondent incapable of settling any claims that may be made against it;
 - g. That the Claimant has quantified his claim against the Respondent and unless the Court grants the orders sought, for attachment before judgment, the suit herein will be rendered nugatory;
 - h. That it is in the best interests of justice that the prayers sought be granted.
3. The Respondent's response to the Claimant's application is contained in two separate replying affidavits sworn by Karimi Rintaugu and Susan Wamuyu Kanafunzi sworn on 24th October 2023 and a third affidavit sworn by Catherine Nthenya Kimeu on 2nd November 2023.
 4. Rintaugu states that he is a shareholder and the Managing Director of both the Respondent and Prochem (EA) Limited.
 5. He denies that there has been any transfer of property from the Respondent to Prochem (EA) Limited.
 6. Rintaugu depones that the Respondent has been undergoing a financial crisis due to the prevailing business situation from 2018 that got worse during the Covid-19 period, leading to the Respondent Company closing down its operations.
 7. Rintaugu concedes that the Respondent is indebted to the Claimant, among other employees. He states that he is willing to pay off the debt owed to the Claimant using his personal resources.
 8. Rintaugu denies the allegations of fraud made by the Claimant against the directors of the Respondent. He asserts that the Claimant has not met the threshold for lifting of the corporate veil.
 9. Kanafunzi concedes being a shareholder and director of Prochem (EA) Limited.
 10. She adds that she is merely a shareholder of the Respondent and does not hold any managerial position and is not involved in the day to day running of the Company.
 11. Kanafunzi joins Rintaugu in denying the allegations of fraud made by the Claimant and states that the Claimant has not met the threshold for lifting of the corporate veil.



12. Kanafunzi states that she has not executed any documents transferring the property of the Respondent to Prochem (EA) Limited.
13. Kimeu depones that she has no shares in either the Respondent or Prochem (EA) Limited.
14. She states that she was first notified of the Respondent’s insolvency and the on-going court case by the Respondent’s Advocate on 23rd October 2023.
15. Kimeu further states that she has been an external Company Secretary of Prochem (EA) Limited and Brandworld Communications Limited since 2015 and 2016 respectively.
16. She claims that her duties were merely administrative and limited to filing annual returns and changes in the company register as well as updating and maintaining registers and statutory records.
17. She states that she had no involvement in the day to day operations of any of the two companies and adds that she last filed annual returns on behalf of the companies in the year 2021.
18. Kimeu asserts that she has no knowledge of any property that may have been transferred by the directors between Brandworld Communications Limited and Prochem (EA) Limited.
19. This is a mixed grill application seeking a wide range of prayers; from attachment before judgment, lifting of the corporate veil, a ban on transfer of shares and assets, to amendment of the claim.
20. The power to order attachment before judgment is donated by Order 39 Rule 5(1) of the [Civil Procedure Rules](#), which provides as follows:

5.

- (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-
 - a. is about to dispose of the whole or any part of his property; or
 - b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

21. The rule of thumb is that an order for attachment before judgment will only issue in the face of clear evidence of mischief by the defendant, with the sole aim of defeating execution of a decree that may be passed against them.

22. This position was settled by the Court of Appeal in its decision in *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & others* (1988) 2KAR 126, in the following terms:

“The power to attach before judgment must not be exercised lightly and only upon clear proof of mischief...namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”



23. The Claimant's move to seek attachment before judgment is motivated by his averment that the Respondent is saddled with debt. Although there is admission that the Respondent is indebted to other former employees, this by itself cannot justify grant of an order of attachment before judgment.
24. As held in *John Kipkemboi Sum v Lavington Security Guards Limited* [1998] eKLR a party's financial status is not enough ground to slap them with an order of attachment before judgment.
25. Moreover, part of the property which the Claimant seeks to attach before judgment belongs to Prochem (EA) Limited, a company that is not a party in these proceedings, and has had no chance to fight off the adverse orders being sought against it.
26. Regarding the lifting of the corporate veil, the law is also well settled. As held in *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR the corporate veil will not be lifted unless there is evidence of serious misconduct, bordering on fraud by the shareholders or directors of the body corporate.
27. The court in the *Ukwala Supermarket Case* (*supra*) went further to restate that a party pursuing lifting of the corporate veil bears the burden of demonstrating that the threshold has been met.
28. In the present case, the Claimant makes general statements that are not supported by any evidence. The only conclusion to make therefore, is that the threshold for lifting of the corporate veil has not been satisfied and this prayer is declined.
29. The Claimant did not adduce any evidence to support the prayer for restraining orders against the directors of the Respondent. This prayer therefore also fails and is disallowed.
30. Since the trial has not commenced, the Claimant is allowed to amend his claim as prayed.
31. The costs of the application will be in the cause.
32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Said for the Claimant

Mr. Ombati for the Respondent

