



**Vision Institute of Professionals (Nairobi) Ltd v Muturi (Appeal
E210 of 2022) [2023] KEELRC 2965 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2965 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E210 OF 2022
JK GAKERI, J
NOVEMBER 20, 2023**

**BETWEEN
VISION INSTITUTE OF PROFESSIONALS (NAIROBI) LTD APPELLANT
AND
MOSES KURIA MUTURI RESPONDENT**

*(Being an appeal from the Ruling and Orders of the Chief Magistrate's
Court at Nairobi (Honourable Rawlings Liluma (SRM) dated and delivered
on 28th November 2022 in Nairobi MCELRC No. 20 of 2018)*

JUDGMENT

1. This is an appeal from the ruling and decree (Hon. Rawlings Liluma Senior Resident Magistrate, delivered on 28th November, 2022 at Nairobi CMEL No. 20 of 2018 Moses Kuria Muturi V Vision Institute of Professionals Ltd and another, Vision Institute of Professionals (Nairobi) Ltd (Objector).
2. In the ruling, the learned Magistrate held that the Objector had failed to establish that the proclaimed goods belonged to it as no evidence of ownership was provided. The court appear to have been persuaded by the Claimants/Decree holder's evidence that the Respondent and the Objector though different legal entities had the same shareholders and address.
3. The learned Magistrate accordingly dismissed the Objector's Notice of Motion dated 17th March, 2022.
4. The Objector was aggrieved by the decision and filed a Memorandum of Appeal dated 2nd December, 2022 raising the following grounds of appeal, namely;
 - a. The learned Magistrate erred in law and fact by failing to take into consideration that the attached goods were in possession of the Objector at its premises.



- b. The learned Magistrate erred in law and fact by failing to appreciate that the Objector and the Judgement debtor were different legal entities and the principle of legal personality can only be departed from as provided by law.
 - c. The learned Magistrate erred in law and fact by holding that the Objector and the Judgement Debtor were the same and shared each others assets and liabilities yet their shareholders and directors were different.
 - d. The learned Magistrate erred in law and fact by failing to consider the probative value of the evidence and that the proclamation notice was lawful.
 - e. The learned Magistrate erred in law and fact by disregarding the many issues raised by Objector.
 - f. The learned Magistrate misdirected himself by failing to determine of possession of the goods as at the date of attachment.
 - g. The learned Magistrate failed to consider that the Decree holder failed, neglected or refused to comply with Order 22 Rule 52 of the Civil Procedure Rules, 2010.
5. The Appellant prays for the setting aside of the ruling delivered on 28th November, 2022 (wrongly stated as 29th November, 2022), an order directing that the Objector's Notice of Motion in the lower court be allowed with costs and costs of the appeal.
 6. The determination of this appeal was delayed by the unavailability of the record of appeal since January 2023 as evidenced by the mentions on 2nd March, 2023 before the Deputy Registrar and 24th April, 2023, 3rd May, 2023 and 12th July, 2023 before this court.
 7. The appeal was canvassed of by way of written submissions.
 8. The Appellant's counsel provided a background of the suit as follows;
 9. That the Statement of Claim was filed in the Chief Magistrates Court on 1st August, 2018 against the Respondent, Vision Institution of Professionals Ltd and judgement delivered on 5th November, 2021 in favour of the Claimant/Respondent in the sum of Kshs.1,690,404.00 and a decree issued on 16th February, 2022.
 10. That Icon Auctioneers, under instructions of the Decree holder proclaimed the Appellant's goods as opposed to those of the Respondent in the suit and the Appellant's Notice of Motion dated 17th March, 2022 was dismissed necessitating the instant appeal.

Appellant's submissions

11. According to counsel, the issues for determination are whether the trial court applied its jurisdiction under Order 22 Rule 51 of the Civil Procedure Rules, 2010 properly, the trial court took into consideration matters it ought not to have considered or failed to do so that this court ought to interfere with the Ruling by the trial court and who should bear the costs.
12. On the first issue, counsel relied on Order 22 Rules 51, 52 and 53 to urge that the court had to determine who was in possession of the goods as at the date of attachment, namely; the Judgement Debtor or the Objector.



13. Counsel cited the sentiments of the court in *Chotabhai M. Patel V Chaprabhi Patel (1958) EA 743* to urge that the Objector had to adduce evidence to prove it had some interest in the property attached and was in possession at the time of attachment.
14. The decision in *Dubai Bank (K) Ltd V Come-Cons Africa Ltd & another (2012) eKLR* was also relied upon.
15. Counsel submitted that based on the text of the ruling, the trial Magistrate did not consider the issue of possession but focused on ownership and did not consider the fact that the proclamation took place on the Objector's premises.
16. That the Objector had indicated that the goods belonged to it as a body corporate, evidence the Respondent did not controvert.
17. According to counsel, the Objector was duty bound to establish that it was not the party against whom the decree was against.
18. Reliance was also made on the sentiments of the court in *Grace Wanjiru Mbugua V Philip Karumi Matu (2009) eKLR*.
19. As to whether the court took into consideration matters it was not supposed to, counsel submitted that a company is a legal person different from its shareholders as held in *Salomon V Salomon & Co. Ltd (1897) A.C 78* and *Victor Mabachi V Nurtun Bates Ltd (2013) eKLR*.
20. Reliance was also made on the sentiments of the court in *Kenyariri & Associates Advocates/Applicant V Hans Jurgen Langer (2016) eKLR* to underline the principle of corporate personality of the registered company even where shareholders were the same to urge that by taking into consideration the fact that the shareholders of the Judgment Debtor and the Objector were the same which was not the case, the trial court pierced the corporate veil of the companies without any basis.
21. Counsel further submitted that the proclamation was carried out by a lady named Mary Wangari as opposed to Jeremiah Muchendu, trading as Icon Auctioneers and no evidence was availed that she was an employee of Icon Auctioneers.
22. According to counsel, Section 14 of the [Auctioneers Act](#) renders an auctioneer's license non-transferable and the trial court did not address the issue.
23. As to whether the court ought to interfere with the ruling, counsel submitted that the court had jurisdiction to re-evaluate the evidence before the trial court and make its own conclusions as held in *Selle & another V Associated Motor Boat Co. Ltd & another (1968) EA 123* as well as *Abok James Odera t/a A.J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR* and *Peters V Sunday Post LTD (1958) EA 424* among others.
24. Finally, counsel submitted that the learned trial Magistrate misdirected himself on the principles that govern objection proceedings under Order 22 Rule 51 of the Civil Procedure Rules, 2010.

Respondent's submissions

25. According to the Respondent's counsel, the issues for determination are whether the trial court applied its jurisdiction under Order 22 Rule 51 of the Civil Procedure Rules, 2010 properly, and whether the court ought to interfere with the court's ruling.
26. On the first issue, counsel posed the question whether the Appellant had proved ownership of the proclaimed goods and cited the Court of Appeal decision in *Zingo Investment Ltd V Miema*



- Enterprises Ltd (2015) eKLR where the court cited the High Court decision in Akiba Bank Ltd V Jetha & Sons Ltd (2015) eKLR on the burden of proof on the part of the Objector.
27. Counsel invited the court to disregard the Appellant's contention that since the goods were in the said premises, the Objector had a legal or equitable interest in them.
 28. It was submitted that proof of ownership was not presented before the court as the issue was not one of ownership of the premises but proprietary interest in the goods as held in Zingo's case (Supra) as well as Arun C. Sharma V Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 others.
 29. Counsel urged that the Objector/Appellant merely attached two single business permits from the County Government issued to 'Vision Institute of Professional' as opposed to Vision Institute of Professionals (Nairobi) Ltd, the Appellant. That a lease or title document to confirm occupation would have been sufficient.
 30. Counsel submitted that the trial court did not misdirect itself.
 31. As to whether the court considered matters it ought not to have considered or failed to consider others, counsel submitted that the trial Magistrate did not lift the corporate veil as alleged and determine that the two companies were the same.
 32. That the court only appreciated that the two companies had similar directors.
 33. That the Respondent was not interested in the directors or shareholders of the companies.
 34. Counsel submitted that the Appellant was incorporated to enable the enable the Judgement Debtor evade paying the decretal sum awarded by the lower court. That the change of name should not be used to evade liability as held in Malindi Air Services Ltd V Prestige Air Services (2000) eKLR.
 35. According to counsel, the only difference between the names of the two companies was the word Nairobi in the case of the Appellant company and both had 3 similar directors and shareholders and the business permit was in the name of the Judgement Debtor.
 36. Counsel urged that although the Judgement Debtor and the Appellant were different legal entities, it was evident that the Appellant was incorporated after the Respondent had filed his suit and arguably, the directors intended to use it to protect themselves against potential liability.
 37. That the Appellant has not disclosed its relationship with the Judgement Debtor in terms of similarity of name, postal address and permits.
 38. Counsel further submitted that the Appellant did not prove that the proclamation was conducted by Mary Wangari as opposed to Mr. Jeremiah Muchendu or that one Mary Wangari had no authority.
 39. As regards interference with the ruling of the trial court, counsel submitted that the court did not misdirect itself as the Appellant failed to prove ownership of the proclaimed goods.
 40. Counsel urged the court to uphold the trial court's ruling.

Determination

41. As correctly submitted by the Appellant's counsel, a first appeal is a retrial and the court is duty bound to re-evaluate the evidence so as to arrive at its own conclusions as held in Selle & another V Associated Motor Boat Co. Ltd & others (Supra) among other cases cited above.
42. The Appellant raises issues touching on legal personality of the two companies, evidence, possession and compliance with Order 22 Rule 51 of the Civil procedure Rules, 2010.



43. The issues isolated by counsels capture the gravamen of the appeal and the court will proceed accordingly.
44. As regards the application of Order 22 Rule 51 of the Civil Procedure Rules, 2010, the rule states that;
- “A 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.”
45. As ably demonstrated by counsels, it is trite that for the Objector to succeed, it must demonstrate that it had a legal or equitable interest in the property in question.
46. From the many judicial authorities cited by both counsels, it is common ground that the burden of proving the legal or equitable interest is borne by the Objector as held by the court in *Dubai Bank (K) Ltd V Come-Cons Africa Ltd & Impak Holdings Co. Ltd (2021) eKLR* that;
- “Although the law is that in the Objection Proceedings, the court does not and cannot make a finding as to the ownership of the property, the subject of the objection proceedings, but simply decide whether or not the objector has interest, legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the Objector to establish ownership. See *Chantabhai M. Patel & another HCCC No. 544 of 1957*.”
47. *Odunga J. (as he then was) expressed similar sentiments in Boleyn Magic Wall Panel Ltd V Nesco Services Ltd; Boleyn International (K) Ltd (Objector) (2021) eKLR.*
48. In the instant appeal, the burden fell on the Appellant herein.
49. It is not in dispute that the Respondent commenced his suit against the Respondent on 1st August, 2018 and judgement was delivered on 5th November, 2021.
50. From the record, it is clear that the Judgement Debtor did not appeal the decision delivered on 5th November, 2021 where the court entered judgement for the Decree-holder.
51. It is unclear to the court as to why the Judgement-Debtor having not appealed the judgement or applied for its review did not pay the decretal sum or undertake to pay by instalments.
52. A copy of the Proclamation on record show that same was effected on 4th March, 2022 and received by the Appellant under protest.
53. The Appellant sought a stay of execution among other orders before the trial court.
54. In its ruling dated 28th November, 2022, the trial court held that the Applicant had not demonstrated that the attached goods belonged to the Appellant (Objector).
55. This is the ruling the subject matter of the instant appeal.
56. The learned trial Magistrate was ambiguous that proof of ownership of the goods attached was essential and the Objector had not tendered sufficient evidence.
57. The learned Magistrate stated;
- “It is my opinion that the need to table proof of ownership became even more important when the Decree-holder pointed out that though the Objector and the Judgement debtor



were separate entities by virtue of their certificates of incorporation, the shareholders were the same and they shared the same address. If evidence of ownership had been produced then, it would have cleared doubts in the mind of this court as to the ownership of the goods. As things stands, ownership has not been proved and the assertion by the Decree-holder that the application is an attempt by the Judgement-Debtor to evade setting the decree is not far-fetched.”

58. The trial Magistrate is faulted for not addressing the issue of possession underscored in the Chotabhai M. Patel V Chaprabhi Patel (Supra).
59. While it is correct that the trial court did not address itself to the issue of possession of the goods attached, the salient question would in the court’s view be whether the omission occasioned prejudice to the Appellant or led to an incorrect finding.
60. As counsel for the Appellant correctly states, as pronounced by courts, possession is one of the facts a court is enjoined to consider though not determinative.
61. What is determinative is the nature or character of possession which in the court’s view demonstrates the party’s interest in the goods, be it legal or equitable.
62. Black’s Law Dictionary defines possession as;
The fact of having or holding property in ones power; the exercise of dominion over property.”
63. Possession assumes different forms, such as actual and constructive among others.
64. Although the Appellant’s counsel argued that the Appellant was in possession, the Appellant led no evidence that its possession was on its own account or in trust bearing in mind that it had not provided evidence that it was authorised to conduct any business within the Nairobi County or other part of Kenya.
65. Although possession is said to nine-tenths of the law, it does not confer proprietary rights. The party in possession must establish its interest in the property.
66. This far, the court is not persuaded that the failure by the court to take into account the fact of possession led to an incorrect finding as will become apparent shortly.
67. The provisions of Order 22 Rule 51 of the Civil Procedure Rules, 2010 are clear that the person claiming to have a legal or equitable interest in the attached property must demonstrate such interest.
68. In the instant suit, the Objector produced a Certificate of Incorporation dated 3rd June, 2019 and another dated 25th August, 1997 to demonstrate that the two entities were indeed different.
69. In addition, it provided a Single Business Permit issued by the Nairobi City County Government to ‘Vision Institute of Professional’ dated 26th February, 2021 valid from 20th February, 2021 to 25th February, 2022.
70. The license is issued to a Private Higher Education Institution for Kshs.150,000/= and the place of business is Agro House, Moi Avenue, Nairobi.
71. Further, the Appellant/Objector availed details on the two companies, namely Judgement-Debtor and itself.
72. The document reveals that the Judgement-Debtor, Vision Institute of Professionals Ltd has 4 shareholders namely; Anson Njoi Muya, Oliver Wanyonyi Wafula, Pollet Nekesa Wafula and Michael Kipkorir Chirchir.



73. The Directors of the company are Anson Njoi Muya, Mary Anne Silali and Michael Kipkorir Chirchir.
74. On the other hand, all shareholders of the Appellant/Objector, Vision Institute of Professionals Ltd are Directors and are Susan Wangechi, Anson Njoi Muya, Michael Kipkorir Chirchir, Mary Anne Silali, John Kamau Mburu, Joseph Njuguna Njoroge and Caleb Apuoka Njeka.
75. While the Appellant's registered office is indicated as Agro House, Moi Avenue, Nairobi, the Judgement-Debtor has no physical address but both companies share the postal address.
76. Equally, while the telephone and email address of the Appellant are provided, those of the Judgement-Debtor have not.
77. From the records, it is clear that the Respondent was employed by the Judgement-Debtor on 13th May, 2010 and left in April 2018, evidently before the Appellant was incorporated and commenced its business, if any.
78. From the evidence on record, it is unclear as to which of the companies occupied the premises in Agro House, Moi Avenue as the Appellant did not avail a document of title or lease agreement to establish the basis of occupation.
79. Relatedly, the appellant did not avail evidence of its place of business or a licensee to carry out any business within the Nairobi City County.
80. The license on record bears the name of Vision Institute of Professional and neither the Judgement-Debtor nor the Appellant demonstrated that it was issued to it. However, the Court, as adverted to elsewhere in this judgment is alive to the fact that the license was issued to a Private Higher Education Institution.
81. Similarly, the items attached would appear to suggest that they were being used for purposes of giving instructions to learners or trainees.
82. Particulars of the business conducted by the two companies would have assisted the court in making a finding as to who among them may have had the requisite legal or equitable interest in the attached goods.
83. But as correctly stated by the trial court, "the law dictates that whoever desires a court to rule in his favour on certain facts must prove that those facts actually exist" as ordained by the provisions of Section 107, 108 and 109 of the *Evidence Act*.
84. Based on the evidence in support of the Objector's Notice of Motion Application dated 17th March, 2022, the court is in agreement with the findings of the trial court that the Appellant/Objector has not provided sufficient evidence to establish that it had a legal or equitable interest in the attached items.
85. On the submission that the trial Magistrate lifted the veil of incorporation, counsels have adopted contrasting positions. The Appellant's counsel urges that reference to the shareholders of the companies amounted to taking into consideration of matters which the court ought not to have considered.
86. The Respondent's counsel submitted that the judge merely appreciated the fact that there were similar names which may have been inevitable since the Applicant provided the documents and the court may have found it necessary to pierce the corporate to verify the submission that the Judgement-Debtor was indeed avoiding liability in the name of another company.



87. It is undeniable that the two companies have similar names but for the addition of the word (Nairobi) in the case of the Appellant's name.
88. It is unclear to the court as to what led to the incorporation of the Appellant company. However, it is clear that the shareholders or directors of the Judgement-Debtor were part of the decision and it appears that they did not desire to lose the former identity of the company perhaps owing to the nature of business, partnerships or other considerations.
89. It requires no gainsaying that on registration, a company becomes a body corporate, a legal entity distinct and separate from its members and directors or managers, with distinct capacities as elucidated by Lord MacNaghten in the famous House of Lords decision in *Salomon V Salomon & Co. Ltd (1897) AC 22* where the judge stated;
- “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 trustee for them.”
90. The principle of legal or corporate personality is the cornerstone of company law.
91. However, this general rule has been qualified in various respects by the *Companies Act*, 2015 and judicial pronouncements.
92. As correctly submitted by both counsels, the Judgement-Debtor and the Appellant are different legal entities, the fact that two shareholders of the Judgement-Debtor are major shareholders and directors of the Appellant and one director of the Judgement-Debtor is a director and shareholder of the Appellant notwithstanding.
93. Did the learned trial Magistrate pierce the corporate shell or lift the veil of incorporation?
94. From the evidence on record, it is unambiguous that the two companies had the same postal address and 2 shareholders of the Judgement-Debtor are major shareholders of the Appellant Company.
95. The foregoing is factual and in the court's view, the trial Magistrate adverted to the shareholding of the companies to underscore the fact that it was incumbent upon the Appellant to avail evidence to demonstrate that it had a legal or equitable interest in the attached goods.
96. The learned trial Magistrate made no finding that the alleged shared postal address and shareholders implicated the sufficiency or otherwise of the burden of proof on the Appellant.
97. Overall and in the court's view, the learned Magistrate did not take into account matters which he ought not to have taken into account though he did not address the essence of possession in his ruling, a matter which, in the court's view did not vitiate the ruling delivered on 28th November, 2022.
98. As to whether the shareholders and directors of the Judgement-Debtor formed the Appellant company to avoid liability, the evidence on record is insufficient, in the court's view to justify such a finding in that if that was the case, the shareholders of the Judgement-Debtor would not have been members or directors of the appellant company and possibly would have incorporated a company with an unfamiliar name to conceal their identity.
99. Contrary to the Respondent's counsel's argument that the change of name should not be used as a strategy to evade liability, there was no change of name in the instant case, but the registration of a new company with albeit a similar name.



100. A change of name by a company has no effect on rights and obligations of the company in relation to 3rd parties.
101. As regards the submission that the proclamation was effected by a person other than Mr. Jeremiah Muchendu, t/a Icon Auctioneers, that one Mary Wangari did so contrary to the provisions of Section 14 of the *Auctioneers Act*, 1996, the Appellant tendered no evidence to substantiate the allegation.
102. Significantly, a copy of the proclamation dated 14th March, 2022 identifies the Auctioneer as Jeremiah Muchendu and one Wangari as a witness, evidence the Appellant did not controvert with credible evidence.
103. Finally, as to whether the court should interfere with the ruling delivered on 28th November, 2022, the court is not persuaded that there are compelling reasons to do so.
104. Despite the fact that the learned Magistrate did not address the issue of possession and made reference to the shareholders of the two companies incidentally, the gravamen of the case was whether the Appellant had demonstrated that it had a legal or equitable interest in the attached goods, which it failed to do.
105. Evidence of purchase of the items or inventory of its assets or insurance policy over the goods would have guided the court in making the determination.
106. From the foregoing, it is clear that the instant appeal is for dismissal and it is accordingly dismissed.
107. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF NOVEMBER 2023

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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