



**Ogana v David Engineering Limited; David (K) Engineering Limited (Objector)  
(Cause 591 of 2019) [2023] KEELRC 2750 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2750 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 591 OF 2019  
L NDOLO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**DENNIS ODHIAMBO OGANA ..... CLAIMANT**

**AND**

**DAVID ENGINEERING LIMITED ..... RESPONDENT**

**AND**

**DAVID (K) ENGINEERING LIMITED ..... OBJECTOR**

**RULING**

1. On 19<sup>th</sup> January 2023, I delivered judgment in favour of the Claimant in the sum of Kshs. 824,000 being six months' salary in compensation for unlawful termination of employment plus two months' salary in lieu of notice.
2. Pursuant to an execution process initiated by the Claimant, two applications were filed; one by the Respondent dated 22<sup>nd</sup> August 2023 pending appeal against my judgment before the Court of Appeal and the second by the Objector dated 23<sup>rd</sup> August 2023. This ruling relates to both applications.
3. The Respondent's application dated 22<sup>nd</sup> August 2023 is supported by an affidavit sworn by its Human Resource Manager, Gilbert Meo and is based on the following grounds:
  - a. The Respondent has preferred an appeal against the judgment being Civil Appeal No E165 of 2023: David Engineering Limited v Dennis Odhiambo Ogana;
  - b. The Respondent has an arguable appeal with a high probability of success, which may be rendered nugatory if the application is not granted;
  - c. The Claimant has attached Motor Vehicle Registration No. KBE for purposes of execution, which Motor Vehicle does not belong to the Respondent;



- d. The Claimant's financial status is not known and he may be unable to repay the decretal sum in the event the appeal is successful;
  - e. Unless stay of execution is granted, the Respondent may be unable to recover the colossal decretal amount after execution thereby suffering substantial loss;
  - f. The Respondent is willing to abide by any conditions for the due performance of the decree appealed from.
4. By its application dated 23<sup>rd</sup> August 2023, the Objector seeks the following orders:
- a. An order lifting/staying the proclamation and attachment effected on 21<sup>st</sup> August 2023 by Hariki Auctioneers against Motor Vehicle Reg. No. KBE 628B that belongs to the Objector;
  - b. An order directing the Claimant and/or his agents to release the construction materials attached but not proclaimed, that were being delivered to a client's site by Motor Vehicle Reg. No. KBE 628B;
  - c. An order directing the Claimant to compensate the Objector for the financial loss incurred by dint of the attachment of Motor Vehicle No. KBE 628B and cost of construction materials attached but not proclaimed.
5. The application is supported by an affidavit sworn by Haamid Saeed Hafeez, who describes himself as the Objector's Finance Officer and is based on the following grounds:
- a. That by a proclamation dated 21<sup>st</sup> August 2023, Hariki Auctioneers proclaimed and attached the Objector's Motor Vehicle No. KBE 628B, without notice, purportedly in satisfaction of a decree against the Respondent;
  - b. That the Objector was not a party to the proceedings, culminating to the judgment and decree issued against the Respondent;
  - c. That the warrants of attachment and sale issued by the Court on 10<sup>th</sup> August 2023 commanded the Claimant to issue a 15 days' notice, which was not complied with;
  - d. That the subject Motor Vehicle belongs to the Objector and is thus not liable to attachment or sale;
  - e. That the Claimant, through his agents, proclaimed and attached a motor vehicle that was delivering construction materials to a site belonging to the Objector's client, thus delaying the commencement of a housing project;
  - f. That it is in the interest of justice that the orders sought be granted.
6. The Claimant's response to the application dated 22<sup>nd</sup> August 2023, is by way of replying affidavit sworn by his Counsel, Ichaura Wachira on 14<sup>th</sup> September 2023.
7. Counsel terms the application as a knee jerk reaction by the Respondent to stall execution proceedings to the detriment of the Claimant.
8. He states that the application does not meet the conditions established by Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#).
9. Counsel for the Claimant, Ichaura Wachira swore another affidavit of even date, in response to the Objector's application. He accuses the deponent of the affidavit in support of the application of lies and material non-disclosure.



10. Counsel asserts that the Respondent and the Objector are one and the same. He adds that the Objector's move to bring proceedings is only meant to deny the Claimant the fruits of his judgment.
11. Regarding the application for stay of execution pending appeal, the conditions to be satisfied are stated in Order 42 Rule 6 (1) & (2) of the [Civil Procedure Rules](#) as follows:
  - a. That the Applicant has demonstrated that they will suffer substantial loss if the order sought is not granted;
  - b. That the application has been made without unreasonable delay; and
  - c. That the Applicant has given security for due performance of the order or decree that may ultimately be binding on them.
12. In the submissions filed on behalf of the Claimant, reference was made to the decision in [Equity Bank Ltd v Taiga Adams Company Limited](#) [2006] eKLR where it was held that the foregoing conditions are conjunctive in nature, meaning that a party seeking an order of stay of execution must satisfy all the conditions.
13. In the present case, the Respondent alleges that it will suffer substantial loss while at the same time stating that the attached Motor Vehicle does not belong to it but to the Objector. This begs the question what loss the Respondent would suffer if the attached property does not belong to it.
14. Regarding the issue of delay, it is on record that judgment in this case was delivered on 19<sup>th</sup> January 2023 and the Respondent did not move the Court until August 2023, a time lapse of eight (8) months.
15. In its submissions dated 13<sup>th</sup> October 2023, the Respondent makes a cursory mention of an unidentified clerk who allegedly filed away the office file. As held in [Global Tours & Travel Limited v Five Continents Travel Limited](#) [2015] eKLR in granting an order of stay of execution, the Court exercises judicial discretion which must be invoked rationally and with accountability. A party seeking such an order has a duty to explain any delay in making the application.
16. In this case, the Respondent went to sleep for 8 months and did not offer any credible explanation for the delay, which in my view, is inordinate.
17. Finally, apart from a general statement that it would be willing to abide by any conditions given by the Court, the Respondent did not bother to offer any specific security.
18. On the whole, I find and hold that the Respondent has not satisfied the conditions for grant of stay of execution set by Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#).
19. The application dated 22<sup>nd</sup> August 2023 is therefore dismissed with costs to the Claimant.
20. I now turn to the Objector's application dated 23<sup>rd</sup> August 2023. The Claimant made serious allegations of lies and material non-disclosure against the Objector. Of significance is the failure by the Objector to disclose its relationship with the Respondent whose name bears a striking resemblance with the Objector.
21. In his submissions dated 16<sup>th</sup> October 2023, the Claimant drew the attention of the Court to the fact that one Gary Bangera who was involved in the termination of the Claimant's employment in his capacity as a Director of the Respondent is also listed as a Director and Shareholder of the Objector. Neither the Respondent nor the Objector countered this assertion. It was also not lost on the Court that the two applications by the Respondent and the Objector were presented on the same day.



22. This Court is well aware of the principle of corporate identity set in *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22. It is however, also well established in law that a party will not be allowed to use the corporate veil to flee from responsibility.
23. The Claimant referred the Court to the decision in *Miema Enterprises Ltd v Njoka Tanners Ltd* [2007] eKLR where Warsame J (as he then was) stated the following:

“It is my firm decision that the 2<sup>nd</sup> Objector is using the Company’s Act as an instrument to commit fraud and more so run away from its obligation towards creditors. I think it is right to say that the Directors of the Defendant Company and 2<sup>nd</sup> Objector are one and the same. They are using the legal protection given to them under the statute to defraud creditors by engaging in multiple companies.”
24. For employment claims specifically, an employer cannot get away with obligations to employees through multiple layers of legal or business structures (see [Kenya Hotels and Allied Workers Union v Diani Sea Resort t/a Carslake Nominee Limited](#) [2015] eKLR).
25. That said, I find and hold that the Objector’s application dated 23<sup>rd</sup> August 2023 is without basis and proceed to dismiss it with costs to the Claimant.
26. The interim orders granted on 28<sup>th</sup> August 2023 are vacated.
27. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Waiganjo for the Claimant

Mr. Anyonje the Respondent

Mr. Kyobiko for the Objector

