



**Transport and Allied Workers Union v Kenya Bus Service; Abiria Limited & 3 others (Objector) (Cause 68 of 2006) [2022] KEELRC 4048 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4048 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 68 OF 2006**

**M MBARŪ, J  
MAY 26, 2022**

**BETWEEN**

**TRANSPORT AND ALLIED WORKERS UNION ..... CLAIMANT**

**AND**

**KENYA BUS SERVICE ..... RESPONDENT**

**AND**

**ABIRIA LIMITED ..... OBJECTOR**

**TOYOTA KENYA LIMITED ..... OBJECTOR**

**TRANSPORT LINKS ..... OBJECTOR**

**TSUSHO CAPITAL (LOXEA LTD) ..... OBJECTOR**

**RULING**

1. The ruling herein relates to two (2) applications;
  1. One dated 2nd September, 2021 and filed by Transport Links, the 1st objector and
  2. Application dated 6th September, 2021 filed by Tsusho Capital (LOXEA Ltd) the 2nd objector.
2. Application dated 2nd September, 2021 is seeking for orders that;
  - a. An order be issued for stay of execution of the Decree in this suit pending the hearing and determination of this application and objection.
  - b. The proclamation of motor vehicles registration numbers KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z by Virmir Auctioneers in execution of the Decree and



any subsequent action by the auctioneers or decree-holder be declared illegal, irregular and unlawful and the same be set aside and/or discharged.

- c. Costs be provided for.
3. The application is supported by the affidavit of Bernard Wanyama and on the grounds that the decree-holder has illegally and maliciously proclaimed motor vehicles number KCY 396Y, KCF 3977, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z on 28<sup>th</sup> August, 2021 pursuant to a decree issued on 29<sup>th</sup> September, 2017. If the execution is allowed to proceed it will cripple the objectors operations who are the legal owners of these vehicles and the respondent does not have any benefit from them. The objector is not a party to the suit herein and execution cannot issue against its property and unless the orders sought are issued, there shall be prejudice, loss and damage.
4. Mr Wanyama in his Affidavit avers that before execution, the auctioneers did not carry out due diligence to ascertain ownership of the subject vehicles and that this is not the property of the respondent. As the Accounts manager for the 1<sup>st</sup> objector, motor vehicles number KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z belong to the 1<sup>st</sup> objector and cannot be proclaimed in execution of the suit herein where the 1<sup>st</sup> objector is not a party.
5. The 1<sup>st</sup> objector is the registered owner of the motor vehicles number KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z while judgement herein was entered against Kenya Bus Service for Ksh.526, 329,765 and the decree holder has purported to proclaim against the property of the objectors who allowed the respondent to use their logo but the ownership belong to the objectors.
6. The objectors are franchisees of Kenya Bus management Service Limited having entered into a Franchise Agreement to allow the objectors to use the company logo on their individual vehicles. The objectors have full control and management of the vehicles and the beneficial and insurable interests in the vehicles vests in the objectors.
7. Application dated 6<sup>th</sup> September, 2021 is filed by Toyota Kenya Limited seeking for orders that;
  - a. This court be pleased to grant a temporary injunction restraining the Decree Holder whether by itself, its employees, servants r agents from handling, selling, transferring, alienating, interfering with the ownership of, or in any other manner dealing with motor vehicles registration numbers KCB 167G, KCC 097K, KCB 081A, KCC 985E, KCB 005G, KBX 947R, KCA 383Y, KCB 262Y, KCC 801J, KC 381Y, KCA 738E, KBX 946R, KBX 938R, KCB 633E, KCD 679L, KCF 284S, KBX 213K, KCD 067Q, KCF 946W, KBX 944R, KBX 214K, KBX 943R, KBX 945R, KCA 743E, KCC 643D, KCA 746A, KBX 219K, KBX 940R, KBX 939R, KCA 706E, KCA 704E, KCA 703E, KCA 695E, KCA 702E, KCA 699E, KCA 698E, KCA 705E, KCA 696E.
  - b. The proclamation of the motor vehicles by Patrick Ng'ang'a Mburu t/a Virmir Auctioneers in execution of the Decree issued on 29<sup>th</sup> September, 2017 and any subsequent action by the said auctioneers or decree-holder be declared illegal, irregular and be set aside.
8. The application is supported by the affidavit of Omar Osogo the general manager for the objector and on the grounds that the attachment herein by the decree holder is irregular and unlawful and the attached property belongs to the objector who is the registered own and not party to the suit herein. The objector has the legal and equitable financial interest over the subject vehicles each valued at ksh.8 million and all valued at ksh.312 million.
9. The vehicles were leased on hire purchase terms to various parties who continued to service their existing credit facilities and the auctioneer was duty bound to undertake due diligence and establish



ownership before proclamation. To proceed with execution will prejudice the objector who is not a party to these proceedings.

10. The claimant filed the Replying Affidavit of .....

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11. The 1<sup>st</sup> objector filed Further Affidavit of Gerald Mulati the fleet manager and aver that contrary to the allegations by the claimant, the 1<sup>st</sup> objector is the owner of motor vehicles number KCF 806K, KCE 052A, KBX 535H, KBY 872L, KBZ 734V, KCR 577X and KBK 735E. These vehicles are not owned by the respondent and there is no evidence that these are not the properties of the objector.
12. There is no law barring any person from being a director of a company save the respondent and the 1<sup>st</sup> objector are two distinct and separate companies. Each is liable to own debts. The commonality of shareholders and directors does not impute fraud. The vehicles were transferred to the 1<sup>st</sup> objector by Kenya Bus Management Services which is not the respondent and such assets have never belonged to the respondent.
13. There is no evidence that the respondent and Kenya Bus Management Services is one and the same company. The two are distinct from the objector and the allegations that the 1<sup>st</sup> objector was registered to perpetuate fraud is false and misleading as the companies are not related at all. The fact the businesses of the 1<sup>st</sup> objector and the respondent are similar does not mean this is one company.
14. The claimant has the option of lifting the corporate veil for all the companies that are claimed to be in cahoots with the respondents to address the alleged fraud but the 1<sup>st</sup> objector's assets have been wrongfully proclaimed. The orders herein relates to the respondent and Kenya Bus Management Services Limited and not the 1st objector who has legal and equitable ownership of the proclaimed motor vehicles and which ought to be declared irregular and should be set aside.

#### **Parties agreed and filed written submissions.**

15. The 1<sup>st</sup> objector submitted that it is the legal and equitable owner of vehicles proclaimed by the claimant and Order 22 rule 51 allow an objector with interest over attached property to proceed and have the same lifted as held in *Stephen Kiprotich Koech v Edwin K Barchilei; Joel Sitienei (Objector)* [2019] eKLR. Where an objection is that the attached property in execution of a decree is the property of an objector and is not liable to attachment the court should investigate the objection.
16. The objector has logbooks for he subject vehicles to show that motor vehicles number KCF 806K, KCE 052A, KBX 535H, KBY 872L, KBZ 734V, KCR 577X and KBK 735E is registered in its name and under Section 8 of the *Traffic Act* the person whose name appears as the registered owner is deemed to be the owner. The 1<sup>st</sup> objector is a separate and distinct company from the respondent and cannot be held liable for debts of the respondent as held in *Margaret Amimbo t/a Igar Auctioneers v Lasit Limited & another* [2014] eKLR.
17. The 3<sup>rd</sup> and 4<sup>th</sup> objectors submitted that they are the registered owners of KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z and there is proof of ownership in logbooks and the claimant has not produced any evidence to the contrary. Such proof is as required under Order 22 rule 51 of the *Civil Procedure Rules* and as held in *Michira Messah & Company Advocates v Katana Kalume Ndurya; Kalume Kenga Katana (Objector)* [2021] eKLR.



18. In this case, the auctioneer failed to undertake due diligence to ascertain the ownership of the attached vehicles and had this been done it would have been apparent that such belonged to the 3<sup>rd</sup> and 4<sup>th</sup> objectors.
19. The claimant submitted that the application by the objectors are similar and meant to stop execution. The court is functus officio vide order of 14<sup>th</sup> May, 2019 that if there is any legal challenges concerning the execution herein the same should be addressed under the Winding Up Cause No.21 of 2005. The issues addressed herein have been addressed and determined for more than 15 years.
20. The claimant waited for the Winding Up Cause and on 11<sup>th</sup> May, 2021 the High Court dismissed the same for want of prosecution. The Winding Up Cause by BP Kenya has been decided and it is hence logical that the matter be settled and the award against the respondent delivered on 6<sup>th</sup> September, 2007 be executed.
21. The objectors have come to court with unclean hands since the 1<sup>st</sup> objector and the respondent as a judgement debtor have simply changed hands. The 1<sup>st</sup> objector failed to attach the list of directors of Abiria Limited and a search at the Companies Registry reveal that some of the directors of the 1<sup>st</sup> objector are the same for the respondent.
22. A search of vehicles number KBH 577Q KBK 735E and KBQ 195W indicate the previous owner to be the respondent and the current owner is the 1<sup>st</sup> objector. Proceedings herein have been occasioned by the ulterior motives of the respondent which has dogged compliance with the judgement and to settle its liabilities. The respondent registered Kenya Bus Service Management to take the place of its precursor of the 1<sup>st</sup> objector so as to avoid legal liability and its directors are proxies in 1<sup>st</sup> objector and vice versa. The membership of the 1<sup>st</sup> objector should be unearthed to bear liability as held in *Multichoice Kenya Ltd v Mainkam Ltd & Another* [2013] eKLR.
23. The 2<sup>nd</sup> objector has not disclosed any material relationship to the attached vehicles save too assert that there is a hire purchase agreement with the objectors. No agreements have been attached as evidence.
24. The 3<sup>rd</sup> and 4<sup>th</sup> objectors have not filed company returns and any search cannot reveal they own the alleged vehicles. No interest is demonstrated that the fleet of vehicles that bear the brand name Kenya Bus Services Management belong to them and the objections made should be dismissed with costs.

## Determination

### Is the court functus official?

25. The process of execution is addressed under Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which apply the Civil Procedure Act and the Rules thereto. In this regard, Order 22 rule 51(1) of the Civil Procedure Rules provides that;

Any 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.

26. The ruling of the court herein on 14<sup>th</sup> May, 2019 with regard to the Winding Up Cause No.21 of 2005, in my view and in reading the subject ruling, this does not remove the process of execution of the judgement herein from this court to under the Winding Up Cause and the objections herein made by the objectors emanate from the execution proceedings initiated by the claimant as the decree holder herein and not elsewhere.



27. Objection proceedings cannot commence anywhere else. Such relate to the Decree herein and hence proper.
28. the respondent as the judgment debtor herein is a company under its own name and from the records submitted; the objectors are separate and distinct companies. Under the law, such are entitled to object to attachment of their properties where they hold the legal and equitable ownership therefrom save, where such objector companies are formed as conduits of the respondent's properties and assets so as to defeat the judgement and decree of the court, the claimant as the decree holder is at liberty to move and secure its rights as allowed under the law and not through execution against a non-suited party.
29. As submitted by the 1<sup>st</sup> objector, there exists procedures for the lifting of corporate veil and call for the books of account relating to the subject companies. Such procedures cannot be cured through the use of the procedure applied by the claimant herein to proclaim and attach the properties of third parties who are separate and distinct from the respondent.
30. On the objections made, in proceedings stopping the attachment and sale of property following a court decree, an objector must have a legal or equitable interest in whole or in part of any property attached in execution. The court is then required to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit. and in the case of *Chotabhai M. Patel v Chaprabhi Patel* [1958] EA it was held that;
- b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
  - c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.
  - d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.
31. The evidence of ownership is imperative. Such should be followed with possession and interest making the question of legal right and title relevant.
32. The 1<sup>st</sup> objector assertion is that it is the legal owners and has an equitable interest with regard to motor vehicles registration numbers, KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z.
33. To the Supporting Affidavit of Bernard Wanyama, the 1<sup>st</sup> objector attached the following motor vehicle records;
- KCY 396Y, owned by Loxea Limited and Transport Links Limited as of 25<sup>th</sup> August, 2021 and which was registered on 17<sup>th</sup> December, 2015 after judgement was delivered herein;
  - KCF 397Y, owned by Loxea Limited and Transport Links Limited;
  - KCF 398Y, same ownership;
  - KCF 399Y, same ownership;
  - KCF 400Y, same ownership; and



KCF 401Z, has the same ownership.

34. The 2<sup>nd</sup> objector, Toyota Kenya in the Affidavit of Omar Osogo attached extracts for logbooks of motor vehicle registration numbers;

KCB 167G registered in the name of Toyota Kenya Limited;

KCC 097K registered in the name of Toyota;

KCB 081A owner is Toyota Kenya;

KCC 985E, KCB 005G, KBX 947R, KCA 383Y, KCB 262Y, KCC 801J, KC 381Y, KCA 738E, KBX 946R, KBX 938R, KCB 633E, KCD 679L, KCF 284S, KBX 213K, KCD 067Q, KCF 946W, KBX 944R, KBX 214K, KBX 943R, KBX 945R, KCA 743E, KCC 643D, KCA 746A, KBX 219K, KBX 940R, KBX 939R, all owned by Toyota; and

KCA 706E, KCA 704E, KCA 703E, KCA 695E, KCA 702E, KCA 699E, KCA 698E, KCA 705E, KCA 696E, owned by Bukinya Success Limited and Toyota.

35. The auctioneers attached the following motor vehicles registration numbers;

KCA 695E, KCA 746E, KBX 947R, KCC 801J, KCF 284S, KCA 738E, KBX 946R, KCB 633E, KCA 696E, KCA 702E, KBX 213K, KCC 985E, KCF 946W, KCA 939E, KBX 943R, KCB 631F, KCA 698E, KBX 219K, KCA 705E, KCA 704E, KCB 262Y, KCD 069Q, KBX 942R, KCC 097K, KBX 944R, KCD 004Q, KCA 699E, KBX 939R, KCA 743E, KBX 945R, KCA 706E, KCA 383Y, KCB 005G, KBX 936K, KCA 944B, KCC 864W, KCA 381Y, KCB 167G, KBX 940R, KCA 942B, KCC 643D, KBX 214K, KCA 603E, KCD 679L, KBX 938R, KCA 940E, KCB 081A, KBX 129K, KCF 397Y, KCF 395Y, KCE 401Z, KCF 396Y, KCF 400Y, KCF 395Y, KCF 806K, KBH 577Q, KCE 052A, KBX 535H, KBY 872L, KCW 366Q, KBZ 724V, KCR 577X, KBV 914V, KBK 735E, and KCD 559V.

36. With legal title held by Loxea Limited, Transport Links, Toyota Kenya Limited or Bukinya Success Limited and Toyota, the vehicles attached under such legal title are hereby removed from attachment;

37. The motor vehicles registration numbers KCY 396Y, KCF 397Y, KCF 398Y, KCF 399Y, KCF 400Y and KCF 401Z. also vehicles number KCB 167G, KCC 097K, KCB 081A, KCC 985E, KCB 005G, KBX 947R, KCA 383Y, KCB 262Y, KCC 801J, KC 381Y, KCA 738E, KBX 946R, KBX 938R, KCB 633E, KCD 679L, KCF 284S, KBX 213K, KCD 067Q, KCF 946W, KBX 944R, KBX 214K, KBX 943R, KBX 945R, KCA 743E, KCC 643D, KCA 746A, KBX 219K, KBX 940R, KBX 939R, KCA 706E, KCA 704E, KCA 703E, KCA 695E, KCA 702E, KCA 699E, KCA 698E, KCA 705E, and KCA 696E.

38. The objectors now ascertained as the legal holders of title to these vehicles, the legal right and title over the proclaimed goods/properties in execution of the decree herein is irregular, the objectors applications dated 2<sup>nd</sup> and 6<sup>th</sup> September, 2021 are found with merit. The claimant shall remove from the list the above identified vehicles whose ownership is attached to the objectors and address the rest accordingly.

39. Accordingly, applications dated 2<sup>nd</sup> and 6<sup>th</sup> September, 2021 by the objectors are hereby dismissed. Execution of the decree shall cease. Each party shall pay own costs.

**DELIVERED IN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**M. MBARŪ**

**JUDGE**



**In the presence of:**

Court Assistant: Okodoi

