



**Bundi v Tiger Electronics & Motorbike Ltd (Miscellaneous Civil Application
E015 of 2024) [2024] KEHC 9016 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E015 OF 2024**

EM MURIITHI, J

JULY 25, 2024

BETWEEN

JOSEPH BUNDI PLAINTIFF

AND

TIGER ELECTRONICS & MOTORBIKE LTD RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 24/1/2024, brought under Orders 22 Rule 35 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 63 of the Civil Procedure Act and Article 159(2)(b) & (d) of the Constitution and all other enabling provisions of the law, the Applicant seeks:
 1. Spent
 2. That the Honourable Court be pleased to issue summons directing Peter Wanjohi Gichuki and Emmah Nyambura Wanjohi who are directors of the Respondent/Judgment Debtor to attend court on the appointed day, to be orally examined as to the business and affairs of the Respondent/Judgment Debtor and the property or properties of the Respondent/Judgment Debtor or the Respondent/Judgment Debtor's means of satisfying the decretal sum.
 3. That the Honourable Court be pleased to issue an order directing Peter Wanjohi Gichuki and Emmah Nyambura Wanjohi in their capacity as the directors of the Respondent/Judgment Debtor to produce before the court any book of accounts, cheque books, bank statements and statutory documents relating to the operations and the transactions of the Respondent/Judgment debtor and the said directors be examined on oath on the said documents from 2011 to date.



4. That the Honourable Court be pleased to issue an order directing Peter Wanjohi Gichuki and Emmah Nyambura Wanjohi in their capacity as directors of the Respondent company pay the decretal sum as per the judgment of the trial court.
 5. That the Honorable court be pleased to grant any other or better order/relief as shall meet the ends of justice.
 6. That the costs of the application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Joseph Bundi, the Applicant herein sworn on even date. He contends that judgment was entered in his favour whereby his advocates on record proceeded to extract the decree. His advocates made an application for execution of the decree by attachment and sale by public auction which was granted by this court. His advocates instructed Bealine auctioneers to proceed and attach the judgment debtor's property after which the auctioneers obtained warrants of attachment from this court authorizing the attachment. The Respondent, with a view of frustrating execution of the Notice to Show Cause taken out against them, filed a replying affidavit through one of its directors, Peter Wanjohi Gichuki, indicating that the Respondent had been wound up. Peter Wanjohi Gichuki clearly admitted in that replying affidavit that he and Emmah Nyambura Wanjohi were the directors of the Respondent/Judgment Debtor at the time of the institution of the suit. Notably, the said Peter Wanjohi and Emmah Nyambura ingeniously registered yet another company on 29/3/2021 under the name Tiger Motorcycle Parts Manufacturing Limited, with the two directors conducting the same business as the wound-up Respondent to evade the looming execution on the Respondent. The aforementioned conduct is fraudulent and illegal, which conduct invites the piercing of the corporate veil as it is apparent that the company is being used as a sham to avoid recognition by the eye of equity. Peter Wanjohi and Emmah Nyambura, in their own capacities and as the previous directors of the Respondent have the means of paying the decretal sum and are only refusing to settle the Applicant's claim for no justifiable reason. He is advised by his advocates that the said previous directors of the Respondent are mandated to keep records relating to the operations of the Respondent and in the circumstances are best placed to explain the affairs of the Respondent. It is in the interests of justice that he be allowed to summon and examine Peter Wanjohi and Emmah Nyambura in their capacity as previous directors of the Respondent as to the means and assets of the company. He urges the court to exercise its discretion and issue such other orders in the interest of justice. The judgment obtained was not an exercise in futility and he should be allowed to enjoy the fruits of the judgment.
3. The Applicant swore a supplementary affidavit on 20/2/2024 in support of his application.
4. The Respondent, Tiger Electronics and Motorbikes Ltd opposed the application through its replying affidavit filed on 19/2/2024 and sworn by Peter Wanjohi Gichuki. He terms the application as frivolous, vexatious, misconceived, misguided and meritless, which ought to be dismissed with costs. He is advised by his advocates that a company is held to be a separate entity from its shareholders and directors, and courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the company, shareholders or directors who are asserted to be the company's alter egos have acted in fairly egregious manner. He cited the classic cases of *Mugenyi & Company Advocates v The Attorney General* (1999) 2 EA 199 and *Salomon v Salomon* (1897) AC 78, which illustrates the instances when the corporate personality veil may be lifted. He faults the Applicant for failing to prove that the company was nefariously wound up with the sole objective of defeating their quest to execute against the company. The Respondent was wound up and dissolved long before the judgment of the trial court was even rendered and its assets distributed amongst the shareholders. He and Emmah Nyambura ceased to be directors of the Respondent once it was dissolved



and they were advised that they cannot be held responsible for the company's liabilities unless it is proved that those liabilities were incurred due to their fraudulent actions. Neither he nor Emmah Nyambura are liable to satisfy the decretal amount in Tigania CMCC No. 31/2011, and he urged the court to dismiss the application with costs.

Submissions

5. The Applicant urges that he should not be denied the enjoyment of the fruits of his judgment whilst the directors of the Respondent hide under the protection of the corporate veil, and cites the Court of Appeal case of *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another* (2018) eKLR. He urges the court to issue summons to the directors of the Respondent to be orally examined as to the affairs of the Respondent, and cites *Bamburi Special Products Limited v Remax Construction Limited* (Civil Case 431 of 2014) [2023] KEHC 17380 (KLR) (Commercial and Tax) (15 May 2023) (Ruling). He urges the court to be persuaded by the authorities herein and arguments put across and allow the application with costs.
6. The Respondent did not file any submissions.

Analysis and Determination

7. The issues for determination are whether the application is merited.
8. The brief facts of this case are that the Applicant entered into a sale agreement for the purchase of a motor cycle from the Respondent, which agreement was duly executed and payment made. The Respondent subsequently failed to issue the Applicant with a logbook of the motor cycle, which amounted to breach of the contract. The Applicant successfully sued the Respondent vide Tigania PMCC No. 31/2021 where he was awarded Ksh. 252,500. It is alleged that, in order to evade satisfying the decree, the Respondent was wound up and its then directors, Peter Wanjohi and Emmah Nyambura registered a similar company, which amounts to illegal and fraudulent conduct. The said directors are now said to be hiding under the corporate veil in order to be absolved from liability.
9. Section 44 (1) of the *Civil Procedure Act* provides for property liable to attachment and sale in execution of a decree as follows:

“ All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.”
10. Order 22 Rule 35 of the *Civil Procedure Rules* provides for examination of judgment-debtor as to his property as follows:

“ Where a decree is for the payment of money, the decree-holder may apply to the court for an order that —

 - (a) the judgment-debtor;
 - (b) in the case of a corporation, any officer thereof; or
 - (c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for



the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.”

11. In the case of *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another* (2018) eKLR cited by the Applicant, the Court of Appeal held that;

“In our view, the learned Judge was right to lift or pierce the veil of incorporation to ensure justice and equity to all parties prevails. Further, the law is that courts will disregard the veil of incorporation where it is apparent that the device of incorporation is used for some illegal, fraudulent or improper purpose. See *Mugenyi & Company Advocate v The Attorney General* (1999) 2 EA 199. In the present instance, Mr. Baiya claimed that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent’s account. Why would Mr. Baiya, a director in the 2nd respondent and who definitely had full knowledge of its affairs (that it had no attachable assets or financial means to satisfy the decree) insist that the decree be settled by it? We draw the same inference as the 1st respondent that the same was meant to defeat the satisfaction of the decree, an improper purpose warranting the court to go behind the veil of incorporation. This is especially since the benefit of the works carried on by the 1st respondent was realized and continues to be enjoyed by the appellant. Surely in the circumstances of this case, the appellant did not expect a court of equity to shut its eyes to the 1st respondent’s plight and leave it without a remedy. The appellant incorporated the 2nd respondent and then had it enter into an agreement with the 1st respondent knowing well that it had no financial means or assets to meet the obligations related with the contract. In the absence of any reasonable excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2nd respondent’s veil of incorporation for purposes of ensuring justice to both parties.”

12. It is pointed out by the applicant that no sooner had the Respondent in the present case been wound up than its then directors Peter Wanjohi and Emma Nyambura incorporated Tiger Motorcycle Parts Manufacturing Limited, a similar company to Respondent, with the intention of defeating the Applicant’s legitimate claim.

13. I respectfully note the decision in *Robert Kinaga Waweru v Northcorr Enterprises Ltd* [2021] eKLR, the Court (A. Mabeya J.) reiterated that:

“It will be a travesty of justice for a court of equity to close its eyes where it is clear that a person incorporates a company, enters into agreements through it, derives benefits therefrom and leaves the parties to such agreements licking financial wounds while he continues to enjoy the benefits therefrom. The directors and shareholders must give full account of the assets of the company or its whereabouts.... This is a Court of equity and such mischief cannot be ignored.”

14. As counseled by the Court of Appeal in *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another* (*supra*), it would be a failure of justice for this court to shut its eyes and leave without a remedy an Applicant holder of a legal decree, which the Respondent through its directors has deliberately made inexecutable, or incapable of satisfaction. It is for these kind of situations that the remedy of lifting of corporate veil exists! But such legal action may only arise if the relevant Company was in existence, and that was the situation in the *Githunguri Dairy case* and



Bamburi Spcial Products Ltd. V Remax Construction Limited (Mshila, J.) 20230 eKLR, both cited by the applicant.

15. However, if the Company is dissolved, then there must, under the law, be antecedent steps taken to reinstate the Company to the Register and restore the situation as it was before the dissolution. See Sections 916-919 of the *Companies Act* 2022.
16. If the Company has been wound-up, there is no Respondent company to be sued and upon which execution may issue either directly or through its directors upon lifting of veil. The person who has a claim against the dissolved company is obliged to make an application for restoration of the company to the register before any claims may be brought against the company.
17. For example, section 916 of the *Companies Act* 2022 (same provisions as the *Companies Act* of 2015), which provides as follows:

“916. Application to Court for restoration to the Register

- (1) An application may be made to the Court to restore to the Register a company—
 - (a) that has been dissolved after being liquidated under the law relating to insolvency;
 - (b) that is taken to have been dissolved following administration under that Act; or
 - (c) that has been struck off the Register—
 - (i) under section 894 or 895; or
 - (ii) under section 897, whether or not the company has in consequence been dissolved.
- (2) Such an application may be made by—
 - (a) the Attorney-General;
 - (b) a former director of the company;
 - (c) a person having an interest in land in which the company had a superior or derivative interest;
 - (d) a person who has an interest in land or other property—
 - (i) that was subject to rights vested in the company; or
 - (ii) that was benefited by obligations owed by the company;
 - (e) a person who, but for the dissolution of the company, would have a contractual relationship with it;
 - (f) a person with a potential legal claim against the company;
 - (g) manager or trustee of a pension fund established for the benefit of employees of the company;
 - (h) a former member of the company, or the executor or administrator of such a person;
 - (i) a person who was a creditor of the company at the time of its being struck off the Register or dissolved;



- (j) a former liquidator of the company;
- (k) if the company was struck off the Register under section 897, a person of a description specified by regulations referred to in section 900(1) (f) or 901(2) (f); or
- (l) any other person appearing to the Court to have an interest in the matter.”

18. This court finds that the Applicant has not established a foundation upon which the process of execution by lifting the veil may be levied because it has not been proved that the respondent company is in existence, and the applicant’s case, in any event, rests on the accepted fact of winding up of the Company and incorporation of another company under a different name to carry on the same very business of the wound-up Company.

19. In my respectful view, it behoves the applicant to first seek the restoration of the wound up Company in accordance with the law and, thereafter, seek the reliefs prayed for in the present application for the examination of the directors by the court to decide whether the said directors should be held to be personally liable for the particular debt of the Respondent. No such application under the Companies Act has been made before the Court.

Orders

20. Accordingly, for the reasons set out above, this Court finds that the present application dated 24/1/2024 is premature and it is held in abeyance pending any application by the Applicant for the reinstatement of the respondent Company, or as he may be advised by Counsel.

21. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Apperances:

Mr. Mutuma, J. Advocate for the Applicant.

Ms. Wangui Kuria Advocate for the Respondent.

