



**Sichuan Huashi Enterprises Corporation East Africa (Ea) Limited v
Capital Realty Limited; Machua & another (Interested Parties) (Civil
Suit 3 of 2020) [2022] KEHC 11825 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 3 OF 2020
GV ODUNGA, J
MAY 20, 2022**

BETWEEN

**SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA (EA)
LIMITED APPLICANT**

AND

CAPITAL REALTY LIMITED RESPONDENT

AND

JACINTA MUTHONI MACHUA INTERESTED PARTY

AGNES WANGECHI INTERESTED PARTY

RULING

1. By a notice of motion dated July 5, 2021, the plaintiff/applicant herein seeks the following orders:
 1. Summons do issue compelling one Pamela Achieng Alotch, Holiday Resorts Development Company Limited, Andrew Lucas Rosana, Francis Mburu, Nzambu Mwendwa and Raymond Atandi Rosana who are known Directors or officers or members of the judgment debtor to attend court on such date as may be ordered or allocated by court, to be orally examined on oath on whether the judgment-debtor has any and what property or means of satisfying the decree
 2. The said directors, officers or members be ordered to produce the judgment debtor's books, papers, documents and /or evidence showing the affairs of the company;
 3. In default of such attendance and/or providing suitable means and assets for the satisfaction of the decree of the honourable court, the said directors, officers or members be jointly and/or severally held personally liable to satisfy the decree of the court in full;



4. The decree-holder be granted leave to execute the decree herein against the said directors, officers or members of the judgment-debtor herein personally, in default of payment of the decretal amount claimed herein;
5. The costs of this application be borne by the judgment debtor and/or its said officers or members in any event.
2. The application is expressed to be brought under section 3A of the Civil Procedure Act, order 22, rule 35 and order 51 rule 1 of the Civil Procedure Rules and it is supported by an affidavit sworn by Ren Lianquan, a director of the plaintiff/applicant. According to the deponent, despite the fact that the respondent is aware of the debt, the court's decree in this matter for Kshs 194,575,570.40 remains unsatisfied as the applicant has not been able to trace any assets owned by the respondent for the purposes of attachment.
3. It was disclosed that since Pamela Achieng Alotch, Holiday Resorts Development Company Limited, Andrew Lucas Rosana, Francis Mburu, Nzambu Mwendwa and Raymond Atandi Rosana are the directors, officers or members of the respondent company, it is proper for the court to have the said directors, officer or members examined in relation to the affairs of the respondent and its satisfaction of the decree in this matter as the respondent no longer has a known place of business thus making efforts to execute futile.
4. In response to the application, the respondents filed an affidavit sworn by Francis Anthony Mburu, a Director of the defendant. According to him, as evidenced in the records annexed, the Directors of the Company as at the last return filed at the Companies Registry were Andrew Lucas Rosana, Francis Mburu, Nzambu Mwendwa and Raymond Atandi Rosana. According to the deponent, Pamela Achieng Alotch was merely the company secretary for the sol purpose of filing returns at the Company Registry and was unfamiliar with the running of the affairs of the company.
5. It was further averred that Holiday Resorts Development Company Limited was merely a corporate shareholder of the respondent who nominated Francis Mburu and Nzambu Mwendwa as Directors to the board of the respondent.
6. It was the deposed that the examination of directors pursuant to order 22 rule 35 aforesaid does not extend to examining the shareholders who are separate from the company and who are not involved in the running of the company and also does not extend to causing the company's debts to be satisfied by the Directors, shareholders and/or officers of the company. It was however disclosed that the Directors had no objection in appearing to disclose the current affairs of the company.
7. It was however averred that some of the orders sought are beyond the ambit, scope and intention of the said provision and therefore incapable of being granted and that since the defendant is a limited liability company and a legal person in its own right, the decree obtained against the defendant is incapable of being enforced or executed against the Directors or shareholders of the defendant company in their individual capacity.
8. The court was therefore urged to either dismiss the application in its entirety or in the alternative dismiss it to the extent that it seeks to examine persons who are not directors or officers of the company and to cause directors, shareholders and officers of the defendant to be held personally liable for the satisfaction of the decree.
9. It was averred that the plaintiff was aware that the defendant was unable to settle its debt to the defendant as a result of the actions of its secured creditors, Housing Finance Bank, who seized its assets including those assigned to the plaintiff as per the terms of the accord and satisfaction agreement.



10. It was in any event contended that the application was unmerited having invoked the wrong provisions of the law.
11. On behalf of the plaintiff it was submitted that from the response by the judgement-debtor, the application is unopposed save for an objection on the inclusion of Pamela Achieng Alotch and Holiday Resorts Development Company Ltd and the levying of execution against directors, officers and shareholders of the company.
12. According to the applicant, rule 35 of order 25 of the *Civil Procedure Rules* entitles the court to allow the decree-holder the right to examine the judgment-debtor, any officer of a corporation or any other person on the judgment-debtor's property and reliance was sought from *Ramaben Ramnikal Patani & 2 Others vs Garden Chambers Limited* [2019] eKLR, where Okwany, J while citing with approval the decision of Ringera, J (as he then was) in Nairobi HCCC No 1287 of 2000, *Ultimate Laboratories vs Tasha Bioservice Ltd.*
13. It was submitted that this application seeks to have the officers of the Judgment-debtor examined as to the property of the judgement debtor and to have the officers held personally liable for the debt in default. As the authority cited above shows, the court has the powers to lift the corporate veil in appropriate cases. In the present case, the directors, officers and shareholders have set up the Judgment-debtor as a sort of a shell through which they carry out transactions and hope to use its corporate feature to shield themselves from liability. This scheme is very apparent in the manner in which Holiday Resorts Development Company Limited which is a shareholder in the company has nominated two persons to be directors. Further, the design of this scheme can be seen in the failure to finance the activities of the company (judgement-debtor). Thus, it was not surprising to see the judgement-debtor fail to enter appearance or file a defence in this matter. The officers, directors and shareholders knew very well that it had nothing. It was a shell and as such no adverse action could be taken against it in terms of execution and that they were themselves shielded from liability by the corporate veil.
14. On the objection to have Pamela Achieng Alotch summoned for examination for being the secretary of the company, it was submitted that section 3 of the *Companies Act* defines 'officers' of a company as any director, manager or secretary of the company or body and that Pamela Achieng Alotch falls within this provision. According to the applicant, the allegation that the company secretary was unfamiliar with the running of the company further lends credence to the submission that the judgement-debtor company was being run as a vehicle for fraud.
15. It was further submitted that other than officers of a company, rule 35 of order 22 entitles the decree-holder to examine any other person necessary. Thus, the rule would entitle the court to have a shareholder, Holiday Resorts Development Company Limited, who is also the majority shareholder in the judgement debtor company.
16. The court was therefore urged to grant the applicant as prayed.

Determination

17. I have considered the application, the affidavits in support of and in opposition to the application, the submissions filed and the authorities cited.
18. Order 22 rule 35, which is the correct application under which the application was brought provides 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.

19. According to the said provision, those who may 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, are the judgement debtor, an officer of a corporation or any other person. A reading of the said provision does not expressly state that the officer of a corporation can only be examined where the corporation is the judgement debtor and apart from that the provision gives the court the powers to examine any other person. Accordingly, the court has a wide discretion to decide whom to summons for examination as long as the court is satisfied that the person may have information that may assist the court in determining 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. In other words, this is an avenue by which the court determines the judgement debtor's assets and those assets may include the debts owed to the judgement debtor by third parties hence the wide discretion.
20. In this case, the application is objected to on the ground that Pamela Achieng Alotch was merely the Company Secretary for the sole purpose of filing returns at the Company Registry and was unfamiliar with the running of the affairs of the Company. Further, that Holiday Resorts Development Company Limited was merely a corporate shareholder of the respondent who nominated Francis Mburu and Nzambu Mwendwa as Directors to the Board of the respondent. I agree with the holding in where Okwany, J expressed herself as hereunder:

“The above provision grants the court power to summon any officer of a company to attend before it and be examined on whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any means of satisfying the decree. The duty of the court in this respect was aptly stated by Ringera J in Nairobi HCCC No 1287 of 2000 ultimate Laboratories v Tasha Bioservice (unreported) Ltd as follows:

“The court's duty under the order and rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree”,

Ringera J (as he then was) continued

“While I agree with the defendant's/judgment debtor's advocate that the objective of an examination of a company's director or officer under order XX1 rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, 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, I don't agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the court and all other provisions of the law to lift the



corporate veil of the company and order the director to personally discharge the debts of the company”.

Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under order 22 rule 35 is circumscribed with the purpose set out in the rule. That is;

.....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.

I, therefore, take the view that, as long as the applicant has shown that the respondent is in a position to provide information in the nature of discovery.....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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the respondent, that the applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution. If the decree- holder already has such definite information of the debts and properties of the judgment debtor, there will be need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule”.

13. In the instant case, what the applicants seek is what has been referred to as discovery in aid of execution since they seek to have the company directors, officers and/or Managing Director summoned to appear in court for cross examination and production of the respondent’s records together with the company bank statements and director’s personal bank statements. In essence, the applicants also seek orders for the lifting of the corporate veil and order that the Managing Director be held personally liable to discharge the debts of the company.

14. In the case of *Masefield Trading (K) Ltd v Rusmore Company Limited & Another* [2008] eKLR, it was held:

“I think the above rule grants this court jurisdiction to summon an officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”

21. It is true that the above provision does not expressly provide for the lifting of the corporate veil. This court has had occasion to deal with the same provision in *Peter O Ngoge T/A O P Ngoge & Associates vs Ammu Investment Company Limited* [2012] eKLR. In that case the court expressed itself as follows:

“It is however my view that the lifting of a corporate veil is not the same thing as an application under order 22 rule 35 of the *Civil Procedure Rules*. In the latter an officer is examined as an agent of the company while in lifting the corporate veil, the mask of incorporation



is lifted with the result that the shareholders are no longer agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity. The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. In other words, the corporation's brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. The day to day management of the company may, however, be handled by specific officers tasked to do so on behalf of the board. However, the ultimate responsibility rests with the directors. It therefore follows that the management of the corporation must be deemed to be carried by or on behalf of the Board save in cases where the ultra vires principle applies. The legal position as regards incorporated entities is well settled. In *Standard Chartered Bank Kenya Limited vs Intercom Services Limited & 4 Others* Civil Appeal No 37 of 2003 [2004] 2 KLR 183, the Court of Appeal citing *Salomon vs A Salomon & Company Ltd* [1897] AC 22 and *Adams vs Cape Industries Plc* [1990] 1 Ch 433 held that it is a principle of company law of long antiquity that a limited company has a legal existence independent of its members and that a company is not an agent of its members. The court further said that the principle of alter ego attributes the mental state of company's directors or other officers to the company itself in order to fix the company with either criminal or civil liability.

It follows that the mere fact that one is a director or shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of *Mugenyi & Company Advocates vs The Attorney General* [1999] 2 EA 199 following *Palmer's Company Law Vol 1 (22 ed)* lists 10 instances under which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a legal persona and these are:-

1. Where companies are in the relationship of holding and subsidiary companies;
2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;
3. In certain matters relating to taxation;
4. In the law relating to exchange control;
5. In the law relating to trading with the enemy;
6. In the law of merger control in the United Kingdom;
7. In competition of the European Economic Community;
8. In abuse of law in certain circumstances;



9. Where the device of incorporation is used for some illegal or improper purpose; and
10. Where the private company is founded on personal relationship between the members.

In *Salomon vs Salomon (supra)* and *Jones & Another vs Lipman & Another* [1962] 1 WLR 833 it was held that whereas a registered company is a legal person separate from its members this veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Therefore if a company is thought to be a mere cloak or sham, a device or a mask which the defendant holds to his face, in an attempt to avoid recognition by the eye of equity, the court will grant summary judgement even against the person behind the said company.

However, the decision to lift the corporate veil will not be lightly undertaken. In the present case there is no allegation that the applicant has attempted to execute against the defendant company and such attempts have failed. The only allegation made is that the applicant is not aware of the assets of the respondent. Whereas that may be a ground for invoking the provisions of order 22 rule 35 aforesaid, in my view, that does not necessarily satisfy the conditions stipulated for the lifting of corporate veil of a corporation.

In the premises I am not satisfied there exist, as of now, circumstances that would justify the lifting of the corporate veil of the company in order to find the directors of the respondent liable. Further it is not alleged that Alan Cleophas Mulango, the director against whom the order of arrest is directed is the sole shareholder and/or director of the company. Whereas it was submitted that it is this director who gave instructions, such an averment does not appear anywhere in the affidavit and even if it were, without seeking orders against all the shareholders and/or directors, it would not be possible for the court even if it was so minded to lift the veil of incorporation and find only one shareholder and/or director liable in these circumstances. Such an action may be construed to amount to contravention of article 27 of the Constitution which provides for freedom from discrimination.”

22. I have considered the averments made by the applicant which largely remain uncontested. It is not in contest that the defendant owes the applicant the decretal sum which remains unpaid. It is contended on behalf of the defendant that it has no asset capable of settling the said debt since, as a result of the actions of its secured creditors, Housing Finance Bank seized its assets including those assigned to the plaintiff as per the terms of the accord and satisfaction agreement. That, however, is the issue that this court will determine when the officers of the defendant are orally examined.
23. Since the powers of examination are wide and not limited to directors, I find nothing wrong with having those who are connected with the defendant Company orally examined.
24. Accordingly, while I grant the reliefs sought in prayers 1 and 2 thereof I decline to grant prayers 3 and 4 at this stage. The costs of this application to be borne by the defendant.
25. Orders accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF MAY, 2022.

G V ODUNGA

JUDGE



Delivered in the presence of:
Mr Moronge for the Plaintiff
CA Susan

