



Kikambala Housing Estate Limited v Anjarwalla & Khanna Advocates & 2 others (Civil Suit 2 of 2018 & 58 of 2015 (Consolidated)) [2022] KEHC 17111 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 17111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 2 OF 2018 & 58 OF 2015 (CONSOLIDATED)
MN MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

KIKAMBALA HOUSING ESTATE LIMITED PLAINTIFF

AND

ANJARWALLA & KHANNA ADVOCATES 1ST DEFENDANT

MASHARIKI GEOSURVEYS LIMITED 2ND DEFENDANT

BANK OF AFRICA KENYA LIMITED 3RD DEFENDANT

RULING

1. The application before this court is a notice of motion dated April 22, 2021 brought under the provisions of order 22 rule 35 and order 50 rule 6 of the *Civil Procedure Rules, 2010* and sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya. The 2nd defendant/applicant seeks the following orders-
 - i. Spent
 - ii. That the respondent/judgment debtor's director namely Osman Erdinc Elsek be summoned to Court on a date to be fixed by this Honourable Court for oral examination as to whether the judgment debtor has any property or means of satisfying the decree herein;
 - iii. That the respondent/judgment debtor's director namely Osman Erdinc Elsek be summoned to attend Court and produce books of accounts and any documents relating to operations of the judgment debtor's company, including bank statements, to show the assets of the judgment debtor;
 - iv. That in default of compliance with orders 2 and 3 above, the said director namely Osman Erdinc Elsek be deemed personally liable to settle the party and party costs of KES 30,303,956.35; and



- v. That the costs of this application be in the cause.
2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on April 22, 2021 by Dennis Malembeka, a land surveyor working for the 2nd defendant/applicant. In opposition to the application herein, the plaintiff/respondent filed grounds of opposition.
 3. The application was canvassed by way of written submissions. The applicant's submissions were filed on March 4, 2022 by the law firm of Kairu & McCourt Advocates whereas the plaintiff/respondent's submissions were filed on March 31, 2022 by Kikambala Housing Estate Limited, the plaintiff herein.
 4. Mr McCourt, learned Counsel for the 2nd defendant submitted that the plaintiff vide a Notice of Motion application dated July 6, 2018 sought to withdraw the suit herein against the 2nd defendant and that on July 24, 2018, Hon. Justice P.J Otieno issued an order marking the suit as against the 2nd defendant withdrawn with costs to the 2nd defendant. That consequently, the 2nd defendant filed its party and party bill of costs following which a ruling on taxation was delivered on February 8, 2019 for Kenya Shillings Thirty Million, Three Hundred and Three Thousand, Nine Hundred and Fifty-Six and Thirty-Five Cents (KES 30,303,956.35). He submitted that the 2nd defendant has been unable to execute for the said funds as all attempts to trace the plaintiff company's attachable assets have been fruitless.
 5. Mr McCourt submitted that the only known asset belonging to the respondent is plot No Kilifi/Mtwapa/867 which is subject to other litigation as outlined here below:
 - i. Malindi ELC No 355 of 2015, Bank of Africa Kenya Limited v KHEL and The Land Registrar Kilifi County;
 - ii. Malindi ELC No 207 of 2015, Amina Mohammed Kasinga & 21 Others v KHEL and others;
 - iii. Malindi ELC No 217 of 2018, Wellington Namai Mirikau v KHEL and another; and
 - iv. Mombasa HCCC No 2 of 2015 consolidated with Mombasa HCCC No 58 of 2015 which is the suit herein.
 6. Mr McCourt relied on the provisions of order 22 rule 35 of the *Civil Procedure Rules*, the case of *Masefeld Trading (K) Ltd v Rushmore Company Limited & another* [2008] eKLR and the case of *Ramaben Ramnikal Patani & 2 others v Garden Chambers Limited* [2019] eKLR, in submitting that the applicant has identified one Mr Osman Erdinc Elsek as one of the directors of the plaintiff company who has been in active participation in this suit and in the mediation proceedings. It was also submitted that the said proceedings had culminated in an agreement that was later adopted as a Court order dated 2nd November, 2018, with respect to among others, three hundred and five housing units built by the plaintiff company on plot No Kilifi/Mtwapa/867. It was stated that Mr Osman Erdinc Elsek should present the company's documents on the contents of that order.
 7. In citing the case of *Post Bank Credit Limited v Nyamangu Holdings Ltd* [2015] eKLR, he urged this Court to summon the director for purposes of oral examination on the financial records and statements pertaining to the unsold properties for purposes of execution. He also referred to the case of *Salomon v Salomon and Co Ltd* [1897] wherein the Court strived to uphold the doctrine of separability in companies.
 8. Mr McCourt contended that in default of honouring the summons to appear and oral examination by the directors, failure to produce any and all documents as required pursuant to the provisions of Order 22 Rule 35 of the *Civil Procedure Rules*, and in the event that the applicant and the Court are unable to decipher the actual and true financial status of the company during the oral examination, this Court be



pleased to lift the corporate veil and hold the director(s) of the plaintiff company personally liable for satisfaction of the party and party costs. He relied on the case of *Petrol Oil (K) Ltd v Hosborne Arunga & 2 others* [2013] eKLR, where the Court lifted the veil of incorporation and held the directors personally liable to the claim, having failed to provide proper accounts in respect of the judgment debtor's assets.

9. The plaintiff relied on the provisions of Articles 24, 50 and 259 of the *Constitution of Kenya 2010* and the case of *Satinderjit Singh Matharu v Armajit Singh Gabir & 5 others* [2016] eKLR, in submitting that its director Deniz Elsek is domiciled in Turkey and noting the strange times which we are in of Covid-19 pandemic that has restricted movement, it is in the interest of justice that all parties are accorded a chance to be heard before any prejudicial orders are issued. The plaintiff further submitted that the 2nd defendant's request that the respondent be held liable for the judgment debtor's debt, is against the locus classicus of *Salomon v Salomon* (*supra*) wherein it was held that a company is in law a separate legal entity distinct from its members and directors.
10. It was submitted by the plaintiff that there is no sufficient evidence adduced by the 2nd defendant that it has attempted to execute against the plaintiff as all that the 2nd defendant has done is to make mere allegations and statements that a firm of Auctioneers failed to trace the plaintiff's assets, but that is not sufficient to warrant lifting of the corporate veil. The plaintiff contended that the corporate veil may only be lifted where the Court finds that there exists special circumstances indicating that the company is a mere façade concealing the true facts and that the company is involved in fraud. The plaintiff relied on the Court of Appeal decision in *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR.
11. The plaintiff submitted that he who alleges must prove and that the 2nd defendant had presented to this Court a copy of a title deed for Kilifi/Mtwapa/867 registered in the name of the plaintiff which is proof of ownership, thus it is misleading for the 2nd defendant to claim that the said property does not form part of the plaintiff's assets. The plaintiff averred that as attested by the 2nd defendant, the property herein is subject to several cases against the plaintiff.
12. The plaintiff relied on the case of *Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & another* [2016] eKLR and submitted that the lifting of the corporate veil remedy cannot be sought under order 22 rule 35 of the *Civil Procedure Rules*.

Analysis And Determination

13. I have considered the application filed herein and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff as well as the written submissions by Counsel for the parties. The issues that arise for determination are-
 - i. Whether Osman Erdinc Elsek, a director of the judgment debtor should be examined on oath on the state of affairs of the plaintiff and produce the judgment debtor's books of account, and any documents relating to operations of the judgment debtor's company; and
 - ii. If Osman Erdinc Elsek should be deemed personally liable to settle the party and party costs of KES 30,303,956/35 in default of compliance with issue No (i) herein above.
14. In the affidavit filed by the 2nd defendant, he deposed that by a letter dated April 17, 2019, the 2nd defendant demanded payment of the taxed costs of Kshs. 30,303,956.35 from the plaintiff. It was further deposed that the plaintiff had failed to settle the said taxed costs. The 2nd defendant averred that the Auctioneers had been unable to trace assets belonging to the plaintiff company and any efforts to execute had been thwarted.



15. The respondent opposed the application herein through the following grounds of opposition dated July 13, 2022-
- i. That the application is directed at the director of the respondent company instead of the respondent;
 - ii. That the application fails to appreciate the fact that the respondent is a distinct legal entity separate from its directors;
 - iii. That the application is premised on the flawed assumption that the corporate veil of the respondent has been pierced and the directors have assumed liability;
 - iv. That no application has been made and no grounds have been advanced for the piercing of the corporate veil thus the application lacks any legal leg to stand on; and
 - v. That the respondent stands to suffer prejudice if the application is allowed.

Whether Osman Erdinc Elsek, a director of the Judgment debtor should be examined on oath on the state of affairs of the plaintiff and produce the judgment debtor's books of account, and any documents relating to operations of the judgment debtor's company.

16. The application herein is premised on the provisions of Order 22 Rule 35 of the [Civil Procedure Rules, 2010](#) which state as hereunder-

“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.”

17. The above provisions were considered in the case of *Ultimate Laboratories v Tasha Bio Service Limited* NBI HCCC No 1287 of 2000 (unreported) which was cited by Judge Nzioka J, in [Tropical Wood Limited v Samilisinternatinal Investments](#) [2017] eKLR, wherein the Court observed that-

“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 within 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.”



18. It is not disputed that the plaintiff's suit against the 2nd defendant was withdrawn with costs to the 2nd defendant on July 24, 2018. Thereafter, the 2nd defendant filed its party and party bill of costs and a ruling on taxation was delivered on February 8, 2019 in favour of the 2nd defendant for KES 30,303,956.35. The 2nd defendant submitted that it has been unable to execute for the said costs as all attempts by Thaara Auctioneers to trace the plaintiff's attachable assets have borne no fruits. It is also not disputed that the only known asset belonging to the respondent is plot No Kilifi/Mtwapa/867 which is the subject of other litigation.
19. The plaintiff on the other hand submitted that the 2nd defendant has presented to this Court a copy of a title deed for Kilifi/Mtwapa/867 registered in the name of the plaintiff which is proof of ownership, thus it is a non-starter for the 2nd defendant to claim that the said property does not form part of the plaintiff's assets. In addition, it contended that the 2nd defendant has not adduced sufficient evidence to the effect that it has attempted to execute against the plaintiff.
20. In light of the foregoing, it is evident that the instant application is one among the many available modes of execution of orders and decree. As such, this Court is persuaded that the 2nd defendant is well within its rights to seek this Court to summon the plaintiff/judgment debtor's director to be examined on oath over the state of affairs of the plaintiff company. This Court is guided by the decision in *Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited* [2015] eKLR, where the Court held as follows-
- “A person to be summoned under Order 22 Rule 35 (c) of the *Civil Procedure Rules*, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor's annual financial statement, documents of title to property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”
21. The plaintiff submitted that one of its directors director Deniz Elsek is domiciled in Turkey and noting the strange times which we are in, of the Covid-19 pandemic that have restricted movement, it is in the interest of justice that all parties be accorded a chance to be heard before any prejudicial orders are made. This Court takes judicial notice that the Government of Kenya has since the filing of the present application given directives to the effect that all travelers above the age of 12 years arriving in the country through any point of entry will be required to show proof of either COVID-19 vaccination or a negative COVID-19 PCR test conducted not more than 72 hours before departure. Therefore, there is nothing stopping any of the plaintiff's directors who are domiciled outside Kenya from coming into this country to be examined on oath as to the state of affairs of the plaintiff/judgment debtor company and to produce the judgment debtor's books of account and other documentary evidence.

If Osman Erdinc Elsek shall be deemed personally liable to settle the party and party costs of KES. 30,303,956/35 in default of compliance with issue No (i) herein above.

22. The above issue calls for the lifting of the corporate veil in order for Osman Erdinc Elsek, the plaintiff's director, to be held personally liable for the debt herein, I find that based on the doctrine of ripeness, this is an issue that this Court can only determine after the examination under oath, of the plaintiff/judgment debtor's director and after considering the documentary evidence tendered on the affairs of the plaintiff company. The Supreme Court of Kenya in the case of *Communications Commission of*



Kenya & 5 others v Royal Media Services Ltd & 5 others Pet 14A, 14B & 14C of 2014 [2014] eKLR, while speaking to the Ripeness doctrine made the following observation-

“The doctrine focuses on the time when a dispute is presented for adjudication. The *Black’s Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:

“The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.”

23. This Court’s finding is that the application dated April 22, 2021 succeeds in part. This Court directs Mr Osman Erdinc Elsek to attend court on November 2, 2022, to be orally examined as to whether the plaintiff/judgment debtor has any property and/or means of satisfying the decree herein, and to produce any documents relating to the operations of the judgment debtor’s company including bank statements, to show the assets of the judgment debtor for purposes of satisfying the decree herein. Summons shall issue to Mr Osman Erdinc Elsek to attend Court on November 2, 2022 for the above purpose.

24. Costs of this application shall be borne by the plaintiff/respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiff/respondent

Mr Manda holding brief for Mr McCourt SC for the 2nd defendant

Mr Oliver Musundi – Court Assistant.

