



Wayaffe v Toner Holdings Limited & another; Stanbic Bank Kenya Limited (Garnishee); Aristocrats Concrete Limited (Proposed Interested Party) (Environment & Land Case E112 of 2022) [2024] KEELC 5920 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E112 OF 2022
JO MBOYA, J
SEPTEMBER 16, 2024**

BETWEEN

ALEXANDRE WAYAFFE PLAINTIFF

AND

TONER HOLDINGS LIMITED 1ST DEFENDANT

CORRINE MARIE MADELEINE GENEVIEVE 2ND DEFENDANT

AND

STANBIC BANK KENYA LIMITED GARNISHEE

AND

ARISTOCRATS CONCRETE LIMITED PROPOSED INTERESTED PARTY

RULING

Introduction And Background:

1. The Plaintiff/Applicant has approached the court vide Notice of Motion Application dated 25th April 2024 brought pursuant to the provisions of Sections 1A, 1B, 3A and 94 of the Civil Procedure Act; Order 1 Rule 10(2); Order 23 Rules (1) (2) & (3); Order 51 and Order 50 of the Civil Procedure Rules and Article 159(2)(a) & (d) of the Constitution and in respect of which same [Applicant] seeks the following reliefs:

- i. Spent
- ii. Pending inter partes hearing and determination of this Application, the honourable court be and is hereby pleased to issue a Garnishee Order Nisi directed against the Garnishee herein to preserve and/or attach a sum of KShs. 30,307,046.40 held by it in bank account number



010000039459 in the name and on behalf of Aristocrats Concrete Limited which sum of money is the decretal sum in the manner pursuant to the ruling delivered on 20th December 2023.

- iii. This Honourable Court be pleased to grant the Plaintiff leave to execute the decree and/or order of this Honourable Court issued in the ruling delivered on 20th December 2023 against the 1st and 2nd Defendants before taxation of the Party and Party Bill of Costs.
 - iv. Aristocrats Concrete Limited be and is hereby joined in the matter as an interested party for the limited purpose of the hearing and determination of this application.
 - v. The Honourable Court be and is hereby pleased to lift the corporate veil of the 1st Defendant/Judgement Debtor herein and Aristocrats Concrete Limited be and is hereby held personally liable to pay to the Plaintiff a sum of KShs. 30,307,046.40 being the decretal sum pursuant to the ruling of the honourable court delivered on 20th December 2023.
 - vi. This Honourable Court be and is hereby pleased to issue a Garnishee Order Absolute directed at the Garnishee to pay to the Plaintiff a sum of KShs. 30,307,046.40 held by it in the bank account 010000039459 in the name and to the credit of Aristocrats Concrete Limited which sum of money is the decretal sum in the matter pursuant to the ruling delivered on 20th December 2023.
 - vii. The costs of this Application be borne by the 1st Defendant and the Interested Party.
2. The instant Application is premised and anchored on a plethora of grounds which are enumerated in the body thereof. Furthermore, the Application is supported by the Affidavit of the Applicant [Deponent] sworn on even date and to which the Deponent has attached eight documents/annexures.
 3. Upon being served with the Application beforehand, the 1st Defendant/Respondent filed a Replying Affidavit sworn on 4th June 2024, whereas the Proposed Interested Party filed a Replying Affidavit sworn on 10th June 2024.
 4. On the other hand, the Garnishee filed a Replying Affidavit sworn on 14th June 2024 and in respect of which the Garnishee has contended that the Application beforehand is not only premature and misconceived but same [Application] constitutes an abuse of the due process of the court.
 5. The Application came up for hearing on 22nd May 2024, whereupon the Advocates for the respective parties covenanted to canvass and dispose same by way of written submissions. In this regard, the Applicant thereafter proceeded to and filed written submissions dated 10th July 2024, whereas the 1st Defendant/Respondent and the Proposed Interested Party filed written submissions dated 22nd July 2024.
 6. On behalf of the Garnishee, written submissions are dated 23rd July 2024. For coherence, the three [3] sets of written submissions, which have been highlighted in the preceding paragraph as well as the instant paragraph, form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions

7. The Applicant filed written submissions dated 10th July 2024 and wherein same [Applicant] has adopted the grounds contained at the foot of the Application and similarly reiterated the averments in the body of the Supporting Affidavit.



8. Furthermore, the Applicant has thereafter raised, highlighted and canvassed four [4] salient issues for consideration by the court.
9. Firstly, Learned Counsel for the Applicant has submitted that the Applicant has established and demonstrated sufficient cause and basis to warrant leave being granted to the Applicant to commence and proceed with execution of the decree before taxation. In this regard, Learned Counsel for the Applicant has submitted that the Applicant herein was diagnosed with malignant form of cancer and thereafter same [Applicant] underwent a surgery to treat the ailment.
10. Additionally, Learned Counsel for the Applicant has submitted that arising from the diagnosis and the subsequent surgery, the Applicant herein continues to receive medication and which requires a great deal of financial resources.
11. On the other hand, Learned Counsel for the Applicant has also submitted that the Applicant herein utilized his savings towards the payment of the purchase price of the suit property, which purchase collapsed as a result of the fraudulent conduct on the part of the 1st Defendant/Respondent.
12. Arising from the foregoing, Learned Counsel for the Applicant has therefore submitted that the Applicant requires finances with a view to meeting his [Applicant] medical bills and other attendant expenses. In this regard, Learned Counsel for the Applicant has posited that the need to procure medication and the attendant expenses founds a proper basis upon which leave should be granted to enable the Applicant to execute the judgement of the court before taxation.
13. In support of the submissions that the Applicant has established and demonstrated sufficient cause to warrant the grant of leave, Learned Counsel for the Applicant has cited and referenced the holding in the case of Mercedes Sanchez Raul Tussel v Samken Limited, Abercrombie & 2 Others 2002 eKLR.
14. Secondly, Learned Counsel for the Applicant has submitted that the court ought to proceed to and decree the lifting/piercing of the veil of the 1st Defendant/Respondent, with a view to enabling the court to deal directly with the shareholders/directors of the 1st Defendant/Respondent. In this regard, Learned Counsel for the Applicant has posited that the 1st Defendant has conducted herself in an improper and fraudulent manner and thus giving a basis for the lifting/piercing of the corporate veil.
15. In particular, Learned Counsel for the Applicant has submitted that the 1st Defendant/Respondent and the Proposed Interested Party herein proceeded to withdraw all the monies which were in the bank account of the 1st Defendant/Respondent, leaving only a paltry sum of KShs. 200,000/- Only.
16. Furthermore, Learned Counsel for the Applicant has submitted that the act of withdrawing the monies which were in the account of the 1st Defendant/Respondent was deliberate and intentional and, in any event, same was intended to defeat the realization of the judgment of the court.
17. On the other hand, Learned Counsel for the Applicant has also submitted that the Proposed Interested Party is a major shareholder in the 1st Defendant/Respondent and furthermore same [Proposed Interested Party] is the controlling hand in the operations of the 1st Defendant. In this regard, it has been posited that the Proposed Interested Party is therefore the hand and mind that controls the affairs of the 1st Defendant/Respondent.
18. Additionally, Learned Counsel for the Applicant has also submitted that the Proposed Interested Party and the 1st Defendant/Respondent share directors and thus it is evident that the 1st Defendant/Respondent herein is merely an agent of the Proposed Interested Party.



19. At any rate, Learned Counsel for the Applicant has referenced various paragraphs of the Supporting Affidavit wherein the Applicant has highlighted the various actions committed by both the 1st Defendant/Respondent and the Proposed Interested Party, which paragraphs it is contended found a proper basis to warrant the lifting of the veil.
20. In support of the submissions touching on and concerning the lifting of the veil, Learned Counsel for the Applicant has cited and referenced various decisions including African Banking Corporation Limited v Nestar Limited (under receivership) and 6 Others 2014 eKLR, Mombasa Bricks and Tiles Limited & 5 Others v Arvind Shah & 7 Others 2019 eKLR and Stephen Njoroge Gikera & Another v Econite Mining Co. Limited & 7 Others 2019 eKLR.
21. Thirdly, Learned Counsel for the Applicant has submitted that upon the lifting/piercing of the veil, the court should be pleased to order and direct that the Proposed Interested Party be made personally liable to satisfy/meet the liabilities attendant to the suit judgment.
22. Fourthly, Learned Counsel for the Applicant has submitted that the Application for Garnishee is timely and meritorious and same should be allowed. At any rate, Learned Counsel for the Applicant has submitted that the contention that the Application for Garnishee order is premature as posited by Learned Counsel for the Garnishee is incorrect and mistaken.
23. Furthermore, Learned Counsel for the Applicant has submitted that the court ought to grant the Order Nisi so as to preserve the integrity of the judicial process and in particular to avert the repeat of the improper conduct by the 1st defendant/Respondent and the Proposed Interested Party who proceeded to and withdrew all the monies that were obtaining in the accounts of the 1st Defendant/Respondent in a bid to defeat the judgement of the court.
24. In the premises, Learned Counsel for the Applicant has submitted that the Application beforehand is therefore meritorious and same ought to be granted. For good measure, Learned Counsel for the Applicant has posited that the court ought to lift the veil of the 1st Defendant/Respondent and thereafter proceed to grant a Garnishee Nisi against the Garnishee Bank.

b. 1st Defendant/Respondent and the Proposed Interested Party's Submissions

25. The 1st Defendant/ Respondent and the Proposed Interested Party filed joint written submissions dated 22nd July 2024 and wherein same have adopted and reiterated the contents of the Replying Affidavits sworn on 4th June 2024 and 10th June 2024 respectively. Furthermore, the 1st Defendant/Respondent and the Proposed Interested Party have thereafter highlighted four[4] salient issues for consideration.
26. First and foremost, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the Applicant herein has neither established nor demonstrated sufficient cause or basis to warrant leave being granted to commence and proceed with execution before taxation of the costs. In particular, Learned Counsel has posited that prior to and/or before granting leave, the court ought to be treated to plausible and cogent reasons and not otherwise.
27. Additionally, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the grant of leave to execute prior to and before the taxation of costs should be undertaken and/or issued in exceptional circumstances. For good measure, Counsel has posited that the execution before taxation of costs has the legal consequence of exposing the Judgement Debtor to double execution and thus unnecessary execution costs.



28. Other than the foregoing, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also submitted that the Application beforehand and in particular the limb seeking leave to execute before taxation of costs has been mounted with unreasonable and inordinate delay which has not been accounted for. In particular, it has been contended that the Application has been mounted after the lapse of more than eight months from the date when the judgment was rendered/delivered by the court.
29. In view of the foregoing, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has posited that the Applicant herein has therefore failed to meet the statutory threshold to warrant the grant of leave to commence execution proceedings before the taxation of costs.
30. To this end, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has cited and relied on inter alia the holding in the case of Mercedes Sanchez Raul Tussel v Samken Limited, Abercrombie & 2 Others 2002 eKLR, Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi 2014 eKLR, Sparkle Properties Limited v Johanna Ngai & 8 Others 2020 eKLR and Erad Suppliers & General Contractors v NCPB 2012 eKLR respectively.
31. Secondly, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also submitted that the Applicant herein has neither established nor demonstrated the requisite basis to warrant the lifting of the veil of the 1st Defendant either in the manner sought or at all. In any event, counsel has posited that the lifting of the veil of a company can only be undertaken and/or gone into in exceptional circumstances, albeit upon proof that the company is sham or was incorporated for purposes of improper and criminal activities.
32. On the other hand, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also submitted that the court can only venture forward and pierce the veil where it has been demonstrated that the company has engaged and/or involved itself in illegalities.
33. Be that as it may, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the Applicant has failed to demonstrate that the 1st Defendant is sham or has engaged in improper, illegal and fraudulent activities to warrant the piercing of the veil.
34. Furthermore, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also contended that the mere fact that a company, 1st Defendant/Respondent not excepted, is unable to satisfy the decretal sum or better still is insolvent, does not found a basis for the lifting/piercing of the veil of the company.
35. To this end, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has cited and referenced various decisions including Kolaba Enterprises Limited v Sham Sud Hussein Varvani & Another 2014 eKLR, H. L Bolton Engineering Co. Limited v T.J Graham and Sons Limited 1956 3 All ER, Adam v Monarch Development Limited & 2 Others 2023 KELC 16331 and Ukwala Supermarket v Jaideep Shah & Another 2022 eKLR respectively.
36. Thirdly, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the Applicant herein has failed to demonstrate a basis to warrant the joinder of the Proposed Interested Party in the matter beforehand. In particular, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has posited that a party can only be joined into a suit during the pendency of the proceedings with a view to assisting the court to effectively and effectually determine the issues in dispute.



37. Nevertheless, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has contended that in respect of the instant matter, the suit has since been heard and determined and all the issue[s] hitherto in dispute have been resolved vide judgment rendered on 16th October 2023.
38. At any rate, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that in respect of the instant matter there is no basis upon which the Proposed Interested Party ought to be joined in the matter. For good measure, learned counsel has invited the attention of the court to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules which underpin joinder of parties.
39. Furthermore Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also cited and referenced various decisions including *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* 2014 eKLR, *Mary Beach Limited v Attorney General & 18 Others* 2018 eKLR, *Keiran Day & 5 Others v Ceres Estates Limited (in receivership)* 2011 eKLR, *Lilian Wairimu Ngatho & Another v Moki Saving Cooperative Society Limited & Another* 2014 eKLR and *JMK v MWM & Another* 2015 eKLR respectively.
40. Finally, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the Application for Garnishee Order Nisi is not only premature and misconceived but same is legally untenable. In particular, Learned Counsel has posited that the Order Nisi constitutes execution which cannot be gone into prior to and before leave to execute has been granted and/or issued.
41. In addition, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has also submitted that other than the Application being premature on account of the fact that no leave has since been issued, the Order Nisi can only issue and be granted against a Judgement Debtor and not any other party, the Proposed Interested Party not excepted.
42. In support of the submissions that an Order Nisi can only be issued to attach the debts due to a Judgement Debtor, Learned Counsel has cited various decisions including *Nyandoro & Co. Advocates v National Water Conservation and Pipeline Corporation, Kenya Commercial Bank Group Limited (Garnishee)* 2021 eKLR, *Mengich T/A Mengich & Co. Advocates & Another v Joseph Mabuai* 2018 eKLR and *James G. K. Njoroge T/A Baraka Tools and Hardware v APA Insurance Co. Limited & 3 Others* 2018 eKLR.
43. Premised on the foregoing submissions, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has invited the court to find and hold that the Applicant herein has failed to satisfy the requisite threshold to warrant the grant of the reliefs sought. In this regard, Counsel has contended that the Application is devoid of merit and thus ought to be dismissed.

c. Garnishee's Submissions:

44. The Garnishee filed written submissions dated 23rd July 2024 and wherein same [Garnishee] has reiterated the contents of the Replying Affidavit sworn on 14th June 2024 and thereafter highlighted and canvassed one salient issue for consideration by the court.
45. Suffice it to point out that Learned Counsel for the Garnishee has submitted that the garnishee proceedings have been commenced prematurely long before leave to execute has been granted. Furthermore, Learned Counsel has contended that the garnishee orders are being sought against a party who has not been joined into the proceedings.



46. Based on the foregoing, Learned Counsel for the Garnishee has submitted that the garnishee proceedings and the order nisi can only arise once the court has granted the leave sought to commence execution before taxation and also lifted the veil of the 1st Defendant, which are yet to arise and/or accrue.
47. Arising from the foregoing, Learned Counsel for the Garnishee has posited that the Garnishee herein ought to be discharged from the proceedings. In any event, Learned Counsel for the Garnishee has submitted that the Proposed Interested Party is a separate and distinct company from the 1st Defendant.
48. In short, Learned Counsel for the Garnishee has submitted that the Application beforehand is premature and misconceived and hence same ought to be dismissed with costs to the Garnishee.

Issues For Determination:

49. Having reviewed the Application and the responses thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues emerge [crystalise] and are thus worthy of determination:
 - i. Whether the Applicant herein has established and/or demonstrated the requisite basis to warrant leave being granted to commence and proceed with execution before taxation or otherwise;
 - ii. Whether the Applicant has demonstrated sufficient cause to warrant the lifting/piercing of the 1st Defendant's veil or otherwise;
 - iii. Whether the Applicant has satisfied the threshold to warrant the joinder of the Proposed Interested Party in the suit and consequential execution against same; and
 - iv. Whether the garnishee proceedings and the garnishee nisi sought, are premature and misconceived or otherwise.

Issue No. 1

i. Whether the Applicant herein has established and/or demonstrated the requisite basis to warrant leave being granted to commence and proceed with execution before taxation or otherwise

50. The Applicant herein has sought to be granted leave to commence and proceed with execution of the judgment, which was rendered on 16th October 2023 prior to and before taxation. In this regard, the Applicant has invoked the provisions of section 94 of the *Civil Procedure Act*, which underpins the grant of leave to commence execution before taxation.
51. According to the Applicant, same is desirous to commence and proceed with execution before taxation because same [Applicant] was diagnosed with malignant cancer and thereafter same [Applicant] underwent a medical surgery. In this regard, the Applicant avers that same is still on medication and hence requires financial resources to enable same to procure medication as well as other related expenses.
52. Owing to the foregoing, the Applicant contends that having been diagnosed with malignant cancer and having underwent medical surgery and taking into account the financial resources required to meet the medication and related expenses, same has thus established and demonstrated sufficient basis to warrant the leave being granted.



53. On the other hand, Learned Counsel for the 1st Defendant/Respondent and the Proposed Intended Party have contended that the Applicant herein has neither established nor demonstrated the requisite basis to warrant being granted leave to commence execution before taxation.
54. In particular, Learned Counsel for the 1st Defendant/Respondent and the Proposed Intended Party has contended that the Application beforehand has been made and mounted with unreasonable and inordinate delay, which delay has neither been accounted for nor explained. In this respect, it has been contended that if the Applicant was keen to procure and obtain leave, same [Applicant] ought to have approached the court timeously and with due diligence.
55. Other than the forgoing, Learned Counsel for the 1st Defendant/Respondent and the Proposed Intended Party has also contended that the Applicant herein ought to have generated the bill of costs and shared same with counsel for the 1st Defendant Respondent to facilitate agreement or taxation. However, Learned Counsel has submitted that the Applicant herein appears to be contented with the delay in filing the Bill of Costs, for reasons only known to same [Applicant].
56. In addition, Learned Counsel for the 1st Defendant/Respondent and the Proposed Intended Party has also submitted that the grant of leave to commence execution prior to taxation ought to be granted with necessary circumspection, insofar as the grant of such leave would entail double execution as against the judgement debtor. In this regard, it has been contended that such a scenario is bound to subject the Judgement Debtor to unnecessary expenses and by extension double jeopardy.
57. Having reviewed the rival submissions, I beg to take the following position. Firstly, the Applicant herein has averred that same was diagnosed with malignant cancer and thereafter same underwent medical surgery. Besides, the Applicant has also averred that same continues to seek further treatment, which comes with the attendant medical expenses/charges.
58. Suffice it to point out that the averments by the Applicant pertaining to and concerning the medical treatment and the attendant expenses, have neither been controverted nor impugned by either of the parties. In this regard, I find and hold that the reasons that have been advanced by the Applicant to underpin the request for leave to proceed with the execution before taxation are plausible and tenable.
59. Be that as it may, it is not lost on this court that the grant of leave to commence execution before taxation should be made and/or issued in exceptional circumstances so as to avert a scenario where the judgement debtor is exposed to double execution and by extension double jeopardy.
60. Furthermore, it is worth restating that execution is never meant to mete out and or subject the judgement debtor to punishment. Consequently and in this regard, the Court is obliged to exercise due caution before granting leave to proceed with execution before taxation.
61. To this end, it suffices to adopt and reiterate the holding in the case of African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 others [2014] eKLR where the Court considered the circumstances to be taken into account prior to and before granting leave to execute before taxation.
62. For coherence, the Court stated and held thus:

My view of the matter is, the mischief sought to be addressed by Section 94 was to protect a judgment debtor from suffering multiple executions in respect of the same suit; i.e one in respect of the principal sum and the other for the costs after ascertainment. In this regard, if it is shown to the satisfaction of the court that the judgment creditor has foregone or waived costs and that the execution is for the principal sum and interest only, there is nothing in law, in my view, that bars the court to record such a fact and make an order accordingly.



63. The import and tenor of Section 94 of the *Civil Procedure Act* which underpins the necessity for leave to commence execution before taxation and the circumstances to be satisfied before such leave can be granted, was also highlighted/ elaborated upon in the case of *Erad Suppliers & General Contracts v NCPB - Misc. Civ. Case No. 639 of 2009* (UR) where the court [Odunga], as he then was, stated and held thus:

In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a party entitled to costs has abandoned or waived the same, in my view, Section 94 of the *Civil Procedure Act* does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary.”

64. Taking into account the averments raised and espoused by the Applicant and juxtaposing same against the apprehension of double jeopardy, it is my humble view that the circumstances enunciated by the Applicant are grave enough to warrant of leave to commence execution being granted, prior to and before taxation of the costs.
65. At any rate, there is no gainsaying that the process attendant to the taxation of costs may in certain instances be long drawn out and take quite a bit of time. Furthermore, it is also not lost on the court that a party aggrieved by the certificate of taxation may feel obliged to file and mount a reference in terms of the provisions of Rule 11 of the Advocates Remuneration Order.
66. In the circumstances, my answer to issue number one [1] is to the effect that the Applicant herein has indeed placed before the court plausible and cogent explanation to warrant the grant of leave to commence execution, prior to and before taxation of costs.

Issue No. 2

ii. Whether the Applicant has demonstrated sufficient cause to warrant the lifting/piercing of the 1st Defendant’s veil or otherwise

67. Having disposed of the first issue, which relates to the necessity to grant leave to commence execution before taxation of the costs, it is now apposite to venture forward and address the critical question pertaining to the lifting/piercing of the veil of the 1st Defendant.
68. The Applicant herein has contended that following the delivery of the judgement, same [Applicant] took out an Application for Garnishee against the 1st Defendant/Respondent’s bankers, in a bid to realise the judgement sum. However, it has been contended that upon the institution of the Garnishee Proceedings, the 1st Defendant/Respondent and the Proposed Interested Party proceeded to an withdrew all the monies that were in the bank account of the 1st Defendant/Respondent.
69. Furthermore, the Applicant has contended that upon the withdrawal of the monies which were obtaining in the bank account of the 1st Defendant/Respondent the said 1st Defendant/Respondent generated a notice to the tenants of the premises known as Muthaiga Heights and wherein the 1st Defendant/Respondent advised the tenants thereat to cease depositing monies in the bank account under reference.



70. In addition, the Applicant has also averred that subsequent to the issuance of the notice to the various tenants the 1st Defendant/Respondent also proceeded to and closed the bank account hitherto held at Stanbic Bank Limited, who was the Garnishee.
71. Premised on the foregoing, Learned Counsel for the Applicant has therefore implored the Court to find and hold that the Applicant herein has established and demonstrated lawful basis to warrant the piercing and/or lifting of the 1st Defendant/Respondent's veil and thereafter to pave way for execution against the Proposed Interested Party, who is stated to be the major shareholder in the 1st Defendant/Respondent.
72. On the other hand, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the lifting and/or piercing of the corporate veil of the 1st Defendant/Respondent can only be gone into and undertaken in exceptional circumstances and not otherwise.
73. Besides, Learned Counsel has submitted that the piercing/lifting of the veil of the company can only be undertaken where it is demonstrated and/or proved that the company is a sham or has engaged in improper, illegal and criminal activities and thus the necessity to pierce the veil and deal with the persons behind the company in question.
74. Additionally, the Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has posited that before the veil of the company can be lifted, it is the obligation of the Applicant to place before the court plausible and cogent evidence and in particular to prove the allegations underpinning the application for piercing of the veil.
75. Be that as it may, Learned Counsel for the 1st Defendant/Respondent and the Proposed Interested Party has submitted that the Applicant beforehand has failed to place before the court sufficient and credible material to warrant the piercing/lifting the 1st Defendant's veil. In any event, it has been contended that the fact that a company is unable to settle and/or satisfy her debt, is not a proper basis to warrant piercing of the veil.
76. Taking into account the submissions by the respective parties, there is no gainsaying that the lifting and/or piercing of the company veil can only be done in exceptional circumstances. Furthermore, before a court of law ventures forward and proceeds to pierce the corporate veil of a company, the Applicant must place before the court credible evidence to demonstrate that the company in question is sham, or has engaged in improper, illegal and criminal activities.
77. Other than the foregoing, it is also settled law that the mere fact that a company is unable to meet and/or satisfy her debts or better still, is insolvent does not found a basis to warrant the piercing of the veil.
78. To this end, it suffices to cite and reference the holding in the case of *Ukwala Supermarket v Jaideep Shah & Another* 2022 eKLR where the court stated and held thus:

18. The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as 'A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.' (See *Jones vs. Lipman & Another* [1962] 1 All ER 442) and *H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held;

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act



in accordance with 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 they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”

79. The court venture further and stated as hereunder:

21. Piercing the corporate veil is an equitable remedy. The burden rests on the party asserting such a claim to demonstrate, using the factors outlined above, that the two conditions have been met. Each case is determined on its own merits under a totality of circumstances test.

80. Other than the foregoing, the circumstances under which the corporate veil of a company may be lifted and/or pierced were also discussed in Halsbury’s Laws of England 4th Edition as follows:

“90. Piercing the corporate veil. Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.

81. Duly guided by the ratio decidendi and the observations which have been highlighted in the preceding paragraphs, it is now appropriate to revert to the instant matter and to discern whether the Applicant herein has duly discharged the burden of proof to warrant the lifting/piercing of the corporate veil either in the manner sought or otherwise.

82. To start with, the Applicant contends that following the delivery of the judgement in respect of the instant matter, same [Applicant] took out Garnishee Proceedings with a view to realising the judgement sum. However, the Applicant contends that as soon as the Garnishee Proceedings were taken, the 1st Defendant/Respondent and the proposed Interested Party, proceeded to and withdrew all the monies which were obtaining in the designated bank account.

83. Furthermore, the Applicant has contended that thereafter the 1st Defendant/Respondent proceeded to and advised the bank to close the designated bank account. Consequently, and in this regard, the Applicant posits that the actions by the 1st Defendant/Respondent were aimed at defeating the realization of the judgement.

84. Other than the foregoing, the Applicant has also contended that the 1st Defendant/Respondent also generated a memo to the tenants occupying its [1st Defendant/Respondent’s] premises, namely, Muthaiga Heights apartments to cease depositing monies in the account which had hitherto been provided.



85. Based on the foregoing, the Applicant herein now contends that same has placed before the court sufficient and credible material to warrant the piercing and the lifting of the veil of the 1st Defendant/ Respondent so as to enable execution to proceed as against the Proposed Interested Party.
86. To my mind, the withdrawal of the monies which were held in the designated account by the 1st Defendant does not ipso facto denote the commission of any fraud or criminal offence. In any event, it suffices to point out that mere suspicion and apprehension no matter how strong, cannot found basis for lifting of the veil of the company.
87. Secondly, it is also worthy to point out that the Applicant herein has not demonstrated that the 1st Defendant/Respondent is a sham company and merely an alter ego of its directors and shareholders. On the contrary, there is no gainsaying that the 1st Defendant/Respondent actually owns properties including Muthaiga Heights, wherein same is indicated to have generated a memo to its tenants.
88. On the other hand, it is also important to underscore that the execution process, which the Applicant adverts to have commenced beforehand and which is being relied upon to found the basis for lifting of the veil, appears to have been illegal and thus a nullity. For good measure, no execution could have been commenced prior to and without taxation of costs unless leave to do so had hitherto been granted.
89. In my humble view, the averments being relied upon by the Applicant herein to warrant the piercing and/or lifting of the veil, do not meet and or satisfy the established threshold for lifting of the veil.
90. In the premises, my answer to issue number two [2] is to the effect that the Applicant herein has failed to demonstrate sufficient cause and/or basis to warrant the lifting/piercing of the 1st Defendant's corporate veil either as sought or at all. In any event, the lifting and/or piercing of the corporate veil of a company, the 1st Defendant not excepted, ought to be undertaken in exceptional/ peculiar circumstances and not for the mere asking.

Issue No. 3

iii. Whether the Applicant has satisfied the threshold to warrant the joinder of the Proposed Interested Party in the suit and consequential execution against same

91. The Applicant herein has also sought for the joinder of the Proposed Interested Party into the suit for the limited purposes of the hearing and determination of the subject Application. For good measure, the application for joinder of the Proposed Interested Party is underpinned by the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules 2010.
92. Furthermore, the Applicant has contended that upon the joinder of the Proposed Interested Party as an interested party and coupled with the lifting of the 1st Defendant's veil, the court be pleased to proceed to grant liberty for execution to proceed against the Proposed Interested Party.
93. In addition, the Applicant has also contended that the execution against the Proposed Interested Party should proceed on the basis of an order nisi to attach the monies which are held in the designated account belonging to the Proposed Interested Party.
94. Despite the submissions by the Applicant herein, it is worthy to recall and reiterate that the joinder of a party either as an interested party or otherwise, can only be undertaken and or made at any stage of the proceedings, meaning during the pendency of the proceedings; and not after the proceedings have terminated.
95. Additionally, it is not lost on this court that the purpose of joinder of a party in terms of Order 1 Rule 10(2) of the Civil Procedure Rules is intended to enable the party joined to assist the court in arriving at



an effective and effectual determination of the issues in controversy. Suffice it to underscore that issues in controversy can only be the issues which the court needs to engage with and determine with a view to arriving at a fair and just determination.

96. Arising from the foregoing, there is no gainsaying that once judgement has been rendered and/or delivered in a matter, the delivery of judgement determines all the issues in dispute and henceforth there is no issue in controversy to warrant the joinder of a party in whatsoever capacity.
97. To my mind the prayer by the Applicant herein to have the Proposed Interested Party joined has been made too late in the day and thus same shall not serve any meaningful purpose. At any rate, it is worth pointing out that even if the court were to decree joinder [which the court is not inclined to do], the joined party would thereafter be at liberty to file pleadings and documents.
98. Notwithstanding the foregoing, it suffices to underscore that the intended joinder that is sought by and on behalf of the Applicant is moot and redundant to the extent that the suit has since been heard and determined. In this regard, the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules are therefore irrelevant and unhelpful.
99. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of *J.M.K v MWK & Another* 2015 eKLR where the court held and stated thus:

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

100. Flowing from the foregoing decision, there is no gainsaying that joinder of a party can only be done during the pendency of the suit and to enable the Court to determine all the issues in controversy and not otherwise. However in respect of the instant matter, the Applicant seeks the joinder ex post delivery of the judgement.
101. In my humble view, the intended joinder is not only premature and misconceived but same [intended joinder] constitute an abuse of the due process of the court. Furthermore, no joinder of a party can be done merely for purposes of execution against such a party in the manner sought beforehand.
102. Before departing from the issue herein, it is also worth recalling that the Applicant desires to have the Proposed Interested Party joined and thereafter same [Proposed Interested Party] to be held liable to pay the debt due and owing to the Applicant.
103. Suffice it to point out that the intended execution against the Proposed Interested Party would also be still borne insofar as same offends the provisions of Section 94 of the *Civil Procedure Act*, taking into account that no leave had hitherto been granted before the seeking of the execution. Furthermore, the



Application for leave to take out execution cannot be made simultaneously, with the application for execution.

104. Quite clearly, the application for leave must precede the execution and be dealt with beforehand so as to [sic] pave way for the intended execution.

Issues No. 4

iv. Whether the garnishee proceedings and the garnishee nisi sought, are premature and misconceived or otherwise.

105. The Applicant herein filed the instant Application and in respect of which same sought a plethora of reliefs. To start with, the Applicant is seeking leave to commence and proceed with execution of the judgement sum before taxation. Suffice it to point out that the court has since dealt with the question of leave.
106. Nevertheless, what is important at this juncture is whether the Application for leave to commence and proceed with execution could be mounted simultaneously with the actual execution vide garnishee proceedings.
107. Put differently, was it necessary for the Application for leave to be filed and canvassed prior to the commencement of execution. Better still, the question that the court must grapple with is whether the filing of an application for leave to commence execution before taxation is synonymous with the grant of leave.
108. To my mind where the law provides for leave to be sought for and obtained before the doing of an act, [like the situation underpinned by Section 94 of the *Civil Procedure Act*] it behooves the applicant/claimant to first and foremost procure and obtain the leave before doing the act for which leave was being sought.
109. At any rate, it is imperative to state and point out that the filing of an application for leave, like in the instant case, does not denote that leave shall automatically be granted or issued. Instructively, the issuance of leave is not as a matter of right. Neither is the issuance of leave a mechanical process, for one to imagine that once leave is sought for, same shall automatically issue.
110. To the contrary, there is no gainsaying that where one files an application for leave for the doing of an act, the designated person, the Applicant not excepted, is called upon to place before the court plausible explanation and thereafter the court will calibrate on the explanations availed and thereafter exercise its discretion, one way or the other.
111. Simply put, I hold the humble position that the commencement of execution proceedings by way of garnishee in terms of Order 23 of the Civil Procedure Rules, long before leave was granted was premature, mistaken and misconceived. For good measure, the commencement of the garnishee proceedings long before leave was issued is tantamount to placing the wagon before the horse.
112. In this respect, I beg to point out that the submissions filed by Learned Counsel for Garnishee are meritorious and spot on. Notably, garnishee proceedings are execution proceedings and one cannot be seeking leave to commence execution, yet before the leave is granted, the execution proceedings have been commenced.
113. On the other hand, it is also worthy to underscore that garnishee proceedings are intended to attach the debts due to and owing in favour of a judgement debtor. In this regard, the provisions of Order 23 of the Civil Procedure Rules are unequivocal and devoid of ambiguity.



114. Without belabouring the point, garnishee proceedings can only be taken with a view to attaching the debts due to and owing in favour of a judgement debtor and not a Proposed Interested Party or better still, an interested party.
115. In view of the foregoing, it is my finding and holding that the garnishee proceedings, which are indeed execution proceedings, were commenced prematurely and contrary to the provisions of Section 94 of the *Civil Procedure Act*. For good measure, it was incumbent upon the Applicant to await the decision of the court as pertains to whether leave to commence execution before taxation, would have been granted or otherwise.
116. Before departing from the issue herein, it suffices to take cognisance of the holding of the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR

However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that *Petition No. 10 of 2014* has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. *Petition No. 10 of 2014* having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.

117. Though the Supreme Court was not dealing with a situation touching on and/or concerning the grant of leave to commence execution before taxation, the ratio decidendi emanating from the decision of the court is to the effect that where leave is required, same must be procured and obtained beforehand. Furthermore, the court also posited that a person who desires to obtain such leave, cannot proceed to do the thing for which leave is required before the leave has been granted.
118. In respect of the instant matter, the Applicant certainly knew that same required the leave to commence execution but before the leave could be granted same [Applicant] was already seeking garnishee order nisi which is itself execution.
119. Simply put, the Application by the Applicant herein is omnibus and thus amounts to an abuse of the due process of the court. Suffice it to reiterate that any application before the court must be undertaken in a pragmatic manner and not otherwise.



Final Disposition:

120. Flowing from the discussion [details highlighted in the body of the ruling] it must have become crystal clear that the Application beforehand has only succeeded on one limb only, namely, the limb seeking leave to commence execution before taxation of costs.
121. Other than the foregoing, the rest of the prayers at the foot of the Application are not only premature and misconceived but same are also legally untenable taking into account the provisions of Order 1 Rules 10(2) and Order 23 of the Civil Procedure Rules 2010.
122. In the premises, the final orders that commend themselves to the court are as hereunder:
- i. Leave be and is hereby granted to the Applicant to commence and proceed with execution before taxation of costs as against the 1st Defendant/Respondent.
 - ii. The prayer for joinder of the Proposed Interested Party be and is hereby dismissed.
 - iii. The prayer for lifting/piercing the veil of the 1st Defendant/Respondent be and is hereby declined.
 - iv. The garnishee proceedings against the Garnishee are hereby declared premature and misconceived. Same be and are hereby struck out.
 - v. The Proposed Interested Party be and is hereby awarded cost of the Application and same [costs] shall be borne by the Applicant.
 - vi. The Garnishee is similarly awarded costs of the Application and same to be borne by the Applicant.
 - vii. The 1st Defendant/Respondent shall however bear own costs of the Application.
123. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Hans Oichoe for the Plaintiff/Applicant.

Mr. Charles Agwara for the 1st Defendant/Respondent and Proposed Interested Party.

Ms. Wanja for the Garnishee.

No Appearance for the 2nd Defendant.

