



**Sunfunder INC & another v Astonfield Solesa Sola Kenya Limited (Commercial Case E205 of 2021) [2025] KEHC 946 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 946 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E205 OF 2021  
MN MWANGI, J  
JANUARY 17, 2025**

**BETWEEN**

**SUNFUNDER INC ..... 1<sup>ST</sup> PLAINTIFF**

**BEYOND THE GRID SOLAH FUND, LLC ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ASTONFIELD SOLESA SOLA KENYA LIMITED ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 19<sup>th</sup> July 2023, filed by the plaintiffs/decreed holders pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 22 Rule 35 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.
2. The plaintiffs seek an order that Ameet Lanchand Devshi Shah, a Director/Principal Officer of the defendant/judgment debtor, be summoned to appear in Court to produce financial documents or accounts related to the judgment debtor's loan facility, and for oral examination on the defendant company's financial affairs, and that in default of compliance with the above, this Court be pleased to lift the defendant company's corporate veil and issue arrest warrants against the said Ameet Lanchand Devshi Shah in execution of the decree issued on 16<sup>th</sup> December 2021. In the alternative, the plaintiffs urge this Court to lift the defendant company's corporate veil for purposes of execution of the decree herein against Ameet Lanchand Devshi Shah, in the event that the cross-examination of the defendant company's Director reveals fraud or impropriety by the Directors/Principal Officer of the defendant, in respect to the defendant's finances.
3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Samuel Malaki, the plaintiffs' Head of Finance. He averred that a decree



was issued by this Court in favour of the plaintiffs on 16<sup>th</sup> December 2021, for USD 3,584,563.86 plus costs and interest. He stated that the defendant has to date not settled the aforesaid amount save for USD 375.84 which was recovered from the defendant's accounts as a result of garnishee proceedings. He averred that the defendant has no assets that can be attached to satisfy the said decretal sum. Mr. Malaki stated that the defendant's only known Kenyan Director/Shareholder is Mr. Ameet Lanchand Devshi Shah since the other Directors are foreign incorporated companies.

4. He contended that a financial review of the defendant's accounts during the loan facility period which was advanced pursuant to a Loan Agreement dated 12<sup>th</sup> May 2017, is necessary to determine potential fraud or impropriety by the defendant company's Directors/Principal Officer. Mr. Malaki urged this Court to summon Mr. Ameet Lanchand Devshi Shah to present the defendant company's financial records and for him to be cross-examined to ascertain whether there was any impropriety and fraud in the management of the said finances.
5. In opposition to the application, the defendant filed a Notice of Preliminary Objection dated 23<sup>rd</sup> February 2024, raising grounds that -
  - i. This Honorable Court cannot hear and/or determine this application fatally defective as it is seeking orders for purposes for which are not permitted under the law (sic);
  - ii. This Honorable Court cannot hear and/or determine this application fatally defective as it fails to meet the legal threshold for a claim of piercing the veil of incorporation as the applicants have not tabled before this Honorable Court prima facie evidence to demonstrate fraud by the respondent (sic);
  - iii. This Honorable Court cannot hear and/or determine this application fatally defective as it seeks to shift the burden of proof from the applicants to the respondent which is contrary to the law that squarely places the burden of proof on the party asserting a claim for piercing of the corporate veil (sic); and
  - iv. That filing of the instant application and suit amounts to abuse of the Court process and is a fishing expedition by the applicants, and is only intended to cause panic, unnecessary anxiety, trouble, unnecessary expense, and unlawful pressure on the respondent in order to accede to the applicant's unlawful demands and such the entire claim should be dismissed with costs (sic).
6. The defendant also filed a replying affidavit sworn on 3<sup>rd</sup> May 2024 by Ameet Lalchand Shah, one of the defendant's Directors. He asserted that Kenyan Courts are reluctant to pierce a company's corporate veil, save for instances where it has been demonstrated that there are cases of serious misconduct or egregious behavior, which in this case the plaintiffs have not done. He averred that the defendant received a total of two disbursements from the plaintiffs totaling to USD 2,474,980.00 which funds were used as working capital, including settling an overdraft facility, paying suppliers, advancing funds for solar energy projects, and covering operating expenses.
7. He further averred that the plaintiffs were fully informed of the defendant's financial position, including its overdraft liabilities, at the time the parties herein entered into a Loan Agreement. In the premise, Mr. Shah contended that all expenditure was legitimate, and no fraud or impropriety occurred. He stated that the defendant's inability to pay the plaintiffs the decretal sum herein is as a result of several significant projects including contracts with Bidco, Ashut Engineering, and three large solar projects, which failed to materialize due to external factors, leading to irrecoverable losses of over USD 3,500,000.00. The defendant deposed that it has faced numerous difficulties, including unpaid



receivables from completed projects such as the Two Rivers Solar Plant and Marco Borero, KRA tax obligations, and frozen accounts.

8. He contended that the defendant company's audited accounts for the years 2017 & 2018 confirm proper financial management with no qualified opinions issued. Mr. Shah asserted that the defendant's inability to repay the debt is not due to fraud but external challenges. He stated that holding him personally liable for the said debt would defeat the purpose of incorporation and contradict company law protection. He claimed that targeting him specifically for lifting the corporate veil, despite the existence of other Directors, is malicious and an act of bad faith. He averred that a company's inability to pay its debts is not a ground to lift its corporate veil. He asserted that the plaintiffs have not provided any evidence of illegality or fraud by the defendant's Director.
9. On 27<sup>th</sup> February 2024, this Court gave directions to the effect that the instant application and the defendant's Notice of Preliminary Objection would be canvassed by way of written submissions. The plaintiff's submissions were filed on 16<sup>th</sup> May 2024 by the law firm of Mulanya & Maondo Advocates, while the defendant's submissions were filed by the law firm of Rutere & Kalu Associates on 17<sup>th</sup> July 2024.
10. Mr. Maondo, learned Counsel for the plaintiffs submitted that this Court has jurisdiction under Order 22 Rule 35 of the Civil Procedure Rules, 2010 to determine the application herein. He argued that the defendant has failed to satisfy the decree of USD 3,584,563.86 which is equivalent to Kshs. 471,370,147.59, with recovery efforts yielding only USD 375.84. He urged this Court to summon the defendant's Directors/Officers to produce the company's financial records and for them to undergo cross-examination to establish whether the defendant has assets or means to satisfy the decree, whether there was mismanagement of the company, and whether fraud or impropriety occurred. Counsel referred to the case of Stephen Njoroge Gikera & another v Econite Mining Company Ltd & 7 others [2018] eKLR, and further submitted that a company's corporate veil may be lifted when there is evidence of fraudulent, improper, or illegal acts committed by its Officers.
11. Mr. Maondo argued that despite the defendant's explanation in its replying affidavit regarding the receipt and application of funds, the instant application filed under Order 22 Rule 35 of the Civil Procedure Rules, 2010 still requires the defendant's Director, Mr. Ameet Lanchand Devshi Shah, to appear in Court for examination under oath, then further actions will follow based on the findings of the said examination. Counsel urged this Court to allow the instant application, issue summons to Mr. Ameet Lanchand Devshi Shah, and dismiss the defendant's Preliminary Objection, deeming it meritless as it did not raise a pure point of law.
12. Ms. Rutere, learned Counsel for the defendant cited the provisions of Section 16(2) of the *Companies Act* and the case of Salomon v. Salomon & Co. Ltd [1897] AC 22, and submitted that the instant application is unfounded in both fact and law as it offends the principle of corporate personality, a fundamental principle of company law. She further submitted that exceptions to this rule should be applied sparingly and only in clear cases of fraud, misconduct, or where the company operates as a façade. Counsel relied on the case of Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & another [2014] eKLR, and argued that the plaintiffs have not made out a case to warrant this Court to exercise its discretion and issue an order lifting the defendant's corporate veil. She argued that inability of a company to settle its debts due to lack of funds and/or assets is not enough justification to warrant lifting of a company's corporate veil.
13. Ms. Rutere stated that the plaintiffs' application to cross-examine the defendant's Directors is without merits and should be dismissed. She further stated that all relevant financial documents have already been provided, clearly showing the company's financial position. That in any event, no evidence has



been presented to suggest that the defendant's Directors engaged in fraudulent or improper conduct that would justify an order for cross-examination. In submitting that the affidavits already submitted are sufficient hence cross-examining the defendant's Directors would be redundant, wasteful of the Court's time, and unnecessary, Ms. Rutere relied on the holding by the Court in *Kwacha Communications Limited & another v Pindoria Holding Limited & another (Civil Appeal E033 of 2022)*.

### **Analysis and Determination**

14. I have considered the instant application and the affidavit filed in support thereof. I have also considered the Notice of Preliminary Objection and the replying affidavit filed by the defendant. I have also considered the written submissions by Counsel for the parties. The issues that arise for determination are -
- i. Whether the defendant's Notice of Preliminary Objection is merited;
  - ii. Whether the defendant's Director, Mr. Ameet Lanchand Devshi Shah, should be examined on oath, as to the defendant's means and assets and produce financial documents or accounts related to the defendant's loan facility; and
  - iii. Whether the defendant's Corporate veil should be lifted and the defendant's Director, Mr. Ameet Lanchand Devshi Shah held personally liable for the defendant's debt to the plaintiffs.

### **Whether the defendant's Notice of Preliminary Objection is merited.**

15. A Preliminary Objection should raise a pure point of law. It should be argued on the assumption that all facts pleaded by the opposing party are correct. It cannot be raised if any facts need to be ascertained or if what is sought is the exercise of judicial discretion. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696, at page 700, the Court defined a Preliminary Objection as hereunder -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

16. In the case of *Omondi v National Bank of Kenya Ltd & others* [2001] KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of Preliminary Objections, as follows -

..... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of



the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....

17. Upon perusal of the defendant's Notice of Preliminary Objection dated 23<sup>rd</sup> February 2024, it is clear that it contains disputed facts that call for this Court to interrogate the evidence adduced in order for it to make a determination. For the said reason, this Court finds that the defendant's Preliminary Objection can be argued in the normal manner, thus it does not qualify as a valid Preliminary Objection.

**Whether the defendant's Director, Mr. Ameet Lanchand Devshi Shah, should be examined on oath, as to the defendant's means and assets and produce financial documents or accounts related to the defendant's loan facility.**

18. It is trite that this Court has the power to summon any Officer of a company to attend before it to be examined on 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, pursuant to the provisions of Order 22 Rule 35 of the Civil Procedure Rules, 2010 which states that -

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. 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 quoted with authority by Nzioka J., in Tropical Wood Limited v Samilisinternational Investments [2017] eKLR that-
- a. 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;
  - b. ...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.
  - c. 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.
20. Mr. Shah contended that targeting him specifically for lifting the corporate veil, despite the existence of other Directors, is malicious and an act of bad faith. It is my considered view that the said assertion is however contrary to the provisions of Order 22 Rule 35(b) which provides that in the case of a



corporation, any of the company's officers may be summoned. The law does not make it mandatory to summon all the Directors and/or several Officers of a company. Further, in this case, the other Director of the defendant is a foreign-incorporated company. I am as such not persuaded that there is any malicious intent and/or bad faith by the plaintiffs seeking to summon Mr. Ameet Lanchand Devshi Shah under the provisions of Order 22 Rule 35 of the Civil Procedure Rules, 2010.

21. It is not in contest that the plaintiffs have an unsatisfied decree against the defendant issued on 16<sup>th</sup> December 2021, for USD 3,584,563.86 plus costs and interest, out of which the plaintiffs have only been able to recover USD 375.84 as a result of garnishee proceedings. It is also not disputed that Mr. Ameet Lanchand Devshi Shah, is a Director of the defendant company alongside Astonfield Management Limited, a company incorporated in the British Virgin Islands.
22. The defendant submitted that since all relevant financial documents showing its financial position have been attached to its replying affidavit in opposition to the application herein, there is no longer a need for cross-examination of the defendant's Directors/Officers. As correctly submitted by Counsel for the plaintiffs, Order 22 Rule 35 of the Civil Procedure Rules, 2010 provides for oral examination and not affidavit evidence. Further, the defendant has not demonstrated what prejudice it will suffer in the event an order for cross-examination of its Directors is issued.
23. In the premise, I am persuaded that the plaintiffs have made out a case to warrant this Court to exercise its discretion and summon Ameet Lanchand Devshi Shah, a Director of the defendant company, to produce financial documents or accounts related to the defendant's loan facility, and for oral examination on the defendant company's financial affairs, Whether the defendant's corporate veil should be lifted and the defendant's Director, Mr. Ameet Lanchand Devshi Shah be held personally liable for the defendant's debt to the plaintiffs.
24. The doctrine of ripeness as submitted by the plaintiffs is applicable in this case. This is because, in order to aptly determine whether or not the defendant's Director, Mr. Ameet Lanchand Devshi Shah should be held personally liable for the defendant's debt to the plaintiffs, the Court has to first determine whether there is sufficient reason to pierce and/or lift the defendant's corporate veil by considering the testimony of the defendant's Director alongside the documentary evidence produced. This doctrine was considered by the Supreme Court in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR, as hereunder -

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.

25. Therefore, this Court is of the view that it is in the interest of justice that this issue be held in abeyance until after the cross-examination of the defendant's Director, Mr. Ameet Lanchand Devshi Shah.
26. In the end, this Court finds that the instant application is merited, whereas the defendant's Notice of Preliminary Objection dated 23<sup>rd</sup> February 2024 is not merited. Consequently, I make the following orders -
  - i. The defendant's Notice of Preliminary Objection dated 23<sup>rd</sup> February 2024 is hereby dismissed;



- ii. Summons shall issue to Mr. Ameet Lanchand Devshi Shah, the defendant's Director, to attend Court to be orally examined as to the defendant's business and affairs, property, and/or means of satisfying the decretal sum herein;
- iii. An order is hereby issued directing the said Director to produce the defendant's financial documents or accounts with respect to the defendant's loan facility, and any other documentary evidence showing the status of the business;
- iv. Mr. Ameet Lanchand Devshi Shah shall be examined on the contents of the said documents at a date to be set by this Court;
- v. Prayer Nos. 2 & 3 are hereby held in abeyance and shall be determined after examination on oath of Mr. Ameet Lanchand Devshi Shah, the defendant's Director, and upon production of inter alia, the defendant's financial documents or accounts in respect to the defendant's loan facility; and
- vi. Costs shall be the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JANUARY 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Onyango h/b Mr. Maundu for the decree holders/applicants

No appearance for the judgment debtor/defendant

Ms B. Wokabi – Court Assistant.

