



REPUBLIC OF KENYA



KENYA LAW
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**Mbarak v Vyas Hauliers Ltd (Civil Appeal 275 of 2018)
[2025] KEHC 1770 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 275 OF 2018
JK NG'ARNG'AR, J
FEBRUARY 4, 2025**

BETWEEN

NURU AWADH MBARAK APPELLANT

AND

VYAS HAULIERS LTD RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 31st May 2023 pursuant to Section IA, 1B, 3A of the *Civil Procedure Act*, Order 22 Rule 35 of the Civil Procedure Rules, and all other enabling provisions of the law.
2. The Appellant seeks for orders that the directors of the Respondent namely Laxmishanker Vyas and Deepak Laxmishanker Vyas do personally appear in court for oral examination on the assets and liabilities of the Respondent company and/or the said directors should be held personally liable for payment of the outstanding decretal sum of Kshs. 1,205,270.27 together with interest at court rate as from 17th October 2020 until payment in full. That the directors of the Respondent namely Laxmishanker Vyas and Deepak Laxmishanker Vyas do produce all books of accounts, bank statements, annual returns, tax payment, record/declarations, list of past and present assets, cheques, audited accounts and any other information relating to the past, and present status of the Respondent company from 2016 to date. That in the event the said directors of the Respondent company do not give a satisfactory account of the Respondent's affairs, this court be pleased to lift the corporate veil of incorporation and direct that the decree be executed against the directors personally. That costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn on 31st May 2023 by Nuru Awadh Mbarak that this court delivered judgment on 16th October 2020 wherein it awarded the Applicant damages of Kshs. 3,749, 269.42 against the Respondent with interest and costs both in the appeal and the lower court. That costs in this court was taxed at Kshs. 280,000 while costs in



- the lower court was taxed at Kshs. 167,615.85. That the insurer to the Respondent, Geminia Insurance Limited, being obliged to satisfy the judgment, paid Kshs. 3,000,000 and failed to pay the balance saying that its liability under the law is limited to Kshs. 3,000,000 and below. That the Respondent is therefore liable to satisfy the balance of the decretal amount in the sum of Kshs. 1,205,270.27 together with interest at court rate with effect from 17th October 2020 until payment in full. That the Respondent company is no longer in operation and there is a high likelihood that the company assets are in the name of the directors since the company has not been formally wound up.
4. The Respondent filed a Replying Affidavit sworn on 26th April 2024 by Deepak Laxmishanker Vyas, the director of the Respondent, that Laxmishanker Vyas is deceased. That they were previously engaged in transport business but since the introduction of the Standard Gauge Railway (SGR), the transport business went under. That in 2017, Deepak Laxmishanker Vyas was diagnosed with cancer and he had to travel out of the country several times leading to a total collapse of the company. That the company last filed returns in 2015 and that the company bank accounts have become dormant. That this is not a proper case for the court to lift the veil and order the remaining director to settle the outstanding balance.
 5. The application was canvassed by way of written submissions. The Applicant filed submissions dated 7th November 2024 and argued that Deepak Laxmishanker was cross examined and it became clear that the director had failed to furnish this court with all the records of the company, that the director had not instructed any auditor to prepare any statement of audited accounts despite the court issuing orders for the supply of the same to the decree holder and court, and that the director has also failed to furnish this court with evidence of the company being wound up. The Applicant urged this court to lift the corporate veil by citing the case of Post Bank Credit Limited (in liquidation) v Nyamangu Holdings Limited (2015) KEHC 5964 (KLR) and the case of Kaydee Quarry Limited v Baileys Rocktech Limited (2021) eKLR.
 6. The Applicant submitted that the director of the Respondent company failed to furnish this court with any list of past and present assets of the company. That part of the annexed documentation to the Replying Affidavit is a letter dated 3rd May 2019 which provides assets belonging to the Respondent company to which the credit institution indicates that the same will be repossessed and auctioned if the Respondent company fails to settle the outstanding balance enumerated therein. That however, there is no indication whether the said assets were repossessed or whether they are in repossession of the company. That it is therefore not disputed that the company was not formally wound up and all records should have been maintained and produced pursuant to Section 628 of the *Companies Act*.
 7. The Respondent in their submissions dated 12th September 2024 contended that the Applicant has failed to prove that the corporate veil ought to be lifted. That they have not shown in any manner that the directors of the Respondent company have had a reduction in minimum membership of the Respondent company, misdescribed the company, run the business in a manner to defraud others or used the business as an avenue to evade taxes. The Respondent relied on the holdings in the case of Jiang Nan Xiang v Cok Fas-St Company Limited (2018) eKLR and Carey Ngini v Dennis O. Ogolla & Another (2010) eKLR which cited with authority the case of Corporate Insurance Company Limited v Savemax Insurance Brokers Limited and Another (2002) 1 EA 41.
 8. I have considered the Notice of Motion application dated 31st May 2023, the Replying Affidavit sworn on 26th April 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
 9. It is not in dispute that on 16th October 2020 judgment was delivered in the trial court in favour of the Applicant. The principal amount together with interest and costs amounted to Kshs. 3,797,789.53.



Cost in the High Court were taxed at Kshs. 280,000 while those in the lower court were taxed in the sum of Kshs. 167,615.86. Geminia Insurance Limited settled the sum of Kshs. 3,000,000 in accordance with terms of policy of insurance. The Applicant now demands from the Respondent a sum of Kshs. 1,205,270.27 being the balance that ought to be settled by the insured, together with interest at court rate from 17th October 2020 until payment in full.

10. The Applicant prayed that the corporate veil of incorporation be lifted and the decree executed against the director personally. This is on the basis that when Deepak Laxmishanker was cross examined, he failed to furnish the court with all records of the company, statement of audited accounts of the company and evidence of the company having been wound up.
11. The Respondent maintained that this is not a proper case for lifting of the corporate veil as one of the directors passed on, and the business went under when the SGR was introduced and when Deepak Laxmishanker was diagnosed with cancer. That the company last filed returns in 2015 and its bank accounts have become dormant. That for the corporate veil to be lifted, the Applicant had to show that the directors of the Respondent company have had a reduction in minimum membership of the Respondent company, misdescribed the company, run its business to defraud others or as an avenue to evade taxes.
12. The Court of Appeal in *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* (2016) eKLR observed circumstances for lifting of the corporate veil as follows: -

“The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”
13. Further, the court in *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others (Miscellaneous Civil Application 43 of 2023)* [2024] KEHC 2343 (KLR) (8 March 2024) (Ruling) observed: -
 22. It is therefore evident that in a case such as the instant one, the corporate veil will only be lifted where it is demonstrated that the actions of the directors or shareholders smacks of bad faith and that the corporate veil is being used as a mask to fraudulently shield such directors or shareholders from execution of the decree. The veil may therefore be pierced where it appears that the business of the company has for instance been carried on with intent to defraud creditors of any other person or for any fraudulent purpose. Only where justice of the case demands should the corporate veil be disregarded and lifted.
 23. The proper procedure before a Court determines whether to lift the veil of incorporation is to first summon such directors to Court to be orally examined as to whether it has any and/or what property and/or means of satisfying the decree. The directors may in the process be also called upon to produce any books of accounts or documents, for purposes of scrutiny. It is during this process that the Court may then determine whether the directors are guilty of bad faith, or wilful acts meant to avoid settlement of the decree or even outright fraud. Should the existence of such circumstances be established, then the Court may go ahead to lift the corporate veil and hold the directors or shareholders personally liable to settle the decree.”



14. This court has perused proceedings and established that the Director, Deepak Laxmishanker, in cross examination stated that the Respondent company collapsed. He however failed to furnish this court with a list of assets or statement of accounts showing the status of the Respondent company. I find that legitimacy of a company is established when books of accounts and evidence of assets are produced.
15. The court in *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* (2012) eKLR held as follows: -
- “Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides: - ‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’ Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”
16. I find that the corporate veil is being used as a shield against execution of the decree by the Applicant. I am therefore persuaded to lift the corporate veil and hold the directors personally liable for Kshs. 1,205,270.27 being the balance to be settled by the insured together with interest at court rates from 17th October 2020 till payment in full.
17. The Applicant’s Notice of Motion application dated 31st May 2023 is allowed in terms of prayer 3. I therefore lift the corporate veil of Vyas Hauliers Ltd, the Respondent herein and direct that the decree be executed against the director, Deepak Laxmishanker, personally. The Applicant is awarded costs of this application to be settled by the director, Deepak Laxmishanker.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

.....Advocate for the Appellant

.....Advocate for the Respondent

Court Assistant – Shitemi

