



REPUBLIC OF KENYA



KENYA LAW
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NCBA Bank (K) PLC v Shiva Carriers Limited & 4 others (Commercial Case E003 of 2021) [2025] KEHC 1541 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E003 OF 2021
J NGAAH, J
FEBRUARY 21, 2025**

BETWEEN

NCBA BANK (K) PLC PLAINTIFF

AND

SHIVA CARRIERS LIMITED 1ST DEFENDANT

JAGGED ALLIANCE LIMITED 2ND DEFENDANT

SPRINGBANK INVESTMENTS LIMITED 3RD DEFENDANT

DEEPAK MADAN GOPAL SONI 4TH DEFENDANT

RAJEEV BANK SONI 5TH DEFENDANT

RULING

1. The application before court is a motion dated 7 October 2024 in which the applicant seeks the following orders:
 1. The 1st & 2nd Defendants' officers, Mr. Sarla Devi Madan Gopal Soni, Mr. Deepak Madan Gopal Soni & Mr. Rajeev Deepak Soni, do attend court, on a date to be fixed, to be examined as to the 1st & 2nd Defendants' property and means of satisfying the decretal sum of Kshs. 245,540,229.26 as at 27th January 2021 plus interest at commercial rates of 14% per annum from that date until payment in full.
 2. The 1st & 2nd Defendants' officers, Mr. Sarla Devi Madan Gopal Soni, Mr. Deepak Madan Gopal Soni & Mr. Rajeev Deepak Soni, to present to court and to the Plaintiff's advocates on record, at least fourteen (14) days prior to the date of the examination, all books of accounts, annual returns and any other document that may be necessary to demonstrate the 1st & 2nd Defendants' means, assets and liabilities.



3. In default of compliance with either order (1) or (2) above, or in default of showing sufficient cause, there be an order that Mr. Sarla Devi Madan Gopal Soni, Mr. Deepak Madan Gopal Soni & Mr. Rajeev Deepak Soni, jointly and severally, are personally liable to satisfy the decree dated 30th April 2021 and that execution may issue against them, or their property, in their personal capacity.
4. The costs of this application be awarded to the Plaintiff against the 1st & 2nd Defendants and the named officers, jointly and severally.”
2. The motion is expressed to be brought under sections 1A, 18, 3 & 3A of the *Civil Procedure Act* Cap 21, and Order 22 Rule 35 of the Civil Procedure Rules 2010. It is supported by the affidavit of Mr. Stephen Atenya who has sworn that he is the plaintiff’s principal legal counsel and thus authorised to swear the affidavit on behalf of the applicant.
3. According to Mr. Atenya, by a judgment and the resultant decree dated 30 April 2021, the 1st, 2nd, 4th & 5th defendants, are liable, jointly and severally, to pay to the plaintiff the sum of Kshs. 245,540,229.26 as at 27 January 2021 plus interest at commercial rates of 14% per annum from that date until payment in full, and costs.
4. The plaintiff attempted executing the decree but its attempts only yielded the sum of Kshs. 20,000,000.00 being the proceeds of sale of Title No. Mombasa/Block I/404 then owned by the 3rd defendant. According to the plaintiff, this sum is paltry. The sale of Title No. Mombasa/Block I/134, on the other hand, yielded nothing to the plaintiff since the entire sum was retained by the chargee, Diamond Trust Bank Limited, that had a prior right.
5. The plaintiff’s claim arises from loan facilities advanced to the 1st defendant for the purchase of several trucks and trailers. The trucks and trailers are not traceable.
6. According to the applicant, the 1st & 2nd defendants are capable of satisfying the decree but are allegedly, fraudulently using the cloak of incorporation as a means of defeating the plaintiff’s attempts at execution. The plaintiff believes that the 1st and 2nd defendants’ directors negligently or fraudulently managed the affairs of the 1st and 2nd defendants as a result of which the applicant has difficulties in recovering its loan.
7. The plaintiff believes that the assets of the 1st and 2nd defendants were misappropriated by its officers and to demonstrate this it is alleged that Mr. Sarla Devi Madan Gopal Soni recently acquired ownership of Title No. Mombasa/Block X/156, a palatial home in Tudor area of Mombasa County. The plaintiff also believes that the 1st and 2nd defendants’ officers have deliberately hidden the 1st and 2nd defendants’ attachable assets purposefully to defeat any execution against the 1st and 2nd defendants.
8. In the circumstances, it is necessary for the court to call for an examination of the 1st and 2nd defendants’ officers, and for the production of all books of account, to enable the court to do justice between the parties. As at 30 September 2024, the 1st defendant’s officers, were Mr. Sarla Devi Madan Gopal Soni, Mr. Deepak Madan Gopal Soni and Mr. Rajeev Deepak Soni. The 1st defendant is the majority shareholder of the 2nd defendant. The other shareholder, with one (1) share, is the 4th defendant.
9. None of the respondents filed any response to the application. There are affidavits of service on record showing that they were served with the application and the hearing notices.



10. Order 22 rule 35 of the Civil Procedure Rules under which the application has been made reads as follows:

35. 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.
11. It has been held in *Masefield Trading (K) Ltd v Rushmore Company Limited & Another* Civil Suit No. 1794 of 2000; (2008) eKLR, that under this rule, the court is entitled to summon any officer of a company to attend court for his examination on the assets and means available to the company for settlement of a court decree against the company. It is only after such an examination that the the court may or may not lift the veil of incorporation.
12. And in *Nairobi High Court Civil Case No. 1287 of 2000; Ultimate Laboratories versus Tasha Service Limited* (unreported), it was held that the objective of an examination of a company’s director or officer under Order XXI Rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what property or means of satisfying the decree. Under the same provisions and, based on its inherent power, the court has power to lift the corporate veil of the company and order the director to personally discharge the debts of the company.
13. According to Ringera, J. (as he then was) held in this case 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.” It is not necessary that the applicant or decree holder must first establish the debtor’s debts and properties; neither is it necessary that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation.
14. According to the learned judge that kind of approach defeats the entire purpose of the rule which is to enable the applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. The learned judge noted:
- “If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgmentdebtor’s known properties.”
15. As to who can be summoned, the court noted:
- “...any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs



to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule.”

16. In view of these pronouncements, and considering that that the persons sought to be examined are directors of the judgment debtor from which the decree-holder has been unable to recover the outstanding loan, I am satisfied that the applicant has met the threshold for grant of prayers 1 and 2 of the motion.
17. As far as the prayer for lifting of the veil is concerned, it would be premature to grant the prayer before the examination of the directors of the chargor. It is only after examination of the directors that the court can make up it is mind whether the corporate personality is being employed as a mask for fraudulent schemes or improper conduct, among other grounds upon which the corporate veil may be lifted. (See the cases of *Gilford Motor Co. vs. Horne* [1933] Ch. 935 and *Jones vs. Hipman* [1962] 1W.L.R. 832).
18. For the foregoing reasons, prayers 1 and 2 of the application are hereby allowed. I make no orders as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 21 FEBRUARY 2025

NGAAH JAIRUS

JUDGE

