



**Campon (Suing as the holder of the Power of Attorney for Bautista Valentin and Maria Doloves Martinez as the Administrator to the Estate of the Late Esther Buendia Martinez) v Islam & another (Civil Suit 248 of 2011) [2025] KEHC 12095 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12095 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 248 OF 2011  
F WANGARI, J  
MAY 22, 2025**

**BETWEEN**

**ALEJANDRO CAMPON (SUING AS THE HOLDER OF THE POWER OF ATTORNEY FOR BAUTISTA VALENTIN AND MARIA DOLOVES MARTINEZ AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE ESTHER BUENDIA MARTINEZ) ..... PLAINTIFF**

**AND**

**SWALEH BROK ISLAM ..... 1<sup>ST</sup> DEFENDANT**

**MASH BUS SERVICES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For ruling is the Plaintiff's application Notice of Motion Application dated 18<sup>th</sup> June, 2024. The application is brought pursuant to the provisions of sections 1A, 1B, 3A, 34, 38 and 92 of the [Civil Procedure Act](#), Orders 5 Rule 17, 22 Rule 35 and 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders: -
  - a. That Francis Nguta Mulili and Jitendra Papatlal Mashru being directors and or shareholders of Mash Bus Services Limited at the material time to this application do attend court and be examined as to whether Mash Bus Services Limited whom is the Judgement Debtor herein has any property or means of satisfying the decree herein and to produce Judgment Debtor's books of accounts for the year 2008 – 2024 and other document evidence showing the same before the court;
  - b. That in default of the said directors complying with the above court order they be ordered to personally pay the outstanding decretal amount of Kshs. 49,969,367.304/= to the Plaintiff or to be imprisoned and committed to civil jail for a period not less than six (6) months;



- c. That the court do direct that the directors of Judgment Debtor be served by way of substituted service through their last known postal address 98728 Mombasa;
  - d. Any order that this court will deem fit to grant; and
  - e. Costs.
2. The grounds in support of the application are briefly that the Decree Holder instituted a suit against the Judgment Debtor on 8<sup>th</sup> July, 2011 claiming damages against the Judgment Debtor as a result of accident that occurred on 7<sup>th</sup> September, 2008 involving motor vehicle KAX 627T. Judgment was entered against the Judgment Debtor on 31<sup>st</sup> May, 2016. The same has never been appealed and that the decretal sum awarded has not been paid in full. It is said that the Decree Holder has faced predicament in executing the judgment against the Judgment Debtor and that he is not informed of any assets owned by the Judgment Debtor.
  3. It is stated that execution of the said judgment has been a tussle to undertake. Despite several demands, Mash Bus Services Limited has failed to make good the award. It is averred that Francis Nguta Mulili and Jitendra Popatlal Mashru are the directors of the Judgment Debtor. Accordingly, the said two (2) directors be examined as to whether the Judgment Debtor has any property or means to satisfy the balance of the decree and to produce book of accounts and other documents before the court.
  4. It is contended that if the said directors fail to comply with the order, the corporate shell be cracked in the interest of justice. He states that a company is an alias of its members and the corporate personality is being blatantly used as a cloak for fraud, improper conduct and basis to evade creditors. It is also stated Mash Bus Services Limited is a shell, front faced to appear as if is a real thing when in reality, it is a front for defrauding members of the public and creditors. Reiterating this point, the Plaintiff argues that the buses at the yard where Mash Buses Services Limited operate as shows Mash East Africa Limited as owners.
  5. It is stated that Judgment Debtor and its directors are keeping away records related to its operations to prevent the Decree Holder from attaching any assets of the Judgment Debtor. He urges the court to grant the orders sought. The application is supported by an affidavit of even date sworn by the Plaintiff. It restates more or less the grounds in support of the application save for the annexures attached. I see no need to rehash the same.
  6. The application is resisted through the replying affidavit dated 24<sup>th</sup> September, 2024 sworn by Francis Nguta Mulili who introduces himself as an ex-director of the 2<sup>nd</sup> Defendant alongside Jitendra Popatlal Mashru. He states that the 2<sup>nd</sup> Defendant was lawfully wound up in accordance with its articles of association. He has annexed a notice of intended dissolution issued through Kenya Gazette Notice No. 6970 dated 7<sup>th</sup> July, 2017 and a notice of dissolution issued through Kenya Gazette Notice No. 11046 dated 30<sup>th</sup> October, 2014.
  7. He avers that owing to the fact that the 2<sup>nd</sup> Defendant is no longer in existence, neither himself nor his co-director are in a position to give any information as regards the dissolved entity's properties or means of satisfying the decree and that the books of account for the period 2008 – 2024 cannot be produced seven (7) years after the 2<sup>nd</sup> Defendant's dissolution. He adds that the 2<sup>nd</sup> Defendant was incorporated on 26<sup>th</sup> August, 2003 while Mash East Africa Limited on 16<sup>th</sup> November, 2011. As such, they are distinct and separate entities under Company Law with only himself being the common denominator.
  8. To underscore his position, he states that the 2<sup>nd</sup> Defendant and Mash East Africa Limited do not share a registered office, physical and/or postal address. In conclusion, he stated that the application



was omnibus as the prayers were not related, the orders to pierce or lift the veil of incorporation was unprocedurally brought and through the backdoor without invoking the law under which the same is hinged and that no nexus had been established between the two (2) entities. He thus seeks the application to be dismissed with costs.

9. The 2<sup>nd</sup> Defendant filed a further replying affidavit dated 30<sup>th</sup> September, 2024 which in essence sought to clarify that the notice which he had earlier averred was dated 30<sup>th</sup> October, 2014 was erroneous. He clarifies that the dissolution notice is dated 30<sup>th</sup> October, 2017.
10. The application was orally argued by Counsel for the parties and after consideration of the arguments, prayer (a) of the application was allowed. On 11<sup>th</sup> February, 2025, Francis Nguta Mulili appeared before this court and testified for himself and on behalf of his co-director. He was examined in chief, cross-examined and re-examined. I have duly considered his testimony.
11. Parties thereafter opted to file their respective submissions which they duly filed. The Plaintiff's submissions are dated 21<sup>st</sup> February, 2025 while those of the 2<sup>nd</sup> Defendant are dated 3<sup>rd</sup> March, 2025. I have duly considered the respective submissions and I am grateful to the parties for their industry in filing well researched submissions. They serve as a useful guide to this court in arriving at a just determination either way.

### **Analysis and Determination**

12. I have carefully considered the application dated 18<sup>th</sup> June, 2024, the response, the parties' respective rival submissions, the authorities cited as well as the law and the only issue for determination is whether the application is well founded. Corollary to this is the issue of costs.
13. It is not in dispute that the deceased estate obtained judgment against the Defendants to a tune of Kshs. 52,969,367.304/= on 31<sup>st</sup> May, 2016. It is equally not in dispute that out of this amount, the 2<sup>nd</sup> Defendant's insurer paid a sum of Kshs. 3,000,000/= being the statutory limit. Further, it is not denied that Francis Nguta Mulili and Jitendra Popatlal Mashru were the 2<sup>nd</sup> Defendant's directors prior to its dissolution sometimes in the year 2017.
14. The gravamen of the Plaintiff's application is that the two (2) directors be summoned to give the 2<sup>nd</sup> Defendant's books of account and also show whether the 2<sup>nd</sup> Defendant has any assets to satisfy the decree. I note that the 2<sup>nd</sup> Defendant has submitted on the Plaintiff's standing. Though it is a sound argument, my view is that the only issue and which parties did not submit extensively on it is the relationship between the 2<sup>nd</sup> Defendant and Mash East Africa Limited.
15. It is now old hat that a company is a distinct and separate legal personality from its directors and shareholders. This was settled as early as 1897 in the case *Salomon v Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members. This position was restated by the Court of Appeal in the case of *Victor Mabachi & Anor v Nurtturn Bates Ltd* NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR where it held thus: -  

“...A company is a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil...”
16. The 2<sup>nd</sup> Defendant was wound up in 2017. Mash East Africa Company is a totally separate entity from the 2<sup>nd</sup> Defendant herein. It is not denied that Francis Nguta Mulili is the only denominator or relationship between the two (2) entities. Is this sufficient reason to treat the two as the same? I do



not think so. A person can be a director of several companies but that cannot pass muster to have the several companies be deemed as related.

17. Despite the Plaintiff submitting that the two companies share the same postal address, a perusal of the two CR 12s attached indicate otherwise. The 2<sup>nd</sup> Defendant's postal address is 98728 while that of Mash East Africa Limited is 99139. The directors' and/or shareholders' postal addresses is immaterial.
18. In the case of Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [ 2016] eKLR, the court addressing itself on the issue of piercing or lifting the corporate veil held as follows: -

“...The court lifting the corporate veil is exercising its inherent jurisdiction to do justice and fairness of the end of the justice. This jurisdiction maybe 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 revenue...” (Emphasis added).

19. From the foregoing, it is clear beyond peradventure that an application to pierce or lift the corporate veil cannot be granted as a matter of course. A party seeking to do so must adduce evidence of the special circumstances to warrant the court exercise discretion in the party's favour. The separate legal personality of a company must be jealously guarded.
20. In the present circumstances, I do not find any basis to pierce or lift the corporate veil as sought by the Plaintiff. No evidence has been adduced of any improper conduct or fraud. In any event, allegations of fraud must be specifically pleaded and evidence adduced. Nothing of the sort has been done. I have said enough to show that the application must fail.
21. On costs, the same follows the event. However, it must be remembered that award of costs is discretionary and the court reserves the discretion whether to award the same or not. Though the application has failed, it was not brought in bad faith and the Plaintiff had bona fides in bringing the same. I therefore direct that each party shall bear own costs.
22. The upshot of the foregoing is that the court renders itself as hereunder: -
  - a. The Notice of Motion Application dated 18<sup>th</sup> June, 2024 lacks merit and the same is hereby dismissed;
  - b. Each party to bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Mr. Jengo Advocate for the Applicant

Mr. Oloo Advocate for the Respondent

Ms. Norah, Court Assistant

