Superfit Steelcom Limited v Anmol Limited (Arbitration Cause E049 of 2022) [2025] KEHC 6765 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E049 OF 2022

PM MULWA, J

MAY 22, 2025

BETWEEN

SUPERFIT STEELCOM LIMITED ..... APPLICANT

AND

ANMOL LIMITED ..... RESPONDENT

RULING

1. Before the court for determination is the Decree holder's application dated 12th September 2021, brought under Order 22 Rule 31(1) and 35 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 3A and 38 of the *Civil Procedure Act*. The applicant seeks the following orders:

   i. spent

   ii. That an injunction to issue restraining the judgment debtor and or its Directors or any of its agents from dealing with the assets of the judgment Debtor in any manner pending the hearing and determination of this application.

   iii. That Notice to Show Cause and summons do issue compelling the directors of the Respondent /judgment debtor, Anmol Limited, Sunit Jayantilal Shah and Shirazali Kassan Jamal and any other officials of the Company to personally attend court on such date as may be ordered or allocated and be examined on oath as to whether the judgment debtor has assets or means to satisfy the decree herein.

   iv. The said directors, or officials, be ordered to produce the judgment debtor's books of accounts, documents and /or evidence showing the affairs of the company;

   v. In default of such attendance and/or providing suitable means and assets for the satisfaction of the decree of the honourable court, the said directors, shareholders to be jointly and/or

severally held personally liable to satisfy the decretal sum of Kshs. 64,694,565 plus interest at 14% p.a. in full;

vi. The decree-holder be granted leave to execute the decree herein against the said directors, and shareholders of the judgment-debtor herein personally, in default of payment of the decretal amount claimed herein;

vii. In the alternative to prayer 4 a notice to show cause be issued upon the directors to show cause why they should not be committed to civil jail for failure to satisfy the decree.

viii. That the costs of the application be provided for.

2. The application is supported by an affidavit sworn by Ashwin Madhaparia, a director of the applicant/ decree-holder. According to the deponent, the judgment debtor is fully aware of the decree but has willfully failed or neglected to satisfy the same. The decree holder is not aware of any assets currently owned by the judgment debtor, rendering execution proceedings futile. It is further deponed that the directors of the judgment debtor fraudulently transferred the company's assets with the intention of defeating the decree holder's efforts to recover the decretal sum. Despite the issuance of the final award, the judgment debtor continued to dispose of its assets in a manner calculated to frustrate enforcement of the decree.

3. In response to the application, the respondent filed a replying affidavit sworn by Sunit Jayantilal Shah, a director of the respondent. In the said affidavit, he sets out a brief history of the contractual relationship between the parties and asserts that the respondent company does not possess any assets capable of satisfying the decree. He avers that all the housing units developed under the project were sold, and that the respondent is no longer in possession of any assets. He denies the allegations of fraudulent conduct and states that neither he nor the other director currently hold any shares in the respondent company, as the shareholding was transferred to the individual purchasers upon the successful sale of all units. He further avers that the proceeds from the sales were utilized to settle outstanding loan obligations, including principal and interest, owed to Diamond Trust Bank.

4. During the hearing, Mr. Shah presented himself for cross-examination and largely reiterated the contents of his affidavit, maintaining his position as set out therein.

5. Following the oral hearing and cross-examination, the parties proceeded to file their respective written submissions, which the court has duly considered.

Analysis and determination

6. I have considered the application, the affidavits in support of and in opposition to the application, the submissions filed and the authorities cited.

7. Order 22 rule 35 of the Civil Procedure Rules provides as follows:

> 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.

8. The above provision grants the court power to summon any officer of a company to attend before it and be examined on whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any means of satisfying the decree.

9. In David Kariuki Namu v Institute of Policy Analysis and Research (2021) eKLR the court observed that:

> " ...whereas the Court has the power to summon Directors and officers of a corporation to be examined orally for purposes of establishing means of execution, the applicant must first provide sufficient evidence to justify the summons."

10. In the present case, the applicant seeks orders for the directors and other officials of the judgment-debtor company to be summoned for examination and compelled to produce relevant records, including bank statements and books of account. The applicant further seeks the lifting of the corporate veil and an order that the directors be held personally liable for the satisfaction of the decree.

11. In response, the judgment-debtor argues that the company is no longer owned by its original shareholders or directors, as the shareholding allegedly passed to the individual purchasers of housing units developed by the company. However, what is not in dispute is that the directors were aware of the decree and were actively involved in the management and transactions of the company, including the sale of its assets.

12. The Respondent does not dispute the existence of the debt and has not demonstrated either the willingness or capacity to satisfy the decretal sum. Furthermore, no documentation has been availed to account for the application of proceeds from asset sales, nor to show that such proceeds were applied lawfully or in good faith towards legitimate obligations. Conversely, the applicants hold a valid decree in their favour which remains unsatisfied, despite sustained efforts at execution. They have produced a current search certificate confirming that Sunit Jayantilal Shah and Shirazali Kassan Jamal are directors of the judgment-debtor. The applicants have also detailed the steps undertaken in the course of executing the decree, which have been frustrated by the conduct of the said directors.

13. In the circumstances, it would be fair, just and consistent with the objectives of execution under the law to require the named officers of the company to appear before the Court to disclose the company's assets, if any, and to assist in the execution process. They shall also be required to produce for inspection any relevant documents in their possession or control, including but not limited to, books of account, title documents, or any other records relating to the assets and financial position of the judgment debtor obtained by virtue of their position as directors or shareholders of the company.

Lifting of the corporate veil

14. The applicant also sought orders that the directors Sunit Jayantilal Shah and Shirazali Kassan Jamal be deemed personally liable to settle the claim herein and that warrants of attachment be issued against them in the event that they fail to appear in court for oral examination.

16. It is trite law that a company is a distinct legal entity separate from its directors and shareholders, as held in the landmark case of Salomon v Salomon & Co. Ltd [1897] AC 22 (HL)—this principle is not absolute. The jurisprudence in this jurisdiction recognizes exceptions to the principle of limited liability. As was emphasized in Trust Bank Limited v Ajay Shah & 2 Others [2002] eKLR, where it is shown that a company has been used as a device or mask to conceal wrongdoing, commit fraud,

or frustrate legal obligations, courts are entitled to disregard the corporate personality and impose personal liability.

17. Courts have consistently held that the corporate veil may be lifted in appropriate circumstances, particularly where it is demonstrated that the company is being used as a vehicle for fraud, where the corporate structure is employed to evade legal obligations, or where the company is a mere façade concealing the true facts. In the present case, the directors' failure and/or refusal to disclose the financial position of the company, coupled with their admitted disposal of company assets without any form of transparency or accountability, paints a clear picture of an attempt to obstruct execution and frustrate the course of justice.

18. Notably, one of the directors appeared before this Court under oath and stated that the company presently has no assets with which to satisfy the decretal sum. No credible evidence or documentation has been provided to support that assertion, nor has any explanation been offered as to the fate of the company's assets previously in its possession.

19. In light of the foregoing, I am satisfied that this is an appropriate case for the lifting of the corporate veil. I accordingly find and hold that Mr. Sunit Jayantilal Shah and Mr. Shirazali Kassan Jamal, the directors of the judgment-debtor company, shall be held personally liable for satisfaction of the decree.

20. As regards the prayer for committal to civil jail, Order 22 Rule 31 permits such action only where a judgment debtor has the means to pay but willfully refuses to do so. The Court of Appeal in Braeburn Limited v Gachoka & Another [2012] eKLR emphasized that civil jail for non-payment of a debt is a measure of last resort, and must comply with constitutional and international standards, including Article 11 of the International Covenant on Civil and Political Rights (ICCPR) and Article 29(f) of *the Constitution* of Kenya, 2010.

21. In the present case, the directors have averred under oath that the company has no assets and that any proceeds were applied to discharge secured debts. In the absence of clear evidence that they presently possess the means to pay and are deliberately withholding payment, I find that committal would be premature and unjustified at this stage.

Final Orders

22. Accordingly, the Court issues the following orders:

    a. A temporary injunction is hereby issued restraining the judgment debtor, its directors, agents, or servants from transferring, disposing of, or otherwise dealing with the assets of the company pending further orders of this Court.

    b. The directors of the judgment debtor—Mr. Sunit Jayantilal Shah and Mr. Shirazali Kassan Jamal—shall personally attend court for examination under oath pursuant to Order 22 Rule 35 of the Civil Procedure Rules.

    c. The said directors shall produce, at the said examination, all relevant books of account, bank statements, and documents evidencing the financial status of the judgment debtor.

    d. The corporate veil is hereby lifted, and the said directors are declared personally liable to satisfy the decretal amount of Kshs. 64,694,565 plus interest thereon at the agreed contractual rate.

    e. The prayer for committal to civil jail is declined.

    f. Costs of the application shall be borne by the respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Joy Anami for Applicant/decree holder

Mr. Shah for Respondent/judgment debtor

Court Assistant: Carlos