



Dar Iman Limited v Clasico Builders (K) Limited (Commercial Miscellaneous Application E113 of 2021) [2024] KEHC 8562 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

COMMERCIAL MISCELLANEOUS APPLICATION E113 OF 2021

MN MWANGI, J

JULY 11, 2024

IN THE MATTER OF SECTION 35 OF THE ARBITRATION ACT OF 1995

AND

IN THE MATTER OF AN ARBITRATION AT NAIROBI

BETWEEN

DAR IMAN LIMITED JUDGMENT DEBTOR

AND

CLASICO BUILDERS (K) LIMITED DECREE HOLDER

RULING

1. The decree holder filed an application dated 20th September, 2022 seeking orders for cross-examination of the judgment debtor's Directors so as to determine whether the judgment debtor has any assets that are capable of satisfying the decree in issue. On 13th October, 2022, this Court granted orders for the cross-examination of the judgment debtor's Directors, Caroline Wamuyu and Anthony Peter Wainaina Kamau. Subsequently, the said Directors filed several affidavits concerning the affairs of the judgment debtor.
2. On 30th May, 2023, Mr. Anthony Wainaina Kamau, one of the Directors of the judgment debtor was cross-examined by Mr. Davidson Makau, the learned Counsel for the decree holder. He confirmed that the judgment debtor has two Directors, being himself and Caroline Wamuyu, who have been equally sharing the company's ownership since its incorporation in the year 2009. Mr. Kamau testified that the decree holder was awarded Kshs.39,000,000/= by the Arbitrator, but the judgment debtor has been insolvent for about nine (9) years, thus unable to pay the aforesaid sum due to continuous losses since the year 2014. He further testified that the judgment debtor is no longer operating or trading, although it remains registered and owns a few assets in the form of unit trusts valued at less than Kshs.1,000,000/



- =, which continue to accrue interest. He acknowledged that Ms. Wamuyu had communicated with one of the decree holder's Directors about the debt but was unaware of any offer she made to pay Kshs.10,000,000/=, or where she would obtain the money to settle the debt.
3. Mr. Kamau stated that the judgment debtor had an account at the Upper Hill branch of Commercial Bank of Africa until the year 2013 although he had not provided bank statements. He mentioned that the judgment debtor entered into a Kshs.180,000,000/= contract with the decree holder for constructing off-plan units on all that parcel of land known as L.R. No. 8527/9 Farasi Lane, registered in the name of Ms. Wamuyu, but no transfer of the said property to the judgment debtor was required. He indicated that payments were made to the judgment debtor's account, but the company later needed additional financing, and when that proved unsuccessful, the Directors took personal loans of Kshs.136,000,000/=, from Housing Finance Company of Kenya (HFCK), secured by a charge over Ms. Wamuyu's property as collateral. He explained that all the vendor payments passed through HFCK. He stated that the judgment debtor was involved only in the construction project and that Dar Iman Ltd has unit trust investments valued at less than Kshs.1,000,000/=.
 4. Mr. Kamau testified that the company owes trade payables to Auditors for work done and they are paid between Kshs.35,000/= to Kshs.40,000/= annually, and has outstanding tax liabilities, though he provided no evidence for the tax claims. He stated that the off-plan units' project was financed by himself and Ms. Wamuyu, who settled invoices for the judgment debtor. That they also paid contractors and other vendors personally on behalf of the judgment debtor. He testified that due to cost overruns, the project incurred significant losses, which were borne by the judgment debtors personally. That despite that, revenue was generated from unit sales. He stated that the judgment debtor constructed six units, five of which were sold for Kshs. 60,000,000/= to Kshs.70,000,000/= each. He later stated that the fifth unit was sold for Kshs.86,000,000/= in the year 2017, and he and Caroline Wamuyu retained the sixth unit.
 5. Mr. Kamau indicated that the judgment debtor made sales of over Kshs. 136,000,000/= from the sales, which money was owed to HFCK, but they could not settle the loan since the amount due increased as a result of delays in payment by the purchasers of the units. He confirmed that the accounts presented in Court were unsigned by the Auditor and included a non-current account of Kshs.59,251,130.00, which were unit trusts considered as liabilities and shown in shareholder advances. He testified that Kshs. 52,000,000/= was paid to the decree holder, and it was reported as a decrease in shareholder advances. He explained that a project analysis estimated a Kshs.37,000,000/= loss by the year 2013, but a more significant loss occurred in his and Ms. Wamuyu's joint personal account instead of the judgment debtor's account. He stated that according to the account statements, they paid Kshs.896.00 in tax.
 6. In re-examination, he testified that the project did not make any profits because of penalties and default expenses applied to the loan, and interest. He further testified that the loan advanced to him and Ms. Wamuyu was converted to a mortgage in the name of Ms. Wamuyu which was then taken over by Kenya Commercial Bank.
 7. Ms. Caroline Wamuyu, a Director of the judgment debtor, testified that on 7th March 2022, she messaged the decree holder's Director offering to make a deposit and pay the remaining balance in monthly instalments towards settlement of the amount due to the decree holder from the judgment debtor. She stated that she intended to do that by selling the property owned by the judgment debtor's Directors or borrowing money, but they have been unsuccessful in securing a loan for the judgment debtor. She stated that she could not recall committing to pay Kshs.10,000,000/=, and affirmed that the judgment debtor was unable to pay the debt owed to the decree holder.



8. In re-examination, Ms. Wamuyu testified that the offer of Kshs.10,000,000/= that she made to the decree holder's Director was not accepted. She further testified that the judgment debtor made a loss of Kshs.53,000,000/= due to the decree holder's poor workmanship. Ms. Wamuyu asserted that the judgment debtor has no assets or cash.
9. After cross-examination of the judgment debtor's Directors, this Court on 18th September, 2023 directed Counsel for the decree holder to file a formal application, if the decree holder intends to execute against the judgment debtor's Directors personally. Consequently, the decree holder filed a Notice of Motion application dated 25th September, 2023 pursuant to the provisions of Order 22 Rule 35 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 3A & 63 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, and all other enabling provisions of the law seeking orders for the Court to disregard, lift, and/or pierce the corporate veil of Dar Iman Ltd and hold its Directors, Caroline Wamuyu and Anthony Peter Wainaina Kamau, personally liable for satisfying the Court's decree issued on 15th March, 2022. The decree holder also sought to be granted leave to execute the said decree against the said Directors, and for the judgment debtor and/or its Directors to bear the costs of the application herein.
10. The application is supported by an affidavit sworn on the same date by Naran Hirani, the decree holder's Director. He averred that the decree holder successfully prosecuted an arbitration claim against the judgment debtor, resulting in an Arbitral Award dated 15th January, 2021, for Kshs. 27,845,670.00, which amount would earn interest at the rate of 14% per annum. He deposed that on 30th July, 2021, Judge Majanja recognized the aforesaid award as binding and granted leave to the decree holder to enforce it as a decree of the Court. That thereafter, on 14th January, 2022 the Deputy Registrar taxed the costs at Kshs.1,390,410.00. Mr. Hirani averred that as at 25th September, 2023, the decree holder was entitled to approximately Kshs. 38,355,312.46, with the decretal sum accruing daily interest of approximately Kshs.10,680.53 until full payment.
11. He stated that the decree holder has been unable to trace any assets of the judgment debtor to satisfy the decretal sum, and that previous attempts at execution were obstructed by objection proceedings from the judgment debtor's sister company. Mr. Hirani deposed that on 13th October, 2022, the Court ordered the cross-examination of the judgment debtor's Directors, Caroline Wamuyu and Anthony Peter Wainaina Kamau, who subsequently filed several affidavits about the judgment debtor's affairs. That the said Directors reported a profit of Kshs.266,874.00 for the financial year ending December, 2011, but they refused to include a Kshs.185,061,574.00 liability from executing the JBC form of contract in the company's accounts and opted not to call up a loan facility of Kshs.52,669,323.00 advanced to the judgment debtor. Mr. Hirani averred that the judgment debtor's Directors confirmed selling 5 out of the 6 constructed housing units, and they retained one unit, but they did not provide accounting records to the Court detailing the total revenue generated from the said sales or the expenses incurred.
12. Mr. Hirani deposed that the housing unit retained by the Directors of the judgment debtor was transferred by Ms. Wamuyu to Melek Holdings Ltd, a company where she, Jeremy Peter Kamau, and Lisa Wambui Wainaina are Directors and Shareholders. He contended that from the cross-examination of the judgment debtor's Directors and their affidavits, it is evident that the judgment debtor failed to keep books of accounts from the time it was incorporated, maintain adequate corporate records and comply with corporate formalities. In addition, he contended that the said Directors did not approve and sign the financial statements of the judgment debtor after relevant financial years, thus violating Section 658 of the [Companies Act](#). Mr. Hirani stated that the judgment debtor is inadequately capitalized and has no assets to satisfy the decretal sum.



13. He asserted that it is clear that the judgment debtor was incorporated and used for the improper purpose of shielding its Directors under the corporate veil from the consequences of their actions, which includes deliberately refusing and failing to pay the judgment debtor's debt due to the decree holder.
14. The application was opposed vide a replying affidavit sworn on 24th October, 2023 by Anthony Peter Wainaina Kamau, a Director of the judgment debtor. He averred that the instant application is res judicata in view of the application dated 20th September, 2022. He further averred that the application herein is an improper attempt to conduct a second cross-examination of the judgment debtor's Directors and to lift the corporate veil. Further, that no formal application to pierce the corporate veil has been filed or determined by this Court or any other, thus rendering the current application fundamentally flawed. He contended that the judgment debtor's lack of assets does not automatically entitle the decree holder to execute against its Directors, and in any event, there have been no allegations or evidence of fraud or corporate improprieties against the Directors to warrant the decree holder being granted the orders sought. Thus, the claims in the decree holder's supporting affidavit are unproven allegations.
15. Mr. Kamau stated that all proceeds from the sales of the units were used to pay the existing loan to HFCK which was not enough, hence his Co-Director procured an additional facility of USD 407,746.48 in the year 2018 as a Director of Melek Holdings Limited, a third party that held title to Unit No. 3 of the project, to repay the outstanding loan to HFCK. That subsequently, the charge of the property on which the housing units have been constructed was transferred to KCB Bank Limited in the year 2020, and that Ms. Wamuyu continues to pay the outstanding loan to date.
16. He claimed that the JBC contract executed on 21st November, 2012 for Kshs. 185,061,574.00 could not be included in the financial statements for the year 2012 because the amount was not payable at the time of execution. He contended that according to the accrual principle of accounting, future payments cannot be recorded in a previous accounting year, thus the contract sum could not be recorded in the year 2012.
17. Mr. Kamau deposed that pursuant to the provisions of Section 147 of the *Companies Act* (repealed), the judgment debtor had no mandate to keep books of accounts every year from the date of incorporation. Further, that no audited accounts had been undertaken by the judgment debtor for the years 2014 to 2022 as it falls under the exceptions provided for in Section 711 of the *Companies Act* of 2015. He averred that the Shareholders of the judgment debtor wrote off the shareholder advances, resulting in negative retained earnings on the balance sheet, which deficit has been offset by the share capital over the years.
18. In a rejoinder, the decree holder filed a supplementary affidavit where it contended that the instant application is not res judicata the application dated 20th September, 2022, because the said application was not fully determined as Judge Majanja in his ruling made an order for the production of the judgment debtor's books of accounts as part of the execution process, but he did not address the lifting of the corporate veil which would have been ruled upon substantively once the books of accounts had been produced in Court, and the Directors of the judgment debtor examined. The decree holder claimed that some of the accounts produced by the judgement debtor's Directors were not audited as the financial statements for the years 31st December, 2011, 2012 & 2013 were not executed by DMC Associates, the alleged Auditors. The decree holder urged this Court to lift the corporate veil so as to ensure that the ends of justice are met.



19. The application herein was canvassed by way of written submissions. The decree holder’s submissions were filed by the law firm of S. S. Malonza Advocates LLP on 14th December, 2023, whereas the judgment debtor’s submissions were filed on 5th March, 2024 by the law firm of MJD Associates Advocates.
20. Mr. D. Makau, learned Counsel for the decree holder relied on the provisions of Section 7 of the Civil Procedure Act and the Supreme Court case of John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & another Petition No. 17 of 2015, where the case of Angle v Canada (Minister of National Revenue – M.N.R.), 1974 Can LII 168 (SCC), [1975] 2 SCR 248 was cited, and submitted that the instant application is not res judicata the application dated 20th September, 2022. He cited the decisions in Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd [2021] eKLR and Joel Ndemo Ong’au & Another v Loyce Mukunya [2015] eKLR and stated that the judgment debtor was incorporated and used for the improper purpose of shielding its Directors under the corporate veil. He prayed for the judgment debtor’s corporate veil to be pierced and for leave to be granted to the decree holder to execute the decree issued on 15th March, 2022 personally against Caroline Wamuyu and Anthony Peter Wainaina, the Directors of the judgment debtor.
21. Mr. Onyancha, learned Counsel for the judgment debtor cited the provisions of Section 7 of the Civil Procedure Act and the Court of Appeal case of Accredo AG & 3 others v Stefano Uccelli & another [2019] eKLR, and submitted that the application herein is res judicata the application dated 20th September, 2022 which was heard and determined substantively by the Court (differently constituted) on 13th October, 2022, and the orders issued therein have neither been reviewed nor set aside by the Court of Appeal. He relied on the Court of Appeal case of Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others [2018] eKLR and contended that the decree holder has not made out a case to warrant the lifting of the judgment debtor’s corporate veil. He referred to the case of Admani & another v Monarch Developers Limited & 2 others (Environment & Land Case E426 of 2021) [2023] KEELC 16282 (KLR) and stated that lack of assets and funds to satisfy the decretal sum does not justify lifting of the corporate veil.

Analysis And Determination.

22. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the judgment debtor, as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the application herein is res judicata; and
 - ii. Whether this Court should lift/pierce the judgment debtor’s corporate veil and hold its Directors personally liable for the debt due to the decree holder.

Whether the application herein is res judicata

23. The doctrine of res judicata is provided for under the provisions of Section 7 of the Civil Procedure Act, 2010 which states that –

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



24. It is trite law that for the doctrine of res judicata to be effectively invoked, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that –
- i. The suit or issue raised was directly and substantially in issue in the former suit;
 - ii. That the former suit was between the same party or parties under whom they or any of them claim;
 - iii. That those parties were litigating under the same title;
 - iv. That the issue in question was heard and finally determined in the former suit; and
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
25. The doctrine of res judicata ousts the jurisdiction of a Court to try any suit or issue which has been determined with finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. The decree holder herein filed an application dated 20th September, 2022 seeking inter alia for orders for cross-examination of the judgment debtor's Directors, production of the books of accounts, audited financial statements, annual returns, bank statements, cheque books and other statutory document relating to the judgment debtor. The decree holder also sought an order for the judgment debtor's Directors to be held personally liable to satisfy the decree of the Court, and an order for leave to execute the decree herein against the judgment debtor's Directors personally.
26. On perusal of the record, I note that the said application was placed before Judge Majanja on 13th October, 2022 for hearing, and the learned Judge made orders allowing the application dated 20th September, 2022 for issuance of summons to the judgment debtor's Directors for cross-examination on the judgment debtor's means, and for the said Directors to provide all the books of accounts and relevant documents of the judgment debtor for examination. From the orders that were granted, it is worth noting that the prayer for the judgment debtor's Directors to be held personally liable to satisfy the decree of the Court, and for leave to execute the decree herein against the judgment debtor's Directors personally was not heard and determined on merits, as the said prayer was to be considered after cross-examination of the judgment debtor's Directors and examination of the judgment debtor's books of accounts, audited financial statements, annual returns, bank statements, cheque books and other statutory documents.
27. In the instant application, the decree holder prays are for this Court to disregard, lift and/or pierce the corporate veil of the judgment debtor and hold its Directors, personally liable for satisfying the Court's decree issued on 15th March, 2022, and for the decree holder to be granted leave to execute the said decree against the said Directors, and that the judgment debtor and/or its Directors bear the costs of the application herein. It is evident that the prayers sought in the present application have not been heard and determined by this Court or any other Court of competent jurisdiction on merits. It is therefore my finding that the doctrine of res judicata cannot be effectively raised and upheld in this case.

Whether this Court should lift/pierce the judgment debtor's corporate veil and hold its Directors personally liable for the debt due to the decree holder.

28. It is trite law that a company is a separate legal entity from its members and shareholders, this position was espoused by the Court in the English case of *Salmon vs Salmon* [1987] AC 78. This position is however not cast in stone as there are instances where the corporate veil of a company may be pierced



and/or lifted. The Court in the case of Jones and another vs Lipman & another [1962] I WLR 833 set out instances that warrant the piercing/lifting of a company's corporate veil by stating that -

“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or proper or illegal acts. This act of removing the façade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil.”

29. The Halsbury's Laws of England (4th Ed) at para 90 summarizes the principles governing the lifting of the corporate veil as hereunder -

“Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced.”

30. In addition, the Court of Appeal in the often cited case of Riccati Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR in addressing the issue of piercing/lifting the corporate veil of a company stated thus -

“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.”

31. In this case, the decree holder has a decree that was issued against the judgment debtor on 15th March, 2022 for Kshs.27,845,670.00, which sum accrues interest at the rate of 14% per annum. It is not disputed that the judgment debtor has not yet settled the aforesaid sum. As a result, the decree holder filed the instant application seeking this Court to pierce/lift the judgment debtor's corporate veil and hold its Directors personally liable for satisfying the said decree, and for leave to execute the said decree against the judgment debtor's Directors personally.

32. From the cross-examination of the judgment debtor's Directors, it is evident that the judgment debtor was incorporated on 21st December, 2009 with Anthony Peter Wainaina Kamau and Carolyne Wamuyu Wainaina as its Directors, and it was operating an account at the Upper Hill branch of Commercial Bank of Africa. Sometime in the year 2012, the judgment debtor and the decree holder got into a contract for the construction of six off-plan housing units on all that parcel of land known



as L.R. No. 8527/9 Farasi Lane, registered in the name of Ms. Wamuyu. Mr. Kamau, one of the judgment debtor's Directors testified that sometime in the year 2013, the judgment debtor ran into financial difficulties thus necessitating it to procure a loan to finance the aforesaid project, but since the judgment debtor did not have any assets and/or property it was impossible for it to secure a loan. Consequently, its Directors procured a loan of Kshs.136,000,000/= from HFCK which was secured by a charge registered over L.R. No. 8527/9 Farasi Lane in favour of HFCK.

33. Mr. Kamau stated that the said amount of Kshs.136,000,000/= was then advanced to the judgment debtor in the form of shareholder advances to finance the project undertaken by the judgment debtor. He further stated that it was a term of the financial facility advanced to them by HFCK that any payment of the off plan units would be paid through HFCK, vide a joint account opened in the names of the judgment debtor's Directors. It was the testimony of Mr. Kamau that the judgment debtor did not finance the said project since he and Ms. Wamuyu made payments to the contractor and other vendors, and also paid invoices raised by the judgment debtor.
34. He also testified that the off plan housing units were finally built to completion, and four of them were sold for between Kshs.60,000,000/= and Kshs.70,000,000/=, one was sold for Kshs.86,000,000/=, and one unit was retained by the judgment debtor's Directors. As result, they made sales of over Kshs.136,000,000/=. Mr. Kamau contended that the project undertaken by the judgment debtor incurred significant losses that were borne by the judgment debtor's Directors personally. According to Mr. Hirani in his affidavit sworn on 25th September, 2023 it later turned out that housing unit No. 3 which the Directors of the judgment debtor retained was later transferred by Ms. Wamuyu to a company by the name of Melek Holdings Ltd, a company in which Ms. Wamuyu, Jeremy Peter Kamau and Lisa Wambui Wainaina are its Directors and Shareholders.
35. In the case of Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd [2021] eKLR the Court when considering a similar application held as follows-

“In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company's alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute.

In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- a. First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
- b. Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

Some of the factors the Court would like at to determine if the two requirements have been met include the following:

- a. Whether the company is adequately capitalized;
- b. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;
- c. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;



d. Whether the alter ego has treated the assets or finances of the corporation as his own.”

36. Mr. Kamau testified that the judgment debtor has been insolvent for about nine (9) years due to continuous losses since the year 2014. He further testified that the judgment debtor is no longer operating or trading, although it remains registered and owns a few assets in the form of unit trusts valued at less than Kshs.1,000,000/=, which continue to accrue interest. He stated that the judgment debtor had an account with the Commercial Bank of Africa where money for the off-plan housing units was paid by interested purchasers of the units. He however failed to produce bank statements for the said account hence this Court cannot establish whether the said account is still operational and if it is, its current balance was not disclosed to this Court.
37. Since the judgment debtor’s Directors confirmed that they are the ones who paid the contractors and other vendors for work done on the project undertaken by the judgment debtor, this Court expected an account of how the money that had been deposited in the judgment debtor’s bank account at Commercial Bank of Africa was spent but none was tendered for examination by this Court. Mr. Kamau contended that failure to avail and/or produce the judgment debtor’s bank account statements was because the Court in its orders issued on 13th October, 2022 did not direct them to do so. On perusal of the said order, I note that Judge Majanja directed the judgment debtor’s Directors to provide all the books of accounts and relevant documents of the judgment debtor for examination. In my considered view, the term “all relevant documents” would include the judgment debtor’s bank account statements.
38. Since the judgment debtor’s Directors failed to avail and/or produce the judgment debtor’s bank account statements for reasons unknown to this Court, an adverse inference has to be made thereon. See the case of Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR where the Court held that -

“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.”

39. It is worth noting that during the cross-examination of Mr. Kamau, he claimed that the judgment debtor was incorporated for purposes of undertaking the project of constructing off-plan housing units only. He however offered no explanation as to why despite the fact that the project was completed and the housing units sold, the judgment debtor has not been wound up and/or declared insolvent on account of its inability to pay its debts.
40. It was Mr. Kamau’s testimony that the proceeds of the sale of the off-plan units was applied to settle the loan advanced to the judgment debtor’s Directors. However, no account statements from HFCK were availed for this Court to appreciate how the said funds were applied. It is evident from Mr. Kamau’s cross-examination that he was not sure how much the judgment debtor made from the sale of the housing units since all that he did was to give estimated figures. No sale agreements, RTGS slips or bank deposit slips were produced by the judgment debtor’s Directors for this Court to ascertain how



much the judgment debtor made from the sale of the said houses, in order for this Court to determine if indeed the judgment debtor is in a position to pay its debt to the decree holder or not.

41. In view of the foregoing, this Court is not in a position to ascertain whether the judgment debtor is properly capitalized, for it to be in a position to settle the debt due to the decree holder.
42. The decree holder contended that no formal corporate records were maintained by the judgment debtor, that the judgment debtor failed to comply with the provisions of Sections 629, 658 & 711 of the *Companies Act*, it failed to maintain proper account records for the sale of the housing units, there was no proper separation of accounts between its account and those of its Directors who paid for the expenses of the company personally, and also received funds for the sale of the housing units, and that the judgment debtor's Directors entered into financial obligations with knowledge of the struggling financial status of the judgment debtor.
43. It is not disputed that the judgment debtor failed to comply with the provisions of Sections 629, 658 & 711 of the *Companies Act*. The purported audited accounts produced by the judgment debtor's Directors were all prepared after the Court issued an order for production of the same. The veracity of some of the said accounts cannot be ascertained as they were not signed and/or executed by the Auditor who prepared the said accounts. As noted hereinbefore, the judgment debtor failed to maintain proper account records for the sale of the housing units since its Directors could not tell this Court with certainty how much it made from the sale of the housing units, and they did not provide accounts relating to the said sales that would assist have assisted this Court in ascertaining the proceeds of the said sale.
44. Mr. Kamau testified that since the judgment debtor could not secure financing on its own as it did not have any assets, he and his co-Director (Ms. Wamuyu) took out personal loans that were secured by a charge over the property where the units were to be constructed, and advanced the money to the judgment debtor as shareholder advances. He further testified that they opted not to call up the said advances but asserted that the proceeds from the sale of the off-plan units were used to repay the said loan. It is worth noting that the money which is said to have been advanced to the judgment debtor as shareholder advances is not accounted for since Mr. Kamau stated that together with his Ms. Wamuyu, they personally financed the project of construction of the off- plan housing units.
45. It was clear from the evidence of Mr. Kamau that after the loan from HFCK was procured, all finances in relation to the aforesaid project were run through the said account which was jointly operated by Mr., Kamau and Ms. Wamuyu, and not through the judgment debtor's bank account at Commercial Bank of Africa. This is clear evidence of lack of separation of the judgment debtor's accounts and those of its Directors. If at all the judgment debtor's Directors opted not to call up the money they had advanced the judgment debtor, proceeds of the sale of the housing units should have been banked in the judgment debtor's accounts. The proceeds should not have been applied towards settling the debt due to HFCK from the judgment debtor's Directors.
46. It is my finding that by treating the said shareholder's advances as their personal money, dictating and directing how the same would be applied, and using the proceeds of the sale of the housing units to settle their personal loans with HFCK, the judgment debtor's Directors treated the judgment debtor's assets and finances as their own, which is not only frowned upon by the law, but is also one of the principles that Courts look at when deciding whether or not to lift/pierce a company's corporate veil. This Court also finds it questionable that the judgment debtor's Directors advanced the judgment debtor Kshs.136,000,000/=, which they had procured through a loan from HFCK being fully aware of the judgment debtor's struggling financial status, which begs the question of how they intended to recover this money and/or settle the debt they owed to HFCK.



47. Having taken all factors into consideration, I am persuaded that there has been improper conduct on the part of the judgment debtor's Directors, and the corporate veil is being used to shield the said Directors from execution of the decree by the decree holder. In the circumstances, I am persuaded that I should exercise my discretion in favour of the decree holder by piercing the judgment debtor's corporate veil, thus holding its Directors personally liable for satisfying this Court's decree issued on 15th March, 2022.
48. I therefore pierce the corporate veil of Dar Iman Limited, the judgment debtor herein, thereby holding its Directors Mr. Anthony Peter Wainana Kamau and Ms. Caroline Wamuyu Wainaina personally liable to pay the decretal amount.
49. Consequently, I hereby grant leave to the decree holder to execute the said decree against the judgment debtor's Directors. Costs of the instant application are awarded to the decree holder and are to be settled by the judgment debtor's Directors in their personal capacity.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING
DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Davidson Makau for the decree holder/applicant

Mr. Onyancha for the Judgement debtor/respondent

Ms B. Wokabi – Court Assistant.

