



Mareco Limited v Mellech Engineering & Construction Limited (Commercial Miscellaneous Application 59 of 2017) [2024] KEHC 9536 (KLR) (Commercial and Tax) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 59 OF 2017**

AA VISRAM, J

JULY 24, 2024

BETWEEN

MARECO LIMITED APPLICANT

AND

MELLECH ENGINEERING & CONSTRUCTION LIMITED RESPONDENT

RULING

1. I have considered the application dated 19th January, 2024, together with the affidavit in support sworn on even date; the replying affidavit sworn in opposition to the same on 23rd February, 2024; the submissions of the parties; and the applicable law.
2. The Applicant is seeking orders to lift the warrant of arrest issued against the directors of the Judgment Debtor; and within three (3) months of granting the said prayer, the directors of the Judgment Debtor be granted leave to show cause why execution should not issue and/or why they should not be committed to civil jail.
3. Counsel for the Respondent submitted that there is an issue of representation by the advocates for the Applicant. He submitted that the pleadings may not be on record properly despite the consent between the parties regarding the issue of representation.
4. Counsel further submitted that the Judgment Debtor failed to honour the consent dated 26th September, 2022, leading to the execution proceedings which are the subject matter of this application.
5. I have looked at the arbitration award published on 11th November, 2016 (“the Award”), found at Exhibit AOM1 of the replying affidavit, and it is evident to me that the parties to the arbitration are both limited liability companies, and not individuals. Paragraph two of the Award states the names of



the parties in full, and is to that effect. In short, Gerald Reuben Wamalwa and Grace Wanjiru Wamalwa were not parties to the said Award.

6. I further note that the consent at page 63 of the replying affidavit is a consent between the Respondent and the Applicant Company, and not the directors, in their personal capacity.
7. Similarly, the ruling dated 27th November, 2019, relates to the recognition and enforcement of the Award, and therefore, relates to only the parties to that Award. Based on the above, I am satisfied that there is no judgment pending against Gerald Wamalwa or Grace Wamalwa in their personal capacity, which was the basis upon which the various Notices to show cause were issued on various dates.
8. In this regard, I note that the Notice to show cause dated 3rd August, 2023, specifically identifies Gerald and Grace as the Judgment Debtors rather than the Company as a Judgment Debtor. This was erroneous. Based on the evidence before me, the Debtor, is and always was, Mellech Engineering and Construction Limited.
9. It is trite that the Judgment Debtor, as a company, has a separate personality from its shareholders/ owners and/or its directors. This principle is encapsulated in the seminal case of *Salomon v Salomon & Co* [1897] AC 22, where Lord Macnaghten affirmed the separation between the corporation and its members in the following terms:-

“The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act”.

10. Based on the principle above, in the absence of a court order, the veil of incorporation may not be pierced in the manner in which the Decree Holder sought to do so. Execution ought to have taken place against the Judgment Debtor/Company, and not the individual directors in their personal capacity.
11. Moreover, had the Decree Holder wished to pursue the individual directors in their personal capacity, the law stipulates that there is a process to be followed, and specific grounds which must be established first. As part of this process, the party seeking to lift the corporate veil must tender cogent evidence showing why the veil of incorporation of any given corporate body ought to be pierced.
12. In *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR, the court, at paragraph 15 of the said decision, quoted with approval, the following principles from *Halsbury's Law of England* with regard to the test or grounds to be established:-

“The Halsbury's Laws of England, 4thEdn para. 90; addresses the issue of piercing the veil of incorporation and states that;

“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 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 lifted" (emphasis mine).

13. Similarly, in *Jones v Lipman & Another* [1962] 1 All ER 442) and *H. L. Bolton (Engineering Co. Ltd v T. J. Graham & Sons Ltd* [1956] 3 All ER, the English courts stated that the persona of a company may be dispensed with in situations where:-

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such.”.

14. Moreover, Order 22, Rule 35 of the *Civil Procedure Rules* provides for the procedure to be followed as a precursor to piercing the veil of incorporation. The said provision provides as follows:-

“35. Examination of judgment-debtor as to his property [Order 22, rule 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”.

15. Only after examination of the directors as set out above, and in the event, it is appropriate to do so, and based on the criteria set out above, may the court proceed to make such an order lifting the corporate veil. In the present circumstances, no such discovery relating to execution has taken place, and there is no evidence before me that a court vested with jurisdiction issued any orders to pierce the corporate veil of the Judgment Debtor/ Company.
16. Finally, notwithstanding the issue of representation, which has not come out clearly from either of the parties, this court is not inclined to allow a piercing of the corporate veil without a mustering of the test as set out above, first.
17. Accordingly, I find that execution against the directors of the Judgment Debtor in their personal capacity was unlawful. Based on the reasons above, I find that the application is with merit.
18. The warrants of arrest issued against Gerald Reuben Wamalwa and Grace Wanjiru Wamalwa are hereby set aside with costs. It follows that the said directors need not appear before the Deputy Registrar to show cause why they should not be committed to civil jail.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF JULY 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....For the Applicant



.....For the Respondent

