



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Kikambala Housing Estate Limited (Miscellaneous Application  
199 of 2017) [2023] KEHC 27633 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 199 OF 2017  
F WANGARI, J  
OCTOBER 3, 2023**

**BETWEEN**

**SAMWEL NYAMU KAMAU ..... APPLICANT**

**AND**

**KIKAMBALA HOUSING ESTATE LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant moved the court vide the Notice of Motion application dated 2<sup>nd</sup> December, 2020 and filed on even date. He sought for the following orders as against the Respondent: -
  - a. Spent;
  - b. That the Honourable Court be pleased to order that Osman Erdinc Elsek and Deniz Elsek being the directors/shareholders of the Respondent/Judgement Debtor do attend court on a date to be allocated by the court for purposes of their examination as to: -
    - i. Whether any or what debts are owing to the Respondent/Judgement Debtor;
    - ii. Whether the Respondent/Judgement Debtor has any and what property or means of satisfying the Decree;
  - c. That in default of compliance with the orders subject of prayer 2 above, the Honourable Court be pleased to direct that Osman Erdinc Elsek and Deniz Elsek personally satisfy the entire decretal amount due to the Applicant/Decree Holder or be imprisoned and committed to civil jail for a period not less than six (6) months;
  - d. That the costs of the application be borne by the Respondent/Judgement Debtor and/or Osman Erdinc Elsek and Deniz Elsek.



2. The grounds in support of the application were that pursuant to a sale agreement between the parties dated 15.6.2012, parties proceeded for arbitration where an arbitral award dated 13.5.2016 was made in favour of the Applicant for terms that the Applicant was entitled to Kshs. 1,020,000/= as the claim and Kshs. 277,020/= as interest. On 5.2.2018, the court recognized the award and held that it was binding on the parties. It was thus adopted as the judgement of the court and a decree to that effect was to issue. On 24.5.2018, the decree issued.
3. The Applicant proceeded to tax his costs and through a ruling delivered on 23.7.2019, the Applicant's costs were taxed at Kshs. 201,875/=. On 28.10.2019, warrants of attachment of movable property in execution of a decree for money and warrants of sale of property in execution of a decree for money were issued to Makuri Auctioneers on 28.10.2019. Through a letter dated 4.8.2020, the said auctioneers returned the warrants unexecuted as there were no attachable assets.
4. The Applicant averred that all his attempts to realize the decree through garnishee proceedings yielding nothing as the Respondent/Judgment Debtor through her directors/shareholders have no attachable securities in the bank accounts identified. A search at the companies' registry disclosed that the two (2) individuals mentioned in the application were the Respondent's directors/shareholders. Thus because of the failure to settle the decretal sum, it was imperative that the directors/shareholders be summoned.
5. The application was opposed. The Respondent filed grounds of opposition dated 4<sup>th</sup> February, 2021 on even date. The Respondent contended among other grounds that the application was premised on the flawed assumption that the corporate veil of the Respondent has been pierced and that the directors have assumed liability.
6. The Respondent through one of its directors further filed a replying affidavit dated 14<sup>th</sup> July, 2021 on the same date. Among the averments in the said response were that the Respondent was the owner of a property described as Kilifi/Mtwapa/867 and that the Applicant had made no efforts to execute the said property.
7. Directions were taken that the application be disposed off by way of written submissions. Both parties duly filed their submissions and cited various authorities in support of their rival positions. The Applicant's submissions are dated 28<sup>th</sup> March, 2023 and filed on 29<sup>th</sup> March, 2023.
8. The Respondent's submissions are dated 22<sup>nd</sup> May, 2023 and filed on the same date. Am grateful for parties' compliance with the directions. The court shall make reference to the said submissions and authorities when rendering itself on the merit or otherwise of the application.

### **Analysis and Determination**

9. Having considered the application, the responses, written submissions, cited authorities and the law, the following are the issues for determination: -
  - a. Whether the Applicant has made out a case to warrant the orders he is seeking;
  - b. What is the order as to costs?
10. At the onset, it is not in dispute that the Respondent is a limited liability company registered as such under the Laws of Kenya. It is equally not in dispute that Osman Erdinc Elsek and Deniz Elsek are the Respondent's directors/shareholders.
11. The locus classicus on the relationship between a company and its directors and shareholders was settled way back in 1897 in the case of *Salomon v Salomon* [1897] AC 78. The House of Lords held



that a company is in law a separate person from its members. The Court of Appeal in *Victor Mabachi & Another v Nurtun Bates Limited* [2013] eKLR held as follows: -

“...a company being 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...”

12. The application principally sought for examination of the Respondent’s directors/shareholders as regards means to satisfy the decree that was issued by this court. For the directors/shareholders to be summoned, a party seeking such orders ought to first satisfy the court that the corporate veil ought to be lifted.

13. The *Halsbury’s Laws of England, 4<sup>th</sup> Edition*, paragraph 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.”

14. 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.

15. In *Ukwala Supermarket v Jaideep Shah & Another* [2022] eKLR, it was held as follows: -

“...The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity...”

16. The court went ahead to set the following two (2) parameters to be met before the corporate veil is lifted or pierced.

- 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.

17. I have gone through the entire file and I have not seen any proceedings where the Applicant laid any basis for lifting the veil of incorporation. As such, prayer (2) of the application is untenable. Similarly, I note that the Respondent has attached a title deed for land subject of Title Number Kilifi/Mtwapa/867. The Respondent’s averment on the aspect that the Applicant has not made any efforts to



execute this property was not controverted and I therefore agree with the Respondent that no attempts have been made on executing this property.

18. I think I have said enough to show that the application dated 2<sup>nd</sup> December, 2020 is not yet ripe for consideration.
19. As to the issue of costs, the same follows the event. That is what section 27 of the *Civil Procedure Act*. However, the court has the discretion to direction otherwise. In the circumstances, I direct that each party to bear their own costs.
20. Flowing from the foregoing, I proceed to make the following orders: -
  - a. The application dated 2<sup>nd</sup> December, 2020 is found to be premature as no evidence has been tendered to show that the Applicant has attempted to execute against property title number Kilifi/Mtwapa/867. Based on this, I proceed to issue further orders as follows: -
    - i. The Applicant to carry out due diligence to ascertain that the above-mentioned property is in the name of the Respondent and that it has no encumbrances from third parties;
    - ii. If the findings are in the affirmative, the Applicant to proceed and execute against the said title but only limited to the amount that shall be outstanding at the time of execution;
    - iii. Any difference over and above the decretal sum be remitted to the Respondent; and
    - iv. Either party is at liberty to move the court for further orders or directions
  - b. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023.**

.....

**F. WANGARI**  
**JUDGE**

In the presence of:

Matoke Advocate for Ngonze Advocate for the Applicant

Aziz present in person for the Respondent

Barille, Court Assistant

