



**Musakhi v NMK Capital Investments Limited (Commercial Case E1049 of 2023)
[2024] KEHC 14787 (KLR) (Commercial and Tax) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E1049 OF 2023
MN MWANGI, J
NOVEMBER 14, 2024**

BETWEEN

PETER SIBALE MUSAKHI APPLICANT

AND

NMK CAPITAL INVESTMENTS LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 8th December 2023 pursuant to the provisions of Sections 148, 787, 996 & 1002 of the *Companies Act*, Sections 1A, 1B, 3A, 6 & 34 of the *Civil Procedure Act*, Order 51 Rule 1, and Order 22 Rule 35 of the Civil Procedure Rules, 2010, and all enabling provisions of the law.
2. The applicant seeks orders for this Court to compel the Directors of NMK Capital Investments Limited - namely Keeru Ngugi Mucheru, Amos Macharia Maina, Lucy Joan Gathoni Wanjiru, Fredrick Kariuki Makumi, Gidion Charagu Mwangi, Shiphira Wangui Kanyingi, Agatha Wanjugu Mwaniki, and Wester Wambunya Egesa, to attend Court for examination on the company's ability to satisfy a decree in Milimani MCCCOSU NO. E882 of 2023, and produce business records and evidence of the company's financial status. He also seeks orders for the lifting of NMK Capital Investment Ltd's corporate veil, making its Directors personally liable for the debt of Kshs.9,735,790.54, with interest from 23rd November 2023 until payment in full, due to their fraudulent intentions against creditors. That in default of the above, the said Directors be imprisoned and committed to civil jail for a period not less than six (6) months.
3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 11th December 2023 by Peter Sibale Musakhi, the applicant herein. He averred that the respondent is a private company registered in Kenya with Shareholders and Directors



including Keeru Ngugi Mucheru, Amos Macharia Maina, Lucy Joan Gathoni Wanjiru, Fredrick Kariuki Makumi, Gidion Charagu Mwangi, Shiphira Wangui Kanyingi, Agatha Wanjugu Mwaniki, and Wester Wambunya Egesa. He further averred that the respondent presents itself on its website as specializing in investment and wealth management, covering areas like real estate, corporate car rentals, and project financing. Mr. Musakhi stated that on 24th December 2022, he entered into a Fractional Share Investment Agreement with the respondent for a six-month period, by investing Kshs.300,000/=.

4. He further stated that under the first agreement, he was to receive a monthly return of Kshs.45,000/= equivalent to 15% of the investment, with a full refund of the Kshs.300,000/= principal amount, plus an additional Kshs.45,000/= at the end of six months, unless renewed. The applicant contended that he then entered into a second six-month agreement on 24th March 2023, by investing Kshs.4,700,000/=, thus entitling him to a 15% monthly profit equivalent to Kshs.705,000/=, and a full principal refund at the end of the term. He deposed that after execution of the 2nd agreement, the respondent stopped fulfilling its obligations under the first agreement by failing to pay the remaining monthly profits, and did not pay the required amount upon its expiration in June 2023. Further, that the respondent refused to return the principal sum of Kshs.300,000/= plus outstanding profits of Kshs.90,000/=.
5. The appellant averred that the respondent did not fulfill any payments under the 2nd agreement, effectively defaulting on the full sum owed. He stated that he discovered that the respondent was allegedly operating a pyramid scheme, having defrauded multiple investors in a similar manner. He contended that after taking funds, the respondent closed its office, restricted website access, and some of its Directors started similar ventures, like Aptitude Capital Limited. He deposed that following numerous complaints, the Directorate of Criminal Investigations charged the respondent's Directors with the offence of obtaining by false pretences. That he then filed Milimani MCCCOSU NO. E882 of 2023 against the respondent, which resulted in a judgment dated 23rd November 2023, and a decree issued on 7th December 2023, for the return of the invested funds and accrued interest. He contended that due to the respondent's lack of traceable assets, standard enforcement is deemed ineffective.
6. In opposition to the application, the respondent filed a replying affidavit sworn on 3rd March 2024, by Keeru Mucheru, one of the respondent's Directors. He stated that the respondent is a separate legal entity from its Directors, and it is protected by corporate personality which can only be pierced under exceptional circumstances. He claimed that the applicant has not proved creditor status or established fraud in a Court of law, where the burden of proof is higher than on a balance of probabilities to warrant being granted the orders sought herein.
7. He contended that the applicant has not tendered any evidence in support of the allegation that some of the respondent's Directors have started a new company, Aptitude Capital Limited. Mr. Mucheru averred that the respondent has a registered office, and no complaints have been raised by the company's Shareholders. He further averred that the instant application has been filed prematurely since the applicant has not demonstrated that he attempted other enforcement methods before filing the instant application.
8. The present application was canvassed by way of written submissions. The applicant's submissions were filed on 5th February 2024 by the law firm of S. Kipkorir & Komen Law, whereas the respondent's submissions were filed by the law firm of Chemiati and Company Advocates on 23rd April 2024.
9. Mr. Kipkorir, learned Counsel for the applicant relied on the case of Arun .C. Sharma v Ashana Raikundalia & 5 others [2015] eKLR, and submitted that the corporate nature of a company as a separate legal entity is not absolute as the veil of incorporation may be pierced in certain instances. He further relied on the cases of Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR,



and *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR, and stated that the instant application seeks to lift the respondent's corporate veil on grounds that the respondent company was a façade for financial fraud by its Directors, as they used the said company to illegally enrich themselves through a pyramid scheme, and that the Directors' wrongful conduct caused unjust losses to creditors, including the applicant.

10. Mr. McKenzie, learned Counsel for the respondent relied on the case of the Speaker of the National Assembly v James Njenga Karume [1992] eKLR, and submitted that the instant application has been filed prematurely, without exploring other available methods to enforce the decree issued in Milimani MCCCOSU NO. E882 of 2023 such as instructing an Auctioneer, obtaining warrants to seize property, or requesting for a Notice to Show Cause hearing. He contended that no evidence had been tendered to demonstrate service of the decree upon the respondent. He relied on the case of *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others (Miscellaneous Civil Application 43 of 2023)* [2024] KEHC 2343 (KLR), and argued that there is no evidence to justify the applicant being granted the orders sought.
11. Counsel cited the case of *Palmer's Company Law Vol. 1 (22nd Ed)*, cited in the case of *Mugenyi & Company Advocates v The Attorney General* [1999] 2 EA 199, where the Court listed ten (10) instances in which the veil of a corporate personality may be lifted, Mr. McKenzie contended that the applicant herein has not made out a case to warrant being granted the orders sought in this application. He referred to the case of *Donald Omuyaku Okinami v Luanda Revival Worship Centre* [2021] eKLR, and asserted that the applicant has not discharged his burden of proving fraud on the part of the respondent's Directors to warrant this Court to exercise its discretion in his favour and pierce the respondent's corporate veil.

Analysis And Determination.

12. Upon consideration of the application herein, the affidavit filed in support thereof, the replying affidavit by the respondent, and the written submissions by Counsel for the parties, the issues that arise for determination are -
 - i. Whether the respondent's Directors should be summoned to attend Court for examination on oath and to produce business records and evidence of the respondent's financial status; and
 - ii. Whether the respondent's Directors should be held personally liable for the respondent's debt to the applicant.

Whether the respondent's Directors should be summoned to attend Court for examination on oath, and to produce business records and evidence of the respondent's financial status.

13. Judgment was entered in favour of the applicant against the respondent in MCCCOSU NO. E882 of 2023 on 23rd November 2023. Subsequently, the respondent filed an application seeking to set aside the said judgment but the application was dismissed. The applicant contends that due to the respondent's lack of traceable assets, a known office and/or location, standard enforcement is deemed ineffective.
14. The application herein was filed pursuant to the provisions of Order 22 Rule 35 of the Civil Procedure Rules, 2010 which states that -

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. This Court has the power to summon any officer of a company to attend before it to be examined on 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. The Court of Appeal in the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* (supra), in discussing the issue of lifting of the corporate veil stated thus –

A useful discussion on circumstances where a court will be entitled to lift the corporate veil appears at paragraph 402 of Halsbury's Laws of England 4th Edition Vol. 7(1) where the learned authors say:

“.....or where the court will ‘pierce (or lift) the corporate veil’, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the company will be relevant. The court will go behind the 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. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the court’s ‘piercing’ (or ‘lifting’) the veil.

Where, however, 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. Nor is the court entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the company will fall on another member of the group rather than the defendant company.

It may be that liabilities or obligations will arise without piercing the corporate veil because there is an agency relationship between a parent company and subsidiary, or between a company and its shareholders, but this may not be inferred merely from control of the company or ownership of its shares or from the level of paid up capital. It will depend on an investigation of all aspects of the relationship between the parties and there is no presumption of such agency.”

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.

16. The applicant herein has an unsatisfied decree against the respondent. In as much as the respondent disputes service of the decree, it confirms to have filed an application seeking to set aside the judgment in the lower Court. This in my view confirms that the respondent was duly aware of the judgment



and decree issued against it, thus it is estopped from disputing service of the decree issued by the lower Court. The respondent in disputing the instant application attempted to argue the merits or otherwise of the applicant's claim before the lower Court on the strength of its application seeking to set aside the judgment by the lower Court delivered on 23rd November 2023.

17. Further, the respondent claims that the applicant has not exhausted other enforcement methods available to him such as instructing an Auctioneer, obtaining warrants to seize property, or requesting for a Notice to Show Cause hearing, before filing the instant application. It is however worth noting that the respondent despite being fully aware that its application seeking to set aside the judgment delivered by the Court on 23rd November 2023 was dismissed, has not attempted to settle the decretal sum and/or at the very least approach the applicant with a proposal on how it intends to settle the decretal sum herein. Further, it is not disputed that the individuals named by the applicant are indeed the respondent's Directors.
18. In the premise, the applicant has made out a case to warrant this Court to make an order for the respondent's Directors to be summoned to attend Court for examination on oath and for production of inter alia, the respondent's books of accounts.

Whether the said Directors should be held personally liable for the respondent's debt to the applicant.

19. In determining whether or not the respondent's Directors should be held personally liable for the respondent's debt to the applicant, this Court has to first determine whether there is sufficient reason to pierce and/or lift the respondent's corporate veil. As such, this issue cannot be determined without first giving the said Directors an opportunity to be examined on oath as to the respondent's business and affairs, property, and/or means of satisfying the decretal sum, and for them to produce the respondent's books of accounts relating to the day to day running of the company, audited financial statements, certified company's bank statements, cheque books and other statutory documents for the period in dispute. It is therefore in the interest of justice that this issue be held in abeyance until after the cross-examination of the respondent's Directors.
20. In the end, this Court finds that the instant application is merited. I make the following orders -
 - i. Summons shall issue to Keeru Ngugi Mucheru, Amos Macharia Maina, Lucy Joan Gathoni Wanjiru, Fredrick Kariuki Makumi, Gidion Charagu Mwangi, Shiphira Wangui Kanyingi, Agatha Wanjugu Mwaniki, & Wester Wambunya Egesa being directors of NMK Capital Investments Limited to attend Court to be orally examined as to the respondent's business and affairs, property, and/or means of satisfying the decretal sum;
 - ii. An order is hereby issued directing the said Directors to produce before this Court the respondent's books of accounts relating to the day to day running of the company, and other documentary evidence for the period in dispute, showing the status of its business.
 - iii. The aforesaid Directors shall be examined on the contents of the said documents at a date to be set by this Court;
 - iv. Prayers 3, 4, 5 & 6 are held in abeyance and shall be determined after examination on oath of the respondent's Directors and production of inter alia, the respondent's books of accounts and audited financial statements; and
 - v. Costs are awarded to the applicant.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wanyama for the applicant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

