



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS CIVIL CAUSE NO 606 OF 2012**

**VISARO CONSTRUCTION LIMITED.....CLAIMANT/APPLICANT**

**VERSUS**

**HELLO PROPERTIES DEVELOPMENT COMPANY LIMITED.....RESPONDENT**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 1<sup>st</sup> October 2013. It is brought under the provisions of Order 22 Rule 35 Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act 2010 and all other enabling provisions of the Law. It is supported by the grounds thereto and an Affidavit sworn by Vishram A. Gajipara.

2. The Applicant is seeking for orders that:

*a) The Honourable Court be pleased to make an order that Mr. Ashton Towler and Mr. Friso Abbing, Directors of the Respondent Company be summoned and be orally examined as to whether the Respondent has any and what property or means of satisfying the decree subject matter herein.*

*b) The said Mr. Ashton Towler and Mr. Friso Abbing do produce all books of Accounts belonging to the Respondent Company with regard to the transaction forming the subject matter of this suit.*

*c) The Court does make any other order it deems fit for the ends of Justice.*

*d) The Costs of the Application be awarded to the Applicant.*

3. Subsequently, on 22<sup>nd</sup> September 2015, the Parties entered into a consent whereby prayers (a) and (b) above were allowed as prayed. A further order was made that the costs be in the cause.

4. On 10<sup>th</sup> January 2017, Mr Ashton Tower a Director of the Respondent Company was cross examined as to whether the Respondent has any and what property or means to satisfy the decree which is the subject matter herein. The said decree arose from Arbitral Award filed in Court on 15<sup>th</sup> October, 2012, in which the Respondent Company was ordered to pay the Claimant/Applicant a sum of Kshs15, 148,201,60 with interest at 20% per annum until payment in full.

5. During cross examination, Mr Towler informed the Court that he is the only remaining director of the

Company after the other director Mr Friso Abbing resigned as a director, when the Company ceased trading. That the Company was formed as a Special Purpose Vehicle (SPV), with the main object being to develop and sell houses at Hardy Manor Residential Development. It ceased trading in the year 2009 when all the units had been developed and sold, that is after objective had been accomplished.

6. That, in the year 2010, the Company ran into financial challenges and it passed a resolution for voluntary winding up of the company. That the Application for winding up was opposed by the Claimant and is still pending with Registrar. However, Mr Towler acknowledged that the decretal sum herein has not been satisfied. That the Company made no surplus from the project and has no assets to settle the decree sum.

7. The parties disposed of the Application by filing submission which I have considered. I find that this Application is premised on the procedural provisions of Order 22 Rule 35 of the Civil Procedure Rules which states;

***“Where a decree is for the payment of money, the decree holder may apply to the Court for an order that-***

***a) The judgement-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 judgement-debtor, and whether the judgement-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 judgement-debtor or officer, or other person, and for the production of any books or documents.”***

8. The Applicant submitted that, the Respondent’s witness did not produce any resolution and/or the Application petitioning for voluntary winding up of the Respondent company. That similarly, there is no evidence that, the Company ceased trading once its main purpose came to an end. That the Respondent is contradictory when he avers that the Company ceased trading once its purpose was over and at the same time allege it is in voluntary winding up due to financial difficulties. That, Mr Tower’s testimony therefore ***“leaves a lot more than meets the eye”***. The Applicant urged the Court to find that it is at liberty to bring an Application to lift the veil of incorporation of the Company.

9. The Respondent on their part produced the Kenya Gazette Notice No. 12818 dated 14<sup>th</sup> August 2013, to support the averment that the company is in voluntary winding up and prayed that this Application be dismissed with costs. The Respondent further submitted that the Applicant must provide concrete proof of fraudulent misapplication of the Company assets for the Court to make an order of lifting up the veil of incorporation. That, the cross examination of Mr Tower has revealed that the Respondent is insolvent and there is no malpractice to warrant the lifting of the veil of incorporation.

10. He distinguished this case from the circumstances in the case of; ***Masefield Trading (K) Ltd Vs Rushmore Company Limited & Another (2008) eKLR*** where the Court held that;

***“In the present application, the Plaintiff did establish that the interested party, a director of the 1<sup>st</sup> Defendant company transferred the suit property from the company to himself in the circumstances that clearly suggest that the interested party may have intended to frustrate the Plaintiff from realizing the fruits of its judgement. The said transfer was effected during the pendency of the suit. I think it is only just and fair that the interested party be summoned to Court and be orally examined on the circumstances under which the suit property was transferred from the ownership of the 1<sup>st</sup> defendant.”***

11. In my considered opinion, I find that the purpose of oral examination of Mr Tower was to establish if

the Respondent has any property and/or means to satisfy the decree herein. These legal principles guiding such cross-examination were upheld in the case cited by the Applicant of; **Ultimate Laboratories Vs Tasha Bio-service Ltd HCCC No. 1287 of 2000.** Where the Court held that;

***“The court’s duty under the Order and Rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree.”***

12. At page 8 of the ruling, the Court held that:

***“While I agree with the defendant’s/judgement debtor’s advocate that the objective of an examination of a company’s director or officer under Order XXI RULE 36 is to obtain discovery, for the purpose of execution of a decree against the company, as to whether any or what debts has any and what property or means of satisfying the decree....”***

13. In the instant case, the cross examination of Mr Tower revealed no existence of the Respondent assets or means to satisfy the decretal sum herein. That is why the Applicant seeks to be allowed to lift the veil of incorporation. In the same case of **Ultimate Laboratories Vs Tasha Bio-service Ltd** (supra) Justice Ringera (as he then was) observed that:

***“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted if there is fraud or improper conduct (see the cases of GILFORD MOTOR CO. Vs Horne (1933) Ch. 935 and Jones Vs Hipman (1962) 1 W.L.R.832).”***

14. The issue herein therefore is whether fraud or improper conduct is established for the Court to order for lifting of the veil of incorporation of the Respondent and hold the directors thereof personally liable. First and foremost, the issue of lifting the veil of incorporation is not among the issues and/or prayers sought for in this Application. It only arose through the Applicant’s submissions. Secondly, even then the Applicants submitted as follows:

***“We therefore pray the Court find that the Claimant is at liberty to bring an application to lift the veil of incorporation” (emphasis mine).***

15. Thus the Applicant is not asking for the Court to order for lifting the veil of incorporation but be allowed to “apply” for the same. The Applicant is indeed at liberty to make an Application for the same, even without the Court directing so. The Court will consider the Application at the point of need. I will therefore not delve into that issue at this stage. Any submission on the same will be reserved.

16. Back to the Application herein I find the prayers 1 and 2 thereof were dealt with by consent recorded in Court as aforesaid. That leaves the last two prayers; that the Court may make other order it deems fit. I find no justifiable reason to make any further orders herein. The Applicant is at liberty as aforesaid to apply for lifting of the veil if it so wishes. As to costs, I find that the Claimant is pursuing execution of unsatisfied decree. It will not be in the interest of justice to award the Respondents costs. The costs shall be in the cause.

17. Orders accordingly.

**Dated, signed and delivered on this 14<sup>th</sup> day of June 2017 at Nairobi.**

**GRACE L. NZIOKA**

**JUDGE**

**In open Court in the presence of:**

Mr. Wasike for Simiyu for the Claimant/Applicant

Mr. Wawire for the Respondent

Teresia - Court Assistant