



Shamsudinalibhai & another v Osotua Villas Limited (Miscellaneous Application E917 of 2021) [2025] KEHC 14497 (KLR) (Commercial and Tax) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E917 OF 2021**

F GIKONYO, J

OCTOBER 9, 2025

BETWEEN

ARSHAD SHAMSUDINALIBHAI 1ST PLAINTIFF

NAFISA ARSHAD ALIBHAI 2ND PLAINTIFF

AND

OSOTUA VILLAS LIMITED DEFENDANT

RULING

1. The 1st and 2nd plaintiffs' notice of motion dated 27th March 2025, seeks:
 1. That the consent dated 7th April 2025 be entered and the firm of A.A Law Advocates be allowed to enter appearance on behalf of the Applicants.
 2. That the Honorable Court be pleased to lift and/or pierce the corporate veil of the Respondent Company and hold its directors and/or shareholders personally liable for the decretal sum due under the decree dated 28th November 2022.
 3. That John Kuria Kariuki, Geoffrey Mbugua Kamau and Caroline Wairimu Kimemia being the directors of the Respondent, Osotua Villas Limited be summoned by this Honourable Court and orally examined under oath as to the Respondent's means and assets of satisfying the ruling dated 25th November 2022 and to produce the Respondents books of accounts and other documentary evidence showing the same.
 4. That in default of the Directors complying with the above order such further orders be made against them personally as this Honourable Court may deem fit.
 5. That the costs of this application be provided for.



2. The application is made under Order 22 Rule 35, Order 51 Rules 1 and 3 of the Civil Procedure Rules, Section 1A and 1B and 3A of the *Civil Procedure Act*.
3. The application is premised on the grounds outlined in its body and the primary and supplementary affidavits sworn by the 1st plaintiff on 27th March 2025 and on 27th May 2025. The applicants further filed written submissions dated 27th May 2025.
4. The grounds are that: -
 1. The applicants obtained the decree dated 28th November 2022 against the respondent, following the ruling of 25th November 2022.
 2. Through the ruling, the court allowed the recognition and enforcement of the final arbitral award dated 10th August 2021 as an order of the court.
 3. The respondent was ordered to pay the applicants Kshs.13,000,000/- (Thirteen Million Shillings) together with simple interest at court rates of 14% per annum from 7th June 2016 until payment in full.
 4. The applicants were also awarded costs of Kshs. 652,500/= (Six Hundred and Fifty-Two Thousand, Five Hundred Shillings).
 5. The respondent was also ordered to pay a sum of Kshs. 929,125/= (Nine Hundred and Twenty-Nine Thousand One Hundred and Twenty Five shillings) Inclusive of VAT as the Tribunal's arbitral fees and expenses.
 6. Any sum remaining unpaid under the award was to attract simple interest at the rate of 14% per annum from the date of the publication of the award till payment in full.
 7. The total amount payable by the respondent is therefore Kshs. 14,581,625/- which remains unpaid to date.
 8. The respondent has deliberately failed, neglected, and/or refused to settle the decretal amount despite repeated demands by the applicants.
 9. The respondent has not made any attempt to clear the decretal sum thereby greatly inconveniencing the applicants.
 10. The respondent has no known assets that can satisfy the decree, and efforts to enforce execution have proved futile.
 11. The respondent's directors have fraudulently and dishonestly misused the corporate structure to evade legal and financial obligations.

Response

5. The application is opposed by the defendant through a replying affidavit sworn by Eng. Geoffrey Mbugua Kamau on 16th May 2025 and written submissions dated 11th June 2025.
6. The respondents core contentions are: -
 1. The application is fatally defective as the applicants have sought to execute a decree more than one year after its issuance on 28th November 2022, without first obtaining leave of the Court, as required under Order 22 Rule 18 of the Civil Procedure Rules.



2. The respondent's inability to settle the decretal sum is not wilful but arises from prolonged disputes and strained relations with its financier, Housing Finance Company (HFC) Limited, which significantly disrupted the viability of the Osotua Villas project.
3. The non-settlement of the decretal sum cannot fairly or honestly be attributed to fraud, impropriety, or misuse of the corporate veil. Rather, it is the direct consequence of protracted disagreements with the financier.
4. The applicants have failed to tender any credible evidence of fraud or misconduct on the part of the respondent or its directors.
5. The applicants have not made any attempt to execute the decree, and as such, the present application, akin to post-judgment discovery, is premature and unwarranted.

Submissions

7. The applicants faulted the respondent for failing to table before this court any of its books of accounts and bank statements showing that its earnings have gone to satisfying a third party's claim.
8. The applicants submitted that they have met the conditions for the grant of an order to summon the respondent's directors for oral examination and to produce the documents to show what means and assets are available to settle the decretal sum.
9. The applicants relied on: -
 1. Tropical Wood Limited v Samilisinternational Investments [2017] KEHC 579 (KLR)
 2. Bakex Millers Limited v Esgee Industries Limited [2018] eKLR
 3. Robert Kinaga Waweru v Northcorr Enterprises Ltd [2021] eKLR
 4. Nairobi HCCC No. 1287 of 2000 Ultimate Laboratories v Tasha Bioservice Limited (unreported)
 5. Cecilia Oduro, Suing as the Administrator of the Estate of the Late Melcillius Oduro v Princeton Laureate Academy Limited & 3 others [2015] eKLR
10. The respondent submitted that the applicants have not demonstrated that they have exhausted all other lawful avenues of execution available to them. That in the absence of such steps, the drastic measure of seeking to summon and examine the directors is wholly premature and unjustified.
11. The respondent relied on: -
 1. Reuben Nyanginja Ndolo v Dickson Wathika Mwangi & 3 others, Election Petition No. 11 of 2008
 2. Kenya Hotels and Allied Workers Union v Nyanza Club [2024] eKLR
 3. Tuffsteel Limited v Ukwala Bargains Limited [2024] eKLR
 4. EON Energy Limited v Desnol Investments Limited (Commercial Miscellaneous Application E074 of 2018) 2025 eKLR
 5. Kimeto v Modern Security Holdings Limited [2023] eKLR, Republic v Director of Public Prosecutions & 3 Others; Patel & 2 Others (Ex parte Applicants);
 6. Tufflas Manufacturers Limited (Interested Party) [2024] eKLR



7. Malindi Air Services Ltd v Queensway Investment Ltd [2010] eKLR, and
8. PCEA Tumu Tumu Hospital v Medicomp Techno Services Ltd & Another [2019] eKLR

Analysis and Determination

Change of Advocates

12. The first prayer seeks that the consent dated 7th April 2025 be entered and the firm of A. A. Law Advocates be allowed to enter appearance on behalf of the Applicants. There is no opposition to the prayer. A. A. Law Advocates has complied with Order 9 Rule 9 (b) of the Civil Procedure Rules. Therefore, prayer 1 is merited.

Examination of directors and production of documents

13. The second and third prayers seek orders to summon the directors for oral examination under oath as to the means of satisfying the decretal sum and to produce the respondent's books of accounts and other documentary evidence showing the same and upon non-compliance to lift the respondent's corporate veil to hold its directors personally liable for the decretal sum.

Notice to show cause

14. The respondent asserted that the application is fatally defective as the applicants have sought to execute a decree more than one year after its issuance on 28th November 2022, without first obtaining leave of the Court, as required under Order 22 Rule 18 of the Civil Procedure Rules.
15. The applicants view was that the application squarely falls under Order 22 Rule 35 and not a notice to show cause as stipulated under rule 18.
16. Order 22 Rule 35 provides 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.”
17. The rule is a judicial tool that enables the applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution.
18. From my reading of order 22 rule 18, I do not think that a notice to show cause is required before an application under Order 22 Rule 35 for discovery is filed. The rule is complete and constitute notice to the directors that it is a venture to establish, among other things, whether the judgment-debtor has any and what property or means of satisfying the decree'. In any case, if successful, summons will be issued to the directors detailing the purpose of the summons.



The threshold

19. The threshold for the grant of an order under Order 22 Rule 35 was discussed by this Court in *Margaret Soares v Jane Otieno* [2014] KEHC 6225 (KLR), as follows: -

“I, therefore, take the view that, as long as the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery ...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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the Respondent, that the Applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the Applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule.”

20. In this case, the applicants seek discovery of the Respondent’s means and assets capable of satisfying the decretal sum. They seek to have the respondent’s directors summoned to appear in court for examination and to produce the company’s books of accounts, bank statements and other relevant documents to do so.
21. It is not disputed that the respondent owes the applicants the decretal sum which remains unpaid.
22. The respondent contended that it has no asset, other than its real property that is heavily encumbered, capable of settling the debt. That as a result of disputes between it and its financier HFC Limited, its construction project on the subject property has stalled. I pause here and wonder the sincerity of the directors’ suggestion that the applicant has not exhausted other means or methods of execution.
23. The respondent asserted that the inability to satisfy the decretal sum should not be interpreted as a result of dishonest or fraudulent conduct.
24. To my mind, the respondent’s contentions are not sufficient for purposes of Order 22 Rule 35. The issues they raise are for determination by the court upon oral examination and production of books of accounts. I am satisfied that the applicants have met the threshold for the grant of prayer 3.

Lifting of the corporate veil

25. The court has power to lift the corporate veil of a company. However, in an application under Order 22 Rule 35, the court may or may not lift the corporate veil. *Masefield Trading (K) Ltd v Rushmore Company Limited & Another* [2008] eKLR.



26. The applicants alleged that the respondent's directors have fraudulently and dishonestly used the corporate structure to evade legal and financial obligations. They also faulted the respondent for its failure to satisfy the decree while claiming that it is a going concern for almost 10 years.
27. However, the applicants conceded that the issue of lifting of the corporate veil and whether the directors should be held personally liable are to be determined by the court after examination of directors under oath and after considering the documentary evidence tendered on affairs of the company.
28. I agree with this position.

Disposal

29. Accordingly, in conclusion, I make the following orders: -
1. Prayers 1 and 3 are granted.
 2. Prayer 2 is deferred.
 3. The respondent shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER, 2025 THROUGH TEAMS ONLINE APPLICATION.

F. GIKONYO M

JUDGE

In the presence of: -

Miano for Respondent

Mola for Applicant

CA Kinyua

