



**Johari Flour Mills Limited v Simiyu (Suing as the Legal Representative  
of the Estate of George Nabiye Simiyu - Deceased) (Civil Appeal  
E153 of 2023) [2025] KEHC 15325 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E153 OF 2023  
AC BETT, J  
OCTOBER 30, 2025**

**BETWEEN**

**JOHARI FLOUR MILLS LIMITED ..... APPELLANT**

**AND**

**ELIUD NABIYE SIMIYU (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF GEORGE NABIYE SIMIYU - DECEASED) ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. C. N. Njalale (PM)  
in Butali Civil Case No. E127/2022 delivered on 31st July 2023)*

**RULING**

**Introduction**

1. By a Notice of Motion dated 25<sup>th</sup> February 2025, the Respondent sought the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to issue summons to Alphaxard Muchai Ruga, Allan Kamau Muchai and Albert Makundi Muchai who are the Directors/Share Holders of the Respondent, to attend court on an appointed day to be orally examined as to the business and affairs of the Respondent and/or the property or properties of the Respondent and/or the Respondent's means and ability to satisfy the decretal sum in Kakamega HCCA E153 of 2023 Johari Flours Mills Limited v Eliud Nabiye Simiyu.
  - iii. That upon the personal attendance and examination of the Respondent's directors/ shareholders, namely, Alphaxard Muchai Ruga, Allan Kamau Muchai and Albert Makundi Muchai, this Honourable Court be pleased to make an Order directing them to produce before the court the Respondent's book of accounts, audited financial statements, annual returns,



VAT returns, bank statements, cheque books, title deeds, bank guarantees and other statutory/ relevant document relating to the operations, property ownership and transactions of the Respondent for the last five (5) years and the said Alphaxard Muchai Ruga, Allan Kamau Muchai and Albert Makundi Muchai be examined on oath on the said documents.

- iv. That in default of such attendance and/or providing the requested documents as prayed in 2 and 3 above, this Honourable Court be pleased to lift the corporate veil of the Respondent and the said Directors/Shareholders namely, the said Alphaxard Muchai Ruga, Allan Kamau Muchai and Albert Makundi Muchai be personally held liable to pay the Applicant the decretal sum in Kakamega HCCA E153 of 2023 Johari Flours Mills Limited v Eliud Nabiye Simiyu.
  - v. That this Honourable Court be pleased to issue any other or further orders in the interest of justice.
  - vi. That the costs of this Application be provided for.
2. The application is premised on the grounds set out on the face of the Motion and is supported by the sworn affidavit of Eliud Nabiye Simiyu, the Respondent.
  3. On the court's directions, the application was canvassed through written submissions filed by both parties.

### **Background**

4. The Respondent's application is seeking, inter alia, orders compelling the Directors/Shareholders of the Appellant company, namely Alphaxard Muchai Ruga, Allan Kamau Muchai and Albert Makundi Muchai, to attend court for oral examination on the affairs, business and property of the Appellant, and to produce before court the Company's books of accounts, audited financial statements, annual returns, VAT returns, bank statements, cheque books, title deeds, bank guarantees and other relevant documents for the last five years.
5. The Applicant further seeks orders that in default thereof, an order lifting the corporate veil of the Appellant and holding the said Directors personally liable for satisfaction of the decretal sum.
6. The application is premised on the grounds that on 10<sup>th</sup> December 2024, the Court had entered judgment in favour of the Respondent for the sum of Kshs. 606,644.14 together with interest until payment in full.
7. A decree was duly issued and execution proceedings commenced through Benwill Auctioneers. However, the Auctioneers were unable to execute the warrants as the Appellant and its Directors had allegedly scaled down and closed the business of the Company, dissipated its assets, and concealed attachable property with the intent of defeating the decree.
8. The Respondent contended that the Directors of the Appellant had acted dishonestly and fraudulently in dissipating the Company's assets and deliberately leaving the jurisdiction of the court, thereby frustrating execution.
9. It was further averred that the Directors had fraudulently conducted the Company's business, using the corporate structure as a cloak to shield themselves from liabilities and contractual obligations, hence the necessity of lifting the corporate veil.
10. In response, the Appellant opposed the application through a replying affidavit sworn on 10<sup>th</sup> April 2025 by its Director, Alphaxard Muchai Ruga. It was deposed that while judgement had indeed been



entered in favour of the Respondent, the Appellant company was under severe financial distress and unable to meet its obligations, which includes the decree.

11. It was averred that garnishee proceedings instituted by the Respondent had already failed due to insufficient funds in the Company's bank accounts.
12. The Appellant maintained that it had, in good faith, made efforts to negotiate an amicable settlement, but the same did not materialize due to the Respondent's unwillingness to engage.
13. It was further contended that the Company had voluntarily produced its financial records, thereby demonstrating transparency, and that the Respondent had not furnished any evidence of fraud, dishonesty, or improper conduct to justify the extraordinary remedy of lifting the corporate veil.
14. It was also argued that the *Insolvency Act*, 2015 provided statutory remedies which the Respondent had not exhausted, and that the doctrine of separate legal personality ought to be respected.
15. The Respondent thereafter filed a further affidavit sworn on 14<sup>th</sup> April 2025, reiterating that the Appellant had not shown good faith in liquidating the decretal sum, and that the documents availed were insufficient as they were unaudited and incomplete.
16. It was deponed that the Appellant could not selectively choose which documents to produce, and that the power of the court under Order 22 Rule 35 of the Civil Procedure Rules was to aid inquiry into the Company's affairs to determine its ability to satisfy a money decree.
17. The Respondent further alleged that the Appellant's Directors had failed to refute accusations of scaling down and/or closing the business, evading Auctioneers and dissipating assets, conduct which was said to be fraudulent and sufficient grounds for lifting the corporate veil.
18. It was also asserted that from the Appellant's own financial statements, the Company had closed the year 2024 with a gross profit of over Kshs. 23 million after tax, yet had deliberately refused to settle the decretal sum, thus demonstrating that the Appellant corporate entity was a sham being used by its Directors to escape liability.

### **Respondent's submissions**

19. The Respondent submitted that it had sought orders for the oral examination of the Directors of the Appellant under Order 22 Rule 35 of the Civil Procedure Rules, the production of books of accounts and other documents to ascertain the Company's means, and in default, the lifting of the corporate veil so as to hold the Directors personally liable for the decretal sum of Kshs. 606,644.14.
20. It was argued that despite directions of 6<sup>th</sup> March 2024, the Appellant had not filed its response within time, and the averments in the supporting affidavit remained uncontroverted.
21. Reliance was placed on *Gulleid v Registrar of Persons & another* (Petition E007 of 2021) [2021] KEHC 110 (KLR) and *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, where courts held that affidavit evidence that is unchallenged stands uncontested.
22. On the prayer for oral examination, the Respondent emphasized that Order 22 Rule 35 of the Civil Procedure Rules expressly empowers the court to order such examination whenever a money decree remains unsatisfied.
23. Reliance was placed on *Tropical Wood Limited v Samilis International Investments* [2017] eKLR, *Frank Saenger v Afrikon Limited* [2022] eKLR, *Devnarayan Enterprises Ltd v Rotice & 6 others* [2024] KEELC 1806, and *Justine Nyambu v Jaspa Logistic* [2017] eKLR, all affirming that a decree-



holder is entitled to examine company officers and compel production of documents to determine the corporation's ability to pay.

24. It was stressed that in the present case, the Appellant had not opposed the prayer for oral examination or the production of documents, and had only resisted the lifting of its corporate veil.
25. It was submitted that a Company is a distinct legal entity from its Directors. However, the Respondent argued that courts retain the discretion to pierce the veil where it is abused as a facade for fraud or as a device to evade lawful obligations.
26. Reliance was placed on *Jayden Limited v Bradley Limited* (Misc. Application E202 of 2019) [2021] KEHC 127 (KLR), *Jiang nan Xiang v Cok Fas-St Company Limited* [2018] eKLR, and *Kenya Engineering Workers Union v Rolmil Kenya Limited* (Cause 41 of 2006) [2022] KEELRC 12805 (KLR).
27. In the decisions cited above, courts held that derailing execution by hiding, dissipating assets, or failing to comply with court-ordered disclosure justified lifting the corporate veil and holding Directors personally liable for the Company's debts.
28. The Respondent maintained that the Appellant's Directors had engaged in such fraudulent conduct, including closing offices, hiding from Auctioneers, and dissipating assets to defeat execution.
29. It was further argued that the Appellant's own audited financial statements for the year 2024 reflected a gross profit of Kshs. 23,699,735.73, yet the Company failed to settle a modest decretal sum of Kshs. 606,644.14, evidencing unwillingness rather than inability to pay.
30. It was further argued that reliance on remedies under the *Insolvency Act* was misplaced, since those remedies are only available to corporations whose Directors have not abused the corporate form. It was contended that if the Appellant genuinely believed it was insolvent, it could have itself commenced winding-up proceedings.
31. The Respondent urged the court to find that the Directors of the Appellant should be orally examined and compelled to produce documents as sought, and that in default of compliance, the corporate veil be lifted so that the Directors may be held personally liable for the decretal sum.

### **Appellant's Submissions**

32. The Appellant submitted that the application was devoid of merit, premature, and contrary to established principles of Company law and insolvency procedure. It was argued that the Motion improperly sought to hold Directors personally liable for Company debts in disregard of the doctrine of separate corporate personality.
33. The Appellant submitted that upon incorporation, a Company becomes a legal entity distinct from its members and Directors, as first established in *Salomon v Salomon & Co. Ltd* [1897] AC 22. Reliance was placed on Section 20(1) of the *Companies Act*, 2015, as well as *Victor Mabachi & Another v Nurtun Bates Ltd* [2013] eKLR and *Multichoice Kenya Ltd v Wananchi Group (Kenya) Ltd & 2 Others* [2020] eKLR, where the Court of Appeal reaffirmed that the corporate veil is sacrosanct and only to be lifted in exceptional circumstances.
34. It was submitted that mere inability to pay debts does not, in itself, justify piercing the veil. The Appellant relied on the cases of *Mugenyi & Company Advocates v The Attorney General* [1999] 2 EA 199 and *Kuria Transport Services v Attorney General & Another* [2010] eKLR, where courts held that failure by a company to meet obligations is not sufficient ground to disregard incorporation. It



was contended that the Respondent had not adduced evidence of fraud, dishonesty, or abuse of the corporate form by the Appellant's Directors.

35. On statutory remedies, the Appellant argued that the *Insolvency Act*, 2015 provides a clear framework for addressing companies in financial distress.
36. It was posited that Sections 384 and 660 of the *Insolvency Act* set out mechanisms for liquidation and administration. It was submitted that the Respondent had failed to pursue these remedies and that courts should not resort to extraordinary measures such as piercing the corporate veil when statutory avenues are available.
37. Reliance was placed on *Kenya Commercial Bank Limited v Kenya Planters Co-operative Union* [2010] eKLR, where the Court of Appeal underscored that statutory mechanisms must be respected.
38. The Appellant further maintained that it had acted in good faith, having disclosed its financial position through audited statements and expressed willingness to negotiate a settlement.
39. It was argued that this conduct showed transparency rather than concealment. Reliance was placed on *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & Another* [2017] eKLR, where the Court of Appeal highlighted the importance of amicable settlements before coercive remedies are pursued.

### **Analysis & Determination**

40. In view of the foregoing, the following issues arise for determination by the court: -
  - i. Whether the Respondent has met the conditions for oral examination of the Appellant's Directors and production of documents under Order 22 Rule 35 Civil Procedure Rules.
  - ii. Whether circumstances justify lifting the corporate veil and holding Directors personally liable.
41. Order 22 Rule 35 of the Civil Procedure Rules provides that: "Where a decree is for 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."
42. From the foregoing, I note that Order 22 Rule 35 Civil Procedure Rules is intended to aid a Decree-holder in execution by enabling the discovery of the Judgment-debtor's assets and financial means. Its scope is not confined to situations where property is already identified but extends to inquiries necessary for effective realization of a decree.



43. I am guided by the words of Ringera J (as he then was) in NBI HCCC No. 1287 of 2000 Ultimate Laboratories vs Tasha Bioservice Limited (Unreported), where he stated that;

“Two things emerge from the above proposition. One, the power of the Court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed within the purpose set out in the Rule. That is;

...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. 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.”

44. The underlying objective of a Summons issued under Order 22 Rule 35 of the Civil Procedure Rules is to assist the court in uncovering the actual financial standing of a Company against which a decree has been issued. It is essentially an investigative tool designed to shed light on the Company’s means, assets, and liabilities so that the process of execution may be directed appropriately.

45. This is as espoused in the decision in Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited [2015] KEHC 5964 (KLR) where the court rendered itself thus:

“...person to be summoned under Order 22 Rule 35 (c) of the Civil Procedure Rules, to provide information on the property of the Company...will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor’s annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”

46. The Decree issued on 10<sup>th</sup> December 2024 for Kshs. 606,644.14 plus interest remains unsatisfied. Execution via Auctioneers was thwarted by the Appellant’s alleged business closure and asset dissipation, and garnishee proceedings failed due to insufficient funds.

47. The Respondent’s uncontroverted evidence, including the Respondent’s 2024 gross profit of Kshs. 23,699,735.73 suggests ability rather than inability to pay, warranting scrutiny. The Appellant does not oppose this prayer, focusing instead on the one for veil-lifting.

48. I find that the threshold for oral examination and document production under Order 22 Rule 35 has been satisfied, and the orders should issue.

49. Moving on to the next issue, the doctrine of corporate personality was laid down in the case of Salomon Co. Ltd v Salomon [1897] AC 78, where 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 Nurturn Bates Ltd, [2013] eKLR, supported this position and held that: -

“A company as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”



50. The Salomon case (supra) affirmed that a Company is a separate legal entity from its shareholders and Directors. However, to prevent misuse of this principle, the law has since evolved to permit the lifting or piercing of the corporate veil in appropriate circumstances.
51. Lifting the corporate veil allows courts, in suitable cases, to hold those controlling a Company personally liable for its debts. Where justified, a Director examined may be ordered to satisfy the Company's obligations personally. In the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR, Mabeya J held as follows: -
- “I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* [1897] A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”
52. Further in *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another* [2014] eKLR Gikonyo J rendered himself thus:-
- “...[the] separate legal personality of a company can never be departed from except in instances where the statute of the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”
53. The Respondent's allegations include the Appellant's Directors' deliberate business closure, evasion of Auctioneers, and asset dissipation to defeat execution, supported by the Company's profitable 2024 financials indicating unwillingness rather than insolvency.
54. While the Appellant invokes insolvency remedies under the *Insolvency Act*, 2015, these do not preclude veil-lifting where fraud is evident. However, since the principles established in the Salomon Case (supra), and subsequent cases underscore that lifting of the corporate veil is an exceptional measure reserved for instances of fraud, dishonesty, or misuse of the corporate structure, the Appellant's assertion that it acted in good faith and its expressed willingness to negotiate must be assessed against any evidence of wrongdoing or misconduct.
55. Considering that lifting the corporate veil is an extraordinary remedy, it would be premature to do so without first examining the Company's business affairs, as emphasized in cases requiring sequential enforcement steps. Default without just cause would substantiate abuse, justifying further consideration of personal liability, but only upon proven fraud post-default.
56. The Court holds that the evidentiary threshold for lifting the corporate veil has not yet been met. It is premature to resort to that remedy but it may be revisited if the Directors fail to comply with examination or disclosure orders, or if fraud is later established.

### **Final orders**

57. Having carefully reviewed the application and considered the applicable law, I find that the application is only merited in respect of the second prayer and make the following orders:-



1. The Directors of the Appellant, Alphaxard Muchai Ruga, Allan Kamau Muchai, and Albert Makundi Muchai, are summoned to attend court on a date to be given for oral examination regarding the Respondent's business, affairs, and property.
2. The said Directors shall produce the Respondent's books of accounts, audited financial statements, annual returns, VAT returns, bank statements, cheque books, title deeds, bank guarantees, and other relevant documents for the last five years, and be examined on oath thereon. The said Directors shall file and serve an affidavit(s) and annex the said documents within 14 days.
3. In default of compliance without just cause, the court will entertain a further application to lift the corporate veil and hold the Directors personally liable for the decretal sum.
4. The Directors shall be personally served with Summons to attend court and this Ruling.
5. Costs shall be provided for in the main suit.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Namukuru holding brief for Mr. Khaemba for the Appellant

No appearance for the Respondent

Court Assistant: Polycap

