

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E095 OF 2018

BETWEEN

PRAMUKH TYRES & RETREADS

LIMITED.....PLAINTIFF

-VERSUS-

METRO LOGISTICS LIMITED.....

DEFENDANT

RULING

Introduction and Background

1. Judgment was entered against the Defendant in 2023 for a principal sum of Kshs.23,768,820.90/= with costs being taxed at Kshs.912,102/=. With accrued interest, the total decretal amount now stands at Kshs.44,188,799.00/= as at October 2024. By the application dated 21st May 2025, the Plaintiff seeks the court to summon the directors and shareholders of the Defendant, John Njoroge Mburu and Beatrice Mburu, to be examined under oath about the Defendant's assets and means to pay the decretal

amount. It also seeks to lift the Defendant's corporate veil and hold the directors jointly and severally liable for the entire decretal amount and that the court authorizes the attachment and sale of any assets that are disclosed. As an alternative, the Plaintiff seeks the court to issue a notice for the directors to show cause why they should not be arrested and committed to civil jail for up to six months for failing to pay.

2. This application is supported by the affidavit of MUCHANGI NDUATI NGINGO, an advocate in conduct of this matter on behalf of the Plaintiff, sworn on 21st May 2025. It is opposed by the Defendant through the Grounds of Opposition dated 21st May 2025 and the replying affidavit sworn on 16th May 2025 by VIVIAN NELIMA WAFULA, the Defendant's Legal Officer. The parties have also canvassed the application by way of written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. Upon careful consideration of the pleadings filed by the parties and the rival submission I note that the main issue for the court's determination is whether the Court should lift/pierce the Defendant's corporate veil and hold its directors personally liable

for the unsatisfied decretal sum due to the Plaintiff and; whether the directors should be summoned and examined by the court as to the Defendant's means and assets. The Plaintiff states that the Defendant has adamantly refused to pay the decretal sum despite having the means and that the act of changing the company's name and operating under a new entity, *J. Winston Logistics Limited* is a deliberate fraudulent tactic to obstruct justice and avoid paying the debt. The Plaintiff avers that the directors, as sole owners, are obligated to explain how the debt will be paid and should not be allowed to hide behind the Defendant's legal identity to commit injustice.

4. In response, the Defendant depones that the Plaintiff has not shown a genuine effort to execute the judgment against company itself and that the Plaintiff's actions are an unnecessary "manhunt" against the Defendant's directors instead of a proper execution process. The Defendant contends that the Plaintiff's request to examine directors, pierce the corporate veil, and commit them to jail are improperly sought in a single application and it argues these prayers should be filed in separate, distinct applications as required by law. Crucially, the Defendant states there is no material evidence to show the Defendant engaged in fraudulent activities and it states that the Plaintiff has failed to meet the high legal

threshold required to lift the corporate veil and hold the directors personally liable.

5. The Defendant reaffirms the fundamental legal principle that a company is a separate legal entity from its directors and shareholders and that the judgment, it argues, is against the company, not the individuals. Further, the Defendant claims there is no evidence that the named individuals, JOHN NJOROGE MBURU and BEATRICE NJOROGE are the current directors, or that they have been personally served with the application.
6. I propose to deal with the technical objections raised by the Defendant. It has stated and submits that an application for the examination of directors, who appear as agents of the company under **Order 22 Rule 35** of the **Civil Procedure Rules** and the application for lifting the corporate veil cannot be in the same application, and the application for examination should first precede any move to lift the corporate veil. However, I have gone through procedural architecture of the **Rules** in relation to judgment enforcement including **Order 22 Rule 35**, and that find that the same reveals no express statutory prohibition nor any implicit legal requirement dictating a mandatory sequence or separation of these two prayers. While the prayer for examination of directors serves primarily as a tool for discovery to ascertain the

Judgment Debtor's means and assets, and the prayer for piercing the corporate veil seeks substantive relief to attach personal liability to the directors, both are fundamentally interconnected measures aimed at the singular goal of satisfying the decree. To require a judgment-creditor to file two separate applications to achieve an intertwined objective would constitute an undue procedural burden that serves no practical purpose.

7. Furthermore, the overriding objective under **sections 1A and 1B** of the ***Civil Procedure Act*** mandates this court to handle cases justly, expeditiously, proportionately, and without undue regard to technicalities. Forcing a decree-holder to file multiple, sequential applications in a matter concerning the enforcement of a judgment, where the core allegation is the deliberate dissipation of assets to frustrate execution, would be contrary to this principle. It would lead to procedural fragmentation, unnecessary delays, and increased costs, ultimately undermining the efficient administration of justice. I thus dismiss this objection by the Defendant.
8. The Defendant also noted a deficiency in the Plaintiff's evidence, stating there is no *CR12* document attached to prove that JOHN NJOROGE MBURU and BEATRICE MBURU are the current directors or shareholders of the company, and that they have been personally served with the application. However, I am in agreement the

Plaintiff's submissions that the said named persons directors have never denied being the sole proprietors and shareholders of the Defendant and that the deposition by the said VIVIENNE NELIMA WAFULA, stated there was "*....no reason advanced by the Plaintiff/Applicant to warrant the named directors to be held personally liable to settle the decretal sum herein* " essentially acknowledging that JOHN NJOROGE MBURU and BEATRICE MBURU are the Defendant's directors and I therefore hold as such. This objection by the Defendant is equally dismissed.

9. Turning to the merits of the application, I am in agreement with the Defendant's submission that a company is a separate legal entity from its members and shareholders and that this position was espoused by the Court in the English case of **Salmon vs Salmon [1987] AC 78**. However, I am in agreement with the Plaintiff's submission that this position is not cast in stone as there are instances where the corporate veil of a company may be pierced and/or lifted. The Court of Appeal, in **Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] KECA 763 (KLR)** held that "*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.”

10. That the Plaintiff is the holder of a decree in the sum of Kshs.44,188,799.00/= that is yet to be settled by the Defendant, is not in dispute. Whereas the Defendant has stated that there is no evidence to show that it has engaged in any fraudulent activities, I find that they have not substantially responded to the claim that when the Plaintiff's auctioneers went to the Defendant's known premises, they found that the company had changed its name on the signboard to *J. Winston Logistics Limited* and the auctioneers could not find any attachable assets in the Defendant's name and that a vehicle at the premises was registered to an individual, JAMES KIMANI NJOROGE and not the Defendant. This, in my view, imputes an improper motive on the Defendant and is a clear demonstration that it has been evasive and is employing unorthodox tactics to frustrate recovery, including changing the company name on its premises from *Metro Logistics Limited* to *J. Winston* to evade attachment. This calls for an explanation by the Defendant and its directors as set out by **Order 22 Rule 35** of the **Rules** as it also appears that the line between the Defendant's corporate identity and that of its directors is blurred. Further, in the absence of a statement of the Defendant's financial position, this Court is not in

a position to ascertain whether it is properly capitalized, for it to be in a position to settle the debt due to the Plaintiff. The Defendant and its directors will therefore have to produce the Defendant's financial statements and books of accounts for the court to ascertain its solvency and capability.

11. I therefore find that there is sufficient reason to summon the Defendant's directors to inform the court and the Plaintiff about the assets of the Defendant, if any, as well as the status of its books of accounts. The said information would inform this court and the Plaintiff as to the Defendant's capacity to satisfy the decree and if the same is not satisfactory, then the court would exercise its discretion and pierce its corporate veil.

Conclusion and Disposition

12. In the foregoing, I allow the Plaintiff's application dated 21st May 2025 as follows:

- 1) The directors and shareholders of the Defendant, namely JOHN NJOROGE MBURU and BEATRICE MBURU, are hereby compelled to appear in court on a date to be fixed for examination on oath as to the Defendant's means and assets.**
- 2) The said directors shall produce the Defendant's books of accounts and all other relevant documents and evidence to reveal the**

Defendant's assets at the time of their examination.

3) Upon the personal attendance and examination of the said directors, should their explanation be unsatisfactory, then based on the evidence presented in the Plaintiff's affidavit showing a prima facie case of asset dissipation and corporate veil manipulation, this court will order the piercing of the corporate veil of the Defendant

4) JOHN NJOROGE MBURU and BEATRICE MBURU will then be jointly and severally liable to pay the Decree-Holder/Applicant the full decretal sum of Kshs.23,768,820.90/= together with interest at 14% from the date of judgment and taxed costs of Kshs.912,102/=.

5) The warrants of attachment and sale of the Defendant's disclosed assets are hereby issued and shall be executed upon identification of such assets.

6) The costs of this application are awarded to the Plaintiff and are to be settled by the Defendant and its Directors

DATED SIGNED AND DELIVERED virtually this 28TH DAY of OCTOBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Mr. Nduati for the Plaintiff/ Applicant.
2. Ms. Tuwei holding brief for Mr. Kirimi for the Defendant/Respondent.
3. Amos - Court Assistant

ORIGINAL