Mutua & 19 others v Habo Group of Companies Ltd (Employment and Labour Relations Cause E724 of 2016) [2025] KEELRC 3120 (KLR) (4 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3120 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS CAUSE E724 OF 2016

K OCHARO, J

NOVEMBER 4, 2025

BETWEEN

PATRICK MUTUA & 19 OTHERS & 19 OTHERS .... CLAIMANT

AND

HABO GROUP OF COMPANIES LTD .... RESPONDENT

RULING

1. The Decree holders, by their application dated 14th October 2024, sought the following orders:

   I. THAT the Directors of the Respondent Habo Group of Companies Ltd, namely Augustine Omondi Awiti, Hezron Awiti, Bolo and Monica Anyango Awiti, be examined on oath as to the Judgment debtor's means and assets and to produce accounts and documentary evidence showing the same.

   II. In default of the said Directors complying with the above order, this Court be pleased to order that the said Directors be held personally liable to pay the Claimants the decretal sum in the decree herein, taxed costs plus interest at court rates.

   III. THAT the costs of this application be provided for.

2. By its ruling dated 12th June 2025, this Court rendered itself on limb one of the applications. The same was allowed. Subsequently, one of the Directors, Augustine Omondi, appeared before this Court and was cross-examined on the various aspects mentioned in limb one of the applications.

3. During cross-examination, the Director testified that the Respondent Company was dissolved in February 2021 at the request of its Directors. At the time of dissolution, the company had existing judgments against it, and it owned motor vehicles. He stated that the audit report he presented before this Court reveals that most of the motor vehicles were taken by the Government of Kenya. The deregistration occurred after the judgment in this case was handed down.

4. The Director further testified that he is not aware of any order by Justice Ndolo, in any file, that mandated the sale of the motor vehicles and that the proceeds of the sale be applied towards settling the sums of the decree.

5. Although the audit report dated 27th August 2019 lists the cases in which judgments had been entered against the Respondent company, the directors did not produce any material to demonstrate that the decretal amounts of those matters had been settled.

6. He further stated that he is not aware of the order that reinstated the Respondent Company into the register of Companies. After the order, there has not been any deregistration.

7. During his re-examination testimony, the Director asserted that, to his knowledge, the Respondent company has not been reinstated to the register. Given that the company remains deregistered, he is no longer its Director and, therefore, unable to account for the company's assets. It is the Government that should.

8. The Respondent Company does not have the financial capability to settle the Judgments against it.

9. When this Court sought clarification from the Director, he stated that when the Auditors were preparing the report, they referenced the Respondent's bank statements; however, inexplicably, they did not mention that in the report. They did not annex the bank statements to the report.

The Decree Holders' Submissions.

10. Learned Counsel for the Decree Holders identified one issue for determination, namely, whether the Court should order that the said Directors be held personally liable to pay the Claimants the decretal sum in the decree herein, taxed costs, plus interest at court rates.

11. He submitted that limb two of the application should be allowed. The Director's argument that for a company to be restored to the register, there must be gazettement, and that it is the Registrar of Companies and the state that can explain the whereabouts of the Respondent's assets, stands on quicksand, considering this Court's holding on the impact of the restoration order that was issued in Mombasa Miscellaneous Application No. E 030 OF 2023-Reph Opiyo Ojwang vs Habo Group of Companies Ltd.

12. Undoubtedly, the dissolution of the Respondent Company was sought and achieved by its Directors, after this court's Judgment and at the time when execution proceedings had issued to recover the decretal sum from the Respondent. The decision was made in the circumstances of this matter with the sole intention of defeating justice. This is a proper case where the veil of incorporation should be lifted.

13. To support the foregoing point, Counsel cited the decision in Jian Nanxing vs- Cok Fast Company Limited [2018] eKLR, where the Court held;

> " .... The law on lifting of the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are, inter alia, where there is no real formal legal separation between the company and its shareholder and/or the company's actions were wrongful and fraudulent, or if the shareholders and /or directors act recklessly in the management of the business of the company and /or design a scheme, to perpetrate financial fraud, and or if the company's creditors suffer unjust cost, that is, they did business with the company and they left with unpaid bills or unpaid court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and or directors personally liable."

14. Learned Counsel further submitted that it is apparent from the evidence of the Director under cross-examination that they hid from the Court critical financial documents that showed the actual financial status of the Respondent. They didn't produce her bank statements and tax returns.

15. Learned Counsel further placed reliance on the judicial precedent in the case of Johnathan Mulewa Makae v Habo Group of Companies Ltd- Mombasa ELRC NO. 179 OF 2016 to fortify his submissions that the Decree holders merit the order sought in limb two of the application.

The Respondent's Submissions.

16. Learned Counsel for the Respondent and the Directors identified four issues for determination:

    a. Whether this Honourable Court has the jurisdiction to entertain this application.

    b. Whether the reinstatement of the Respondent Company in the Register of Companies is critically necessary for the court to proceed in the manner urged in the Claimant's application herein.

    c. Whether the directors can be summoned to be examined on the assets of a Company dissolved pursuant to the provisions of the *Companies Act* before the Company is restored in the Register.

    d. Who should bear the costs of this suit?

17. Learned Counsel submitted that this court has no jurisdiction to determine the instant application. There is no dispute that the Respondent Company was dissolved through the Gazette Notice dated 29th January 2021. There is no evidence that the Company has been restored to the Register.

18. Section 918 of the *Companies Act* provides;

> " If the Court orders the company to be restored to the Register, the restoration takes effect when a copy of the court order is lodged with the Registrar for registration.
>
> 918[3] As soon as practicable after receiving a copy of the court order, the Registrar shall record the restoration of the company to the Register and publish in the Gazette a Notice of Restoration.

19. Without proof of restoration, it follows that the Company is non-existent. Consequently, the Directors cannot be held to be Directors of the Respondent Company. They cannot be questioned on the assets of a Company that does not exist.

20. Summoning the Directors of the Respondent Company to question them about its assets would, in the circumstances, constitute a complete breach of section 905[1] of the *Companies Act*. The assets have been vested in the state by the express provisions of the law. It would be illogical for the Directors to be called upon to explain their whereabouts.

21. It was further submitted that the effect of deregistration is that the debt which is due to a creditor by the deregistered company is not extinguished. However, such debt is not enforceable. To buttress this point, Counsel placed reliance on the case of Barclays National Bank Ltd vs Ballock. 1981 [4] AS 291[W].

22. By reason of the foregoing, the application should be dismissed with costs.

Analysis and Determination.

23. In light of this Court ruling herein on the first limb of the instant application, and the outstanding limb for determination, in my view, the only issue for determination at this juncture is whether, in the circumstances of this matter, the Respondent's corporate veil should be lifted so as to hold its Directors personally liable for its liabilities.

24. This Court observes that the Respondent has extensively submitted on the implications of the deregistration, the significance of sections 918 and 905, and the restoration order issued by the High Court, in relation to this Court's jurisdiction to entertain the present application. With all due respect, the efforts invested by Counsel for the Respondent regarding this matter were not usefully so applied. This Court, in its earlier ruling on limb one of the application, extensively examined the aspect and rendered its decision on the same. It shall be an affront to the well-known principle of res judicata to revisit the same and determine as urged by the Respondent. Further, it will be a waste of this Court's precious time to even comment on them, even in the leanest manner.

25. The purpose for which this Court permitted the examination of the Respondent's Director under oath and to testify on the matters outlined in limb one of the application, as well as the order resulting from my earlier ruling, was to give the Directors an opportunity to demonstrate to the court that this is not a proper matter in which the corporate veil of the Respondent Company should be pierced. Equally, it was to provide an opportunity for cross-examination, to elicit information from the Directors that could form the basis for an order to lift the veil. The Directors failed while the Decree holder succeeded.

26. Generally, it is of paramount importance to distinguish clearly between the property rights of a company and those of its shareholders, even if the shareholders are a single entity. The only permissible exception to this rule, as recognised by our law, occurs in rare circumstances where the justification for "piercing" or "lifting" the corporate veil is present. An exhaustive enumeration of such circumstances is not feasible. It suffices to state that these circumstances would typically involve elements of fraud or other improper conduct related to the formation, utilisation, or management of the company.

27. In the case of Central Mining South Africa [Pty] Ltd v Clote Murray N O and Others [Case no 1334/2022[2024] ZASCA 34[28 March 2024], the Supreme Court of Appeal of South Africa, stated;

> " .... Two matters arising from the quoted passage merit further comment. First, reference is made to "those [in practice] rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. 'It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do so otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or improper conduct [and I confine myself to such situations]is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would, in such circumstances, have to be balanced against policy considerations which arise in favour of piercing the corporate veil. ....A Court would then be entitled to look for substance rather than form in order to arrive at the true facts, and if there has been a misuse of the corporate personality, to disregard it and attribute liability where it should rightly lie. Each case should obviously be considered on its own merit."

28. It came out clearly from the evidence of the Director that the Respondent Company was deregistered at its Directors' own initiative and at a time when there were judgments against it, including the one

in this matter, which was at the point of execution of the decree flowing therefrom. The Director was sketchy in his testimony regarding the reason for the initiative and the timing. This, in my view, reveals that the deregistration process was initiated to defeat the enforcement of the decrees. An act that speaks to the dishonesty of the Directors.

29. Despite the earlier ruling by this Court, the Director, showing a lack of seriousness and understanding of its significance, testified that the Directors were not the appropriate persons to testify about the Respondent Company's assets. Instead, it was the Government of Kenya that should have been called to testify. This puts them in a position where this Court should hold, and it hereby does, that contrary to the order that flowed from the ruling on the first limb of this application, they did not explain the affairs and assets of the Respondent Company.

30. The Director admitted that at the time of the deregistration of the Company, it had motor vehicles, but asserted that they got vested in the state as a consequence of the deregistration. This was a vital but unsubstantiated assertion. In my view, the Director was not candid on this matter.

31. This Court reaches this conclusion. Their judgment was obscured by the stance they adopted regarding the deregistration and the assumed accompanying protection they believed they possessed. Consequently, the Directors did not make a sufficient effort to demonstrate that this matter should not be an exception to the general rule stated above.

32. In the upshot, I am satisfied that this is a proper case where the veil of incorporation should be lifted to hold the Directors of the Respondent Company/ Judgment Debtor liable for its debts. Consequently, limb [b] of the application dated 14th October 2024 is hereby allowed with costs.

33. Orders accordingly.

READ SIGNED AND DELIVERED THIS 4TH DAY OF NOVEMBER 2025.

OCHARO KEBIRA

JUDGE