

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
[Coram: A.C. Mrima, J.]
CIVIL APPEAL NO. E061 OF 2025

-between-

- 1. FLAMCO LIMITED**
- 2. HASMUKH RAICHAND SHAH**
- 3. SANJAY RAICHAND SHAH**
- 4. KAVIT HASMUKH SHAH.....**
.....APPELLANTS

-versus-

- GITHUNGURI DAIRY FARMERS COOPERATIVE.....**
RESPONDENTS

*[Being an appeal from the Ruling of Hon. W. Muindi (Adjudicator) in Nairobi Small Claims Court
Commercial Case No. E5858 of 2023 delivered on 29th May 2025]*

JUDGMENT

Background:

1. *Githunguri Dairy Farmers Cooperative*, the Respondent herein, instituted suit against *Flamco Limited*, the 1st Appellant herein, in *Nairobi [Milimani] Small Claims Court Commercial Case No. E5858 of 2023* (hereinafter referred to as '**the suit**') seeking to recover money for dairy products supplied.
2. The suit was heard and in its judgment of 28th March 2024, the trial Court found merit in the Respondent's case. Despite the order to make payment, the Appellants failed to satisfy the decree. The Respondent then took further action. It lodged an application by way of a Notice of Motion 3rd April 2025 seeking among other orders; to restrain the Appellants from disposing off any of its immovable property until the decretal sum was settled; to lift the corporate veil for purposes of examining its directors with a view to establishing the company's assets and to seize their personal property, all in a bid to settle the decretal sum of Kshs 714,589/-.

3. On 6th May 2025, the Court allowed the application to the extent of examining the Directors of the 1st Appellant. However, on 29th May 2025, when the 1st Appellant failed to avail the Directors for examination, it issued warrants for their arrest.
4. The foregoing sequence of events precipitated the appeal. Contemporaneously with the filing of the appeal was the filing of an application by way of a Notice of Motion dated 30th May 2025, which sought interim stay orders. Pursuant to the directions of this Court, both the application and the appeal were heard together and by way of written submissions, hence, this judgment.

The Appeal:

5. Through a Memorandum of Appeal dated 29th May 2025, the Appellants sought to set aside of the warrants of arrest and to have the Notice of Motion dated 3rd April 2025 heard by a different Adjudicator on the following grounds: -
 1. *The Hon. Adjudicator erred in law and in fact by making and issuing an Order that was not prayed for by the Respondent.*
 2. *The Hon. Adjudicator erred in law and in fact in failing to consider that there is no Judgment against the 2nd, 3rd and 4th Appellants.*
 3. *The Hon. Adjudicator erred in law by issuing warrants of arrest against the Appellants without giving them an opportunity to be heard.*
 4. *The Hon. Adjudicator erred in law and in fact by issuing warrants of arrest without issuing any Notice to Show Cause and thus was biased against the Appellants.*
 5. *The Hon. Adjudicator erred in law by failing to uphold the Constitutional tenets of granting parties a hearing before taking away their right to freedom.*
 6. *The Hon. Adjudicator erred in law and in fact in failing to consider the evidence placed before her in the form of a Replying Affidavit sworn on 26th May, 2025 by the 3rd Appellant, Sanjay Shah before making her decision.*

7. *The Hon. Adjudicator failed to consider the issues before her and thus reached the wrong decision.*

The Submissions:

6. In their written submissions dated 11th July 2025, the Appellants identified the main grievance as the Adjudicator's decision to issue a Warrant of Arrest against the 2nd, 3rd and 4th Appellants. They sought a stay of execution of the warrant of arrest, citing Order 42 Rules 6 and 9 of the Civil Procedure Rules, 2010. They submitted that they had met the requisite conditions for the grant of a stay. On the element of substantial loss, they contended that they faced the imminent deprivation of their right to liberty through arrest, which would render the entire appeal nugatory. To buttress their position they referred to the case of *SSA -vs- IMA* [2024] KEHC 8034 (KLR).
7. As regards delay, it was their case that the application for stay was filed on 30th May 2025, merely one day after the impugned Order was issued on 29th May 2025. The Appellants argued it reflected diligence and did not constitute unreasonable delay. On the aspect of security, the Appellants indicated their willingness to comply with any conditions the Court might impose. They submitted, however, that since the impugned orders were warrants of arrest and not a monetary decree, the requirement for monetary security under Order 42 Rule 6(2)(b) did not arise.
8. On merits of their appeal, the Appellants submitted that the Adjudicator acted *ultra vires* by issuing the warrants based on a relief that was neither sought nor prayed for by the Respondent in its Notice of Motion dated 3rd April 2025. They argued that the Court was bound by the pleadings, and by issuing a *suo moto* order for arrest, the Adjudicator acted *ultra vires* and without proper jurisdiction. They drew support from the decision in *Kinyanjui -vs- Njoki* [2024] KEHC 9725 (KLR), which held that a trial Court lacks jurisdiction to grant reliefs not specifically pleaded. They further faulted the warrants of arrest on procedural grounds for having been issued without first issuing a Notice to Show Cause. They submitted that the failure to accord them an opportunity to show cause prior to an order

depriving them of their liberty contravened the principles of natural justice and procedural fairness, in line with the holding in *Abdi & another -vs- Ngacha* [2022] KEELC 3211 (KLR). In the case, it was observed that a judgment-debtor must first be given an opportunity of showing cause.

9. Closely related to the foregoing was the submission on violation of the right to fair hearing. The Appellants argued that the issuance of the warrants without affording them an opportunity to be heard violated their right to a fair trial under Article 50(1) of the Constitution. They called to their aid the decision in *Imison -vs- Jodad Investment Ltd* [2023] KEHC 24372 (KLR). In addition, it was their case that the Adjudicator failed to consider the Replying Affidavit sworn by the 3rd Appellant, which comprehensively addressed the issues. The Appellants cited *Eastside Development Limited vs- Nairobi City County & Its Farmers' Co-operative Society Limited* (2022) KEELC 1106 (KLR), which noted that failure to consider a filed response may occasion an injustice.
10. On the issue of lifting of the corporate veil, it was their case that the Adjudicator issued warrants against the Directors without a prior judicial hearing and determination. They submitted that the 1st Appellant, as a duly incorporated entity, possessed a distinct legal personality. Therefore, in the absence of an order piercing the corporate veil, the Directors could not be held personally liable. To that end, they referred the Court to the case in *Makori Zacharia -vs- Kisii Broadways* [2006] KEHC 58 (KLR) and *Mareco Limited -vs- Mellech Engineering & Construction Limited* [2024] KEHC 9536 (KLR).
11. In the end, they prayed that their appeal be allowed as prayed.

The Respondent's case:

12. *Githunguri Dairy Farmers Cooperative Society*, opposed the appeal and the application for a stay of execution through written submissions dated 24th July 2025. On the issuance of warrants of arrest, it was its case that Adjudicator was right even though the warrants had not been specifically prayed for. It argued that the Court had the authority to act *suo moto* to

protect the integrity of its proceedings and that the warrants were issued as a lawful response to the Appellants' failure to appear for a scheduled examination, an act it deemed contempt of Court.

13. The Respondent relied on *JMA -vs- RGO* [2021] KEHC 12641 (KLR), where the Court observed that it has authority to act *suo moto* to extend parental responsibility. It was its case that the same principle was applied to by the Adjudicator. It also cited *Owners and Masters of The Motor Vessel "Joey" -vs- Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 to support the position that a Court was obliged to decide on matters "*on its own motion*". In rebutting the assertion that the Appellants were not accorded a fair hearing, the Respondent asserted that the Appellants claim of a miscarriage of justice was unfounded. It was its submission that the hearing date was scheduled in open Court with the Appellants' Advocate present and their failure to appear for the examination, without any explanation provided, could not be blamed on the Court. It relied in the case of *Mutinda Musila -vs- Francis Musee Thengi & 2 others* [2019] KEELC 1130 (KLR), which held that the right to a fair hearing entailed notification and an opportunity to be heard, not the right for a party to choose as and when he wants to appear. Referencing *Moses Kimaiyo Kipsang -vs- Geoffrey Kiprotich Kirui & 2 others* [2022] KEELC 1451 (KLR), the Respondent argued that, like the defendants in that case, the Appellants were accorded a chance to be heard but they chose not to.
14. Finally, the Respondent invoked the principle in *Hadkinson -vs- Hadkinson* [1952] All ER 567, arguing that Court orders must be obeyed, and the Appellants' remedy was to apply to discharge the order, not to blatantly ignore it. As regards the lifting of the corporate veil, the Respondent supported the Adjudicator's decision to hold the directors (2nd, 3rd, and 4th Appellants) personally accountable. It was its case that the 1st Appellant was being used as a mask to avoid recognition by the eye of equity.

15. In challenging the application for stay orders, the Respondent claimed that it lacked merit and failed to satisfy the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules. It characterized the application as a tactic to delay execution and avoid accountability. It was their position that the Appellants deliberately failed to comply with Court summons, and granting a stay would amount to rewarding contempt of Court.
16. The Respondent prayed that the appeal and the application be both dismissed with costs.

Analysis:

17. Given the nature of the appeal and since the application was subsumed therein, a consideration of the appeal will *ipso facto* dispose of the application. Therefore, this Court will deal with the main appeal and consider whether the learned Adjudicator erred by issuing warrants of arrest against the 2nd, 3rd and 4th Appellants in the circumstances of the matter.
18. The instant uncontroverted position is that the judgment in the suit was entered against the 1st Appellant, *Flamco Limited*, a registered company and that the 2nd, 3rd, and 4th Appellants are its Directors. It is a basic principle in Company law that a corporation is a distinct legal entity, separate from its directors and shareholders. The directors, therefore, are not the judgment debtors. The Supreme Court in ***Githiga & 5 others -vs- Kiru Tea Factory Company Ltd*** (Application 12 of 2019) [2020] KESC 22 (KLR) cited with approval the decision of the Court of Appeal in *Victor Mabachi and Anor -vs- Nurturn Bates Ltd* [2013] eKLR) where it was observed: -

... The law on the subject is that following Salomon v. Salomon [1897] AC 78, our Courts have been consistent in holding that a limited liability company is separate from its members. Indeed, Majanja J in Valentine Opiyo and Anor v. Masline Odhiambo t/a Ellyams Enterprises High Court Civil Appeal No.2 of 2014, quoted with approval the holding that

[A Company] as a body corporate, is a persona juridica, with a separate identity in law, different from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.

19. The Respondent, recognizing this legal position, correctly applied to the Small Claims Court to lift the corporate veil. Such was a request for the Court to disregard the company's separate personality, an order that is only granted in specific circumstances upon consideration of settled legal principles.
20. The record shows that on 6th May 2025, the Court allowed the application *only* to the extent of examining the Directors. The record *does not* indicate that the Court made any determination to pierce the corporate veil and hold the directors personally liable for the company's debt. Therefore, when the Adjudicator issued warrants of arrest against the 2nd, 3rd and 4th Appellants on 29th May 2025, it was issuing warrants against individuals who were not, at that time, judgment debtors and who were still shielded from personal liability on behalf of the 1st Appellant company by the corporate veil.
21. In this Courts' respectful view, and with tremendous respect to the Learned Adjudicator, the issuance of the warrants of arrest in such circumstances was premature and an error of law. As said, a Court cannot allow execution proceedings against a Company Director in person and on behalf of the Company without first having formally and judicially lifted the corporate veil, a determination which itself must be subject to a fair hearing. Therefore, the Appellants' reliance on *Makori Zacharia -vs- Kisii Broadways* and *Mareco Limited -vs- Mellech Engineering & Construction Limited* was well-placed. In the former, it was observed thus: -

.... The record does not show that at any one time the corporate veil of the judgment debtor was ever lifted. I do not wish to say much regarding that issue because one of the prayers in the application that it yet to be determined seeks lifting of the corporate veil.

22. In this case, there was yet another error of procedure that impugned upon the Appellants' right to a fair hearing. There was no prior Notice to Show Cause issued against the Appellants before the issuance of the warrants of arrest. Such was a serious lapse since the Appellants had only been summoned to be examined on the affairs of the 1st Appellant company and not

more. When the Court found that they failed to attend despite proper service, then it was to determine the issue of the examination of the Directors in one way or the other. Thereafter, the Court was to deal with the issue as to whether the 1st Appellant's Company corporate veil be lifted and once an appropriate order was granted, then and until then, execution proceedings could not formally and legally issue against the Directors and Shareholders of the 1st Appellant Company in their persons. Therefore, the appeal is merited on account of the procedural lapses. However, this Court finds no reason to order that the Learned Adjudicator who handled the matter subject of this appeal should not deal with the matter further. To this Court, let the Learned Adjudicator continue dealing with this matter unless the officer is no longer at the station or for any other good attendant reasons.

Disposition:

23. Based on the foregoing analysis and findings, the following final orders hereby issue: -

- [a] The Appeal be and is hereby allowed and the Notice of Motion dated 30th May 2025 is marked as spent.**
- [b] The Order of the trial Court of 29th May 2025 in Nairobi *Small Claims Court Commercial Case No. E5858 of 2023* issuing Warrants of arrest against the 2nd, 3rd and 4th Appellants herein, be and is hereby set aside in its entirety. The said Warrants of Arrest are hereby quashed accordingly.**
- [c] The Notice of Motion dated 3rd April 2025 is hereby remitted back to the Small Claims Court for a fresh hearing.**
- [d] Each party shall bear its own costs for this appeal and the application.**

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 19th day of November, 2025.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Mr. Otieno, Learned Counsel for the Appellants.

Ms Ndungu, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.