

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ELC CASE NO. 111 OF 2018**

**NAGIEB      OMAR      ALI.....1<sup>ST</sup>**

**PLAINTIFF**

**SHUKRI      OMAR      ALI.....2<sup>ND</sup>**

**PLAINTIFF**

**VERSUS**

**APA                      HOMES                      LIMITED.....**  
**.....DEFENDANT**

**RULING**

**A. PLAINTIFFS' APPLICATION**

1. By a notice of motion dated 30.01.2025 expressed to have been brought under Article 50 of the Constitution of Kenya, Section 323 of the Companies Act, *Sections 1A, 1B, 3A, 29, 34 (1) and 92 of the Civil Procedure Act and Order 51 Rule 1 and Order 22 Rule 35 (b) & (c) of the Civil Procedure Rules and other enabling provisions of the law*, the plaintiffs sought the followings orders;

*a. That this honourable court be pleased to compel Alina Waseem (director and shareholder), Nicholas Kimeu Nzioka (Secretary) and the Estate of Mohamed Rafique (shareholder) as directors and shareholders of the defendant/respondent, to*

*personally attend court in this matter to be orally examined on oath as to the defendant/judgment debtor's properties in its possession or in possession of third parties capable of satisfying the decree herein and to produce all books of accounts, including all accounts holding the proceeds of the sale of Apartment No. E5, D2, A2, A1 and C4 sold between the 26<sup>th</sup> June 2024 and 30<sup>th</sup> October 2024, cheque books and all other documents relating to the financial affairs of the company.*

*b. That upon grant of prayer (a) above, the honorable court be pleased to pierce into and lift the corporate veil of the defendant/judgement debtor and Alina Waseem (director and shareholder), Nicholas Kimeu Nzioka (Secretary) and the Estate of Mohamed Rafique (shareholder) as directors and shareholders of the defendant/respondent be jointly and severally held personally liable to pay the plaintiffs the entire decretal sum, plus interest at court rate from date of filing of the suit on 15.05.2018 until payment in full and costs of the suit within 7 days hereof.*

*c. That upon failure to comply with prayer 2 above, the honourable court be pleased to issue an automatic Notice of Show Cause as to why Alina Waseem (director and shareholder), Nicholas*

*Kimeu Nzioka (Secretary) and the Estate of Mohamed Rafique (shareholder) as directors and shareholders of the defendant/respondent should not be committed to civil jail for failure to pay the entire decretal sum, plus interest at court's rate from the date of filing of the suit on 15.05.2018 until payment in full and costs of the suit.*

2. The application was based on the grounds set out on the face of the application and the contents of the supporting affidavit sworn by Shukri Omar Ali the 2<sup>nd</sup> plaintiff on 30.01.2025. It was contended that on 27.02.2024 judgment was entered for the plaintiffs as against the defendant and subsequently a decree was extracted and served upon the defendant. It was the plaintiffs' case since the judgment was delivered the defendant had, through its directors and shareholders, leased out apartments on the suit property (E5, D2, A2, A1, C4) and charged apartments B6, D5, D6, A3, E2, B4 to Equity Bank.
3. The plaintiffs claimed that the defendant has sold off its attachable assets and blatantly refused to pay the decretal sum. As such, the plaintiffs maintained that it was fraudulent for the defendant's directors and shareholders to sell the apartments in full knowledge of the judgment and decretal

sum. The plaintiffs further maintained that the defendant's actions deprived them of any attachable assets to satisfy the decree. The court was urged to summon the defendant's directors and examine them regarding how they intend to satisfy the decretal sum, and to order the production of all books of accounts relating to the company's financial affairs. Along with examining the directors, the court was urged to lift the corporate veil and hold the directors liable for settling the decree.

**B. 1<sup>ST</sup> DEFENDANT'S RESPONSE**

4. The defendant filed a replying affidavit sworn by Alina Waseem a director of the defendant on 28.07.2025. It was contended that the defendant was not fraudulently transferring the apartments but rather completing conveyancing transactions that were initiated before judgment was delivered. It was the defendant's case that apartments B6, D5, D6, A3, E2 and B4 were no longer in the names of the defendant since they have been transferred to Nozel Trader Limited. The defendant argued that the plaintiffs had not demonstrated that they had taken the requisite steps to execute the decree as there were no

warrants of attachment hence the application for examination of directors was premature. In addition, the defendant maintained that there was a pending appeal concerning apartment E5 in *Mombasa Civil Appeal No. E040 of 2024 APA Homes (K) Limited v Nagieb Ali Omar* with arguable issues pending before the Court of Appeal.

5. It was the defendant's case that the lifting of the corporate veil of any company is done under exceptional circumstances as the company was a separate independent identity in law, distinct from its shareholders, directors and agents. Therefore, the defendant argued that the veil should not be lifted merely because the company has no assets or is unable to pay its debts. Instead, the defendant maintained that the directors had not participated in any fraudulent acts to warrant holding them personally liable for the debts of the company.

### **C. DIRECTIONS ON SUBMISSIONS**

6. When the application was listed for *inter-partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective

submissions. The record shows neither the plaintiffs nor the defendant had filed submissions by the time of preparation of this ruling.

#### **D. ISSUES FOR DETERMINATION**

7. The court has perused the application, the response thereto and the material on record. The court is of the view that the following key issues arise for determination herein:

- a. Whether the plaintiffs have made out a case for the oral examination of the defendant's directors.*
- b. Who shall bear the costs of the application.*

#### **E. ANALYSIS AND DETERMINATION**

*a. Whether the plaintiffs have made out a case for the oral examination of the defendant's directors*

8. It is not in dispute that on 27.02.2024 judgment was delivered in this instant suit against the defendant. The court found that the plaintiffs had proved their case on a balance of probabilities and granted the following orders;

- 1. That the defendant is to refund the sum of 16,000,000/= to the plaintiffs plus the costs and interest at court rate from the date of filing this suit within the next 90 days from today.*

*2. Costs of the suit to the suit to the plaintiffs.*

9. It is the plaintiffs' case that it has been incredibly difficult to execute the decree since the defendant's directors have leased out apartments (E5, D2, A2, A1, C4) and charged apartments (B6, D5, D6, A3, E2, B4) to Equity Bank for Kshs 183,200,000/= all situated on the Plot No. 2911/I/MN. The plaintiffs urged the court to order the oral examination of the defendant's directors as to these sales and for the court to lift the corporate veil and find the directors personally liable for the decretal sum.

10. *Order 22 Rule 35 of the Civil Procedure Rules* is a discovery avenue for the court to aid in execution against a judgment debtor. It 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.*

11. The court in *MASEFIELD TRADING (K) LTD v RUSHMORE COMPANY LIMITED & another* [2008] KEHC 798 (KLR) held, *inter alia*, that;

*“In the present application, the plaintiff did establish that the interested party, a director of the 1<sup>st</sup> defendant company transferred the suit property from the company to himself in circumstances that clearly suggest that the interested party may have intended to frustrate the plaintiff from realizing the fruits of its judgment. The said transfer was effected during the pendency of the suit. I think it is only just and fair that the interested party be summoned to court and be orally examined on the circumstances under which the suit property was transferred from the ownership of the 1<sup>st</sup> defendant. The fact that there exists a pending suit between the two directors of the 1<sup>st</sup> defendant regarding the suit property is no bar for this court examining the interested party to determine if any law was broken in the said transfer. The 1<sup>st</sup> defendant and the interested party jumped*

*the gun when they reached the premature conclusion that the veil of incorporation of the company was being lifted before the said director of the 1st defendant was orally examined by the court. It is upon examination of the interested party that this court may, if the circumstances warrant, lift the veil of incorporation and hold the directors of the company personally liable to satisfy the amount decreed to be paid by the 1<sup>st</sup> defendant.”*

12. The material before the court alludes to the fact that between 2018 and 2024, Plot No. 2911/I/MN had certificates of leases registered against it as well as being charged to Equity Bank for Kshs 133,200,000/=. The defendant defended the registration and claimed that they were completing transactions that were initiated before judgement was delivered and that there was nothing fraudulent about the said registration.

13. The plaintiffs have attached a search of the defendant's directors dated 14.10.2024, which revealed that Alina Waseem is a director and shareholder while Nicholas Kimeu Nzioka is the Secretary and the Estate of Mohamed Rafique is a shareholder. The three are the custodians of the

company's records and possess knowledge of its financial dealings including the alleged sale and charging of several apartments on the suit property. This court has the power to summon any or all three persons named above, under Rule 35 to provide information on the judgment debtor's debt owing to the plaintiffs, and whether the company has any property or means that would satisfy the decree.

14. The plaintiffs have also prayed for the court to lift the corporate veil and find Alina Waseem, Nicholas Kimeu Nzioka and the Estate of Mohamed Rafique personally liable for the decretal sum. As much as this court has this jurisdiction, the decision to lift the corporate veil can only be made after the court has summoned them for examination. The court will then evaluate the evidence that will be adduced therein and determine whether there are sufficient circumstances that would warrant the court to do so.

15. The court finds it fit to summon Alina Waseem, Nicholas Kimeu Nzioka and the legal representative of the Estate of Mohamed Rafique to be examined on oath regarding the sale and charge of apartments (E5, D2, A2, A1, C4) and (B6, D5, D6, A3, E2, B4) all situated on the Plot No. 2911/I/MN as well

as the defendants means and assets. The said examination will assist the court in reaching a determination whether the defendant has assets to satisfy the decree and whether or not the impugned transactions were undertaken fraudulently and with intent to defeat the course of justice. Prayer No. 2 shall be considered after Alina Waseem, Nicholas Kimeu Nzioka, and the legal representative of the Estate of Mohamed Rafique have been orally examined by the court.

b. Who shall bear the costs of the application

16. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. The court is of the view that since examination of directors is yet to be undertaken and further proceedings may become necessary upon such examination, the costs of the application should be in the cause.

## **F. CONCLUSION AND DISPOSAL ORDER**

17. The upshot of the foregoing is that the court finds merit in the plaintiff's application and makes the following orders for disposal thereof:

- a. That Alina Waseem, Nicholas Kimeu Nzioka, and the legal representative of the Estate of Mohamed Rafique being the defendant's director, secretary and shareholder respectively to appear before court on 06.05.2026.***
- b. That on 06.05.2026 Alina Waseem, Nicholas Kimeu Nzioka, and the legal representative of the Estate of Mohamed Rafique will produce before the court the books of account, audited financial statements, annual tax returns, bank statements, licenses, audited reports and other statutory documents relating to operations and transactions of the defendant from January 2018 till January 2025 that are within their possession, custody and control for examination on oath of the said documents in relation to the sale of and charge of apartments E5, D2, A2, A1, C4 and B6, D5, D6, A3, E2, B4 all situated on the Plot No. 2911/I/MN.***
- c. The defendant shall bear the costs of the application.***

**Ruling dated and signed at Mombasa and delivered**  
virtually via Microsoft Teams on this 19<sup>th</sup> day of February 2026.

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**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Gillian - Court assistant

Ms. Ndegwa for the plaintiffs

Ms. Kiendi for the defendant

ORIGINAL