

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NUMBER E6523 OF 2020

AMRISH PANDYA PRAFULBHAI.....

.....CLAIMANT

VERSUS

ISS GLOBAL FORWARDING (K) LIMITED.....

RESPONDENT

RULING

1. Before the court is the Claimant/Applicant's Notice of Motion application dated 24th April, 2025, brought pursuant to Order 22 Rule 35 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A, 34 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Section 148, 787, 996, 1002 of the Companies Act, Cap 486 of the laws of Kenya. The Claimant/Applicant seeks the following orders: -

i. Spent

ii. THAT summons do issue compelling the Judgment Debtor's:

a) Director-Magesh Ganeshan;

b) Shareholder-Directors of ISS Global Forwarding One Person Company LLC

c) Company Secretary- Directors/Partners of Stamford

Corporate Services LLP to personally attend Court on such date as may be ordered/allocated and be examined on oath as to the Judgment Debtor's means

and assets and to produce its books of account and other documentary evidence relevant to revealing the assets of ISS Global Forwarding (Kenya) Limited.

iii. THAT upon personal attendance and examination of the Respondent's director, Magesh Ganeshan, and Directors of ISS Global Forwarding One Person Company LLC and Company Secretary, the Honourable Court be pleased to:

(a) Pierce the Respondent's corporate veil and hold personally liable Mr. Magesh Ganeshan and the Directors of ISS Global Forwarding One Person Company LLC;

(b) Order Mr. Magesh Ganeshan and Directors of ISS Global Forwarding One Person Company LLC to personally pay the Decretal sum and costs of Kshs 4,945,589.00/- and Kshs. 328,609.92/-, respectively and interest at court rates from 9th August, 2024 being the Judgment date.

iv. THAT Warrants of Attachment and Sale of assets of Mr. Magesh Ganeshan and Directors of ISS Global Forwarding One Person Company LLC do issue in execution of the decretal sum, costs, and interests.

v. THAT Mr. Magesh Ganeshan and Directors of ISS Global Forwarding One Person Company LLC to personally bear the Cost of this Application.

2. The application is further supported by the grounds on the face of the motion and supporting and further affidavits of AMRISH PANDYA PRAFULBHAI, the Applicant herein.

- 3.** The Applicant states that the Court entered judgment in his favour for Kshs. 4,945,589 plus interest, and subsequently taxed costs at Kshs. 328,609.92, for which a certificate was issued. He avers further that the Judgment Debtor has since closed its physical offices in Kenya, and only its directors, shareholders, and Company Secretary can disclose whether it has attachable assets within the Court's jurisdiction.
- 4.** The Applicant further avers that despite being served with the Decree and Certificate of Taxation, the Respondent has wilfully failed and refused to satisfy the decretal sum and costs, in disobedience of the Court's orders.
- 5.** It is his assertion that under Kenyan law, the Company Secretary is required to keep company records, including those relating to assets, and their appearance and disclosure would assist the Court in determining whether the directors and shareholders are obstructing or evading execution.
- 6.** He avers that for the reason of the foregoing, the Respondent's books of accounts should be produced before the Court to ascertain its ability to satisfy the judgment debt.
- 7.** The Applicant states that the Respondent's director, Magesh Ganeshan, and the shareholder-directors of ISS Global Forwarding One Person Company LLC are directly and/or vicariously liable for the Respondent's acts or omissions that have resulted in deliberate default.

- 8.** He avers that it is therefore in the interest of justice that his application be allowed as prayed.
- 9.** The Respondent opposed the application vide a Replying affidavit sworn on 24th May, 2025, by Mr. Sean Omondi, the Counsel on record for the Respondent, and a further affidavit by one Martin Waweru, a certified public accountant and a partner at Nitram Accountants LLP.
- 10.** He states that, based on information from Mr. Ganesan, at the time the Decree and Certificate of Costs were issued, the Respondent lacked funds and assets and was therefore unable to satisfy them, and has since 2021 closed its business operations due to severe financial losses caused by the COVID-19 pandemic and related disruptions.
- 11.** It is the Respondent's position that after receiving financial assistance from its group company, ISS Global Forwarding One Person Company LLC, it later obtained sufficient funds to settle the Decree and Certificate of Costs. It states that between 5th and 12th May 2025, the Respondent and the Applicant, through their respective advocates, engaged in discussions and exchanged correspondence aimed at facilitating full satisfaction of the Decree and Certificate of Costs.
- 12.** The Respondent, through counsel, avers that the discussions stalled due to disagreements, including the Respondent's position that statutory deductions were required under Kenyan law, which the Applicant opposed, insisting on full payment without deductions.

13. It avers further that the Applicant initially agreed to receive payment in US Dollars and provided USD bank account details, but later changed his position and demanded payment in Kenyan Shillings, and the Respondent's advocates then requested KES account details in a specified format to facilitate payment of the net amount due.

14. It is the Respondent's assertion that the Applicant's advocates ultimately declined to provide the Kenyan Shilling account details in the requested format, which prevented direct payment from Dubai and necessitated alternative arrangements. It avers further that under Sections 49(2) and 50 of the Employment Act and Section 5(2)(c) of the Income Tax Act, the decretal amount was subject to statutory deductions, including PAYE, and that despite verbal discussions and written correspondence, the Applicant's advocates insisted on full payment without deductions.

15. The Respondent states that Nitram Accountants Africa LLP computed the total amount due under the Decree as KES 5,393,286.13 and assessed statutory deductions amounting to KES 1,999,331.02. It avers that, after deductions, the net amount payable to the Applicant was KES 3,393,955.11, and that Nitram Accountants Africa LLP has confirmed the accuracy of the computations through consultations with the Kenya Revenue Authority.

16. The Respondent avers that, considering the computation, the total aggregate amount payable to the Applicant under the Decree and Certificate of Costs was KES 3,729,137.23. It

further avers that on 23rd May 2025, the Respondent paid the full amount of KES 3,729,137.23 into the Applicant's Advocates' bank account at the I&M Bank Limited, Kenyatta Avenue Branch, and that the payment was confirmed by a transaction report dated 23rd May 2025 from Stanbic Bank Kenya Limited.

17. It is the Respondent's position that, on the basis of the foregoing, it believes that it has fully satisfied the Decree and the Certificate of Costs. In his further affidavit in opposition to the motion, Martin Waweru argues that during the hearing of the main suit, the Respondent adduced evidence through two witnesses, namely Mr. Ganesan and Ms. Sangeeta Susan Mathal showing that it lawfully deducted PAYE from the Applicant's remuneration, but was unable to remit the same to the Kenya Revenue Authority because the Applicant did not have a Personal Identification Number (PIN), despite repeated requests to obtain one.

18. He avers that the evidence, contained in the witness statements of Mr. Ganesan and Ms. Mathal dated 22nd January 2021, was admitted into evidence, confirmed by oral testimony, and remained uncontroverted, hence forming part of the court record. It is his position that, based on this evidence, the Respondent's failure to remit the deducted PAYE was wholly attributable to the Applicant's refusal and/or failure to obtain a PIN.

19. Mr. Waweru avers further that the Respondent lawfully computed and deducted PAYE from the Claimant's monthly

remuneration and intended to remit the tax to the Kenya Revenue Authority (KRA), but remittance was logistically impossible because the Claimant had not obtained a Personal Identification Number (PIN), a requirement confirmed by KRA. It is his evidence that the Claimant's failure to obtain a PIN was due to delays and errors by the Department of Immigration Services in issuing an alien card with correct details, challenges that were worsened by COVID-19 restrictions.

20. He states that after the Claimant eventually received a corrected alien card in November 2020, which was after termination of his employment, the Respondent informed him and requested that he register for a PIN or authorize the Respondent to do so, but the Claimant instead referred the Respondent to his lawyer, and subsequent attempts by the Respondent's advocates to resolve the issue went unanswered. He maintains that to date, the Claimant has failed and/or refused to obtain and provide a PIN, making it impossible for the Respondent to remit the deducted PAYE, and the inability to remit the PAYE is therefore wholly attributable to him.

21. The deponent further avers that the Court delivered judgment on 1st August 2024, where it held that there was no specific prayer regarding unremitted PAYE, noted the Respondent's willingness to remit PAYE upon being provided with the Claimant's tax account details, and directed that the Claimant could pursue the matter with the tax authorities,

even from India. He states that this constituted a determination of the PAYE issue.

- 22.** It is his assertion that to date, no evidence has been filed showing that the Applicant has obtained a PIN or engaged the Kenya Revenue Authority to resolve the PAYE remittance issue.
- 23.** The Respondent states that the closure of its business does not affect its statutory tax obligations, that the Applicant has been paid in full, and that the only outstanding issue concerns remittance of statutory deductions.
- 24.** The Respondent further avers that Nitram Accountants-Africa LLP correctly computed the decretal sums, interest, and statutory deductions, with the computations confirmed by KRA, and that on 23rd May 2025, it paid KES 3,729,137.23 to the Applicant's advocates in full and final settlement of the judgment, decree, and certificate of costs.
- 25.** It states that mandatory statutory deductions (PAYE, NSSF, SHIF, and Housing Levy) were lawfully made because the sums constituted taxable employment income earned in Kenya, the deductions were in force at the time, and the Applicant was not tax-exempt.
- 26.** Finally, the Respondent contends that the Double Taxation Agreement between Kenya and India is inapplicable, as there is no competing claim by Indian tax authorities, and that the income in question is taxable in Kenya only.

- 27.** In a further affidavit sworn by the Applicant on 18th June, 2025, he avers that the issue of statutory deductions was raised before the Court, and that the Judgment Debtor indicated it could not remit deductions because it had not processed the Applicant's Alien Identity Card or obtained a Kenya Revenue Authority PIN which deductions related to a period prior to August 2020. He further avers that, in its judgment, the Court made no specific orders regarding the withheld amounts totaling approximately to Kshs. 1.5 million, other than directing the Claimant to follow up with the relevant tax authorities in India.
- 28.** It is his position that the Respondent has admitted that it has ceased operations in Kenya and closed all its offices, and that part of the decretal sum was paid by the Respondent's parent company based in the Middle East.
- 29.** It is his case that, based on the judgment, certain awards were made in his favour, including a decretal sum of Kshs. 4,945,589, Interest on decretal sum (09/08/2024 - 30/05/2025)- Kshs. 445,103, Taxed costs: Kshs. 328,609.92 and Interest on costs (09/08/2024 - 30/05/2025) of Kshs. 34,503.12, all amounting to Kshs. 5,753,805.60.
- 30.** He states that from the total award of Kshs. 5,753,805.60, the Respondent paid Kshs. 3,729,137.20, leaving an outstanding balance of Kshs. 2,024,668.40. he avers that the judgment was delivered on 9th August 2024, and if the Respondent was genuine in its intention to make statutory deductions, such deductions should have been effected

earlier, arguing further that deductions exceeding Kshs. 1.5 million made during the Claimant's employment were never remitted to any tax authority.

31. It is his case that the dispute arose from a termination that occurred on 31st August 2020, and the Respondent's attempt to apply statutory deductions under laws in force in 2025 (including SHIF, Housing Levy, and revised NSSF rates) is improper and intended to unlawfully reduce the award. He argues that SHIF and the Housing Levy were not in force in 2020, and that the applicable NSSF rates at the time differed from those currently relied upon by the Respondent.

32. It is his position that the Court awarded salary arrears of Kshs. 1,095,589.00, which the Respondent had already retained through prior deductions, and it would be unjust to permit further deductions on that amount.

33. The Applicant finally states that he is an Indian citizen resident in India and cannot practically obtain a Kenyan Alien Identity Card or KRA PIN. Further, he states that Kenya and India have a Double Taxation Agreement (2016), which permits the Respondent to remit the full award and any previously withheld tax deductions upon issuance of a tax certificate.

34. Both parties filed submissions, which have been duly considered.

Determination

35. I have considered the application, the grounds, the supporting and further affidavit, the Replying affidavit, and the further affidavit in opposition. I pick the following issues for determination:-

- i. Whether the Respondent has satisfied the Decree and Certificate of Costs.
- ii. Whether the Applicant has established a basis for examination of directors and third parties under Order 22 Rule 35 of the Civil Procedure Rules.
- iii. Whether grounds exist for piercing the corporate veil and imposing personal liability on the Respondent's directors and shareholders.
- iv. Whether warrants of attachment against the directors personally should issue.
- v. Who should bear the costs of the application.

Whether the Decree and Certificate of Costs have been satisfied

36. It is not disputed that judgment was entered in favour of the Applicant on 1st August 2024 and that a Decree and a Certificate of Costs were subsequently issued. The Respondent has placed before the Court documentary evidence demonstrating payment of KES 3,729,137.23 to the Applicant's advocates on 23rd May 2025.

37. The Applicant's contention is that the decretal amount payable is KES 5,753,805.60, leaving a balance of KES 2,024,668.40, which he attributes to unlawful statutory deductions.

38. Section 49(2) of the Employment Act, 2007 provides that any payments made by the employer under the section shall be subject to statutory deductions. By this provision, there is no doubt that the award made to the Applicant vide the judgment in this matter is subject to statutory deductions.

39. In the case of ***Stubbs v Fourth Generation Capital Ltd [2025] KEELRC 3305 (KLR)***, Justice Radido (now JA) held that compensation under Section 49(1) of the Employment Act 2007, including pay in lieu of notice, can correctly attract PAYE (income tax) deductions, on the basis that where a post termination award replaces what would have been earned in employment, the Income Tax Act treats it as gains or profits, making PAYE appropriate. In the same case, the Court ruled that deducting the Housing Levy and Social Health Insurance Fund (SHIF) contributions from compensation for unfair termination is unlawful, the rationale being that the statutory schemes for the Housing Levy and SHIF presuppose an ongoing employment relationship with regular payroll remittances, which are not designed to apply to court awarded compensation after separation.

40. This Court is persuaded by the decision in ***Stubbs v Fourth Generation Capital Ltd*** (supra) that subjecting compensation to these deductions would impose an unfair labour practice and effectively require double payments outside the statutory framework.

41. In the premise, this court disagrees with the Respondent's assertion that statutory deductions, including PAYE, NSSF,

SHIF, and Housing Levy, were lawfully made, as housing Levy and SHIF were not applicable at the time of the Applicant's employment and should not have been deducted.

42. In respect of the unremitted tax, the Court notes that paragraph 75 of the Judgment herein expressly held that:-

“There was no prayer specific to unremitted tax... This is a matter that the Claimant should pursue with the tax authorities if he is minded to do so.”

43. The foregoing pronouncement in my view, amounts to a final determination on the PAYE dispute, and this Court cannot revisit or expand the Judgment through execution proceedings. This position was settled in ***Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] eKLR***, where the Court of Appeal held that a court becomes functus officio once it has delivered its final judgment.

44. In the end, I reach the conclusion that indeed, the award to the Applicant is subject to statutory deductions pursuant to Section 49 (2) of the Employment Act, 2007, save for the Housing levy and SHIF for the reasons espoused in the foregoing paragraphs. The Claimant/Applicant is in the circumstances, entitled to a refund of the amounts deducted in respect of the Housing Levy and SHIF.

Examination under Order 22 Rule 35

45. Under the instant application, the Applicant sought that the Respondent's Company Secretary, Directors/Partners of Stamford Corporate Services LLP, personally attend Court to

be examined on oath as to the Judgment Debtor's means and assets and to produce its books of account and other documentary evidence relevant to revealing the assets of ISS Global Forwarding (Kenya) Limited.

- 46.** Order 22 Rule 35 indeed allows the Court to summon a judgment debtor or its officers for examination as to means where there is reason to believe the decree remains unsatisfied. In ***Diamond Trust Bank Kenya Ltd v Jamii Bora Bank Ltd [2019] eKLR***, the Court held that examination proceedings are not automatic and must be justified by evidence of inability or refusal to satisfy the decree.
- 47.** In the present case, the Respondent has placed before Court proof of substantial payment and what it deems accounting justification for the decree and the Certificate of costs. The Applicant, on its part, has not demonstrated concealment of assets, dissipation of funds, or refusal to comply with the decree.
- 48.** In my view, mere closure of offices and a disagreement on statutory deduction does not amount to evasion of execution.
- 49.** In the circumstances, I conclude that the threshold for invoking Order 22 Rule 35 has not been met.

Piercing the Corporate Veil

- 50.** The Applicant herein has further sought the piercing of the corporate veil and imposition of personal liability on directors and shareholders of the Respondent company and its

affiliates. In ***Salomon v Salomon & Co Ltd [1897] AC 22***, a company was held to be a separate legal person, and pursuant thereto, courts have consistently held that the veil will only be lifted in exceptional circumstances, such as fraud or improper conduct.

51. Further in ***Trust Bank Ltd v Investech Bank Ltd & 3 Others [2000] eKLR***, the court held that the inability to pay debts or insolvency is not a ground for lifting the veil.

52. In the present case, no fraud has been pleaded or proved, and no evidence has been tendered showing that directors diverted assets to defeat execution. It is also not disputed that payment of the decretal sum was, in fact, facilitated through group support.

53. The Applicant's request to pierce the corporate veil is thus found to have no legal basis and is totally devoid of merit, and is declined.

Warrants of Attachment Against Directors Personally

54. On this one, since the Court finds no basis to pierce the corporate veil, it follows that execution against directors personally would be unlawful. In ***Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd [2002] eKLR***, the Court held that execution can issue only against the parties to the decree.

55. The directors and shareholder entities are not judgment debtors in this matter. The prayer is equally dismissed.

56. In whole, the Claimant/Applicant's Motion application partly succeeds in terms of the following orders: -

- a) That the award to the Applicant is subject to statutory deductions pursuant to Section 49 (2) of the Employment Act, 2007, save for the Housing levy and SHIF.
- b) That an order be and is hereby issued directing the Respondent to refund the amounts deducted in respect of the Housing Levy and SHIF to the Claimant/Applicant.
- c) The application having only partly succeeded, parties shall bear their own costs of the application.

57. Orders accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Ms. Ondieki h/b for Mr. Abidha for the Claimant/Applicant

Mr. Ombogo h/b for Mr. Omondi for the Respondent

Ms. Esther S -C/A

