

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
APPEAL NO. E291 OF 2023

WEST PALM LOGISTICS LIMITED.....APPELLANT
VERSUS
AMKON CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Background

1. This appeal arises from the ruling of the Chief Magistrate’s Court (Hon. S.A. Opande, PM) delivered on 16th October 2023 in Milimani CMCC No. E198 of 2022 in which the trial court allowed an application by the decree holder seeking orders for the lifting of the corporate veil of the judgment debtor company/Appellant and the imposition of personal liability upon its director for satisfaction of a decretal sum.
2. The Respondent, Amkon Construction Limited, instituted a suit in the Magistrate’s Court seeking payment arising from a construction contract, and obtained judgment against the Appellant, West Palm Logistics Limited, for a decretal sum of Kshs. 21,304,855.44 together with costs of Kshs. 446,103.90, following the appellant’s failure to file a defence within the prescribed timelines.
3. Following the entry of judgment and the extraction of a decree, the Respondent experienced difficulty in executing the decree against the Appellant. Faced with these challenges, the

Respondent filed an application dated 13th December 2022 seeking, inter alia:

- i. The director of the Appellant company Caesar Michael Ohera Argwings Kodhek, be summoned to court for oral examination regarding the company's assets and means of satisfying the decree.*
- ii. The said director be compelled to produce books of accounts, statutory documents and financial records relating to the company.*
- iii. The corporate veil of the Appellant company be lifted, and the director be held personally liable for the decretal sum.*

4. Upon considering the application, the learned magistrate allowed the application and ordered that the director be personally liable for the decretal sum.

5. It was that application which culminated in the ruling now challenged before this court vide the Memorandum of Appeal dated 27th October 2023, citing the following 3 grounds:

- i. That the learned trial magistrate erred in law and fact in failing to appreciate that the Appellant had not committed any fraud to warrant the lifting of the corporate veil.*
- ii. That the learned trial magistrate erred in law and fact in holding the Appellants director personally liable for the company's debt.*
- iii. That the learned trial magistrate erred in law and in fact lifted the corporate veil.*

Appellant's submissions

6. The Appellant submits that the learned magistrate erred in law by lifting the corporate veil without evidence of fraud, impropriety, or misuse of the corporate structure.
7. Counsel argued that the principle of separate corporate personality, established in the landmark case of **Salomon v Salomon & Co Ltd [1897] AC 22**, protects directors and shareholders from personal liability for company debts.
8. The Appellant further contends that the trial court improperly relied on speculation rather than evidence demonstrating abuse of the corporate form.
9. Counsel cited the decision in **Riccatti Business College of East Africa Limited v Kyanzavi Farmers Co. Limited [2016] eKLR**, where the Court of Appeal held that lifting the corporate veil should only occur in exceptional circumstances such as fraud or improper conduct. The Appellant also relied on **Lucy Mukembura Kimani v Nzuri Suppliers Limited [2015] eKLR**, where the court outlined the circumstances under which the corporate veil may be lifted.
10. According to the Appellant, none of those circumstances were established before the trial court.

Respondent's submissions

11. The Respondent supports the ruling of the trial court and submits that the appeal lacks merit.
12. It argues that the Appellant failed to satisfy the decree and did not provide any reasonable explanation regarding its inability to do so.

13. Counsel submits that the Respondent was entitled to seek orders under Order 22 Rule 35 of the Civil Procedure Rules, which permits a decree holder to summon officers of a company for examination regarding the company's assets.
14. The Respondent relies on the decision in **Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited [2006] eKLR**, where the court held that lifting the corporate veil may be justified where necessary to facilitate execution of a lawful decree.
15. It is also submitted that the director of the Appellant failed to comply with the court's directions to produce financial documents and failed to attend court when required, thereby justifying the orders issued by the trial court.
16. The Respondent therefore urges the court to dismiss the appeal.

Analysis and determination

17. Having carefully considered the memorandum of appeal, the record of appeal and the submissions of counsel, the following issues arise for determination:
 - i. *Whether the trial court erred in lifting the corporate veil of the Appellant company and holding the director personally liable.*
 - ii. *Whether the trial court properly exercised its jurisdiction under Order 22 Rule 35 of the Civil Procedure Rules*
18. This being a first appeal, our duty is as re-stated in the case of **Abok James Odera t/a A.J Odera & Associates**

v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where it was held that: *“the first appellate court’s role is to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”*

Whether the trial court erred in lifting the corporate veil

19. The central issue in this appeal concerns the propriety of the learned trial magistrate’s decision to lift the corporate veil of the Appellant company and hold its director personally liable for the decretal sum. The Appellant contends that the learned magistrate misapprehended both the facts and the law in reaching that conclusion.
20. It is necessary at the outset to restate the settled legal principle that a company incorporated under the Companies Act acquires a legal personality separate and distinct from its shareholders and directors. The doctrine of corporate personality is well established in **Salomon v Salomon & Co Ltd [1897] AC 22**.
21. The doctrine has been consistently applied in Kenyan jurisprudence, where the courts have held that a limited liability company is a distinct legal person capable of suing and being sued in its own name, and the liability of its members is limited.
22. In **Victor Mabachi & Another v Nurtun Bates Ltd [2013] eKLR**, the Court of Appeal observed that: *“A company*

as a body corporate is a separate and distinct entity from its shareholders and directors and has perpetual succession.”

23. The consequence of that doctrine is that the debts and liabilities of a company are ordinarily its own and cannot be visited upon its shareholders or directors. However, while the doctrine of corporate personality is fundamental, it is not absolute. Courts have recognized that in certain exceptional circumstances, it may be necessary to disregard the separate legal personality and pierce the veil of incorporation.

24. In **John Gikandi Magondu v Charles Gaituri Ndei & another [2014] KEHC 406 (KLR)** the court observed as follows:

“...in some cases, the court will pierce the corporate veil in order to enable it to do justice by treating a particular company for purposes of litigation before it as identical with a person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the person who control it is a relevant feature...”

25. Piercing the corporate veil is an equitable remedy. The burden rests on the party asserting such a claim to demonstrate that *First*, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and *Second*, the facts must be such that adherence to the fiction of separate entity would,

under the circumstances, sanction a fraud or promote injustice.

26. The record shows that the Respondent had obtained judgment against the Appellant company for a substantial decretal sum. Subsequent attempts at execution proved unsuccessful as no attachable assets belonging to the Appellant company could be located. In those circumstances, the Respondent invoked Order 22 Rule 35 of the Civil Procedure Rules, seeking orders for the examination of the Appellant's director regarding the company's financial affairs and means of satisfying the decree.

27. Order 22 Rule 35 expressly empowers the court, where a decree is for payment of money, to summon the judgment debtor or an officer of a corporate judgment debtor to be orally examined regarding its assets and financial affairs. The purpose of this procedure is to facilitate execution by enabling the court to obtain information about the assets of the judgment debtor.

28. The learned trial magistrate correctly appreciated that the Appellant's director, being part of the management of the company, would ordinarily be in a position to provide information regarding the company's assets and its ability to satisfy the decree.

29. Indeed, the trial court noted that the director of the Appellant company was best placed to provide information regarding the company's financial position and its means of settling the decretal sum.

30. The trial court further observed that the director did not offer a satisfactory explanation regarding the company's inability to settle the judgment debt. This appears to have been a factor that weighed heavily in the trial magistrate's decision.
31. Having considered the application and the response thereto, the trial magistrate concluded that the circumstances justified lifting the corporate veil and allowing the Respondent to execute the decree against the director personally.
32. While the learned magistrate was correct to observe that a director may properly be summoned under Order 22 Rule 35 to provide information regarding the company's assets, the question that arises is whether the evidence before the trial court justified the further step of lifting the corporate veil.
33. The legal threshold for lifting the corporate veil is considerably higher than that required merely to summon a director for examination. It must be demonstrated that the corporate personality is being abused for improper purposes.
34. From the record, the Respondent had difficulty tracing attachable assets belonging to the Appellant company and therefore sought to examine its director regarding the company's affairs.
35. However, the order made by the trial court went beyond merely summoning the director for examination. The learned magistrate proceeded to lift the corporate veil and hold the director personally liable for the decretal sum.

36. With due respect, such an order required evidence demonstrating that the company was being used as a vehicle for fraud, improper conduct, or abuse of the corporate form. The record placed before this Court does not reveal such evidence.
37. The Respondent's application was largely premised on the difficulty of executing the decree against the company. However, the inability to satisfy a decree is not by itself a sufficient ground for lifting the corporate veil.
38. The law provides various mechanisms for enforcing judgments against companies, including attachment, garnishee proceedings and insolvency proceedings. The drastic step of lifting the corporate veil should therefore be resorted to only in exceptional circumstances.
39. In the present case, I am persuaded that the order lifting the corporate veil was therefore made without a sufficient legal basis.
40. In the result, the Court finds that the appeal has merit and makes the following orders:
- i. The appeal is allowed.***
 - ii. The ruling and orders of the Chief Magistrate's Court delivered on 16th October 2023 are hereby set aside.***
 - iii. The order lifting the corporate veil of the Appellant company and holding its director personally liable for the decretal sum is vacated.***

iv. The Respondent shall have liberty to pursue lawful execution against the Appellant company in accordance with the Civil Procedure Rules.

v. The Appellant shall have the costs of the appeal.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Muthoni h/b for Mr. Ngugi for Appellant

Mr. Gekonga h/b for Mr. Mugisha for Respondent

Court Assistant: *Carlos*