



Maaralink Tours & Photography Company Limited v Dawagi Investments Limited (Environmental and Land Originating Summons E017 of 2021) [2025] KEELC 879 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2021
FM NJOROGE, J
FEBRUARY 27, 2025**

**BETWEEN
MAARALINK TOURS & PHOTOGRAPHY COMPANY LIMITED APPLICANT
AND
DAWAGI INVESTMENTS LIMITED RESPONDENT**

RULING

1. In a notice of motion application dated 20/1/2023, the Applicant sought the following orders: -
 1.Spent;
 2. That the Honourable Court makes orders for the attendance in court and examination of Anthony Safari Kitsao, Franklin Mwalimu Kitsao and Tom Mungai Ouma, directors and secretary to the Defendant company/judgment debtor respectively for production of the Defendant's audited books of accounts and financial records, for purpose of being examined on the Defendant's means of satisfying the decree herein;
 3. That in default of the said directors/officers complying with the above orders, this Honourable Court be pleased to order that the corporate veil be lifted and Anthony Safari Kitsao and Franklin Mwalimu Kitsao, the directors of the Defendant company/judgment-debtor be held personally liable to the Plaintiff/applicant by paying Kshs. 3,055,000 being the decretal sum plus costs and accrued interest at 10% per annum from the date the costs were certified by the taxing master;
 4. That the costs of this application be provided for.
2. The application is supported by the affidavit of Anthony Nzioka Nyamai, said to be the Applicant's director, sworn on 20/1/2023. The deponent averred that on 11/5/2022, ruling was entered against



the Respondent in favour of the Applicant for a refund of Kshs. 2.6 million and Kshs. 455,000 together with interest at the agreed rate of 10% and costs of the suit. The Applicant averred that a decree was extracted for the decretal sum following which garnishee proceedings were instituted against SBM Bank-Malindi, Account number 0192333612001. Subsequently, a garnishee order nisi was issued whereupon the garnishee notified the Plaintiff that the said account held a balance of Kshs. 5,000/- only.

3. The deponent asserted that all efforts by the Applicant to trace the Respondent's assets have been fruitless thus necessitating the present application. He annexed a copy of the Respondent's CR-12 indicating Anthony Safari Kitsao and Franklin Mwalimu Kitsao to be the directors and shareholders of the Respondent company, and Tom Mungai Ouma the company secretary.
4. The Respondent opposed the application. It filed a replying affidavit sworn by the said Anthony Safari Kitsao on 13/3/2023. The deponent averred that the Applicant's claim herein was premised on the existence of another dispute Malindi ELC Case No. 20 of 2021, Mayungu Real Estate Limited v Dawagi Investment Limited, a suit which hindered the completion of the transaction between the parties herein; that upon determination of the present suit, ELC 20 of 2021 was equally determined in favour of the Respondent herein. Consequently, the Respondent approached the Applicant for purposes of completing the transaction as the Respondent had no money to refund the amount ordered by the court; that it was during the said negotiations when the Respondent's advocate on record became aware of the garnishee order. To the deponent, the application is premature for failure of exhausting all available remedies to recover the decretal sum.
5. The application was canvassed by way of written submissions.

The Applicant's Submissions

6. In the submissions dated 14/6/2023, counsel for the Applicant identified two issues for determination: - whether the officers of the Respondent company should be summoned for examination in respect to payment of the decretal sum; and whether the Honourable Court should lift the veil of incorporation and hold the officers of the company personally liable to settle the decretal amount.
7. Citing Order 22 rule 35 of the Civil Procedure Rules, counsel submitted that the court is equipped with jurisdiction to summon any officer of a company to be examined on the assets and means of the company to settle a decretal amount; and that by examining such an officer, the court may or may not lift the veil of incorporation. Counsel relied on the cases of *Masefield Trading (K) Ltd v Rushmore Company Limited & another* [2008] eKLR, *Stanbic Bank Kenya Limited v Netcash Limited* [2021] eKLR (that cited the case of *Ultimate Laboratories v Tasha Bioservice Ltd Nairobi HCCC No. 1287 of 2000(UR)*), and *Postbank Credit Limited (in liquidation) v Nyamangu Holdings Limited* [2015] eKLR.
8. In relation to the second issue, counsel submitted that depending on the outcome of the discovery and if the officers choose to be evasive and fail to honor the summons issued, then the Court through its inherent powers can lift the veil of incorporation. To support this argument, he relied on the cases of *Masefield Trading (K) Ltd v Rushmore Company Limited & another* [supra]; and *Robert Khamala Situma v Afrikon Limited* [2022] eKLR.

The Respondent's Submissions

9. Counsel for the Respondent filed submissions dated 15/12/2024, wherein he submitted that the Applicant has failed to explain why it did not execute against the property that was the subject of the failed transaction and/or provide evidence that it attempted to attach the Respondent's property



before filing the subject application herein. To counsel therefore, the application herein is premature, and an abuse of the court process. Counsel reiterated that the Respondent continues to hold a known asset which it had attempted to sell to the Applicant. Thus, the Applicant has failed to adduce cogent grounds to warrant this Honorable Court to exercise its discretion to grant orders under the provisions of Order 22 rule 25.

Analysis

10. I have considered the Application, the Replying Affidavit in opposition thereto and the submissions by the advocates for the parties. In my view, the following issues arise for determination:

- i. Whether the directors and company secretary of the Respondent company should be summoned for the purpose of being examined on the Respondent's means of satisfying the decree herein and produce books of accounts.
- ii. Whether the Respondent's corporate veil should be lifted.
- iii. Who should pay the costs of the application?

11. Order 22 rule 35 of the Civil Procedure Rules 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.”

12. The foregoing provision is a jurisdiction donated to the Court to assist decree holders to discover information from officers of a corporation whose assets are unknown. In the case of *Masefield Trading (K) Ltd -v- Rushmore Company Limited* [supra], largely relied upon by both parties herein, Kimaru J stated thus with regard to the court's jurisdiction under Order 22 rule 35:

“I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sums decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation”.

13. Consequently, I find that in the circumstances of the present case that Anthony Safari Kitsao, Franklin Mwalimu Kitsao and Tom Mungai Ouma, directors and secretary to the Defendant company/ judgment debtor respectively can be summoned for production of the Defendant's audited books of accounts and financial records and specifically for the purpose of being examined on the Defendant's means of satisfying the decree herein.



14. The law on lifting the veil of incorporation is now settled. In *John Gikandi Magundu v Charles Gaituri Ndei & another* [2014] KEHC 406 (KLR) the court observed as follows:

“The conditions for lifting corporate veil have been set out in Halsbury's Laws of England 4th Edition Vol.7 paragraphs 90 as follows: -

“90. Piercing the corporate veil notwithstanding the effect of a company's incorporation, 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. In such a case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even agents, directors and controlling the activities of the company. However, this is not the position, even though an individual's connection with the company may cause a transaction with that company to be subject to strict scrutiny the corporate veil will not be pierced.”

15. The directors, in their fiduciary capacity as directors of the Respondent company, have failed neglected and/or refused to make good the decretal sum. It is the applicant's contention on one hand, that it has been unable to find attachable assets for purposes of executing the decree herein. The Respondent's contention on the other hand is that the application is premature and that there exists the Respondent's asset which the Applicant is well aware of. It is noteworthy that the Respondent has however not adduced any evidence to demonstrate that the asset is in existence. Nevertheless, it is not lost on this court that the transaction between the parties collapsed due to a dispute with a third party over the suit property contrary to the plaintiff's expectations and also contrary to an express condition the conditions in the contract.

16. In the circumstances, I am satisfied that the directors and company secretary of the Respondent ought to be summoned to appear before this court to be examined on the assets and means of the company to settle the decretal sum.

17. In view of the foregoing, I find that the application is merited and is hereby allowed in terms of prayers no 2 and 4. Prayer (3) will however take effect depending on what will transpire once the directors are examined in court and determination thereon is hereby deferred till then.

18. Anthony Safari Kitsao, Franklin Mwalimu Kitsao and Tom Mungai Ouma, directors and secretary to the Defendant company/judgment debtor respectively are hereby summoned to appear in court on 7/5/2025 for production of the Defendant's audited books of accounts and financial records and for the purpose of being examined on the Defendant's means of satisfying the decree herein if the judgment debt will not have been settled in full by that date.

19. The costs of this application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

