



Shady Acres Limited & 2 others v Silver Construction Co Ltd & another (Civil Application E047 & E139 of 2025 (Consolidated)) [2025] KECA 1382 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KECA 1382 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E047 & E139 OF 2025 (CONSOLIDATED)
PO KIAGE, J MOHAMMED & WK KORIR, JJA
JULY 25, 2025**

BETWEEN

SHADY ACRES LIMITED APPELLANT

AND

SILVER CONSTRUCTION CO LTD RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E139 OF 2025**

BETWEEN

DAVID MURIUKI MAMBO 1ST APPLICANT

ROSE MAMBO 2ND APPLICANT

AND

SILVER CONSTRUCTION CO LTD 1ST RESPONDENT

SHADY ACRES LIMITED 2ND RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Mabeya, J.), delivered by Gikonyo, J. on 16th January, 2025 in Misc. Appln. No. 1168 of 2020)

RULING

1. These consolidated applications emanate from the ruling of the High Court of Kenya at Nairobi (Mabeya, J.) dated 9th January, 2025 and delivered on 16th January 2025 by Gikonyo, J. in Misc.



- Application No. 1168 of 2020, where the learned Judge ordered the lifting of the corporate veil of Shady Acres Limited, the applicant.
2. By the motion dated 30th January 2025, brought under Rule 5(2)(b) of our rules, in Civil Application No. E047 of 2025 (lead file), the applicant seeks, principally, an order of stay of execution of the orders flowing from the ruling in Nairobi Miscellaneous Application No. E1168 of 2020, pending the lodging, hearing and determination of its intended appeal against that ruling.
 3. The motion is predicated on grounds on its face and is supported by two affidavits of David Muriuki Mambo (Mr. Mambo), the applicant's director, sworn on 31st January 2025 and 6th March 2025. Mr. Mambo contends that J.W.W. Mong'are, J. had partly heard the application by Silver Construction Co. Limited (the respondent) for orders to lift the veil of incorporation of the applicant, when they realised that she had previously acted for a party who had a dispute with the applicant company concerning certain apartments at a venture known as Westpointe Apartments. He avers that the applicant's directors filed an application for the learned Judge's recusal in the proceedings but they never received directions on the same. The file was later moved to Mabeya, J. who adopted the recorded proceedings and determined the matter. Mr. Mambo, however, contradicts the foregoing position in his affidavit sworn on 6th March 2025, by claiming at paragraph six (6) that, the respondent did not file a formal or oral application seeking orders that the corporate veil of the applicant be lifted. He avers that the respondent has since caused to be published in the Sunday Nation Newspaper of 26th January 2025, an article titled, "Court Holds Real Estate Firm Directors Liable for Debt", which article has generated extreme alarm among its clients and shaken its creditworthiness. It is urged that the applicant has an arguable appeal which would become useless if the impugned orders were not stayed.
 4. In answer to the application, the respondent lodged two replying affidavits; one sworn on 26th February 2025, by its counsel on record, Mr. Kelvin Mogeni, and another sworn on 4th April 2025, by Naran I. Vekaria, its general manager. The respondent narrates the history of the dispute while contending that the applicant has repeatedly lodged applications in order to prolong the litigation of this matter, while continuing to unjustly retain money due and owing to the respondent for services already rendered to it. It is asserted that the instant applications are scandalous, frivolous, vexatious and a gross abuse of the court process and thus this Court should dismiss them with costs.
 5. At the hearing of this application, learned counsel Mr. Onduso appeared for Shady Acres Limited, the applicant, Mr. Mogeni for Silver Construction Co. Limited, the respondent and Mr. Amolo for David Muriuki Mambo and Rose Mambo, the directors of the applicant. Parties had filed written submissions which they orally highlighted.
 6. As counsel commenced addressing us, we probed whether there was any chance that they could talk and reach a settlement to be recorded. Mr. Mogeni indicated that his client was amenable to a stay being granted, on condition that the applicant offers some security. We pointed out to Mr. Onduso that in view of the fact that there was a consent judgment on record which had not been satisfied, if at all we were minded to give a stay, it would only be a conditional stay. At that point, we allowed counsel to take a few minutes and consult their respective clients on the terms upon which a stay could be granted, and get back to us. When counsel returned, they had not agreed on a consent and so we proceeded to hear them.
 7. On the arguability aspect, Mr. Onduso contended that Mongare, J. was conflicted when she heard the application dated 2nd March 2022 which sought to have the directors of the applicant examined, with a view to executing upon property LR. No. 209/20735. Further, the learned Judge (Mabeya, J.) went beyond what the respondent had sought, in lifting the veil against the applicant. To counsel, there ought to have been a substantive motion triggering the lifting of the veil. Mr. Onduso submitted



- that there was a real risk of the applicant's property being attached and its directors being arrested and committed to civil jail, as a consequence of the impugned ruling, contrary to the fundamental principles set out in the celebrated case of *A. SALOMON Vs. ARON SALOMON (1897) A.C. 22*. He argued that should execution of the decree be allowed to proceed, then the intended appeal would be rendered nugatory.
8. Mr. Amolo associated himself with position taken by Mr. Onduso. He faulted the learned Judge for failing to mention the application which he was determining in his ruling. On the nugatory aspect, counsel contended that some of the items that had been attached were keepsakes, items that were gifted to the directors during their wedding, while others are antique items which they purchased from expatriates who were leaving the country and the like of them cannot be found in any store or any shop in Kenya. Mr. Amolo submitted that should those items be sold; his clients would suffer irreparable loss.
 9. In opposition to the application, Mr. Mogeni insisted that there was no arguable appeal. He explained that this is a matter arising out of a consent judgment that was entered into on 14th December 2020. The consent judgment provided that any sale proceeds received by the applicant from the sale of any unit or apartment on L.R. No. 209/20735, was to be applied first, to liquidating the respondent's claim. That was, however, not done. Consequently, the respondent sought examination of the applicant's directors. On 24th June 2022, Majanja, J. ruled that the two directors of the applicant were to be summoned and examined on the means of the company to satisfy the debt, and in that regard they were to furnish the court with the company's books of account, among other records. The learned Judge directed that in default, the respondent was to proceed with execution against the applicant's directors, personally. Counsel argued that the decision on lifting the corporate veil was thus made by Majanja, J. and Mabeya, J. merely continued with that decision in his ruling. He contended that it could not thus be said that an order for lifting of the corporate veil of the applicant had not been sought. Mr. Mogeni continued that there was no arguable appeal because the applicant through its directors had not shown how it will settle the consent judgment. They could not also claim to suffer loss as a consequence of executing a valid judgment that had not been settled. Counsel submitted that the units that the applicant was proposing to offer in settlement were in the hands of an objector and, the applicant's directors had actually previously stated in court that those units were not within their control. In conclusion, Mr. Mogeni urged us to dismiss the instant application with costs as it was intended to further delay the matter and deny the respondent its hard earned money.
 10. In reply to those submissions, Mr. Onduso maintained that there was no application before Majanja, J. for the lifting of the applicant's corporate veil. We inquired from him whether they had appealed against the order of Majanja, J. that effectively pierced the veil. Upon much probing from the Court, Mr. Amolo answered by stating, rather reluctantly, that he did not know whether an appeal was ever lodged against the order by Majanja, J. In conclusion, Mr. Amolo prayed for an order of interim stay pending the determination of this application. Mr. Mogeni, however, opposed that plea, submitting that execution had already commenced as the auctioneers had already proclaimed. Counsel added that, the respondent would be greatly prejudiced considering that what was in issue was a money decree, and the applicant had not offered any security to settle it. Upon hearing both parties, we declined to grant any interim orders.
 11. We have considered the rival contentions by respective counsel for the parties. It is trite that an applicant for relief under Rule 5(2)(b) needs to demonstrate that he has an arguable appeal. This merely means an appeal that raises at least one bona fide issue worthy of the Court's consideration on appeal or, put another way, the appeal should not be frivolous. It does not, however, mean an appeal that must necessarily succeed. The second matter which the applicant must show is that the appeal would be



rendered nugatory without the Court's intervention in the interim. An appeal would be rendered nugatory if damage of a great or irreversible character, prejudicial to or probably destructive of the substratum of the appeal, would have occurred in the intervening period. A full discussion of these principles and the notable jurisprudence on them is found in this Court's decision in Stanley Kangethe Kinyanjui Vs. Tony Ketter & 2 Others [2013] eKLR.

12. The applicant's contention that it has an arguable appeal seems to be primarily hinged on the argument that the learned Judge ordered the lifting of its corporate veil when there was no such application before it. As alluded to earlier, the applicant's director appears to have a conflicting view on whether an application for lifting of the corporate veil was ever made. Paragraph five (5) of the affidavit sworn on 31st January 2025 by Mr. Mambo states;

That this file was placed before the Honourable Lady Justice J.W.W. Mong'are and during that time the said Judge heard the application by Silver Construction Limited seeking orders to lift the veil of incorporation of Shady Acres Limited."

Paragraph six (6) of the affidavit sworn on 6th March 2025 by the same deponent states;

That as far as I am aware the 1st respondent namely Silver Construction Limited did not file a formal or oral application seeking orders that the corporate veil of Shady Acres Limited be lifted and as far as I know, the only Notice of Motion that was filed was the one dated 2nd March 2022 a copy of which I now annex and mark EXHIBIT DMM 4 and in that Notice of Motion the orders prayed for were as follows;"

13. The respondent's counsel referred us to the orders of the late Majanja, J., made on 24th June 2022. Those orders are found at page 27 of the replying affidavit sworn on 4th April 2025, by Naran V. Vekaria, the general manager of the respondent. According to the respondent, those orders are what initiated the lifting of the applicant's corporate veil and Mabeya J's ruling and orders, which the applicant seeks to stay, simply proceeded from that point. Majanja, J's orders of 24th June 2022 read as follows in part;

14. [...]

- b. The Notice of Motion dated 2nd March 2022 is allowed only to the extent that the directors of Shady Acres Limited; David Muriuki Mambo and Rose Mambo are to be summoned to court for examination on the means of the company to satisfy the debt and in that regard they shall furnish the court, the annual reports, books of accounts and other document as may be requested by the applicant.
- c. In default of compliance with order (b) above, the applicant may proceed with execution against the said directors personally."

14. During the hearing, we probed counsel for the applicant and the directors of the applicant whether an appeal was ever preferred against the foregoing orders. Counsel responded rather ambivalently, if implausibly, that he was not aware whether an appeal was lodged. It would seem to us, as rightly argued by the respondent, that the learned Judge (Mabeya, J.) only acted on the orders of the late Majanja, J. Absent proof of an appeal having been lodged against that ruling and orders, we take them to be final. In the circumstances, we are not persuaded that the applicant has demonstrated that it has an arguable appeal.

15. On the nugatory aspect, counsel for the respondent informed us during the hearing that execution had already commenced as the auctioneers had already proclaimed. In the result, there appears to be nothing to preserve, this application having been overtaken by events.



16. At any rate, having come to the conclusion that arguability has not been established, we need not be troubled by the second limb.

17. Being so minded, we find the motion to be without merit and it is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

P.O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

