



REPUBLIC OF KENYA



**Njogu v Deekem Petroleum & Industrial Chemical Limited (Cause
1786 of 2017) [2025] KEELRC 386 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 386 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1786 OF 2017
CN BAARI, J
FEBRUARY 14, 2025**

BETWEEN

ALBERT NJAGI NJOGU CLAIMANT

AND

**DEEKEM PETROLEUM & INDUSTRIAL CHEMICAL
LIMITED RESPONDENT**

RULING

1. This ruling relates to the applications dated 6th August, 2024 by the Claimant herein, and one dated 30th September, 2024 by the Respondent. In the motion of 6th August, 2024, the Claimant seeks that Jane Muthoni Gacheru, Sophia Wangu Kamau and Duncan Kiruai Mwai being the Directors of Deekem Petroleum and Industrial Chemicals Limited, the Judgment Debtor herein, be examined personally as to the assets and finances of Deekem Petroleum and Industrial Chemicals Limited and that upon such examination, the veil of incorporation of the Respondent be lifted and the said Directors be ordered to jointly and severally settle the decretal sum Kshs. 425,000/= with interest from 10th June, 2022 until payment in full.
2. The Respondent in its motion of 30th September, 2025 seeks the setting aside of the exparte Judgment entered against it together with the proceedings thereof, and an order granting it leave to file its defence out of time.
3. The Respondent opposed the Claimant's motion vide a replying affidavit sworn on 5th September, 2024 by one Duncan Kiruai Mwai. Similarly, the Claimant lodged a replying affidavit sworn on 5th November, 2024 by Namada Simon in opposition to the Respondent's application.
4. This Court directed parties to file submissions on the two applications, and the submissions were received from both parties.



5. The Claimant in his motion of 6th August, 2024 states that the Respondent has since the delivery of the judgment and despite having been served with the decree, refused or failed to satisfy the decretal sum. He states further that upon instructing BETABASE AUCTIONEERS to proceed with execution by attachment, they were unable to trace the physical location and business premises of the judgment debtor though the company continues with operation.
6. It is his case that it is of absolute importance that Jane Muthoni Gacheru, Sophia Wangu Kamau and Duncan Kiruai Mwai, the Directors of the Respondent do attend court and be examined as to the Respondent's/Judgment Debtor's property and means of satisfying the decree herein.
7. He avers that the hiding of the company offices and assets is meant to avoid settlement of the decree herein, and which makes this a fitting case for the lifting of the Corporate Veil to obviate miscarriage of justice by Directors hiding behind companies while hiding the locations, assets and resources of the said companies.
8. In its opposition to the lifting of its corporate veil, the Respondent states that its directors are not named as Respondents or in any capacity in the present suit and were therefore not personally served with a plaint or summons to enter appearance in the matter.
9. The deponent further states that no fresh suit has been brought against him or any of his co directors/ shareholders of the Respondent for the recovery of the decretal sum in the concluded suit and seeking the lifting of the veil of incorporation.
10. On the second application herein, the Respondent premises its application on allegations that it was never served with the summons to enter appearance and pleadings in this matter. It further states that the matter proceeded in its absence and a judgment entered, therefore its right to be heard was denied and that the Claimant has not demonstrated that he served the Respondent with the pleadings and hearing notice in this matter or at all.
11. The Respondent states that there is no prove of personal service upon the Respondent or at all as required under Order 5 Rule 8 of the civil Procedure Rules.
12. It further states that even if the service was effected and for one reason or another the Respondent fails to attend Court, this Court has unfettered discretion to set aside ex parte judgment if the defence raises triable issues. The Respondent sought to rely in the case of *Tree Shade Motors Ltd v DT Dobie & Another* [1995- 1998] 1 EA 324 for the holding that: -

“ Even if service of summons is valid, the judgment will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the Defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”
13. It is the Respondent's submission that its defence raises very serious triable issues and if not granted to tender its defence before this Court there shall be a miscarriage of justice where he will be condemned to satisfy a decree that was issued ex parte.
14. In his opposition to the Respondent's motion of 30th September, 2024, the Claimant submits that the Respondent was dully served and wilfully chose to ignore the court process. He submits further that one Jane Muthoni Gacheru who is the wife to Duncan Kiruai Mwai also happens to be one of the Directors of the Respondent was served on behalf of the Respondent, and that she received the notices in this matter.



15. It is the Claimant's submission that the Respondent has not met the conditions necessary for grant of stay of execution and that he should be allowed to enjoy the fruits of his judgment. He placed reliance in the case of *Machira v. Machira & Co Advocates v East African Standard* (20021 eKLR to buttress this assertion.
16. The Claimant submits that there is evidence on record showing that the Respondent was dully served and the allegation that it was not aware of matter is an afterthought. It is his submission that the Respondent has annexed a defence which does not raise any triable issues and does not given sufficient reasons to set aside the ex parte judgment and that allowing this application would undermine judicial economy and finality in litigation.

Analysis and Determination

17. I have considered the two motions, the replying affidavits and the submissions by both parties on each of the motions herein. The issues that arise for my determination are:-
 - i. Whether to set aside the exparte Judgment entered against the Respondent together with the proceedings thereof, and allow the Respondent leave to file its defence out of time; and if not
 - ii. Whether the veil of incorporation of the Respondent should be lifted and its Directors ordered to jointly and severally settle the decretal sum Kshs. 425,000/= with interest from 10th June, 2022 until payment in full.
 - iii. Who bears the costs
18. The Respondent's contention is that it was not served with summons to enter appearance and nor was it served with the pleadings in this matter. It is its further assertion that the matter proceeded in its absence and a judgment entered, therefore its right to be heard was denied.
19. On his part, the Claimant through an affidavit sworn by his counsel states that the Respondent was served not only with summons, but also with notices of mentions and hearings at every stage of the matter, but which the Respondent chose to ignore and was only jolted by the application to lift its corporate veil.
20. The Respondent herein, seeks the exercise of the Court's discretionary power. In the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, the court opined thus on setting aside of an ex parte judgment:-

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”.
21. Kasango J in the case of *Samuel Kiti Lewa v Housing Finance Co of Kenya & another* (2015) eKLR, expressed herself thus:-

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. ”



22. Further in the famously cited case of *Mbogo & Another v Shah* (1968) EA 93, the Court held as follows:-
- “...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.
23. As submitted by the Claimant, the court record bears an affidavit of services sworn by one Peter Ngeno a process server, who indicated that he received summons from the Claimant’s Advocates which he could not serve at the Respondent’s last known address owing to the fact that the Respondent had by then closed shop, and that with the help of the Claimant he proceeded to the Respondent’s Directors’ residence where he served the summons on one Mrs. Jane Muthoni Gacheru, a director of the Respondent.
24. It is further evident from the record that mention notices and several hearing notices were issued and served upon the directors of the Respondent, and which service is supported by various affidavits of service that form part of the court record, and which are the basis of the ex parte judgment now sought to be set aside.
25. I further note that although the Respondent denies being served with both summons and the mention and hearing notices, its has not sought to cross-examine the process servers on the issue of service. It is further not lost on this court that the matter herein was filed 8 years ago and the judgment sought to be set aside delivered in June, 2022, close to 3 years ago today.
26. The Respondent filed its motion to set aside on 30th September, 2024 exactly 2 years and 3 months since the delivery of the subject judgment. The delay in filing the motion has not at all been explained, and which I return is highly inordinate.
27. In *Gladys Wakiuru Nyota v Pincle Njoroge & another* (2020) eKLR the court stated as follows:-
- “..... re-opening of a case is not a matter of course. A court must consider each case on its own merits. As was held in the case of *Joseph Ndung’u Kamau v John Njihia* (Supra) and *Standard Chartered Financial Services & 2 others v Manchester Outfitters (Suiting Division) Ltd & 2 others* (Supra), the decision to re-open a case is a discretionary one. The rider is that such discretion must only be exercised sparingly to avoid injustice and miscarriage of justice.”
28. The Respondent has not told this court how it became aware of the matter, the judgment it now seeks to have set aside or the application filed the Claimant seeking to have its corporate veil lifted.
29. In my considered view, the Respondent has not sufficiently shown that it was not served with summons and all the processes attendant to this matter as to warrant this court’s exercise of its discretionary power to set aside the judgment rendered in the matter on 10th June, 2022.
30. I therefore proceed to dismiss the motion dated 30th September, 2024 with costs to the Claimant.
31. On the second issue subject of the motion dated 6th August, 2024, the Claimant seeks that the directors of Respondent company, the Judgment Debtor herein examined personally as to the assets and finances of the Deekem Petroleum and Industrial Chemicals Limited for purposes of execution of the decree issued against the Respondent.



32. The Respondent through its director one Duncan Kiruai Mwai does not deny that the persons mentioned in the suit are indeed the directors and shareholders of the Respondent. Its only objection is that the said director ought to have been sued individually as parties to the suit.
33. In *Jepkemoi v. Zaburi Enterprises Company Ltd & 2 others (Misc. Civil Application 43 of 2023)* [2024] eKLR, the court held:-
- “The corporate veil will only be lifted where it is demonstrated that the actions of the directors or shareholders smack of bad faith and that the corporate veil is being used as a mask to fraudulently shield such directors or shareholders from execution of the decree. ... The veil may therefore be pierced where it appears that the business of the company has, for instance, been carried on with intent to defraud creditors or for any fraudulent purpose. Only where justice of the case demands should the corporate veil be disregarded and lifted.”
34. In *Salomon v. Salomon & Co. Ltd. (1897)* the court affirmed that the corporate veil can be pierced or lifted in situations where the company is used to commit fraud, evade legal obligations, or for improper purposes.
35. It is evident to this court that the Directors/shareholders of the Respondent have used the corporate veil to evade obligations such as the decree herein, which remains unsatisfied close to three years on.
36. In the premise, I hold that it is in the interest of justice and fairness that the corporate veil of the Respondent be lifted.
37. In the final analysis, I do order that Mrs. Jane Muthoni Gacheru, Sophia Wangu Kamau and Duncan Kiruai Mwai being the Directors of Deekem Petroleum and Industrial Chemicals Limited, the Judgment Debtor herein be personally examined as to the assets and finances of Deekem Petroleum and Industrial Chemicals Limited.
38. The examination of the Respondent’s director on 18/3/2025.
- It is hereby so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Omari h/b for Mr. Namada for the Claimant

N/A for the Respondent

Ms. Esther S - C/A

