



Musyoka & 33 others v Insulae Africana Limited & 2 others (Cause 970 of 2016) [2025] KEELRC 385 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 970 OF 2016
M MBARŪ, J
FEBRUARY 13, 2025**

BETWEEN

MICKEY MUSYOKA & 33 OTHERS & 33 OTHERS & 33 OTHERS APPLICANT

AND

INSULAE AFRICANA LIMITED 1ST RESPONDENT

PANGONI HOTELS AND RESORT LIMITED 2ND RESPONDENT

PANGONI BEACH 3RD RESPONDENT

RULING

1. The claimants, Mickey Musyoka & 33 others filed an application dated 18 April 2024 under the provisions of Order 51 Rule 1, Order 22 Rule 35 of the Civil Procedure Rules, and Sections 1A and 3A of the [Civil Procedure Act](#) seeking orders that;
 1. Spent.
 2. Spent.
 3. The court be pleased to issue summons directed to Emma Kavuka Achoki, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited who are directors and shareholders of the 1st respondent/judgment debtor; Managers and any other officers of the 1st respondent/Judgment debtors be compelled to attend court on an appointed day to be orally examined, as to the business and affairs of the 1st respondent/judgment debtor; and/or the property or properties of the respondent/judgment debtor, and/or the 1st respondent/judgment debtor means of satisfying the decretal sum.
 4. The court be pleased to issue an order directed to Emma Kavuka Achoki, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited in their capacity



as the directors of the judgment debtor and any other officers of the 1st respondent/judgment debtor to produce before the court books of accounts, audited financial statement, annual returns, bank statement, cheque books, audited financial statements, annual returns to the operations and transactions of the judgment debtor for the last five (5) years as well as their personal bank statements as stated above, and the said directors be examined on oath on the said documents.

5. In default of appearance and/or failure to appear under such reasonable circumstances as may be deemed fit, the said directors named herein shall be deemed personally liable to settle the claim herein and warrants of attachment shall be issued against them or to be imprisoned and committed to civil jail for a period not less than six (6) months.
6. The court be pleased to make such orders in the interest of justice upon examining Emma Kavuka Achoki, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited.
7. The costs of this application and cross-examination proceedings be awarded to the decree-holder.
2. The 1st claimant, Mickey Muskoka, supports the application because the decree herein for payment of money remains unsettled by the respondents/judgment debtors. Attempts to execute for the decretal amount have been futile as no known attachable assets belong to the 1st respondent/judgment debtor, and the respondent's last known place of business was closed down. The directors of the 1st respondent company at the time of dissolution were Emma Kavuka Acholi, Edgar Kipkurui Kalya, Achoki Oenga, Gideon Mutemi Mulyungi, and Guava Limited.
3. The directors of the 1st respondent company have further conducted their business affairs fraudulently solely to defeat the creditors, including the claimant. As a result of the fraud, auctioneers have been unable to trace any assets belonging to the 1st respondent company, and efforts to execute the judgment have been thwarted.
4. Musyoka avers in his Affidavit that it is necessary for the circumstances for the officer and persons of the directors of the respondent/judgment debtor to appear in court and be examined orally as to operations and means of the company for satisfying the decretal amount which remains unsettled.
5. The 1st respondent/judgment debtor is hell-bent on preventing the claimants from enjoying the fruits of the judgment herein. If the application is not allowed, the claimants will suffer an irreparable setback. Judgment herein was delivered in 2020 in a matter filed in 2016. No person should suffer wrong without a remedy, and no wrong should be allowed without compensation if a court can address it.
6. Musyoka also avers that they filed the claim herein in 2017 following unfair termination of employment. Judgment was delivered in their favour on 13 May 2022, and the court ordered the 1st respondent to pay a sum of Ksh.6,188,084 plus costs and interests, which has not been settled. Efforts to execute have been frustrated, hence this application.
7. In reply, Yesse Achoki Oenga, a director, filed his Replying Affidavit and Grounds of Opposition with the authority to reply on behalf of Emma Kavuka Achoki.
8. The application lacks merit and has not demonstrated sufficient grounds to warrant lifting the corporate veil, other than the reason that the decree for payment of money remains unsettled. The 1st respondent is a limited liability company and is a distinct and separate entity from its directors and shareholders; lifting the corporate veil will serve no purpose.



9. Other grounds are that lifting the corporate veil is not automatic merely because the company has no assets or cannot pay its debts and is thus insolvent. In this regard, the claimants have not met the requirements to warrant piercing the corporate veil.
10. In the Replying Affidavit, Oenga avers that the application is misconceived and bad in law, and the claimants have not demonstrated sufficient grounds to warrant lifting the corporate veil other than the reasons that the decree for payment of money remains unsettled.
11. The first respondent is a limited liability company that is a distinct and separate entity from its directors and shareholders, and lifting the corporate veil would serve no purpose. Such lifting of the corporate veil is not automatic merely because the company has no assets or cannot pay its debts and is thus insolvent.
12. The 1st respondent is not and has never been an employer of the claimants at any material time. Liability only arises where there is an employer-employee relationship with the principal. None of the listed claimants enjoyed an employment relationship with the first respondent; therefore, no liability can arise.
13. The claimants' claim is grossly misinformed, resulting in an unjust assignment of liability. The 2nd respondent employed the claimants, and the management company was responsible for procuring and providing suitable workers such as the claimants.
14. The court should only allow piercing the corporate veil when the applicant has shown such unity of interest and ownership that the company is inseparable from its directors. The facts must be such that adhering to the fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice.
15. Oenga avers that piercing the corporate veil is an equitable remedy, and the burden rests on the party asserting such a claim to demonstrate the same. The claimants as applicants are not truthful when they argue that they are entitled to the extraordinary relief of piercing the corporate veil and that the respondent company closed its doors at its known address. But have managed to serve the respondent with their pleadings. Without meeting the required threshold, the application should be struck out with costs.
16. The other cited persons and directors/shareholders, Edgar Kipkurui Kalya, Gideon Mutemi Mulyungi and Guava Limited, did not respond to the application.

Determination

17. In response to the application, Mr Oenga avers that the 1st respondent is not the employer but the second respondent. However, the judgment herein was delivered on 13 May 2022. The court directed the 1st respondent to pay the claimants their terminal dues plus costs.
18. No appeal has been brought to the attention of the court.
19. In this regard, a summons was issued directing Emma Kavuka Acholi, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited, as directors/shareholders of the judgment debtor, to attend and address the court on the business affairs and properties and how they intend to settle the decretal sum herein for the 1st respondent. Only two directors have attended and filed responses. They contest the employment relationship, determined in the judgment delivered on 13 May 2022.



20. A Company is a judicial person. The law expressly permits the incorporation of a business to enable its shareholders and directors to escape personal liability, as held in *Salomon v Salomon & Co (1897) AC*. However, there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors, thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance.
21. In the case of *Ukwala Supermarket v Jaideep Shah & Kamal Shah [2022] KEHC 2207 (KLR)*, the court held that the privilege of incorporation is not without its limits and that Courts will disregard the corporate form and allow the piercing of the corporate veil to allow a creditor to reach the personal assets of shareholders or directors in certain circumstances.
22. A court will only lift the corporate veil if there has been serious misconduct or if the Company, shareholders, or directors have acted reasonably egregiously. Courts understand the benefits of limited liability as expressed in the statute.
23. As held in *Jocelan Consultants Ltd v County Developers Limited [2019] KEHC 1250 (KLR)*, the court is not prohibited from lifting the corporate veil under order 22 rule 35 of the CPR if grounds for piercing the corporate veil exist.
24. In this case, the cited persons, such as directors and shareholders, have not settled the decretal sum, and attempts to execute it have been futile. There exist no known business assets to satisfy the court decree. The 1st respondent is an entity with directors and shareholders in the name of Emma Kavuka Achoki, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited. There exist valid court orders and decrees that are not satisfied.
25. The Directors/shareholders of the 1st respondent judgment/debtor have merely denied the existence of an employment relationship with the claimants, which has since been addressed. The directors/shareholders have not discharged the onus and burden to disprove the responsibility to settle the decretal sum.
26. Accordingly, the applicants have made a case to summon the directors/shareholders for examination. I, therefore, order Emma Kavuka Achoki, Edgar Kipkurui Kalya, Yesse Achoki Oenga, Gideon Mutemi Mulyungi and Guava Limited to attend court on 5 March 2025 in person to be examined on whether the 1st respondent/judgment-debtor has any means of satisfying the decree. The directors/shareholders are required to produce any relevant books of account and other documentary evidence relating to the finances of the judgment-debtor. The judgment-debtor has the option to satisfy the Decree herein before the 5 March 2025. The costs of the application are to be borne by the judgment-debtor.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

