



**Transport and Allied Workers Union v Kenya Bus Service Limited & another  
(Cause 68 of 2006) [2024] KEELRC 2481 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2481 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 68 OF 2006  
NJ ABUODHA, J  
OCTOBER 11, 2024**

**BETWEEN**  
**TRANSPORT AND ALLIED WORKERS UNION ..... CLAIMANT**  
**AND**  
**KENYA BUS SERVICE LIMITED ..... RESPONDENT**  
**AND**  
**KENYA BUS SERVICE MANAGEMENT LIMITED ..... OBJECTOR**

**RULING**

1. The applicant by a Notice of Motion dated 13<sup>th</sup> May, 2014 sought orders that this honourable court order the lifting of the corporate veil of the respondent and have the respondent's directors listed in the face of the Motion orally examined on the assets of the respondent company.
2. The application was supported by the affidavit of Simon Kigalu and on the grounds that the applicant obtained judgment against the respondent on 6<sup>th</sup> September, 2007 for the sum of Kshs. 526, 326,840/- and that over six years later the applicant have not benefitted from from the award herein as the respondent and the objector have totally frustrated the applicant's effort to execute the award/decreed despite the respondent having assets capable of being attached to satisfy the decree
3. Mr. Simon Kigalu deponed inter alia that:
  - a. That I am the General Secretary of the Claimant/applicant herein and therefore competent to swear this affidavit.
  - b. That the applicant obtained judgment against the respondent on 6<sup>th</sup> September, 2007 for a sum of Kenya shillings five hundred and twenty six million, three hundred and twenty six thousand, eight hundred and forty (Kshs.526,326,840/=). (Annexed herewith and marked "SK1" is a copy of the decree.



- c. That to date (over 6 years later) the applicant's 750 members have not benefited from the award herein as the Respondent acting in concert with Objector have totally frustrated the Applicant's members' efforts to execute the award/decreed despite the Respondent having assets-capable of being attached to satisfy the decree. (Annexed herewith and marked "SK2" are copies of Auctioneer's Proclamation of Attachment revealing the Respondents assets).-
  - d. That this Honourable Court has in its previous rulings made orders that the Applicant do proceed with execution of the decretal sum against the Respondent but the latter acting in collusion with the objector have promptly resisted execution whenever the Applicant's members commence the same. (Annexed herewith and marked "SK3a" and "SK3b" are copies of the Ruling delivered on 17<sup>th</sup> January 2013 and Order-made on 7<sup>th</sup> September 2013 respectively).
  - e. That I am advised by my Advocates on record which advice I verily believe to be correct that in light of these circumstances, there is a need to lift the Respondent to defeat the ends of justice.
  - f. That the Directors of the Judgment Debtor having registered companies including the Kenya Bus Management Limited and Bustrack Limited where they have been using the same interchangeably to defeat our members' claims for compensation. (Annexed herewith and marked "SK4" are copies of documents).
  - g. That it is our believe that the assets of the Judgment Debtor Company are still being used by the Directors to operate businesses under other names and are now employing all manner of schemes to ensure that nothing shall be applied from the assets of the Judgment Debtor to satisfy decree against it.
  - h. That in the interest of justice and fairness, the Directors of Kenya Bus Service being:-
    - i) Karanja Kabage
    - ii) Stanley Kanithai Murage
    - iii) Samuel Kimuchu Gichuni
    - iv) ) The Estate of John Peter. Mbogua
    - v) Ann Heron Gloag
    - vi) Edwins Massimba Mukahanah beheld liable for the satisfaction of our-decree.
  - i. That the acts committed by The Directors of the judgment Debtor culminating in the claim herein was meant to defeat ends of justice and the same amount to fraud for which they ought to be condemned to pay the decretal sum
4. The Respondent filed a Replying Affidavit through one Edwins Mukabanah who stated inter alia that:
- i. That I am the Managing Director of the Respondent and I am duly authorized to swear this Affidavit. I am also familiar with the questions in issue.
  - ii. That whereas Judgment was obtained for the Applicant in September 2006, it is the Applicant who in a misguided effort to frustrate the Respondent's operations has consistently attached assets which the Applicant knew belonged to 3<sup>rd</sup> Parties. This has led to numerous Objection Proceedings and waste of time.



- iii. That in addition thereto, the Applicant is well aware that winding-up proceedings in WC 21 of 2005: In the matter of Kenya Bus Ltd had been commenced against the Respondent.
  - iv. That pursuant to S. 225 of the *Companies Act* (now repealed), the petition operated as a stay of execution. An Order staying proceedings herein was issued pending the determination of the Winding Up cause.
  - v. That the winding up petition was finally withdrawn on 21<sup>st</sup> May 2023, when the Creditor/ Petitioner decided not to pursue it further.
  - vi. That in the circumstances, the mere fact that one is a director of a company does not make the Director liable for the actions of the Company, except in very limited and established circumstances.
  - vii. That the mere fact that the Respondent, which is insolvent, does not have assets and is unable to pay the decretal amount is not a reason for the Respondent's Directors to be saddled with its debts.
  - viii. That the prayers sought cannot be granted in the absence of the Directors being successfully sued as co-defendant's.
  - ix. That further, the Applicant has not set out any foundation why the corporate veil should be lifted or why the Directors should, summarily, be made responsible for the Respondent's debts.
5. In support of the application Ms. Ndunga for the applicant submitted among others that under the *Civil Procedure Act* and Order 22 rule 35(b), the directors ought to be brought before the Court and be examined on means of satisfying the decree. Counsel relied on the case of *BMG Holdings Limited v. Jomax Group Ltd & 2 Others* where the Court stated;
- “... In the case of *Masifield Trading Company Ltd & Another v. Rushmore Company Limited* [2008] eKLR the court when referring to the provisions of Order 22 rule 35 of the Civil Procedure Rules, 2010 stated as follows,
- “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 sum decreed to be paid by the company. By examining such an officer, the Court may or may not lift the veil of incorporation.
6. On the issue of lifting the Corporate veil, Counsel submitted that the respondents have outwardly frustrated the claimants and it now falls at 17 years since the claimant obtained judgment against the respondent and is yet to execute the same due to respondent's delaying tactics. Ms Ndunga relied on the case of *Mombasa Bricks & Tiles & 5 Others v. Arvind Shah & 7 Others* [2019]eKLR where the Court stated:
- “...the Court will pierce the corporate veil in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it as identical with the person or persons in control of 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 nature of the persons who control it is relevant.”
7. According to Counsel, it was unjust for the directors to plead multiple suits and financial stress yet it had the capacity to register and benefit from other companies.



8. Mr. Kyalo for the respondent/directors submitted that whereas the application is founded on Order 22 rule 35 of the Civil Procedure Rules which is limited to cross examination of an officer of a company, the application seeks the lifting of respondent's corporate veil and a finding that the respondent's directors are personally liable for the decree. Counsel submitted that it was trite that orders for cross-examination of directors of the company cannot be sought contemporaneously with those of lifting of the veil. In that regard counsel relied on the case of Oni Properties Limited vs. Signal Investments Limited [ 2021] eKLR where the Court stated in part:

“... a party invoking the court's jurisdiction under Order 22 rule 35 should not again invoke the lifting of the corporate veil in the same application. One has to choose whether to come under Order 22 rule 35 or apply for the lifting of the corporate veil...”

9. Counsel further submitted that it was an elementary principle of law that a company is a separate and distinct entity from its shareholders and relied on the famous case of Salmon vs. Salomon [1895-9] All ER 33 as cited with approval in Gilgil Telecoms Industries v. Duncan Nderitu & 57 Others [2016] eKLR. Counsel further submitted that the principle of lifting the corporate veil is a draconian measure that should only be exercised in exceptional circumstances. It should only be applied when there is clear evidence of fraud, improper conduct or misuse of the corporate structure. Counsel relied on the case of Jayden Limited v Bradely Limited [2021]KEHC 127. It was Mr. Kyalo's contention that the mere fact that one is a director or a shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the company unless the circumstances are such that the corporate veil of the company can be lifted.

10. According to counsel there was no basis for lifting the corporate veil in this case. The financial difficulties faced by the respondent were well documented and stemmed from lawful business decision made to comply with government regulations and to sustain the company's operations amidst economic challenges. Counsel submitted that it was not true that the respondent deliberately failed to settle the decretal sum herein. It was within public knowledge that sometime in 2004, the respondent expended over Kshs. 1 billion in a bid to comply with the then Michuki rules (Legal Notice No. 161 of October, 2003). As a result the company experienced severe financial stress resulting in a surge of creditors seeking to recover their debts. The establishment of Kenya Bus Service Management Limited and Bustrack were strategic moves to preserve the Company's business operations and to protect employees welfare. They were not created to defraud creditors

11. Counsel further submitted that the respondent was willing to negotiate the settlement of the decretal sum in a manner that balances the interests of both parties. The financial constraints faced by the company made it impractical to pay the entire amount in a lumpsum without jeopardizing its operations and the livelihood of its employees.

12. From the foregoing, counsel submitted that the applicant had failed to satisfy the requirements for lifting of the corporate veil.

13. The Court has considered the application herein, the affidavits in support and opposition herein and submission by Counsel. There seems to be not serious contestation over the power of the Court under Order 22 rule 35 to order officers of a corporation to appear before it for purposes of questioning by the decree-holder over what property or means of satisfying a decree issued by the Court. The respondent/directors have not raised any serious objection to the intention by the applicant to have them appear before the Court for purposes of being orally examined by the decree-holder. What the Court understands them to be objecting to is the piercing of the corporate veil thereby holding them personally liable for the debts of the Company. The respondents Counsel has submitted that the



respondent directors have provided comprehensive and transparent information about the company's financial position which included the severe financial stress the company faced as result of compliance with Legal Notice No. 161 of October, 2023 (Michuki Rules) and numerous legal battles against the company, including winding up cause against it. Counsel further submitted that the establishment of Kenya Bus Service Management Limited and Bustrack Limited was strategic move meant to preserve the company's business operations and to protect employees welfare. These entities according to Counsel were not created to defraud creditors but to ensure continuity and efficiency of services.

14. Ms Nduga further stated that the respondent was willing to negotiate the settlement of the decretal sum in a manner that balances the interest of both parties.
15. Order 22 rule 35 provides:

“ ... where a decree is for the payment of money, the decree-holder may apply to the Court for an order that (b) in case of a corporation, any officer thereof; 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 production of any books or documents”
16. A plain reading of the rule yields the interpretation that the judgment debtor or its officers (in case of a corporation) should physically appear in Court and be orally examined by the decree-holder. The rule does not seem to have contemplated presentation of facts and documents by way of affidavit. The decree-holder requires to cross-examine as it were, the judgment debtor. It would therefore appear that even though as alleged the respondent, it has provided sufficient financial information needed, the Court does not agree that to require the physical attendance for purposes of cross-examination over the evidence tendered by affidavit and supporting documents is unnecessary and vexatious.
17. From the authorities relied on by the parties especially Masifield case the Court has jurisdiction to summon any officer of a Company to attend Court so that they can be examined on the assets and means of the company to settle the sum decreed. At the conclusion of the examination of the officer, the Court may or may not lift the veil of incorporation. From the foregoing the Court will order that the directors of the respondent as listed in paragraph 8 of the applicants affidavit and as still alive do appear before the honourable Court on a date to be set by the Court with concurrence of the parties herein for purposes of examination pursuant to the provisions of Order 22 rule 35.
18. Prayer for lifting the corporate veil is premature and cannot be granted until the oral examination is dispensed with.
19. Matter will be mentioned on 25<sup>th</sup> November, 2024 for purposes of taking a date for oral examination of the named directors.
20. As I conclude, the respondent has indicated its willingness to negotiate the settlement of the decretal sum in a manner that balances the interests of both parties. This sadly a very old matter and the Court would encourage parties involved to embrace innovative negotiations which could bring to a close this matter.
21. It is so ordered

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024 DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

**ABUODHA NELSON JORUM**



**PRESIDING JUDGE-APPEALS DIVISION**

