



**Dyer v Five Forty Aviation Limited (Employment and Labour Relations Cause E547 of 2022) [2024] KEELRC 13521 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E547 OF 2022**

**JW KELI, J  
DECEMBER 18, 2024**

**BETWEEN**

**STIRLING DYER ..... DECREE HOLDER**

**AND**

**FIVE FORTY AVIATION LIMITED ..... JUDGMENT DEBTOR**

**RULING**

1. The Decree Holder, following the Judgment Debtor's failure to satisfy the decretal amount, brought an application by way of a Notice of Motion dated 12<sup>th</sup> March 2024 under Order 22 Rule 35 of the Civil Procedure Rules, and Section 3 of the Employment & Labour Relations Court Act, 2011 seeking the following Orders:-
  - a. That the Director of the Judgment-Debtor/Respondent namely Donald Earle Smith do produce all books of accounts of the Judgment-Debtor/ Respondent herein and more specifically the audited accounts covering the period between 1<sup>st</sup> January, 2018, to 31<sup>st</sup> December, 2023.
  - b. That the said Donald Earle Smith do attend this Honorable Court on a date directed to be examined on oath as to the Judgment-Debtor/ Respondent's means and assets.
  - c. That in the event of the Judgment-Debtor/ Respondent is unable to satisfy the Decree herein, and/or the said Directors fail to attend the examination as directed, the said Director Donald Earle Smith do personally satisfy the Decree made herein on 21<sup>st</sup> September, 2023.
  - d. That the costs of this Application be provided for.
2. Grounds of the Application
  1. That on 21<sup>st</sup> September 2023, this Honorable Court decreed that Judgment be entered for the Decree-Holder/Applicant against the Judgment-Debtor/Respondent.



2. That the Judgment-Debtor/Respondent has communicated to the Judgment/Respondents Advocates requesting for payment but none has been forthcoming.
  3. That the Judgment-Debtor/ Respondent was a financially stable Company with the ability to satisfy the Decree herein and the failure by the Director Donald Earle Smith stems from his mismanagement of funds and diverting the Company's funds for his own personal use.
  4. That the said Director operated the Judgment-Debtor/Respondent as part of a group of companies to some of which have ghost Co-Directors and are mere facades.
  5. That said Donald Earle Smith's actions are perpetrated by fraud as he mischievously and illegally diverted the Judgement-Debtor/Respondent's monies for his own selfish use and has continuously made promises to pay my Salary and Terminal dues only to renege on his promise. That it is in the interest of Justice that the Orders sought herein be granted.
3. The application was further supported by the affidavit of Stirling Dyer, the Applicant. He averred as follows: - On 1<sup>st</sup> August, 2022, he instructed his Advocates on record to file this suit against the Judgment-Debtor/Respondent (hereinafter referred to as "the Company") for inter-alia unpaid Salaries and Allowances, unlawful and unfair termination. That this matter was heard and on 21<sup>st</sup> September, 2023 and Judgement entered in his favour. (Annexed at pages 1 to 2 of the annexed bundle of Documents was a copy of the said Decree.) That he was also awarded Costs of the suit for which on 22<sup>nd</sup> January, 2024, the Party & Party Bill of Costs was Taxed to the tune of Ksh 2,552,755.47. (Annexed hereto at page 3 was a copy of the Certificate of Taxation.)
  4. The Applicant further averred that on the 6<sup>th</sup> February, 2024, they wrote to the Company's Advocates requesting for payment but no response has been forthcoming. (At page 4 of the bundle of documents is the e-mail extract to that effect.) That from his knowledge the Company has been experiencing financial challenges occasioned by its Director's mismanagement of funds. That the Judgement-Debtor/Respondent is owned by Five Thirty Investments Limited and Donald Earle Smith both of whom are shareholders but with Mr. Smith (hereinafter referred to as "the Director") being the sole Director. (Annexed hereto at page 5 of the bundle of documents is a copy of the CR-12 confirming this position.)
  5. The applicant asserted that during his work stint at the Company the Director was involved in mismanagement of funds and fraud of which much of the Company's Funds were illegally diverted to his other shadow Companies and his own personal use. That during several occasions he grounded several planes for safety issues despite the Director's insistence and insatiable appetite for Money at the expense of people's lives. He contended that he saved a lot of lives as had those grounded planes been allowed to proceed there could have been many aviation deaths.
  6. The Applicant further averred that the Director, Mr. Smith, operates other several Shadow Companies which are mere facades meant to misappropriate funds for the Director's own personal use. The said Shadow Companies one of which he is a shareholder are as follows:-(see pages 6 to 9 of the annexed bundle of documents for the relevant CR-12s)
    - a) Five Thirty Investments Limited.
    - b) Seven Twenty Investments Limited.
    - c) Ready Jet Spares Limited.
    - d) Specialist Air Services Limited.



7. The Applicant contended that a perusal of the said CR-12s reveals that the Director, Mr. Smith, is a Director of all those Companies of which all are pure smokescreens to aid him in his fraudulent activities. That a case in point of the Directors fraudulent activities was during the year 2022, when the Company was in financial distress due to his mismanagement. However, he still insisted on flying unsafe Aircrafts whose propellers, Propeller hubs, Engine, and landing gears had all expired and were overdue for either discard or overhaul.
8. The Applicant further averred that despite knowing very well that the Company was not in a position to offer safe and reliable Air Travel services, the Director instructed all members of staff to continue receiving Air Ticket funds from unsuspecting customers. That the Director's fraudulent activities did not go unnoticed as on 16<sup>th</sup> November 2022, the Competition Authority of Kenya (hereinafter "COA") through a Notice of even date issued a Cease and Desist Order against the Company.(At pages 10 to 11 of the annexed bundle was a copy of the said Order.)
9. The Applicant contended that according to COA they had received over 50 consumer complaints by customers and some ("Not All") of the allegations against the Company were:-
  - a) False and misleading information on its capability to provide air transport services to passengers and the possibility of amending flight itinerary;
  - b) Arbitrary and/or short notice cancellation of flights; and
  - c) Inordinate delay in refunding customers.
10. The Applicant asserted that he was still the Company's employee during this period and indeed confirmed that these were part of the fraudulent activities which were perpetrated by the Director occasioned by his insistence that the Company operates despite his full knowledge of the Company's incapacity due to his mismanagement and syphoning of funds. That the Director operated the Company as his own personal property and the decisions he made were personal including hiring and firing of employees, deciding who to pay salaries and reduction of salaries. That no resolutions were ever effected to authorize the Director to make certain decisions and the Shareholders of the shadow companies were all but mere pawns to demonstrate that he had partners while in truth he was the sole engine operating the Company.
11. The Applicant stated that the said Director ought to come to Court and produce the Company's audited accounts from the period between 1<sup>st</sup> January 2018 to 31<sup>st</sup> December, 2023, as it would reveal that the Company was financially stable but due to mismanagement of funds by the Director the Company is facing Insolvency. That in default, and/or in the event the Director fails to adequately explain the loss of funds, or the reasons for operating the various shadow Companies he owns then he should be held personally liable for the Decretal sum herein. That the said Director is a man of means with several properties within and outside the Country but also a dishonest person whose only motivation in life is to make money.
12. The Applicant contended that at unless the Orders sought herein were granted, he stood to be a victim of the Director's manipulative effort to deny him the fruits of his hard fought Judgement. He produced a bundle of documents paginated/serialized 1 to 11 collectively marked "SD-1" as his evidence in this matter.

## **Response**

13. The application was opposed by the judgment debtor vide grounds of opposition dated 5<sup>th</sup> April 2024 and replying affidavit of Don Smith dated 20<sup>th</sup> June 2024 as follows:-



1. The Director denied the contents of paragraph 6 of the said Supporting affidavit and put the Decree Holder to strict proof thereof stating such allegations are not founded on any credible assessments. (He annexed and as marked DC-Ia certified copy of Financial performance of the Respondent for the period ending 2021).
2. That the Decree-Holder's position/allegation of being owed by Five Thirty Investments Limited and the Director was unfounded and greatly misconceived in the confines of the Law as its common position that Directors and companies are separate legal entities.
3. That the contents of paragraph 8 of the said supporting affidavit were denied to the extent that the Decree-Holder was an ordinary employee of the Respondent and had tendered any evidence to the effect of the numerous allegations of fraud and diversion of funds to alleged "shadow" companies that had never even conducted business with the Respondent company, (annexed and marked DC-2 were the audited Financial statements for the period ending 2021).
4. That the allegations by the Decree-Holder were rather desperate and unfounded to the effect that he is blaming the Directors of the Respondent for an Act of God being Covid-19 that was not humanly foreseeable and its common knowledge that the Aviation sector in the Country is one of the worst performing sectors especially after Covid-19 happened that completely crippled the Respondent's business operations within the Country and the region.
5. That the Respondent had never had any of its aircrafts crash occasioning aviation deaths or endangering its customers as alleged by the Decree-Holder only that the Respondent was a reputable business enterprise that won awards as a reputable Airline up until Covid-19 happened where its business was crippled as the Government of Kenya shut down the Kenyan airspace for a considerable duration of time of which the Judgement-debtor/Respondent has not been able to recover from the aftermath of Covid-19 to date and is still struggling to stay afloat.
6. That the Judgement-Debtor is still in the process of recovering from the Covid-19 aftermaths and has not deliberately failed to honour its obligations to the Decree-holder by paying the decretal sum, only that the business recovery process is taking longer than anticipated of which one cannot individually blame the Directors of the Respondent on an Act of God that has no human control.
7. That the Respondent is currently having all its Aircrafts grounded on account of a civil dispute between it and it's aircraft suppliers. (Annexed was a copy of the Order in Milimani Commercial Suit No. E360 of 2022 and marked as DC-3).
8. That the various allegations of fraud are baseless as particulars of the same have not been given and or outlined by the Applicant/Decree Holder.
9. The Director stated he was a stranger to the allegations in paragraph 10 of the supporting affidavit as the same are unfounded and speculative taking into consideration that the alleged companies had never done any business with the Respondent except East African Safari Air Express Limited which is also an Airline.
10. The Director denied the contents of paragraph 11 of the supporting affidavit as there has never been any instance that the Respondent's Directors have been cited for such alleged fraud or charged with regards to engaging in any fraudulent activities geared towards transferring money/assets illegally to the detriment of the Respondent's Creditors; shareholders or employees/associates.



11. The Director denied the contents of paragraph 12 of the supporting affidavit as the financial struggles occasioned to the Respondent emanated from an Act of God and no Director is to be held liable.
  12. That further, by the year 2022, the Judgment-Debtor/Respondent was not operational as it halted all its activities in the year 2022 as the Kenya Civil Aviation Authority has not renewed its operational license.
  13. That the contents of paragraph 13 of the supporting affidavit are denied to the extent that they are false, unfounded and misleading.
  14. That the Competition Authority of Kenya never cited the Directors of the Respondent for fraud with regards to transfer of the Respondent's assets or funds but only issued a Cease and Desist Order (COA) to its operations until such a time they will have complied with administrative issues, customer concerns.
  15. The Director denied the contents of paragraph 17 of the Supporting affidavit and stated that the Respondent Airline has been operating in the Kenyan Jurisdiction for about two decades whereby at no time any of its Directors have treated it as his or her own property as the Respondent airline has vastly contributed to the growth of the Kenyan economy and provided employment opportunities to so many people including the Decree-holder.
  16. The Director stated that contents of paragraph 18 of the supporting affidavit were strange to him and will put the Decree-Holder to strict proof thereof.
  17. That the certified audited accounts provide a true picture of the Respondent's state of affairs and the Directors of the Respondent do not operate any shadow companies that do business with the Respondent as alleged by the Decree-Holder.
  18. That it is in the interest of justice and fairness that the Directors of the Judgement Debtor/ Respondent to not be blamed for the aftermaths occasioned by an Act of God and unfounded allegations of Fraud in terms of transfer or embezzlement of the Respondent's funds/assets as the certified audited accounts provide an accurate picture of the Respondent's status and the Decree-Holder should give the Respondent ample time to offset its owed debt as the Respondent tries to get back to its normal operations.
  19. That the Applicant's Application dated 12<sup>th</sup> March 2024 is pre-mature, unfounded and greatly misconceived and should be dismissed with costs.
14. The Decree Holder in response further filed supplement affidavit dated 8<sup>th</sup> July 2024. The Decree Holder asserted that annexures DC-1 ad DC-2 by the Respondent was a confirmation of his assertion that the Respondent company was profitable and that the funds were diverted considering his salary was not paid. That his salary arrears arose from 2018 to 2022. That the respondent had acknowledged that it was a profitable company and worn awards until COVID 2019 which hit the country around March 2020. On the assertion of fraud, the Applicant contended that the suit HCCOMM No. E360 of 2022 confirmed his argument for fraud on the part of the respondent as the plaintiff therein sued the respondent and its sister company for failing to honour terms of their aircraft lease agreement, that in the case, the plaintiffs have cited Don Smith, the Director, for contempt of Court for disobedience of Court Order (pages 13 to 16 of annexures to the supplementary affidavit) and that the Director is accused of cannibalizing the aircraft and sold key components to the tune of Kshs. 269, 100,000. The Applicant stated that the main reason that the Respondent ceased operations was due to Cease and



Desist Order of COA of halting their operations (Order dated 16<sup>th</sup> November 2022 at pages 10-11 of the bundle of annexures under his Supporting Affidavit).

### Written Submissions

15. The application was canvassed by way of written submissions. The Applicant's written submissions were drawn by Charles Gomba & Company Advocates and dated 8<sup>th</sup> July 2024. The Respondent's submissions were drawn by Eliakim Owala and dated 4<sup>th</sup> October 2024.

### Determination

#### Issues for determination

16. The parties were unanimous on the issues for determination in the application to be:-
- a. Whether the judgment debtor/ Respondent's Director, Mr. Donald Earle Smith should be summoned before the Court for examination.
  - b. Whether the judgment debtor/ Respondent's Director Mr. Donald Earle Smith should personally satisfy the Decree herein of 21<sup>st</sup> September 2023.

#### **Whether the judgment debtor/ Respondent's Director, Mr. Donald Earle Smith should be summoned before the Court for examination.**

17. The application was hinged under Order 22 Rule 35 of the *Civil Procedure* Rules to wit:-
- ‘35. Examination of judgment-debtor as to his property [Order 22, rule 35.]
- 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.’

18. The application was further hinged on Section 3 of the *Employment & Labour Relations Court Act*, 2011 which states: -

‘(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.’

19. The Applicant submitted that Order 22 Rule 35 of the *Civil Procedure Rules* is usually invoked when the Decree Holder has failed to trace the assets of the Judgment Debtor for the purposes of execution.



That the Decree was not satisfied. That the Respondent's Director Don Smith in his affidavit dated 20<sup>th</sup> June 2024 had confirmed that the Respondent was unable to recover from COVID-19 to date and was struggling to stay afloat and produced audited accounts for period ending 2021. That the accounts do not cover the period under prayer 1. The Applicant submitted that they had demonstrated fraud and relied on the decision in *Jayden Limited v Bradley Limited*.

20. The Respondent on this issue submitted that it had produced Audited Accounts for the period it was still functional before it halted its operations sometime in 2021. That Prayer 1 of the Notice of Motion covers a period it was not in operation having grounded services pursuant to the Court Order annexed in the Replying Affidavit of 20<sup>th</sup> June 2024 under paragraph 9 on preservation of such aircrafts pending the conclusion of repossession proceedings still ongoing. The Respondent contended that the Application was unfounded/unconcluded facts still being prosecuted before other courts and administrative bodies such as the Competition Authority of Kenya hence subjudice.
21. To distinguish the authority in *Jayden Limited v Bradley Limited* the Respondent submitted that in that case the Court established a direct link on fraud as one of the Directors of the material companies had been charged with a fraud case and convicted. Further in the case there was established grounds indicating diversion of funds. The Respondent submitted that in the instance case the allegations were based on unfounded/unconcluded facts still being prosecuted before other courts and administrative bodies such as the Competition Authority of Kenya.

## Decision

22. In the authority cited by the Applicant in *Jayden Limited v Bradley Limited* the court observed:- "I have carefully considered the pleadings filed herein and the parties' submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for the issuing of Notice to Show Cause and Summons compelling the Respondent's Directors to personally attend Court and be examined on oath as to the judgement debtor's means and assets and to produce its books of the account and other documentary evidence relevant to revealing the respondent's assets. There is also the second issue of whether upon such attendance and examination, the court should pierce the Respondent's Corporate Veil so as to hold its said Directors jointly and severally personally liable to pay the Applicant the decretal sum and taxed costs." The decision was distinguished by the Respondent as above.
23. The application was brought under Order 22 Rule 35 of the *Civil Procedure Rules* which states 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".
24. In the instant case, it was not disputed that Judgment was entered against the Respondent for the amount claimed. It was also not disputed that the Respondent had not settled the decretal sum. Indeed, the Respondent concedes that its business had not been able to stay afloat for reasons that it attributed to COVID-19 negative impact on the aviation industry.



25. As regards prayer 1 and 2 of the Application, the same concerned production of books of accounts. The decretal amount remains unsettled and the respondent has not placed before the court a proposal to make the payment. A successful litigant, such as the applicant herein, is entitled to the fruits of its Decree. I adopt with approval the decision of Justice Okwany in *Jayden Limited v Bradley Limited* (2021) e KLR to apply in the instant case being :- “Order 22 rule 35 of the *Civil Procedure Rules* allows a holder of a money decree to apply for the oral examination of any officer of a corporation regarding any assets or debts owing to the judgement debtor, or other means of satisfying the court decree and for production of books or documents. I therefore find that the prayer for oral examination of the respondent’s Directors is well anchored in law and that the applicant has made out a case for the granting of orders sought. Consequently, I allow the prayer as sought and issue order of Notice to Show Cause and Summons compelling the Respondent’s Directors and Shareholders and Directors of Pevan East Africa Limited to personally attend Court and be examined on oath as to the judgement debtor’s means and assets and to produce its books of the account and other documentary evidence relevant to revealing the respondent’s assets.” In the instant case I similarly allow the prayers sought in the Notice of Motion and issue a Notice to Show Cause and Summons compelling the Director of the Judgment- Debtor/ Respondent namely Donald Earle Smith to personally appear in Court to be examined on oath as to the Judgement Debtor’s means and assets and to produce its books of the accounts and more specifically the audited accounts covering the period between 1<sup>st</sup> January, 2018 to 31<sup>st</sup> December, 2023 as sought in the Application.

**Whether the judgment debtor/ Respondent’s Director Mr. Donald Earle Smith should personally satisfy the Decree herein of 21<sup>st</sup> September 2023**

26. I have evaluated the evidence placed before me on the alleged fraud and mismanagement of the Respondent company by the Director, Mr. Donald Earle Smith. The law is settled on the circumstances under which such an order can be issued. *Halsbury’s Laws of England* (4th Ed) at para 90 summarizes the principles governing the lifting of the corporate veil 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 the purpose of the litigation before it, as identical with the 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 persons who control it, is a relevant feature. In such 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 as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced.”

27. The evidence placed before Court by the Applicant was of pleadings in HCCOMM NO. E360 of 2022 where the Respondent is sued for failure to honour terms of aircraft lease agreement and a contempt application against Don Smith the Respondent’s Director for allegedly cannibalising the key parts of the aircraft. Finally the Cease and Desist Order of the Competition Authority of Kenya. All these proceedings are pending for final decisions before other courts and competent regulatory authorities. I find reliance on the same to be subjudice.



28. In the circumstances I find no evidence is placed before me to prove fraud or misconduct on the part of the said Director to exercise the power of lifting of the veil of the company. The circumstances of lifting the veil were cited in *Jayden Limited v Bradley Limited* [2021] KEHC 127 (KLR) where the court relied in the case of *Jones and Another vs Lipman & Another* [1962] IWL 833 where it was held: -“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or proper or illegal acts. This act of removing the façade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil.” In the instant case I find no prove of fraud or misconduct on party of Don Smith proved to justify the deviation of the principle of legal entity of company separate from Directors by exercise the restricted power of lifting the company veil. The court holds it is not illegal to be a Director or Shareholder of more than one company. The prayer of lifting the veil is disallowed.

### **Conclusion**

29. In the upshot the Notice of Motion is allowed by Issuance of Order of a Notice to Show Cause and Summons compelling the Director of the Judgment- Debtor/ Respondent namely Donald Earle Smith to personally appear in Court physically on the 6<sup>th</sup> February 2025 to be examined on oath as to the Judgement Debtor's means and assets and to produce the books of the accounts of the Judgment- Debtor/ Respondent herein and more specifically the audited accounts covering the period between 1<sup>st</sup> January, 2018 to 31<sup>st</sup> December, 2023.

30. Costs in the cause

31. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024.**

**JEMIMAH KELI,**

**JUDGE.**

C/A – Caleb

Decree holder: - Applicant Awuor h/b Ngoba

Respondent: - Owala

