



**Ng'asura & 28 others v Karrymart Limited (Cause 903 of 2017)
[2023] KEELRC 2319 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 903 OF 2017
MN NDUMA, J
SEPTEMBER 28, 2023**

BETWEEN

NAOMI CHEPKIRUI NG'ASURA & 28 OTHERS CLAIMANT

AND

KARRYMART LIMITED RESPONDENT

RULING

1. The Claimants/Applicants in the notice of motion application dated 2/11/2022 seek an order in the following terms:-
 1. That the directors of the judgment-debtor/Respondent, including, Dr. George Kariithi and Mrs Nancy Kariithi, be summoned to attend Court and be orally examined as to the proper and means of satisfying the decree.
 2. That the directors be and are hereby ordered to produce before the Court books and records of account of the judgment –debtor/Respondent for the last five years.
 3. That costs of this application be borne by the judgment-debtor Respondent.
 4. That costs of this application be provided for.
2. The application is premised on grounds (a) to (f) set out on the face of the notice of motion as follows:-
 - (a) That judgment on admission was entered in favour of the Claimants against the Respondent on November 24, 2017 for the sum of shillings 2,553,141.
 - (b) That the judgment-debtor/Respondent has not paid any amount to satisfy the decree.
 - (c) That the judgment debtor/Respondent closed its business and are hiding under the corporate veil in order to defeat the decree herein.



- (d) That the decree holders/applicants have a right to enjoy the fruits of their judgment.
 - (e) That the Court has powers to order for the directors of the Judgment debtor/Respondent to be orally examined as to the property, means of satisfying the decree and production of books of account.
 - (f) That it will be fair and in the interest of justice that the application be allowed as prayed.
3. The application is buttressed in the supporting affidavit of M/s Shelmith Wangenchi Gitahi who deposes that the judgment debtor/respondent company was the employer of the Decree Holders/Applicants. That the directors of the respondent are a couple and the respondent was essentially a family business.
 4. That on 24/11/2017, the Court issued judgment on admission in the sum of the 2,553,141. That the judgment debtor has not paid any amount to the Applicant towards satisfaction of the decree.
 5. That the judgment/debtor closed its business along Moi Avenue in Nairobi but the directors continue their lives in some upmarket estate in Nairobi.
 6. That the directors need to attend Court and be orally examined as to the means of satisfying the decree including production of books of accounts, with a view to the Court making an appropriate order in execution of the decree.
 7. That the applicants have been greatly prejudiced by the non-satisfaction of the decree since the year 2017.
 8. That it is fair and just that the application be granted.
 9. The respondent filed a replying affidavit dated 27/1/2023 opposing the application to have directors summoned and be examined as prayed.
 10. The respondent states that it is a separate legal entity from its directors and no justification has been demonstrated for the Court to lift the corporate veil. That the mere reason that the respondent has no assets or is unable to pay its debt is not sufficient to lift the veil of the company.
 11. That the directors being natural persons are not liable for the debts of the respondent company and the applicants are not entitled to seek execution of the decretal sum against the directors.
 12. The Court was referred to the case of *Kolaba Limited v Shamsudin Hussein Varvani & another* [2014] eKLR where the Court held:-

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors.”
 13. The respondent deposed that the applicants ought to demonstrate why the corporate veil should be lifted. The respondents relied on the case of *Victor Mabech & another v Nurtorn Bates Limited* – Civil Appeal No 247 of 2005 [2013] eKLR where the Court held:-

“A company is a body corporate, is a *persona juridica*, with separate independent identity in law distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”



14. The respondent cited *Halsbury's Law of England* 4th Edition at paragraph 10 on the lifting of the veil as follows:-

“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 persons who control the 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 cases, 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.”

15. The applicants rely on the provision of order 22, rule 35 (c) of the *Civil Procedure Rules* which has been the subject of numerous case decisions as in *Tropical Wood Limited v Samilis International Investments* [2017] eKLR where the Court held:-

10. The above provisions were considered in the case of; NBI HCCC No. 1287 of 2000 *Ultimate Laboratories v Tasha Bioservice Limited* (Unreported), and the Court stated that;

“Two things emerge from the above proposition. one, the power of the court to summon a person to attend and be examined under order 22 rule 35 is circumscribed within the purpose set out in the Rule. That is;

...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.

I therefore, take the view that, as long as the applicant has shown that the respondent is in a position to provide information in the nature of discovery....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, the Court should summon the person to attend and be examined in relation to the purpose stated in the Rule.”

16. The Court stated further:-

“14. In the given circumstances, I find that, it is in the interest of justice that the prayers sought for herein be granted.”

17. In *Postbank Credit Limited (in liquidation) v Nyamanga Holdings Limited* (2015) eKLR the Court held that:-

“A person to be summoned under order 22, rule 35(c) of the *Civil Procedure Rules*, to provide information on the property of the company will also be required to produce any relevant documents or copies thereof on the assets of the company or books of account including but not limited to the judgment Debtor’s annual financial statement, documents of title, property of the company in his possession and which he may have obtained as director and/ or shareholder of the judgment debtor.”



18. The Managing Director of the respondent Mr. George Kariithi, deposes that the respondent did not close shop on its own volition nor did the directors move stock. That the closure was as a result of a ruling dated 20/3/2018 wherein the court allowed the respondent's landlord to execute an order to have the respondent vacate from its business premises.
19. That in addition to being evicted from its business premises, the landlord therein instructed Nairobi Connections Services Auctioneers to proclaim the respondent's goods. The said tools of trade were proclaimed on 9/4/2018.
20. That execution cannot issue against the Directors of the company and therefore this application is misconceived since the directors are separate legal entities from the respondent and no justifiable grounds have been disclosed to warrant lifting of the veil since lifting of the veil may be done in circumstances well set out by the Court to include:-
 - (a) Fraud or improper conduct on the part of the company and Directors/shareholders.
 - (b) The company must have intentionally acted to evade tax obligations.
 - (c) The company was being used to conduct criminal activities; and
 - (d) Discovery of fraudulent or improper designs by the directors/shareholders of the company.
21. That the applicants have not laid out any basis for the lifting of the corporate veil. That the company closed its operations along Moi Avenue and has no tangible assets. Its liability can therefore not be borne by the directors. That lifting the veil would be a mere academic exercise therefore. That it is in the interest of justice that the application be dismissed.

Determination

22. The Court has carefully considered the depositions by the parties and the legal positions set out herein before in this ruling and has come to the inevitable conclusion that the applicants have not in the notice of motion and supporting affidavit of Shelmith Wangechi Gitahi disclosed and or brought to the attention of the Court any facts which place the respondent within the realm set out in case law, cited herein including the case of *Magenyi & Company Advocates v The Attorney General* [1999] 2 E.A. 199, where the Court quoted Palmers Company Law with approval on the ten (10) instances in which the veil of corporate personality may be listed including:-
 1. Where the companies are in the relationship of holding and subsidiary companies.
 2. Where a shareholder has lost the privilege of limited liability, and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the minimum to the knowledge of the shareholders:-
 3. In certain matters relating to taxation.
 4. In the law relating to exchange control;
 5. In the law relating to trading with the enemy;
 6. In the law of merger control in the United Kingdom;
 7. In competition of the European Economic Community;
 8. In abuse of law in certain circumstances;
 9. Where the device of incorporation is used for some illegal or improper purpose; and



10. Where the private company is founded on personal relationship between the members.
23. The applicant failed to discharge the onus placed before it on a balance of probability to warrant the Court to invoke its discretion under order 22, rule 35 of the *Civil Procedure Rules, 2010*.
24. Accordingly, the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF SEPTEMBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

M/s Akinyi for claimants/Applicants

M/s Nekesa for Respondent

Ekale: Court Assistant

