



**Wainaina & 2 others v Decon Enterprises Limited; Kamotho & another (Applicant) (Environment & Land Case 455 of 2017) [2024] KEELC 6410 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6410 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 455 OF 2017**

**JG KEMEI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**PETER KIMANI WAINAINA ..... 1<sup>ST</sup> PLAINTIFF**

**PETER NJOROGE NG'ANG'A ..... 2<sup>ND</sup> PLAINTIFF**

**SUSAN WANGARI MITHAMO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**DECON ENTERPRISES LIMITED ..... DEFENDANT**

**AND**

**EUNICE WAMBUI KAMOTHO ..... APPLICANT**

**CHARLES GITHII KAMOTHO ..... APPLICANT**

**RULING**

1. The Applicants filed the instant Notice of Motion dated 27/11/2023 seeking Orders THAT;
  - a. Spent.
  - b. Spent.
  - c. The Honorable Court be pleased to set aside its Ruling and Order issued on the 26<sup>th</sup> September, 2023 lifting the corporate veil of the Defendant.
  - d. The Honorable Court be pleased to vary and/or set aside its Ruling and Orders issued on 26<sup>th</sup> September 2023 holding among others, the Administrators of the estate of John Joseph Kamotho (deceased) individually liable for settling the decree with respect to this suit.
  - e. The Honorable Court be pleased to order any other relief that this Honorable Court deems fit to meet the ends of justice.



- f. The costs of this application be provided for.
2. The Application is based on the grounds on the face of it inter alia that the Plaintiffs herein filed an application dated 12/1/2023 seeking to lift the corporate veil of the Company; that the said application was never served upon the instant Applicants; the Court proceeded to allow the said application on 26/9/2023 effectively finding the Applicants among others personally liable to settle the Judgment debt with respect to the suit. Further that the corporate veil was prematurely and procedurally lifted since the late Ruiru Muchochi Gikonyo and J.J Kamotho have a separate and distinct legal personality from the Defendant Company. That the Applicants herein are administrators of the estate of the late J.J Kamotho and they can only be held liable to settle claims against his estate once the said claims are verified by the Succession Court. That the Applicants cannot be held liable herein noting that the decree became due long after the demise of the Defendant Directors and in particular Kamotho and such debt cannot attach to his estate.
  3. The application is supported by the Affidavit of Eunice Wambui Kamotho, the 1<sup>st</sup> Applicant on her behalf and that of the 2<sup>nd</sup> Applicant. Rehashing the grounds in their motion, the deponent annexed a copy of this Court's Order lifting the corporate veil of the Defendant EWK-1. She reiterated that they were never served with a notice of entry of Judgement or Decree but only learnt of this suit upon being served with the order lifting the corporate veil. That they are apprehensive that the Plaintiffs are in the process of extracting warrants of attachments and will proceed to wrongfully attach their properties as shown by annexures EWK-2a and b.

Company issued on 10/11/2023 as

4. On behalf of the Plaintiffs, the 1<sup>st</sup> Plaintiff Peter Kimani Wainaina swore his Replying Affidavit on 5/2/2024. Outlining the background of the Application, he deposed that the Plaintiffs, as the successful litigants herein moved the Court vide a motion dated 12/1/2023 seeking to allow them to execute the decree dated 26/7/2018 against the Directors of the Defendant Company. That despite their due diligence, the Plaintiffs had failed to trace the Defendant Company Directors physically and electronically hence the request to serve them by way of substituted service as directed by the Court on 2/3/2023. That upon serving them by way of substituted service, the Court allowed the application dated 12/1/2023 for lifting the corporate veil. That the said veil is being used as a shield and an improper conduct calculated to defraud the Plaintiff by entering into a sale agreement for purchase of Plot No L.R 20695 Deacon Estate. That the Directors of the Company having passed on, their named legal representatives are obliged to settle the debts incurred by the deceased. In support of their objection, they annexed a bundle of documents marked PWK1 and urged the Court to dismiss the application.
5. In a rejoinder, the Applicants filed a Further Affidavit sworn on 9/2/2024. It was averred that the corporate veil of a Company can only be lifted in exceptional circumstances where there is evidence of fraud by the Directors. That upon his demise, J.J Kamotho ceased to be a Director of the Company. A copy of his death certificate is marked EWK-1. That a Company has perpetual succession and as such the Company's liability cannot attach to a deceased Director. That the estate of Kamotho has been condemned unheard contrary to the rules of natural justice. They beseeched the Court to allow their application as prayed.
6. The Applicants through the firm of Wanyonyi & Muhia Advocates filed submissions dated 7/6/2024. They drew two issues for determination to wit whether this Hon Court should exercise its discretion in their favor and who bears the costs of the Application.



7. On the first issue, it was submitted that substituted service ought to be invoked as last resort. That it is curious how they were not served of the Application for lifting corporate veil but they conveniently traced them in their homesteads for service of the ex parte Court orders of 26/9/2023. That J.J Kamotho having died on 6/12/2014 and this suit filed in 2017 and Judgment entered on 27/4/2018, the order for lifting corporate veil was issued 9 years later and the late Kamotho did not have any shares in the Company at the time of filing the succession proceedings. That the decree having not been presented in respect of Kamotho's estate, it is irregular and his legal representatives are not personally liable for the Company debt. Lastly the Applicants prayed for costs of the application.
8. On their part, the Plaintiffs' submissions dated 3/6/2024 were filed by the firm of Koceyo & Company Advocates advertisement. A singular issue was drawn for determination; whether the Applicants are deserving of the orders sought. Answering the issue in the negative, the Plaintiffs posited that they rightly obtained this Court's leave to serve the Applicants by way of substituted service. That the legal threshold for granting an order to set aside ex parte decision or proceedings is hinged on an Applicant's showing sufficient cause to that end. That having filed their suit way back in 2017 they are entitled to enjoy fruits of their Judgment yet the Applicants are delaying the cause of justice.
9. The main issue of the application is whether the application is merited.
10. The gist of the Applicants' case is that they are aggrieved by the eminent execution against them in their capacity as legal representatives of the estate of J.J Kamotho, who according to the Plaintiffs, is a former Director of the Defendant Company. That J.J Kamotho's liability is as a result of the Court's Order issued on 26/9/2023 piercing the Defendant Company's corporate veil to hold its Directors personally liable for the Judgment delivered herein against it and in favor of the Plaintiffs. They therefore ask the Court to set aside the ex parte order issued on 26/9/2023.
11. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus:

“Where under this Order Judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the Judgment or order upon such terms as may be just.”
12. This provision is amplified by Order 51, rule 15 of the Civil Procedure Rules which provides that the Court may set aside an order made ex parte. The powers of the Court to set aside ex parte proceedings and orders is wide. But it must be exercised judicially. In the case of Patel Vs. E.A. Cargo Handling Services Limited (1974) E.A. 75 the Court was of the view that the discretion of the Court in setting aside ex parte Judgments or rulings is very wide. It was stated:

“There are no limits or restrictions on the judge's discretion except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced Judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
13. And even then, where it is clear that either there was no service of a document or that the service was erroneous and Judgment has been entered thereto, the Court will set aside the proceedings ex debito



justitiae. In the Court of Appeal case of Patrick Omondi Opiyo T/A Dallas Pub Vs. Shaban Keah & Another [2018] eKLR the Learned Judges stated as follows:

“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore Judgment is entered against a party who has not been served and hence not been heard, such Judgment will be set aside ex debito justitiae.”

14. This was the similar holding in James Kanyita Nderitu and Another vs. Marios Philotas Ghikas & Another [2016] eKLR where the Court stated as follows:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default Judgment is an irregular Judgment liable to be set aside by the Court ex debito justitiae. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

15. It is therefore trite that in setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the Respondent was not properly served with summons or that the Respondent failed to appear in Court at the hearing due to sufficient cause. A limited Company is a juristic person with separate legal entity from the Directors and shareholders. Upon demise of one of the Directors, the remaining Directors continues with the business of the Company. The estate of the deceased is only entitled to dividends.

16. The Court in Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR while dealing with the issue of the distinct legal entity of corporate bodies held that:

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

17. The circumstances where a Court will be entitled to lift the corporate veil appears at paragraph 402 of Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 7(1) where the learned authors say:

“... or where the Court will ‘pierce (or lift) the corporate veil’, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the Company will be relevant. The Court will go behind the 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. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a Defendant, so justifying the Court’s ‘piercing’ (or ‘lifting’) the veil.

Where, however, 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. Nor is the Court entitled to lift the veil as against a Company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the Company will fall on another member of the group rather than the Defendant Company.



It may be that liabilities or obligations will arise without piercing the corporate veil because there is an agency relationship between a parent Company and subsidiary, or between a Company and its shareholders, but this may not be inferred merely from control of the Company or ownership of its shares or from the level of paid up capital. It will depend on an investigation of all aspects of the relationship between the parties and there is no presumption of such agency.”

18. The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for meeting the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a Company is a sham, acting as an agent of the shareholders or evading tax revenues. Ringera, J (as he then was) in *Corporate Insurance Company Limited Vs. Savemax Insurance Brokers Limited* [2002] EA 41 found that:

“The veil of incorporation is not to be lifted merely because the Company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the Director of the Company being saddled with the debts of the Company.”

19. The Applicants aver that J.J Kamotho passed on in 2014, three years before filing of this suit. They raised the issue of non-service of the Court documents upon them. In rebuttal the Plaintiff maintain that they were properly served vide substituted service. See the Affidavit of Service sworn on 13/3/2023 to the effect that the Applicants were served through the Star newspaper on 8/3/2023. I find that the Applicants were properly served vide substituted service upon leave being granted by this Court on 2/3/2023. The prayer for setting aside the Court orders issued on 26/9/2023 on the ground of non-service thus fails.
20. However, as already outlined above, Order 12 rule 7 of the Civil Procedure Rules empowers this Court to vary a Judgment or order upon such terms as may be just. The Applicants also urged this Court to grant an appropriate order or relief to ensure ends of justice are met. On one hand there are Plaintiffs who are entitled to enjoy fruits of their Judgment which remains unsettled to date and on the other, the Applicants crave to be accorded a fair hearing as a tenet of natural justice and rule of law. The Court is thus mandated to strike a balance between these two competing and deserving rights.
21. The Civil Procedure Rules which was enacted to amplify the Civil Procedure Act which clothes this Court with inherent power to ensure that ends of justice are met and more particularly upholding the exercise of judicial authority as set out under Article 159 of the Constitution of Kenya, the Court directs that variation of the orders of lifting corporate veil subject to the Plaintiff complying the provision of Order 22 Rule 35 which states;

“ 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.”

22. The foregoing provision is a jurisdiction donated to the Court to assist decree holders to discover information from officers of a corporation whose assets are unknown. The above provisions were considered by the Court in NBI HCCC No. 1287 of 2000 Ultimate Laboratories Vs. Tasha Bioservice Limited (unreported) cited by the Court in Tropical Wood Limited Vs. Samilis International Investments [2017] eKLR thus;

- “(a) 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;
- (b) ... 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.(c)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.”

23. To serve the interest of justice and given the circumstances of this case, the Court is inclined to grant the application to give a chance to the Plaintiffs to exhaust the procedure in Rule 22 Rule 35 of the Civil Procedure Rules with respect to the examination of the Applicants. In that way the Applicants will be afforded the right to be heard upon the examination.

24. Each party to meet the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs/Respondents – Absent

Defendant – Absent

Ms. Millicent Small HB Wanyonyi for 1<sup>st</sup> and 2<sup>nd</sup> Applicants

Court Assistants – Phyllis

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