



**Ogare v Herne Ltd (Cause 35, 36, 37, 38, 39, 40, 41 & 42 of 2017
(Consolidated)) [2022] KEELRC 3830 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3830 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 35, 36, 37, 38, 39, 40, 41 & 42 OF 2017 (CONSOLIDATED)
ON MAKAU, J
JUNE 9, 2022**

BETWEEN

DANIEL OGARE CLAIMANT

AND

HERNE LTD RESPONDENT

RULING

1. The Ruling relates to the Claimant's Notice of Motion dated 17th January 2022 seeking the following orders: -
 - a) That summons do issue compelling Gopal Dhanji Patel, James Haigh And Jayesh Umedlal Shanghavithe the known directors of the Judgment Debtor's Company to attend Court on such a date as may be ordered or allocated to be orally examined on oath as to the Judgment Debtor's means and assets for satisfying the decree subject matter herein.
 - b) That the said directors be ordered to produce the Judgment Debtor's books of account, papers, documents and/or evidence showing the affairs of company.
 - c) That in default of such attendance and/or providing suitable means and assets of or the satisfaction of the decree of the Honourable Court, the Court do lift the corporate veil shielding the directors of the Company from personal liability and do hold that the said directors be jointly and/or severally held personally liable to satisfy the decree of the Court in full.
 - d) That the decree holder be granted leave to execute the decree herein against the said directors of the Judgment Debtor herein personally, in default of payment of the decretal amount claimed herein



- e) That the costs of the application be borne by the Judgment Debtor and/or its said directors in any event.
2. The application is supported by the affidavit sworn by the Claimant's Advocate Mr. Josiah Omambia Oumo on 17th January, 2022 which basically confirms that there is judgment of the Court in force but it has become impossible to execute by attachment because the whereabouts of the Respondent's assets is unknown. The Claimants blame the Respondent's Directors for the quagmire contending that they are using the corporate veil to evade compliance with the judgment. Therefore, the Claimants urge the Court to pierce the corporate veil and order execution of the decree against the Directors.
 3. The Claimants also pray for the Directors to be summonsed to court for examination on oath as to the means, assets and books of account to determine whether there are assets which could be attached in order to settle the decretal sum and costs or else be compelled to meet the same personally.
 4. The Claimants further contend that it is in the interest of justice that the order sought be granted because justice delayed is justice denied.
 5. The Respondent has opposed the application vide the Replying affidavit sworn on 8th February 2022 by one of the Respondent's directors, Mr. Gopal Dhanji Patel. In brief the director contended that the Claim in this matter was fully settled as acknowledged by the Claimant in exhibit GDP -1 annexed to the affidavit. However, he admits that the Claims in Cause 36 of 2017 to Cause 42 of 2017 have not been settled.
 6. According to the director, save for irregular warrants of arrest issued on 20th May, 2019 and 11th June, 2021, the Claimants have not demonstrated that they took any steps in line with the laid down procedure of execution of decrees before seeking to have the Respondent's corporate veil lifted. Therefore, the director contends that the application is premature and is an abuse of the court process.
 7. On the other hand, the director contends that the application has no merits because the applicant has not demonstrated sufficient grounds to warrant lifting of the Respondent's corporate veil. He averred that the Applicant have not shown that the Respondent's corporate personality is being use for fraud or improper conduct.
 8. Finally, the director averred that the Applicants have not proved that the Respondent is not in operation or that it has no assets capable of being attached. Therefore, he prayed for the motion to be dismissed with costs.

Submissions

9. The application was canvassed by written submissions. It was acknowledged for the Claimants that the decretal sum in this suit was settled save for the costs and interest. It was further observed that the Replying Affidavit by the Respondent's director has not proposed any payment plan for settling the judgment debt in all the matters herein. Therefore, the Claimants urge that the application be allowed in terms of prayer (a) and (b) or in the alternative prayer (c) and (d).
10. The Respondent maintained that the application for summoning its directors for examination is premature. Citing Order 22 Rule 35 of the Civil Procedure Rules, the Respondent submitted that before summoning the directors, the Court must have satisfied itself that the Decree Holder has provided sufficient evidence to justify the summons. For emphasis it relied on the case of David Kariuki Namu v Institute of Policy Analysis and Research [2021] eKLR.
11. As regards the lifting of the corporate veil which shields the directors, the Respondent submitted that the bar for doing so is very high and the Courts should exercise the power to lift the veil sparingly. For



emphasis it relied on the case of *Alfatech Contractors Limited v West Wing Investment Limited* [2019] eKLR which cited the decision of Ringera J in *Ultimate Laboratoes v Tasha Bioservice Ltd* Nairobi HCCC No.1287 of 2000 that corporate veil may only be lifted in exceptional circumstances like where it is being used as a mask for fraud or improper conduct.

12. The Respondent further submitted that the instances in which a corporate veil may be pierced were set out by Court in the case of *Mugenyi & Co. Advocates v The Attorney General* (1999) 2 E.A. 199. The Respondent then cited several other authorities where the Court declined to lift the corporate veil after the applicants failed to prove that the directors were using the corporate veil for fraud or other criminal activities or to defeat the plaintiff's Claim. Finally, it prayed for the application to be dismissed with costs.

Issue for Determination and Analysis

13. Having considered the material presented to the Court by the two sides, the following issued fall for determination: -
- a) Whether summons should issue compelling Gopal Dhanji Patel, James Haigh and Jayesh Umedlal Shanghavi, the known directors of the Respondent/Judgment Debtor to attend Court to be orally examined on oath as to the Judgment debtor's means and assets for satisfying the decree herein and to produce the judgment debtor's books of account, papers, documents and/or evidence showing the affairs of the company.
 - b) Whether in default by the said directors to attend Court and/or provide suitable means and assets for the satisfaction of the decree herein, the Court should lift the corporate veil and hold the directors personally liable to satisfy the decree of the court in full, and leave then issue for the decree to be executed against the directors personally.

Summons for Examination and Production of Books of Accounts for the Respondent

14. Order 22 Rule 35 of the *Civil Procedure Rules* provides that: -

“where a decree is for the payment of money, the decree holder may apply for an order that: -

- a) The judgment debtor;
 - b) In case of a corporation, any officer thereof; or
 - c) Any person, be orally examined as to whether any or what debts are owing to the judgment debtor, and whether the decree holder 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 document.”
15. The above provision does not set out the basis upon which an application for summons for examination and production of documents by judgment debtor may be made. However, I agree with Rika J in *David Kariuki Namu v Institute of Policy Analysis and Research* [2021] eKLR that: -

“...whereas the Court has the power to summon Directors and officers of a corporation to be examined orally for purposes of establishing means of execution, the Applicant must first provide sufficient evidence to justify the summons.”



16. In this case, the Claimants have produced search certificate from the Companies Registry (Exh.J002) confirming that the Gopal Dhanji Patel, James Haigh and Jayesh Umedlal Shanghavi are directors of the judgment debtor. Mr. Gopal Dhanji Patel has also admitted that he is a director of the judgment debtor in his Replying Affidavit herein. He has also confirmed that he is aware of the judgment debt in respect of ELRC Cause No.36 of 2017 to 42 of 2017 but contended that the Claim in Cause 35 of 2017 has been settled fully.
17. The Claimant admits that the decretal sum in cause 35 of 2017 was paid but contends that costs and interest have not yet been settled. It is therefore debatable whether the Claim in Cause 35 of 2017 is fully settled.
18. In view of the fact that the Respondent has not fully settled the decretal sum in the claims herein, that it has not made any effort to settle the same, and that its assets are not known, I find that the Claimant's application for oral examination of the company directors, and production of books of account and other documents concerning the company affairs is merited.
19. In arriving at the foregoing decisions, I have distinguished this case from the case of David Kariuki Namu, supra because in that case the applicant did not attach copy of records from the Companies Registry to confirm that the person cited as director was indeed a director of the company.
20. In the instant case, however, the Claimants have produced records from the Registrar of Companies confirming that the cited persons are directors of the judgment debtor. In addition, Mr. Gopal Dhanji Patel has confirmed on oath that he is a director of the company.

Lifting of the Veil

21. The Respondent has opposed the request for piercing of the corporate veil contending that the application is premature and without merits. I will withhold my decision on that matter until the directors attend the court for examination and production of the books of account and other documents that show the affairs of the company.

Conclusion

22. In view of the reasons set out above, I allow the application to the extent set out above, that: -
 - a) The known directors of the judgment debtor herein Gopal Dhanji Patel, James Haigh and Jayesh Umedlal Shanghavi are summoned to attend the Court on 30th June 2022 for oral examination on oath as to the judgment debtor's means and assets for satisfying the decree in this suit and cause 36, 37, 38, 39, 40, 41, and 42 of 2017.
 - b) The said directors are jointly and severally ordered to produce the judgment debtor's books of account and any documents or evidence showing the affairs of the company.
 - c) The issue of the lifting of the corporate veil will be revisited after the examination of the directors as ordered above.
 - d) The issue of costs of the application will await the final determination of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JUNE, 2022.

ONESMUS N MAKAU

JUDGE

ORDER



In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

