



**Muia v Mzoori Limited (Cause 2250 of 2015)
[2022] KEELRC 12715 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12715 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2250 OF 2015**

M MBARŪ, J

JUNE 6, 2022

BETWEEN

VIVIAN MUIA CLAIMANT

AND

MZOORI LIMITED RESPONDENT

RULING

1. The claimant filed application dated August 25, 2021 under the provisions of order 22 rule 35 of the [Civil Procedure Rules](#) and section 12 and 16 of the [Employment and Labour Relations Court Act](#) and rule 17 of the [Court Rules](#) and seeking for orders that;
 1. Summons do issue compelling on Alvin Mogaka Onkundi Mwencha aka Alvin Mogaka the known Chief Executive Officer and shareholder of the judgement debtor company to attend court on such date as may be ordered or allocated, to be orally examined on oath as to the judgement debtor's means and assets.
 2. The said Alvin Mogaka be ordered to produce the judgement debtor's books, paper, document and/or documentary evidence showing the affairs of the company.
 3. In default of such attendance and/or providing suitable and assets for the satisfaction of the decree of the court, the shareholders and directors of the judgement debtor namely: Jernlese Erastus Onkundi Mwencha, Alvin Mogaka Onkundi Mwencha, Joel Amenyua Nyarunda and Wilfred Ong'uti Mainye be jointly and/or severally held personally liable to satisfy the decretal sum of Ksh 1,351,176 plus interests accruing thereon.



4. The decree-holder be granted leave to execute the decree herein against the said shareholders of the judgement-debtor herein personally, in default of payment of the decretal amount claimed herein.
 5. Costs of this application be paid by the respondent and or its directors or shareholders.
2. The application is supported by the affidavit of the claimant and on the grounds that judgement herein was delivered on February 15, 2020 against the respondent but the claimant has been unable to execute as the respondent cannot be traced and has refused to respond to messages and notices sent to them. the CEO and shareholder has thwarted all efforts in execution or to fulfil its legal obligations and hence should be summoned to attend court in person to present books showing the current affairs of the respondent company.
 3. The claimant avers in her affidavit that upon judgement herein on April 15, 2020 the respondent's advocates ceased acting for the respondent for lack of instructions and up filing bill of costs, when it came for taxation on November 27, 2020 the respondents CEO and who was the boss at work one Alvin Mogaka was served with notice via an email dated December 2, 2020 but failed to attend. A search of the respondent and CR12 show that he is a director and shareholder of the respondent.
 4. The matter was adjourned to allow the respondent to attend but were ignored. The respondent directors and shareholders are using the company as a shield to avoid paying the judgement amount and should be summoned in court to show cause why they should not be personally held liable to pay the judgement debt. Alvin Mogaka is a person of means and runs Life Centre, an educational centre and Lufua Garden Limited and is capable of settling the matter herein.
 5. In reply, the respondent filed Grounds of Opposition that the company and shareholders are separate entities and the respondent is coached in a veil of incorporation and independently responsible for its acts and not the directors. The lifting of the veil of incorporation is only done in the event the company shareholders or directors are engaged in fraudulent activities which is not the case here. To allow the claimant to execute against the company directors would be unjust and prejudicial to the respondent.
 6. The respond also filed the relying affidavit of Alvin Mogaka Mwencha the CEO of the respondent and who avers that the respondent has not been in operations since October, 2015 and operations ceased since it became insolvent. The poor financial performance of the respondent was directly and greatly attributable to the claimant's negligence and poor performance as an employee and the respondent does not have assets to satisfy the decree issued by the court.
 7. The company is a separate and distinct person from its shareholder, employees and directors and such veil of incorporation cannot be removed so as to hold the directors liable unless there is fraud which is not the case here and the application by the claimant lack merits and should be dismissed with costs.
 8. Parties addressed the application through written submissions.
 9. The claimant submitted that the respondent directors have acted in bad faith herein to frustrate the judgement of the court. upon judgement, the respondent and its directors have filed review application, notices issued to attend have gone unanswered until the instant application was filed which show bad faith which should allow for the lifting of the corporate veil for the directors and shareholder to be held personally liable to pay the judgement sum as held in *Robert Kinaga Waweru v Northcorr Enterprises Ltd* [2021] eKLR.



10. The respondent has failed to demonstrate what means and assets of the company exists to satisfy the judgement sum. The company has not been wound up and no evidence exists in this regard.
11. In reply, the respondent submitted that the essence of Order 22 rule 35 is for the court to get information as to the judgement debtor's ability or inability to satisfy the decree as addressed in the case of *Masefeld Trading (K) Ltd v Rushmore Company Ltd* [2008] eKLR. the audited statements suffice to show the assets and means of the company to settle a decree as held in *Jiang Nan Xiang v Cok Fas-St Company Ltd* [2018] eKLR. where a witness has sworn an affidavit with regard to any facts, the court should dispense with the personal attendance of a witness.
12. The court should not lift the corporate veil as there is no improper conduct demonstrated on the part of the respondent. the respondent is a distinct and separate company from its directors and there is no matter to justify the summons against the directors. The company's insolvency is not a reason for piercing the corporate veil as held in *China Wu Yi Company Ltd v Edermann Property Ltd & 2 others* [2013] eKLR and the instant application should be dismissed with costs.

Determination

13. As submitted by the respondent, the essence of Order 22 rule 35 is for the court to get information as to the judgement-debtor's ability or inability to satisfy the decree. In the case of *Stephen Njoroge Gikera & another v Econite Mining Co Ltd & 7 others* [2018] eKLR the court held that instances where the veil of incorporation may be lifted must be based on the circumstances of each case to allow the persons behind the company to take responsibility of the entity.
14. Mr Mwencha for the respondent in his replying affidavit dated February 3, 2022 avers that the respondent company has not been in operation since October, 2015 and ceased operations since it became insolvent. Such facts can only be interrogated and addressed upon the production of evidence particularly judgement debtor's books, paper, document and/or documentary evidence showing the affairs of the company.
15. In the case of *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal held that;

... Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.
16. And in *Yaya Towers Limited v Trade Bank Limited* (In Liquidation) (Civil Appeal No 35 of 2000) the same court held that every litigant must be given a fair chance for hearing on the merits. The claimant has moved the court with application seeking the respondent's directors to attend and show cause why they should not personally pay the decretal sum.
17. Save to urge the court that the corporate veil should not be lifted as there is a separate and distinct legal entity from its directors, Mr Mwencha for the respondent does not deny there is a valid and legitimate judgement herein and as the director of the respondent, he has not satisfy the decree thereof.
18. this court under section 20 of the *Employment and Labour Relations Court Act, 2011* is allowed to summon any party to give evidence on oath and to produce relevant documents to ensure its orders are not frustrated. Section 20(4) and (5) directs that;

- (4) For the purpose of dealing with any matter before it, the court may by order in writing signed by or on behalf of the court require any person to—



- (a) furnish in writing or otherwise, such particulars in relation to such matters as it may require;
 - (b) attend before it;
 - (c) give evidence on oath or otherwise; and
 - (d) produce any relevant documents.
- (5) An order made under subsection (4) may include a requirement as to the date on which or the time within which the order is to be complied with.

19. Mr Mwencha does not contest that he is a director and shareholder of the respondent. The noted directors/shareholders namely: Jernlese Erastus Onkundi Mwencha, Alvin Mogaka Onkundi Mwencha, Joel Amenya Nyarunda and Wilfred Ong’uti Mainye shall attend court and show cause why they should not personally satisfy the judgement herein.
20. In this regard, for the due performance of the judgement herein the application dated August 25, 2021 is found with merit and the following orders are hereby issued;
- 1. Alvin Mogaka Mwencha, the Chief Executive Officer of the respondent and shareholder of the judgement debtor company shall attend to be orally examined on oath as to the judgement debtor’s means and assets;
 - 2. Alvin Mogaka Mwencha shall attend and produce the judgement debtor’s books, paper, document and/or documentary evidence showing the affairs of the company.
 - 3. In default as (a) and (b) above the court shall summon the shareholders and directors of the judgement debtor namely: Jernlese Erastus Onkundi Mwencha, Alvin Mogaka Onkundi Mwencha, Joel Amenya Nyarunda and Wilfred Ong’uti Mainye be jointly and/or severally held personally liable to satisfy the decretal sum of Ksh 1,351,176.
 - 4. Costs to the claimant.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

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