



**Wakhungu v Milembe Investment Plc & another (Commercial Appeal
E344 of 2023) [2025] KEHC 8746 (KLR) (Civ) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
COMMERCIAL APPEAL E344 OF 2023
AB MWAMUYE, J
MAY 29, 2025**

BETWEEN

HON CHRISANTUS WAMALWA WAKHUNGU APPELLANT

AND

MILEMBE INVESTMENT PLC 1ST RESPONDENT

FAULU MICROFINANCE BANK LIMITED 2ND RESPONDENT

JUDGMENT

1. This is a judgment on an appeal arising from the ruling of Hon. B. M. Cheloti (Principal Magistrate) delivered on 13th December 2023 in Milimani Commercial Suit No. E982 of 2021. The appellant, Hon. Chrisantus Wamalwa Wakhungu, was the applicant in the lower court, while Milembe Investments PLC (1st respondent) and Faulu Microfinance Bank Limited (2nd respondent) were the Respondents. The impugned ruling dismissed the Appellant's Application dated 21st August 2023. Aggrieved by that outcome, the Appellant lodged the present appeal.
2. The Appellant's Application before the subordinate court sought post-judgment relief aimed at enforcing a decree allegedly obtained in the 2021 suit. The key prayers were orders to examine the 1st Respondent's directors/officers on oath regarding the 1st Respondent's assets and means (under Order 22 rule 35 of the Civil Procedure Rules) and further orders to lift the corporate veil of the 1st Respondent so as to hold its directors personally liable for the judgment debt. The application also included a prayer seeking the recusal of Hon. B. M. Cheloti from the matter. The learned Principal Magistrate, in the ruling under appeal, declined to grant those orders effectively dismissing the prayer for recusal and the enforcement prayers; and maintained carriage of the suit.
3. The Appellant now urges this court to allow the appeal, set aside the magistrate's ruling, and grant appropriate relief. In particular, the Appellant prays that his Application dated 21st August 2023



be allowed as filed, or that this Court makes such orders as will facilitate a fair determination of the outstanding issues by a different magistrate.

Background

4. According to the Appellant, the judgment debt remained unsatisfied by the 1st Respondent. The Appellant then filed an Application dated 21st August 2023 before the trial court seeking several orders to aid in execution. Notably, in Prayer 3 of that Application, the Appellant sought to have the presiding magistrate (Hon. B. M. Cheloti) recuse himself from further handling the matter, citing alleged bias and infringement of the appellant's right to a fair hearing.
5. Prayers 4, 5, 6, and 7 of the application sought substantive enforcement orders, including: an order under Order 22 rule 35 of the Civil Procedure Rules to summon the directors/officers of the 1st Respondent for oral examination on the company's means and assets; an order compelling those officers to produce the 1st Respondent's books of account and financial documents for examination; an order to pierce the corporate veil of the 1st Respondent and hold its directors/shareholders personally liable for the decretal sum; and consequential orders to facilitate execution against the said directors.
6. Dissatisfied, the Appellant filed the present appeal. In his Memorandum of Appeal, the appellant raises several grounds:
 - i. that the learned magistrate erred in failing to disqualify himself from the matter despite clear indications of bias and breach of the appellant's rights to a fair hearing;
 - ii. that the magistrate erred in law and fact by refusing to order the examination of the 1st respondent's directors under Order 22 rule 35, thereby denying the appellant a legitimate avenue of discovering the judgment-debtor's assets;
 - iii. that the magistrate erred in failing to appreciate and apply the doctrine of piercing the corporate veil in the circumstances of the case – or alternatively, in holding (implicitly) that he lacked jurisdiction to do so – thus allowing the 1st respondent's shareholders to evade a lawful judgment debt;
 - iv. that the magistrate's orders collectively violated the appellant's constitutional rights to equality before the law, access to justice, and fair hearing as enshrined in Articles 27, 48, and 50(1) of *the Constitution* of Kenya 2010. The appellant therefore urges this Court to overturn the subordinate court's ruling and grant appropriate relief, including setting aside the impugned orders, allowing the prayer for recusal, and ensuring that the remaining prayers (examination of directors and related relief) are determined afresh by a different magistrate on their merits.
7. The Respondents, in opposing the appeal, supports the reasoning of the trial court. They contend that the magistrate was correct in his decision. They argue, that the Appellant did not demonstrate any bias or reasonable apprehension of bias to warrant recusal; that Order 22 rule 35 was never intended to be used oppressively to harass company officers without proper basis; and that the lifting of the corporate veil is an exceptional measure not to be granted lightly, especially absent clear proof of fraud or misconduct by the company's directors.
8. The Respondents maintain that the 1st Respondent's separate legal personality must be respected and that the Appellant is attempting to improperly rewrite the contract or liability by pursuing the directors personally. They also raise the point that a subordinate court may lack jurisdiction to make certain orders such as declaring shareholders liable for company debts which, in their view, fall within the purview of the High Court under the *Companies Act* or the court's inherent powers. In their view, the magistrate's ruling preserved the integrity of the law and should not be disturbed.



9. From the grounds of appeal and the submissions on record, the following Issues arise for determination:
 - A. Whether the Appellant’s application under Order 22 Rule 35 of the Civil Procedure Rules was properly brought, and whether the trial Magistrate erred in dismissing it.
 - B. Whether the trial court erred in failing to pierce the corporate veil of the 1st Respondent (Milembe Investments PLC) to hold its directors/shareholders personally liable for the judgment debt.

Analysis and Determination

Whether the Appellant’s application under Order 22 Rule 35 of the Civil Procedure Rules was properly brought, and whether the trial Magistrate erred in dismissing it.

10. The Appellant filed an application under Order 22 Rule 35 of the Civil Procedure Rules before the Magistrate’s Court, seeking orders compelling the directors of the Judgment Debtor (Milembe Investments PLC) to attend court for oral examination concerning the company’s assets and liabilities. The application was subsequently dismissed by Hon. B.M Cheloti, Principal Magistrate. This appeal thus primarily concerns whether the dismissal of this application was proper under the law.
11. The Appellant submitted that the application was procedurally and substantively proper and within the scope of Order 22 Rule 35. The Appellant argued that once a decree remains unsatisfied, a decree-holder has the legal right to summon a judgment debtor’s director or officer to disclose the company’s assets, accounts, and means of satisfying the decree. Reliance was placed on various Kenyan authorities, notably *Ultimate Laboratories v Tasha Bioservices Ltd* (HCCC No.1287 of 2000), where the court clearly articulated the purpose of Order 22 Rule 35 as a tool to facilitate post-judgment execution by requiring transparency from the judgment debtor.
12. The Appellant further argued that by dismissing the application outright, the learned Magistrate improperly restricted the Appellant’s right to access justice, contrary to Article 48 of *the Constitution*, and effectively frustrated execution proceedings, depriving him of the fruits of a lawful judgment.
13. The Respondents opposed the application, arguing it was not brought in good faith but rather as a means to harass or embarrass the directors. They further contended that the proper threshold for invoking Order 22 Rule 35 was not met, and that the application was prematurely or improperly filed, thus supporting the dismissal by the Magistrate.
14. Order 22 Rule 35 of the Civil Procedure Rules, 2010 provides as follows:

“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 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.”



15. The purpose and nature of this provision was clearly elucidated in *Ultimate Laboratories v Tasha Bioservices Ltd* [HCCC No. 1287 of 2000], where the court stated:

“The whole purpose of examination under Order 22 Rule 35 is to discover whether the judgment debtor has any and what property or means of satisfying the decree. It is a provision for post-judgment discovery to aid the decree holder to effectively execute a valid decree.”

16. Further, in *Masefield Trading (K) Ltd v Rushmore Company Ltd & Another* [2008] eKLR, the court emphasized that the procedure under Order 22 Rule 35 is fundamentally investigative and informational rather than punitive, stating that:

“The object is merely to ascertain the extent of the judgment debtor’s property or means; it is not to immediately subject directors or officers personally to the judgment debt.”

17. Thus, the intent of Order 22 Rule 35 is expressly to enable decree-holders to obtain critical information about judgment debtors’ financial circumstances. Dismissal of such applications without good reason or proper inquiry into their substance can unjustly frustrate the execution process.

18. In this appeal, the Appellant’s application under Order 22 Rule 35 was clearly within the contemplation and scope of the rule: The Appellant had obtained a valid decree which remained unsatisfied, efforts to execute via conventional means had failed, making the application under Order 22 Rule 35 not only appropriate but necessary to ascertain the judgment debtor’s actual means or assets available to satisfy the decree. There was no procedural irregularity apparent from the record regarding the application.

19. The learned Magistrate’s ruling dismissing the application was not grounded upon substantive analysis of whether or not the application was justified under Order 22 Rule 35. Rather, the Magistrate appears to have prematurely rejected the application without fully appreciating its intended purpose—being investigatory and informative, rather than punitive at that stage.

20. Furthermore, the dismissal of the application effectively shielded the judgment debtor’s directors from legitimate judicial inquiry into the company’s affairs, frustrating the Appellant’s constitutional right to access justice under Article 48 of *the Constitution* of Kenya, 2010. As held in *Multichoice Kenya Ltd v Mainkam Ltd & Another* [2013] eKLR, the courts must guard against permitting corporate personality to unjustly shield individuals from fulfilling lawful obligations or defeating valid decrees.

21. In failing to appreciate these critical elements, the Magistrate erred in both fact and law. The Magistrate failed to exercise judicial discretion properly and acted contrary to the purpose and spirit of Order 22 Rule 35 as well as the overriding objective under sections 1A, 1B, and 3A of the *Civil Procedure Act*.

22. This Court finds that the Appellant’s application was properly brought under Order 22 Rule 35 and the dismissal by the learned Magistrate was erroneous, as it misapprehended both the purpose of Order 22 Rule 35 and the obligations of the court to facilitate rather than obstruct justice and effective execution.

Whether the trial court erred in failing to pierce the corporate veil of the 1st Respondent (Milembe Investments PLC) to hold its directors/shareholders personally liable for the judgment debt.



23. The fundamental issue before this Court is whether the appellant presented sufficient evidence and justification to disregard the separate legal personality of Milembe Investments PLC by piercing the corporate veil, to hold its directors personally liable for the judgment debt.
24. The appellant strongly argued that Milembe Investments PLC was deliberately operating as a mere façade or sham, without genuine substance or business activity, merely structured to evade legitimate legal obligations. The appellant contended that the company’s directors intentionally failed to disclose assets and were actively obstructing execution proceedings. The appellant cited key cases including: *Victor Mabachi & Another v Nurturn Bates Ltd* [2013] eKLR, affirming that Kenyan courts may pierce the corporate veil to address fraud or improper conduct and *Kolaba Enterprises Ltd v Shamsudin V. Varvani & Another* [2014] eKLR, emphasizing courts’ power to disregard corporate personality where a company’s incorporation is merely a façade designed to evade liabilities or perpetrate fraud.
25. Conversely, the respondents maintained that the corporate veil should only be pierced in exceptional circumstances, involving clear evidence of fraudulent conduct, deliberate deceit, or intentional misuse of corporate form. They emphasized that no concrete evidence of fraudulent or improper conduct by Milembe Investments PLC or its directors had been presented by the appellant. The respondents cited: *Multichoice Kenya Ltd v Mainkam Ltd & Another* [2013] eKLR, stressing the need for specific allegations and clear proof of fraud or misuse of the corporate form and *Post Bank Credit Limited (in liquidation) v Nyamangu Holdings Limited* [2015] eKLR, which outlined that piercing the corporate veil requires clear and convincing evidence.
26. The doctrine of separate corporate personality, established in the landmark English case of *Salomon v Salomon & Co Ltd* [1897] AC 22, is well entrenched in Kenyan jurisprudence. This doctrine establishes that a company is a separate legal entity distinct from its members and directors. However, Kenyan courts recognize clear exceptions to this principle, allowing the corporate veil to be pierced in limited and exceptional circumstances, particularly involving fraud, evasion of legal obligations, or where the company is being used as a mere façade.
27. In the authoritative decision of *Victor Mabachi & Another v Nurturn Bates Ltd* [2013] eKLR, the Court of Appeal stated clearly:

“The separate legal personality of a company can be disregarded when it is established that the company is an instrumentality or agent of its directors, used improperly or fraudulently.”
28. In *Kolaba Enterprises Ltd v Shamsudin V. Varvani & Another* [2014] eKLR, the High Court elaborated further, noting:

“The corporate veil can be lifted only where it is clearly proved that the incorporation was merely a sham or façade designed to perpetrate fraud or evade legal obligations.”
29. Similarly, the High Court in *Multichoice Kenya Ltd v Mainkam Ltd & Another* [2013] eKLR reaffirmed that allegations must be explicitly pleaded and supported by solid evidence to justify piercing the corporate veil, emphasizing:

“Mere allegations of default in payment, unsubstantiated suspicions, or financial difficulty are insufficient to warrant lifting the corporate veil.”
30. Examining the record of this case and the submissions, the following points emerge clearly: The appellant alleged deliberate concealment of assets and obstruction of lawful execution by Milembe



Investments PLC. However, these allegations, though serious, were not supported by tangible documentary evidence or specific proven instances of fraud or intentional wrongdoing.

31. In piercing the corporate veil, the evidentiary threshold set by Kenyan courts is notably high. Courts consistently emphasize concrete evidence and specific proof of fraud, impropriety, or intentional misuse of the corporate form. For example, in *Post Bank Credit Ltd v Nyamangu Holdings Limited* [2015] eKLR, the Court emphasized that lifting the veil should be based on clear evidence, stating: “Piercing the corporate veil must be justified by adequate proof that the company is merely a device employed by individuals to evade legal liabilities.”
32. In the present case, such adequate proof was notably absent. Kenyan jurisprudence underscores that veil-piercing decisions should ordinarily follow comprehensive procedural steps designed to reveal a company’s true state of affairs. Particularly, as established in *Masefield Trading (K) Ltd v Rushmore Company Ltd & Another* [2008] eKLR, a thorough examination under Order 22 Rule 35 should precede any decision to lift the corporate veil, allowing courts to rely on clear and verifiable evidence from examination proceedings.
33. In this matter, the application to pierce the veil was made prematurely, without a completed and thorough investigation or examination of Mileembe Investments PLC’s directors or accounts to establish concrete evidence of misconduct.
34. This Court finds that the appellant’s assertions, while indicating suspicion and frustration at execution, did not attain the evidentiary threshold necessary under Kenyan law to justify the exceptional measure of piercing the corporate veil at this stage. Also, the Magistrate, correctly required clearer evidence to justify veil piercing. However, the Magistrate erred procedurally by dismissing the application entirely, rather than facilitating a proper investigation under Order 22 Rule 35 first, to determine if sufficient grounds would emerge thereafter. Finally, the appellant has not yet demonstrated adequate grounds for veil piercing, primarily due to procedural premature dismissal, not substantive evaluation.

Final Orders

In light of the foregoing analysis, the Court makes the following final Orders:

- a. This appeal be and is hereby allowed.
- b. The entire ruling and orders of Hon. B.M Cheloti, Principal Magistrate dated 13th December 2023 in Milimani Magistrate’s Commercial Suit No. E982/2021 be and are hereby set aside.
- c. Prayers three (3) of the Appellant’s Application dated 21st August, 2023 in Milimani Magistrate’s Commercial Suit No. E982/2021 be and is hereby allowed.
- d. The lower court, presided over by a different magistrate other than Hon. B.M Cheloti, Principal Magistrate do make a determination of prayers four (4), five (5), six (6) and seven (7) of the Appellant’s Application dated 21st August, 2023 in Milimani Magistrate’s Commercial Suit No. E982/2021 upon compliance or otherwise by Peter Adams Ludaava with prayer three (3) thereof;
- e. The subsequent proceedings in the lower court shall be presided over by any other Magistrate other than Hon. B.M Cheloti, Principal Magistrate.
- f. Costs of this Appeal are awarded to the Appellant as against the Respondents

It is so ordered.



DATED, SIGNED AND DELIVERED VIERTUALLY THIS 29TH DAY OF MAY 2025

BAHATI MWAMUYE

JUDGE

