Berlin Equipment Limited v Mascor Kenya Limited (Civil Case E051 of 2022) [2025] KEHC 9373 (KLR) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E051 OF 2022

J NGAAH, J

JUNE 27, 2025

BETWEEN

BERLIN EQUIPMENT LIMITED ..... PLAINTIFF

AND

MASCOR KENYA LIMITED ..... DEFENDANT

RULING

1. The motion before court is dated 21 May 2024 and is expressed to be brought under sections 148, 787; 996 and 1002 of the *Companies Act*, cap. 486; section 1A, 1B,3A, 6 and 34 of the *Civil Procedure Act*, cap. 21 and Order 22 rule 35 of the Civil procedure Rules, 2020. The applicant seeks the following orders:

> " 1. That Harshil Kishor Kotecha and Hemal Kishor Kotecha being the directors of Berlin Equipment Limited, the Respondent herein do attend court and be examined as to whether the Respondent has any property or means of satisfying the decree in Mombasa High Court Commercial Case No. E051 of 2022 and to produce the Respondent's books of accounts and other documentary evidence showing the status of the business before the court.
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> 2. That the veil of incorporation of the Respondent be lifted and the Directors Harshil Kishor Kotecha and Hemal Kishor Kotecha be made personally liable and be ordered to settle the decretal sum in Mombasa High Court Commercial Case No. E0 51 of 2022 to the tune of Kshs. 39, 321,256.13 and costs thereto with interest thereof from 13th July 2023 jointly and severally until payment in full.
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> 3. That a declaration be made pursuant to Section 1002 as read with section 996 of the *Companies Act* that the directors of the Respondent were knowingly

party to the carrying on of the business with intent to defraud the applicant and that they are responsible without any limitation of liability for the debt of the company owed to the applicant amounting to Kshs. 39,321, 256.13 with interest thereof from 13th July 2023 jointly and severally until payment in full.

4. That the said directors do immediately settle the said decretal sum of Kshs. 39, 321,256.13.

5. That in default of the said directors complying with the above orders, they be imprisoned and committed to civil jail for a period not less than six (6) months.

6. That in costs of the application be provided for."

2. The application is based on the grounds that the applicant and the respondent were previously engaged in business whereby the applicant supplied goods in the form of machinery and machinery parts and services to the respondent.The respondent is said to have failed, refused or declined to pay Kshs. 36, 597,897.95 for the goods supplied and services rendered between April 2020 and March 2023.

3. The applicant commenced liquidation proceedings against the respondent which, in turn, filed Commercial Case No. E051 of 2022 against the applicant. The applicant filed a counter-claim in the suit. Subsequently, the suit was compromised by a consent dated 13July 2023 according to which the respondent was to pay the applicant the sum of Kshs. 39,321, 256.13 in six equal monthly instalments. The first instalment was to be paid together with the costs of the suit amounting to Kshs. 1,300,000.

4. The respondent failed to satisfy the decree arising from the suit in accordance with the terms of the consent order. The applicant then commenced the execution process and engaged a firm of auctioneers to realize the decretal sum from the respondent. When the auctioneers proclaimed the respondent's attachable assets at the respondent's premises, the firm of Messrs. Muriu, Mungai & Company Advocates LPP initiated objection proceedings on behalf of B.N Kotecha and Sons, Pabari Distributors Limited, Unifresh Exotic Limited, Safety Auto Spares (EA) Limited and Euro Petroleum Products (EA) Limited objecting to the execution.

5. According to the applicant, it has now become apparent that the respondent is trading with other entities and it is not possible to identify properties belonging to the respondent since whatever property has been proclaimed has turned out to be registered in the names of other entities.

6. Further, the applicant's due diligence has revealed that the respondent has no assets in its name and, therefore, no other form of execution can satisfy the decree hence the instant application. More so, the directors of the respondent have declined to ensure that the applicant is paid its rightful dues.

7. The said directors' actions, it is urged, amount to fraud as they engaged the applicant knowing that the respondent does not have properties in its own name, hence no attachments can be made. Since the respondent, under the control of the directors, is actively doing business, the directors should attend court to be examined as to whether the respondent has any property or means of satisfying the decree in Mombasa High Court Commercial Case No. EO51 of 2022 and to produce before court, the respondent's books of accounts and other documentary evidence showing the status of the business of the respondent.

8. It is pleaded that the directors were knowingly parties to the carrying on of the business with intent to defraud creditors of the company and for fraudulent purposes and that they are responsible, without any limitation, for liability of the company's debt, owed to the applicant amounting to Kshs. 39, 321,256.13 in accordance with Section 1002 as read with section 996 of the *Companies Act*.

9. Benson Nzuka Musili has sworn a replying affidavit opposing the application. He has sworn that he is "the plaintiff's head of legal." According to him, there is no proof that the alleged directors hold those positions in the plaintiff/respondent company.

10. Musili admits "that it is true the plaintiff has delayed in complying with the terms of the consent. That delay, however, is not because of any fraudulent activity attributable to the plaintiff's directors, but because of the economic upheaval that businesses suffer from time to time". Further, the plaintiff is owed by several debtors and that it is doing all that it reasonably can to recover the debts and unlock its cashflow. It is urged that the delay in unlocking the plaintiff's cashflow is not a basis for alleging that the plaintiff has no means of satisfying the debt.

11. Order 22 rule 35 of the Civil Procedure Rules, amongst other provisions of law under which the application has been made, reads as follows:

> 35. Where a decree is for the payment of money, the decree holder may apply to the court for an order that—
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> (a) the judgment-debtor;
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> (b) in the case of a corporation, any officer thereof; or
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> (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.

12. It has been held in Masefield Trading (K) Ltd v Rushmore Company Limited & Another Civil Suit No. 1794 of 2000; (2008) eKLR, that under this rule, the court is entitled to summon any officer of a company to attend court for his examination on the assets and means available to the company for settlement of a court decree against the company. It is only after such an examination that the court may or may not lift the veil of incorporation.

13. And in Nairobi High Court Civil Case No. 1287 of 2000; Ultimate Laboratories versus Tasha Service Limited (unreported), it was held that the objective of an examination of a company's director or officer under Order XXI Rule 36 (now order 22 rule 35) is to obtain discovery, for the purpose of execution of a decree against the company, 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. Under the same provisions and, based on its inherent power, the court has power to lift the corporate veil of the company and order the director to personally discharge the debts of the company.

14. Ringera, J. (as he then was) held in this case 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."

15. It is not necessary that the applicant or decree holder must first establish the debtor's debts and properties; neither is it necessary that the person to be examined has knowledge of or interest in or connection with the judgment-debtor's identified debts and properties which are subject of investigation.

16. According to the learned judge, that kind of approach defeats the entire purpose of the rule which is to enable the applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. The learned judge noted:

> " If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment debtor's known properties."

17. As to who can be summoned, the court noted:

> " ...any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule."

18. Taking cue from these pronouncements, and, considering that, in the absence of any evidence to the contrary, the persons sought to be examined are directors of the judgment plaintiff/respondent company from which the decree-holder has been unable to recover the decretal sum, I am satisfied that the applicant has met the threshold for grant of prayer 1 of the motion to begin with. In particular, it has not been contested that the applicant has made efforts to execute the decree by attachment of what the applicant thought was the respondent's property. Those efforts have proved fruitless since all attachable assets have been found to belong to other entities.

19. As far as the prayer for lifting of the veil is concerned, it would be premature to grant the prayer before the examination of the directors of the respondent. It is only after examination of the directors that the court can make up it is mind whether the corporate personality is being employed as a mask for fraudulent schemes or improper conduct, among other grounds upon which the corporate veil may be lifted. (See the cases of Gilford Motor Co. vs. Horne [1933] Ch. 935 and Jones vs. Hipman [1962] 1W.L.R. 832). The same would apply to prayers 3, 4 and 5.

20. For the foregoing reasons, prayer 1 of the application is hereby allowed. The applicant will have costs of the application. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 27 JUNE 2025

NGAAH JAIRUS

JUDGE