



**K.K Transporters Limited v S.AL Construction & Limited (Civil Appeal E086 of 2022)
[2024] KEHC 905 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E086 OF 2022
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

K.K TRANSPORTERS LIMITED APPELLANT

AND

S.AL CONSTRUCTION & LIMITED RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling of Hon M.W. Murage SRM delivered on 2/6/2022. The appellant being aggrieved by the decision lodged this appeal via Memorandum of Appeal dated 1/7/2022. The grounds upon which the appeal is based as per the memorandum of appeal can be summarized as follows: -
 - a. That the court below erred failing to allow the application to have the respondent's director be orally cross examined on the respondent's assets and in default be compelled to personally settle the respondent's debt.
 - b. That the court erred in failing to hold the directors of the respondent liable for improper and fraudulent conduct by ordering goods on credit and issuing bouncing cheques.
 - c. That the court erred in failing to hold that this was a suitable case for summoning the directors since the decretal sum remained unpaid.
2. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the dispute between the parties emanated from a local purchase order for the purchase of 10,000litres of diesel from the appellant at a cost of Kshs. 690,000/-. That the appellant sued the respondent for the said amount and judgment was entered on 19/1/2021 in its favour.



3. Thereafter, the appellant attached the respondent's assets and only managed to get Kshs. 30,000/- from the sale of the attached items. The appellant submitted that the respondent had no known assets and therefore by issuing bouncing cheques, the director was guilty of fraudulent and improper conduct. Counsel submitted that the only recourse would be to allow the respondent's director to be cross examined on the assets of the respondent company and to produce its books of accounts.
4. On its part, the respondent submitted that the appellant and its agents had attached goods valued at Kshs. 9,307,640/-. That it was erroneous for the court below to hold that the respondent's assets had been found and auctioned to satisfy the decree. That the respondent being unable to pay a debt could not be termed as fraud and it did not have any other asset. That the absence of properties to attach not reason enough to lift the corporate veil.
5. I have carefully considered the record and the submissions of Learned Counsel. The core issue is whether the court below was at fault for dismissing the appellant's application dated 15/10/2021 which had sought the examination of the respondent's director.
6. In the ruling dated 2/6/2022, the court dismissed the application on the ground that the appellant had not proved its case for piercing the corporate veil and that the proclamation notice indicated that there were assets capable of settling the decretal sum.
7. Order 22 Rule 35 of the [Civil Procedure Rules](#) provides: -

“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”.
8. From the foregoing, it is clear that the power of the Court to summon a person to attend and be examined under Order 22 Rule 35 is for the purpose set out in the [Rule](#). That is, to ascertain 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.
9. In this regard, as long as an applicant has shown that a person 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.
10. In the application dated 15/10/2021, the applicant had framed the order such that the director would be personally liable for the decretal sum. This would then amount to piercing the corporate veil.



11. The law on lifting of the corporate is clear. A corporate veil will be lifted only in the face of fraud or some other misconduct of equal gravity. In *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & another* (HCCC No. 125 of 2002) Ringeral J (as he then was) stated the following:

“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 directors of the company being saddled with the debts of the company.

12. Further, in *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another* [2014] eKLR, Gikonyo J rendered himself thus: -

“... [the] separate legal personality of a company can never be departed from except in instances where the statute of the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”

13. From the foregoing, lifting the corporate veil is not a matter that can be taken lightly. It will only be granted in exceptional circumstance, fraud or reprehensible conduct on the part of the director. In the present case, the appellant was entitled to file an application under order 22 rule 35 just to examine the means of satisfying the decree. There was no allegation and/or evidence of any fraudulent or criminal activities on the part of the subject director to have warranted seeking the piercing order.

14. In any event, the appellant had had warrants of attachment and proclamation of the assets of the respondent issued. The record shows that the appellant was still in possession of the assets belonging to the respondent. It is also noteworthy to state that the appellant chose not to value the assets in its possession but only stated the amount the two TVs and furniture that were sold.

15. In view thereof, the Court finds no error in the decision of the Learned Magistrate. Accordingly, I find no merit in the appeal and the same is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

