



Ameer Shaker t/a Esnad General Trading Ltd v Pundberry Limited (Commercial Cause E900 of 2021) [2024] KEHC 4133 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CAUSE E900 OF 2021**

A MABEYA, J

APRIL 30, 2024

BETWEEN

AMEER SHAKER T/A ESNAD GENERAL TRADING LTD APPLICANT

AND

PUNDBERRY LIMITED RESPONDENT

RULING

1. Before Court is an application dated 13/6/2023. It was brought under Order 51(1), Order 22 Rule 35 of the *Civil Procedure Rules 2010*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya.
2. It sought that summons be issued to compel the directors and shareholders of the respondent, namely, Maureen Katuku Mukusya and Isabel Wanjiku to personally appear before Court and be examined on oath as to the means of the judgment-debtor's assets and be ordered to produce books of account.
3. That the corporate veil of the judgment-debtor be pierced and the said persons be held personally liable for the decretal sum of USD 347,683.20 together with interests and costs of Kshs 1,200,000/-. That warrants of attachment and sale of assets of the directors and shareholders of the respondent do issue in execution of the decree. In the alternative, the said directors and shareholders of the judgment-debtor state why they should not be committed to civil jail
4. The application was supported by the grounds on the face it and the affidavit of Ameer Shaker sworn on 13/6/2023. The decree holder averred that it obtained judgement against the judgment debtor for the decretal sum of USD 347,683.20 together with interests and costs of Kshs 1,200,000 pursuant to a consent adopted by the Court on 9/12/2022.



5. That the judgment debtor was to make monthly installments of USD 50,000 till payment in full but had not adhered to that arrangement. That efforts to execute the judgment had been unsuccessful as the auctioneer was unable to trace any assets of the judgment-debtor.
6. The respondent opposed the application vide grounds of opposition dated 17/7/2023. It contended that the application had been filed prematurely and was therefore an abuse of the court process. That there had been no fraud demonstrated to warrant lifting of the corporate veil. Further, that the applicant had not demonstrated that it had not been able to trace the assets of the respondent or that there had been any acts by the directors to avoid settling the decree.
7. The application was canvassed by way of written submissions which I have considered. It was submitted for the applicant that the judgment debtor did not provide evidence to prove its financial position and therefore was unable to controvert the applicant's case. That the respondent was still in business but had closed its physical address to prevent the applicant from executing the decree. That in the premises, the respondent had acted fraudulently and therefore the corporate veil ought to be pierced to hold the directors liable. That the directors were in a position to explain the respondent's financial position in its ability to satisfy the decretal amount.
8. For the respondent, it was submitted that the applicant ought to give sufficient reason as to why it had not obtained warrants of execution against the respondent. On the piercing of the corporate veil, it was submitted that the orders cannot be granted as the Court is functus officio and that the applicant did not prove any fraudulent dealings.
9. I have considered the application, the response and the rival submissions by Learned Counsel. The issue for determination is whether the directors and shareholders of the judgment-debtor, namely, Maureen Mukusya and Isabel Wanjiku should be orally examined in Court on oath as to the state of affairs and means of satisfying the decree.
10. 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”.
11. 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 circumscribed within the purpose set out in the Rule. That is, 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.
12. In view thereof, as long as an applicant has shown that a respondent is in a position to provide information in the nature of discovery, as to whether any or what debts are owing to a 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.

13. In *Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited* (2015) eKLR, it was held that: -

“A person to be summoned under Order 22 Rule 35 (c) of the Civil Procedure Rules, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor’s annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”

14. In the present case, it is not in dispute that there is an unsatisfied decree in favour of the applicant against the judgment-debtor for USD 347,683.20 and interest amounting to Kshs 1,200,000. The judgment-debtor has not disputed that it has not satisfied the same. The named persons have not denied that they are directors of the judgment-debtor. Order 22 rule 35 grants the applicant the right to call for the examination of the directors of the judgment-debtor and to have its books of account to be examined. In this regard I find that the applicant has made its case on this issue

15. On the second aspect, the appellant has sought piercing of the corporate veil upon examination of the directors and have them personally liable for the decretal sum. The law on corporate personality was well settled in the celebrated case of *Salomon v Salomon & Co Ltd* (1897) AC 22 HL to the effect that the veil of incorporation will only be lifted in the face of fraud or some other misconduct of equal gravity.

16. 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.”

17. In this case, the applicant has not produced any evidence to demonstrate that the judgment-debtor has been used in committing fraud, improper conduct and criminal activities. It is upon examination of the books of account and the directors that the Court can reach this conclusion. In this regard, the prayer of lifting the veil shall remain in abeyance until the examination is completed.

18. Accordingly, I find that the applicant has made out a case for summoning the directors for examination. I therefore order Maureen Katuku Mukusya and Isabel Wanjiku to attend court at the next hearing to be examined on whether the judgment-debtor has any means of satisfying the decree. The two are required to produce any relevant books of account and other documentary evidence relating to the finances of the judgment-debtor. The costs of the application is to be borne by the judgment-debtor.

It is so ordered.

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

A. MABEYA, FCI Arb

JUDGE

