



**Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Ltd (Civil Miscellaneous Application 549 of 2017) [2024] KEHC 8778 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8778 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL MISCELLANEOUS APPLICATION 549 OF 2017**

**AN ONGERI, J**

**JUNE 27, 2024**

**BETWEEN**

**NGAYWA NGIGI & KIBET ADVOCATES ..... APPLICANT**

**AND**

**INVESCO ASSURANCE COMPANY LTD ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 26/10/2023 brought under Sections 3A, of the [Civil Procedure Act](#) and Orders 22 rule 35, 51 Rule 1 of the [Civil Procedure Rules](#) 2010 seeking the following orders;
  - i. That this application be certified urgent and heard ex parte in the first instance
  - ii. That the Honorable court be pleased to summon in court Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ngang'a for oral examination as to the assets and liabilities of the judgment debtor herein.
  - iii. That this Honorable court be pleased to order Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry NgangA, the Judgment Debtor's directors to produce in court audited books of accounts and all bank statements of the judgment debtor herein.
  - iv. That the court be pleased to grant leave to the Applicant/ Decree Holder to serve summons to attend court and court orders to the directors of the Judgment Debtor namely Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert



Karakacha Muhavani and Henry Ng'ang'a by way of substituted service by advertising in a Daily newspaper.

- v. That the corporate veil of Invesco Assurance Company
- vi. Limited be lifted so that execution proceedings can proceed against the Judgment Debtor's directors personally.
- vii. That in default, the Honorable court be pleased to order Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Ng'ang'a and/or any other director of the Judgment Debtor Company to satisfy the decree herein amounting to Kenya shillings sixty one thousand two hundred and seventy six shillings (Ksh.61,276/=) together with accrued interests and that the execution to issue against them personally in case of default.
- viii. That cost of this application be borne by the Judgment Debtor.

2. It is based on the grounds on the face of it as follows;

- i. That the decree holder obtained judgment and decree against the Judgment Debtor for the sum of Kenya Shillings Sixty One Thousand Two Hundred and Seventy Six Shillings (Kshs.61,276/=)
- ii. That the assets of the Judgment Debtor are likely to have been hidden, transferred and/ or sold to defeat the Decree Holder's claim against it.
- iii. That the aforesaid was done by the directors of the Judgment Debtor herein with a clear intention of defeating the outcome of the application.
- iv. That the Judgment Debtor Company was being run and managed by the aforesaid directors.
- v. That the Judgment debtor's directors know the whereabouts of the assets which the Decree Holder has failed to locate despite due diligence.
- vi. That the examination on oath of the Judgment debtor's directors in necessary to trace and locate their assets and their whereabouts.
- vii. That the Decree Holder does not know the physical address of the directors of the Judgment Debtor.
- viii. That unless the orders sought herein are granted, the Decree Holder shall continue to suffer great injustice.
- ix. That the court has jurisdiction to lift the veil of incorporation of a company and to hold the judgment debtor's directors liable to settle the decretal sum.

3. The application is supported by the affidavit of Joseph Ngugi in which he deposed that the judgement debtor failed to pay thereby necessitating the filing of a bill of costs herein for taxation and the same was taxed on 15/11/2019 in the sum of Kshs. 61, 276 and the applicant obtained a decree on 10/2/2022. The applicant has been unable to execute the said decree and is aware of the judgement Debtor's ability to satisfy the decree due to the fact that the defendant may have transferred, hidden and/or sold most of its properties and assets capable of satisfying the decree.



4. He deponed that to his knowledge, Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani and Henry Nga'nga are the directors running and managing the Judgment debtor company. The said directors know the whereabouts of the judgement debtor's assets which are unable to locate and thus examination on oath in court of the directors of the judgement debtor is necessary to trace the aforementioned assets.
5. He deponed that the judgement debtor is still in business of issuing new insurance policies and collecting premiums but their assets are unknown. This court has jurisdiction to lift the corporate veil of a company and hold the company directors liable to settle the decretal sum decreed against a company where the company is a mask for fraud or improper conduct.
6. The respondents filed a replying affidavit sworn on 6/12/2023 by Peris Gichohi in which she deposed that the applicant has not laid a basis for summoning the defendant's directors to court when the corporate veil of the company has not been lifted. That further there are no provisions in law requiring the defendant avail its books of accounts and statements before the court. The applicant is using the court to conduct investigations on his behalf which is not a role of the court in an adversarial system of law such as in the Kenyan courts.
7. He averred that no fraud has been alleged against the defendant's directors to warrant the court to lift the corporate veil. The fact that the plaintiff has judgement against the defendant does not constitute fraud as the plaintiff is at liberty to execute the decree as provided for in the *civil procedure rules*. The defendant operates from its head office at telkom plaza, Ralph Bunche road in Nairobi and being an insurance company settles numerous decrees on a daily basis and if the defendant is not able to meet its obligation then the plaintiff is free to apply the provisions of the *Insolvency Act*. The application herein thus lacks merit as the applicant/decreed holder has not demonstrated sufficient grounds.
8. The parties filed written submissions as follows; the applicant submitted that the court issued a decree on the 14/2/2022. The said decree was issued following taxed Advocate Client Certified Bill of Costs. The judgement debtor has acknowledged that there is a decree in favour of the applicant but have refused to pay the same. the applicant has been unable to execute the said decree since the defendant may have transferred/ hidden and/or sold most of the property capable to satisfy the said decree. The judgement debtor has not disclosed sufficient reason why they have refused to settle the decretal sum.
9. The applicant submitted that the provisions of Order 22 rule 35 of the *Civil Procedure Rules*, 2010 which allows a motion to be brought in cases where the decree of the court is for money, like in this case, the decree holder can apply to the court for oral examination of any officer of a corporation regarding any assets or debts owing, or other means of satisfying the court decree and for production of books or documents. In support the applicant cited *Justine Nyambu v Jaspa Logistic* [2017] eKLR where the court held that

“For the reason that the law allows for examination of officers of a corporation on credit worthiness of a judgment debtors, I make the order that Sammy Kita and Esther Muthue Mueni attend court and be examined on respondent/judgment debtor's property and/or means of satisfying the decree herein and to produce the respondent's books of accounts and other documentary evidence showing the same before the court. ”
10. The applicant argued that the conduct of the Judgment Debtor warrants their corporate veil to be lifted. The general rule is that a company is a body corporate, with a separate independent identity in law that is distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil as highlighted in the celebrated case of *Salmon and Salmon and Co. Ltd* (1897) A.C. 22HL.



11. The respondent/judgement debtor submitted that it has not refuted the fact that a decree was issued in favor of the Applicant. The issue in fact is the judgment debtor is in a position to pay the said decree but time is what they ask for. It is known that the Applicant herein was put under receivership and only resumed business and they are trying to revive back business and with that in mind, Respondent has been able to pay some monies to the Applicant. The fact that the Applicant herein states that the judgment debtor has neglected, ignored and or refused to pay the same is indeed a malicious accusation as the same judgment debtor has acted in good faith by paying other matters involving the said Applicant to an extent that some of their files have been marked as closed and settled.
12. The respondent/judgement debtor submitted that the applicant has not explored nor exhausted all other avenues to execute and therefore the applicant's prayer for the corporate veil to be lifted are frivolous, vexatious, scandalous and abuse of court process. The Judgment debtor have acted in good faith noting that the Applicant has filed the same application in different court stations and already he has been paid an approximate sum of Kshs. 1,000,000/=. It would therefore be prejudicial to the Judgment debtor if the corporate veil be lifted when clearly there is no illegality or fraud on their part.
13. The sole issue for determination in this ruling is whether the Directors of the judgment debtor should be summoned for examination on the assets and liabilities of the company.
14. I find that the applicant has a judgment which he cannot execute against the judgment debtor company. In the case of *Jones and Another v Lipman & Another* [1962] IWLRL 833 it was held:

“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity”.
15. In the case of *Carey Ngini v Dennis O Ogolla & Another*[2010] eKLR, the court H M Okwengu, as then she was had this to say: -

“And, that it had already disposed of some of its assets, while other assets were attached by auctioneers. As was observed by Ringera J in Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd (supra):

“The veil of incorporation is not to be lifted merely because the company has no assets or is unable to pay its debts and thus insolvent. In such a situation, the law provides a remedy other than the director of the company being saddled with the debts of the company”.
16. In *Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company Limited* [2012] eKLR. In that case the Court expressed itself as follows:

“It is however my view that the lifting of a corporate veil is not the same thing as an application under Order 22 rule 35 of the *Civil Procedure Rules*. In the latter an officer is examined as an agent of the Company while in lifting the corporate veil, the mask of incorporation is lifted with the result that the shareholders are no longer agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity. The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. In other words, the corporation's brain is the Board of Directors who make decisions on behalf of the company.”



17. I find that the applicant is seeking to examine Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadiah Kioko Kavivya, Albert Karakacha Muhavani And Henry Ngang'a on the assets and liabilities of the judgment debtor herein.
18. This not the same as lifting the corporate veil since the directors are examined as agents of the Company.
19. I allow the application dated 26/10/2023 and direct the directors be examination to determine the credit worthiness of the judgment debtor.
20. Summons to issue of the directors of judgment debtor company to appear before this court within 30 days for cross examination.
21. The respondent judgment debtor to bear the costs of this application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

for the Applicant

for the Respondent

