



Silver Construction Limited v Shady Acres Limited (Miscellaneous Application 1168 of 2020) [2025] KEHC 85 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 85 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 1168 OF 2020**

**A MABEYA, J
JANUARY 16, 2025**

BETWEEN

SILVER CONSTRUCTION LIMITED APPLICANT

AND

SHADY ACRES LIMITED RESPONDENT

RULING

1. The applicant moved this Court for conservatory orders pending arbitration. The matter was compromised following a consent recorded before Tuiyot J (as he then was) on 14/12/2020. The consent was to the effect that the respondent would pay to the applicant the amount owing being Kshs. 55,929,120/= within 120 days and that any amount received from the sale of any apartment or unit on LR No. 209/20735 would first be applied towards liquidating the applicant's claim.
2. However, the respondent failed to comply with the consent and the applicant commenced execution proceedings. The matter came up for cross examination of the respondent's directors following the applicant's application dated 2/3/2022. The applicant also filed a Notice to Produce and listed documents that were to be availed during the cross examination.
3. The directors' case was contained in the affidavit of David Muriuki Mambo sworn on 26/10/2023 together with annexures. His wife Rose Mambo is the co-director. Their case was that the contract was for Kshs. 747,000,000/= and that Kshs. 7 million was paid. The project was financed by I&M bank and from presale of units. However, the land registry closed for 2 years to transit to digitization and covid pandemic followed which adversely affected sales and the company's cash flow.
4. That particularly, the bank repayment was affected and the debt ballooned. That they offered the applicant 5 to 6 units of the apartment but the respondent wanted them transferred to it which the



- respondent could not do. The respondent still owed the bank and the partners also rescinded the units. That they did not have any other source to satisfy the debt.
5. David Muriuki Mambo was cross examined on his testimony as contained in the said affidavit. He admitted that he did not produce books of accounts or sales records as well as the records of the apartments legal status listed in the Notice to Produce. That there was also an agreement with Joint ventures and with Ideal Insurance Brokers who were beneficiary of the work done by the applicant.
 6. That the financial statements did not reflect the applicant's debt. He confirmed that sales reflected on the statements were Kshs.1.3 billion covered client's deposits for the year 2021 which increased to Kshs.1.4billion in the year 2022. The amount was given to the bank. That the debit balance was Kshs. 29,201,952/= after they constructed 250 units though the exact number was not known.
 7. He admitted not having produced the payment records. That the respondent had no shares in the project and that the property was registered in the name of Westpointe Reality Ltd and the units offered to the respondent belonged to the said Westpointe Reality Ltd. That the statement of accounts captioned client deposits belonged to the sales by Westpointe Reality Ltd. That the said Westpointe Reality Ltd had filed objection proceedings before this Court.
 8. He stated that the directors of Westpointe Reality Ltd were himself, his wife Rose Mambo and a Mr Makanga. He further stated that he could not produce the statements of the company without the consent of the other directors. That some of the apartments were subject to court orders and that the company also owed other suppliers.
 9. Parties made their submissions on record. The applicant submitted that the directors failed to satisfy the order of the Court on the company's ability to satisfy the debt. That they were evasive on the legal status of the property where the construction took place. The applicant prayed for execution to proceed against the directors.
 10. It was submitted for the directors that the explanation given was sufficient and that failure to pay the decretal sum was not intentional. That the orders sought could only be issued where there is fraud. That the directors operated above board and had paid 90% of the debt. Lastly, that there was no justification to hold them liable for the respondent's debt.
 11. Order 22 Rule 35 (b) and (c) of the Civil Procedure Rules provides that: -

Where a decree is for payment of money, the decree-holder may apply to the court for an order that –

 - a) ...
 - 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.”
 12. The respondent is a limited liability company holding a distinct capacity from its directors. It has capacity to run its affairs, can sue or be sued and it can also hold and own assets. It is expected that the company should settle its own debts.



13. The respondent entered into a consent and agreed to the terms of payment but failed to settle the amount for the past 4 years. The applicant then sought to execute against the directors. In such circumstances, the Court is called upon to disregard the aforesaid corporate personality and have the director's pursued for the company's debt. However, lifting the corporate veil should be done as last resort and for good reasons.
14. In *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR, it was held that: -

“The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”
15. An allegation that the company is unable to settle its debt or does not have assets is not sufficient. In *Corporate Insurance Company Limited vs Savemax Insurance Brokers Limited and Another* [2002] 1 EA 41, it was held that: -

“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. And in *Mugenyi & Company Advocates -vs- The Attorney General* [1999] 2 EA 199, the court listed grounds for lifting the corporate veil to include situations where the device of incorporation is used for some illegal or improper purpose and where the private company is founded on personal relationship between the members.
17. In the present case, the directors did not dispute the debt. Their case was that the respondent relies on the apartment project and sales of units thereon to run its affairs. That the respondent was also settling its liability to the financier bank and had other creditors as listed on the supplementary affidavit. The directors also annexed court pleadings between the respondent and other parties.
18. However, the orders of this Court and the applicant's Notice to Produce required the directors to produce certain documents. The said documents were necessary to assist the Court determine the respondent's liquidity and whether the decree could be settled. Further, the terms of the consent required the defendant to apply and prioritize amounts received from the sale of units towards settling the decree.
19. Firstly, the sale records were not produced before Court to explain the failure to comply with the consent. Secondly, the directors also failed to produce the documents listed in the Notice to Produce which were necessary to show whether the respondent was being run properly or was only a conduit or front for fraud. The failure to adduce the records proves evasion and also lead to a valid conclusion that the evidence, if produced, would be adverse to the directors' case. See section 112 of the [Evidence Act](#), Cap 80 Laws of Kenya.
20. The directors admitted that the respondent had sold some apartments. Their case was that the income was used to settle the bank loan which had ballooned after the Covid 19 pandemic. That might be the case but was contrary to the consent recorded before Court. There was no application to vary the consent and make it subservient to other priority debts. It amounted to a fraud whereby the applicant and the Court were led to believe that the decree would be settled as per its terms.



21. In support of the willful neglect and breach of the consent by the directors, the statements produced and the oral testimony proved that the respondent earned income from clients' deposits to the tune of Kshs 1.3 billion for the year 2021 which increased to Kshs. 1.4 billion in the next financial year. The financial statements produced did not reflect the applicant's debt meaning that the same was not prioritized.
22. The directors claimed that the land and the apartments belonged to Westpointe Reality Limited and that the respondent did not have any shares in the project. This contradicted the earlier testimony that the respondent had given some 5 to 6 units to the applicant. How could the respondent offer units that did not belong to it? Was the offer not a ploy to keep the applicant at bay while the units were being sold to 3rd parties and the proceeds applied for other liabilities other than the decree?
23. At all material times, the respondent had capacity to enter into the contract with the applicant over the construction of the apartments. Why should it now turn around and claim that it has no shares in the apartment? Why is it that the so-called real owners of the project and property, Westpointe Reality Limited, who are also owned by the directors of the respondent plus one other person, did not enter into the construction contract with the applicant but the respondent?
24. The sales records by Westpointe Reality Ltd were not produced. However, from what the Court was told regarding the directors of the said company, it is clear that the directors of the respondent and the said company are the same. There is also credible evidence from the conduct of the directors and the respondent's business that the relationship between the two companies has been used to evade payment of the debt in this case.
25. Lastly, the constrains experienced during the digitization of the land registration process and later the covid 19 pandemic are irrelevant. The claim of force majeure is also remote. The directors did not show that the applicant was advised of any financial constraints and how the same was being surmounted. There was also no proof that the respondent made any efforts to settle or offset the decree.
26. The circumstances of this case and the evidence produced demonstrate substantial grounds and proves illegality, breach and impropriety necessitating the court to lift the corporate veil. Accordingly, the applicant's application succeeds as prayed with costs.

It is so ordered.

SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

