

KENYA / JUDGMENT

## OMR Medikal Turkish Limited v Asterisk (K) Limited; MSM Medical Equipments Limited (Objector); Icon Auctioneers (Third party) [2025] KEHC 10662 (KLR)

[2025] KEHC 10662 (KLR)

COURT

High Court

BEFORE

F Gikonyo

CASE / FILE NUMBER

Civil Case 104 of 2019

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OMR Medikal Turkish Limited v Asterisk (K) Limited; MSM Medical Equipments Limited (Objector); Icon Auctioneers (Third party) (Civil Case 104 of 2019) [2025] KEHC 10662 (KLR) (Commercial and Tax) (3 July 2025) (Ruling)

Neutral citation:

[2025] KEHC 10662 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts)

Commercial and Tax

Civil Case 104 of 2019

F Gikonyo, J

July 3, 2025

(FORMERLY CMCC NO. 117 OF 2017)

Between

OMR Medikal Turkish Limited

Plaintiff

and

Asterisk (K) Limited

Defendant

and

MSM Medical Equipments Limited

Objector

and

Icon Auctioneers

Third party

## Ruling

### Examination of directors and lifting of corporate veil

1. The applicant/ plaintiff/ decree holder filed the notice of motion dated 20th May 2024, seeking:-1. That summons be issued by this honourable court compelling Dipen Moraraji Rajani, Kkeyur Morarji Rajani & Shantilal Khimji Shah all of P. O. Box Number 49448-100 Nairobi being the directors and secretary of the judgment debtor to attend court at such date as shall be directed by the Honourable court to be orally examined on oath as the judgement debtor's means and assets in its possession or in possession of other third parties to satisfy the decretal sum herein pursuant to the decree issued by this Honourable court dated 15th November 2023. 2.That the said directors and company secretary of the judgement debtor be ordered to produce the judgement debtor's books of audited accounts, bank statements of accounts, cheque books and all other documents and or evidence relating to the financial affairs of the company between August 2016 and 2024 or such other period as may be directed by the court.3. That in default of such attendance and or providing suitable means and assets for the satisfaction of the decree of this honourable court, this honourable court be pleased to lift the corporate veil of the judgment debtor and hold that its directors Dipen Morarji Rajani, Keyur Morarji Rajani be jointly and severally personally liable to satisfy the decree of the court in full.
2. The grounds are that:-1. On 16th December 2022, Mabeya J delivered judgment in favour of the applicant relating to a contract where the respondent failed to supply branded medical equipment despite having received a deposit, and was consequently ordered to refund the said monies.2. The respondent's advocates were served with the judgment and decree by the applicant's former advocates, F. K. Cheluget & Co. Advocates, and, the same were later served via the respondent's known email address used in previous correspondences, but the respondent has refused, declined, or out rightly ignored the orders of this court for over six (6) months.3. Icon Auctioneers, instructed by the applicant, proclaimed assets at the respondent's last known premises to recover the decretal sum, but objection proceedings were filed by MSM Medical Equipment Ltd, indicating that the respondent is no longer in occupation of the premises.4. To date, the respondent's address is unknown, frustrating the

applicant's attempts to enjoy the fruits of the judgment.<sup>5</sup> The applicant has noticed from MSM Medical Equipment Ltd's official website that Dipen Morarji Rajani is its CEO and is also a director of the respondent, leading to a reasonable belief that the two entities have fraudulently connived to delay or defeat the decree by transferring premises and assets.<sup>6</sup> It is in the interest of justice and the overriding objective of the court that the orders sought herein be granted and the application be heard urgently.

3. The applicant asserted that the three officials of the respondent should be summoned for oral examination as to whether the judgment debtor has any property or means to satisfy the decree.
4. The applicant relied on Order 22 Rule 35 of the Civil Procedure Rules, which permits the court to summon a judgment debtor, or in the case of a corporation, any officer thereof, or any other person to be orally examined concerning the debtor's means and property.
5. The applicant submitted that the named officials are the controlling minds of the company and are best placed to provide the necessary disclosure. Summoning them would enable the court to trace the debtor's assets and determine whether execution can be carried out successfully.
6. The applicant urged the court to lift the corporate veil and hold the company's officials personally liable. It was submitted that court orders should not be rendered in vain, and that allowing the judgment debtor and its officials to escape accountability would reduce the court's work to a mere academic exercise.
7. The applicant relied on:-1. Samuel Ojwang Juma v Sapphire Collections Limited (2021) eKLR<sup>2</sup>. Wainaina v Adrian Company Limited (Cause 1390 of 2014) [2023] KEELRC 11783. Ultimate Laboratories v Tasha B Loservice Limited (NBI HCCC No 1287 of 2000)<sup>4</sup>. Salomon v Salomon & Co. Ltd [1897] AC 785. Victor Mabachi & Another v Nurtturn Bates Ltd [2013] eKLR<sup>6</sup>. Riccatti Business College of East Africa Ltd v Kyanzavi Farmers Co. Ltd [2016] eKLR<sup>7</sup>. Makuto v Almakony Limited & Another [2016] eKLR<sup>8</sup>. Arun C. Sharma v Ashana Raikundalia & 5 Others (2015) eKLR<sup>9</sup>. Jiang Nan Xiang v Cok Fas-st Company Limited [2018] eKLR<sup>10</sup>. Justine Nyambu v Jaspa Logistic [2017] eKLR

## Response

8. The company secretary filed written submissions dated 10th February 2025. He submitted that none of the functions of a certified public secretary speaks to the capacity of a company secretary to manage or interfere with a company's books of accounts and management functions. He pointed out that as per the engagement letter dated 4th November 2015, his role was strictly limited to annual compliance, ad hoc services, meeting duties (AGMs, BODs and EOGMs), other secretarial services, and legal services.

9. The company secretary contended that the circumstances of this case do not fit with the specific instances where lifting the veil may be justified. Thus, he submitted that the applicant has not shown sufficient reason to warrant the prayers sought in the application and prayed that the said application be dismissed with costs.
10. The company secretary relied on:-1. Ultimate Laboratories v. Tasha Bioservice Limited, Nairobi HCCC No. 1287 of 20002. Koloba Enterprises Limited v. Shamsudin Hussein Varvani & Another [2014] eKLR3. Mugenyi & Company Advocates v. The Attorney General [1999] 2 EA 1994. Salomon v. Salomon & Co. Ltd [1897] AC 22 (HL)

## Reply

11. In reply, the applicant filed a further affidavit sworn by its general manager, Mustafa Kemal Akin. He clarified that the applicant never claimed Mr. Shah was a director, only that she was the certified secretary.
12. Mr. Akin contended that Mr. Shah's allegation of a "dwindling professional relationship" is unsubstantiated, and the timing of her resignation indicates an intent to avoid her obligations as an officer of the company. He asserted that, as company secretary, Mr. Shah had custody of important documents and acted as the company's contact person, and was therefore expected to assist the court with information on the respondent.
13. Mr. Akin reiterated that the application does not seek to hold Mr. Shah personally liable, but merely to have him appear in court in his official capacity. He disputed the claim that the company secretary was an ordinary third party. He argued that his role carried a duty to communicate on the company's behalf and provide relevant documentation.
14. Mr. Akin stated that the withholding of basic information, such as the respondent's location, had frustrated enforcement of the decree. He thus urged that the company secretary and directors should be summoned to provide information and documents necessary for the satisfaction of the decree and the ends of justice

## Analysis and Determination

15. The issues for determination are whether the respondent's officials ought to produce the requisite documents or be summoned for oral examination in respect to the company's ability or means to satisfy the decree, and whether the veil of incorporation should be lifted and directors held liable.
16. It is not disputed that through a judgment dated 16th December 2022, the court entered judgment in favour of the applicant against the respondent for Euros. 155,023. 59, and a decree issued. It is also not disputed that the party and party bill of costs was taxed at Kshs. 2,069,498. The decree remains unsatisfied, despite service of the decree and steps taken to execute.

## Oral examination

17. The first issue is whether the respondent's officials ought to produce the requisite documents and be summoned for oral examination in respect to the company's ability or means to satisfy the decree.
18. Order 22 Rule 35(b) and (c) of the Civil Procedure Rules entitles the Court to order the examination of a director of a judgment-debtor company or any officer thereof in Court to provide answers in respect to the company's ability or means to satisfy the decree.
19. The respondent's advocates were served with the judgment and decree by the applicant's former advocates, F. K. Cheluget & Co. Advocates. Subsequently, service was effected upon the respondent through its known email address. However, the respondent failed to comply. The applicant then obtained warrants of attachment and sale over the respondent's goods.
20. The applicant then instructed Icon Auctioneers to proclaim the respondent's assets at the respondent's premises to recover the decretal sum. However, MSM Medical Equipment Ltd, filed a notice of objection and an application to raise the proclamation, claiming ownership of the proclaimed goods and that it was the occupant of the premises at which the auctioneer proclaimed the goods.
21. In response to the objection application, Icon Auctioneers filed a replying affidavit sworn by its director, Jeremiah Kiarie Muchendu. The auctioneer's stated that it established that the respondent had relocated to new offices at the Industrial Area from its previously known address on Kirinyaga Road; that it was directed to the premises known as "Asterisk," which, according to neighbouring businesses, operates under that name and receives guests accordingly and that upon an online search, it was noted that Dipen Morarji Rajani, a director of the 2nd respondent, is listed on the website of the objector as its Chief Executive Officer.
22. The objector claimed that the auctioneer was mistaken as to the identity of the respondent and its place of business. It also claimed that the respondent was an absolute stranger to it and that the premises upon which the auctioneer issued the proclamation notice were owned by it.
23. The court found that the objector failed to establish that it owned the proclaimed goods because the import declaration forms were not conclusive, and there was no indication that the forms were for the goods proclaimed. The court also remarked that the claims that the objector does not know the respondent and that the auctioneer mistook its identity with that of the respondent and its place of business were doubtful.
24. The applicant alluded to the collusion between the objector and the judgment debtor to frustrate the execution process by transferring assets and office premises from the judgment debtor to the objector and altering signage to conceal the identity of the actual occupant.

25. The applicant pointed out that a CR12 showed that the objector's registered physical address was Nairobi West District, Bukani Road Building, Plot 209, not the premises at which the auctioneer proclaimed the goods.
26. The applicant urged the court to summon the said director to explain the relationship between the two companies.

### **Company secretary**

27. The company secretary asserted that he had no access to the company's books of accounts or management of their affairs in any way whatsoever. He also asserted that he is not privy to any information or details that will aid the applicant in pursuit of settlement of the decretal amount.
28. The company secretary suggested that the applicant can refer to Form CR12, which contains the physical address of the company. He underlined that he resigned on 10th June 2024, and submitted that this was not malicious nor a means to evade any professional responsibility.
29. The applicant countered that although the company secretary claims to have resigned on 10th June 2024, the application was served on him on 6th June 2024, while he was still the company secretary. It produced a CR12 confirming this. It indicated that his resignation was done in bad faith after service of the application, to aid the directors in defeating the proceedings.
30. As noted above, the court has power to summon or order the examination of a director of a judgment-debtor company or any officer thereof under Order 22 Rule 35(b) and (c) of the Civil Procedure Rules. I note that the applicant does not seek to hold the company secretary personally liable. The applicant has raised questions regarding the company's registered official address which the company secretary is privy to.
31. Therefore, I reject the company secretary's assertion that he is not privy to any information or details that will aid the applicant in pursuit of settlement of the decretal amount.
32. Further, in my view, the date of resignation shows that the company secretary was an official of the respondent during the relevant period. The fact that he has resigned does not prevent the court from summoning him for oral examination regarding matters arising during his term as an official. It is immaterial whether he was served before or after his resignation.
33. From the above and the material on the record, I am satisfied that the applicant has made out a case to summon the respondent's officials for oral examination.

### **Lifting of the corporate veil**

34. The company secretary contended that the circumstances of this case do not fit with the specific instances where lifting the veil may be justified.

35. I am alive to the doctrine of separate legal personality of a company established in *Salomon & Co Ltd v Salomon* [1897] A.C. 22 to the effect that a company is separate and legal entity from its directors. However, I am also cognizant that, as noted in *Arun .C. Sharma v Ashana Raikundalia & 5 others* [2015] KEHC 5039 (KLR) (“Arun case”):-“the artificial person ‘created’ in *Salomon v Salomon* exists only in contemplation of law and does not possess the body of a natural person. It must act, and does act, through human persons—namely, the directors, officers, shareholders, and corporate managers. As time passed, the law developed the doctrine of lifting or piercing the corporate veil, which entails going behind the veil of incorporation to identify the individuals who are the real beneficiaries of the corporate advantages.”
36. The court in *Arun case* [supra] further affirmed that the veil may be lifted not only where there is fraud or improper conduct, but also in “instances where the character of the company or the nature of the persons who control it is a relevant feature.”
37. From the foregoing, I am satisfied that in this case, the nature of the persons who control the respondent is a relevant feature. Therefore, the applicant has laid down a credible basis for the lifting of the corporate veil.

## Disposal

38. Accordingly, the application dated 20th May 2024 is allowed in the following terms:-1. The respondent’s directors and secretary, Dipen Moraraji Rajani, Kkeyur Moraraji Rajani & Shantilal Khimji Shah, to produce the respondent’s books of audited accounts, bank statements, cheque books and all other documents and or evidence relating to the financial affairs of the company between August 2016 and 2024 within 30 days from the date of this ruling.2. The respondent’s directors and secretary, Dipen Moraraji Rajani, Kkeyur Moraraji Rajani & Shantilal Khimji Shah, to personally attend court and be examined on the respondent’s property and means of satisfying the decree.3. Failure or depending on order (2) above, the directors Dipen Moraraji Rajani, Keyur Moraraji Rajani shall be jointly and severally personally liable to satisfy the decree of the court in full.4. Costs of this application are awarded to the applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 3RD DAY OF JULY, 2025. ....F. GIKONYO M.JUDGEIn the presence of: -1. Oduor for Ms. Akoko for Decree Holder2. Ms. Mwaniki for defendant3. Anyona for Manwa for Objector4. Kinyua C/A

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Prepared on 14 October 2026 · Esheria