



**Ukwala Supermarkets Limited v Shah & another (Civil Case  
7 of 2016) [2023] KEHC 198 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 198 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 7 OF 2016  
RN NYAKUNDI, J  
JANUARY 24, 2023**

**BETWEEN**

**UKWALA SUPERMARKETS LIMITED ..... PLAINTIFF**

**AND**

**JAIDEEP SHAH ..... 1<sup>ST</sup> DEFENDANT**

**KAMAL SHAH ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant approached this court vide a notice of motion application dated March 23, 2021 seeking the following orders;
  - a. Spent
  - b. This honourable court do lift the corporate veil of incorporation of the plaintiff and issue summons to Shah Rohit Maganlal, Anilkumar Kliimji Haria, Sandeep Kumar Nemchand Shahl, Mansukh Premchand Shah, Dodhia Vijay Jayntilal and Manish Nemchand Shah all the Directors of the Plaintiff/Judgment Debtor to show cause why they should not be committed to civil jail for failure to pay Kshs. 8, 721, 526 being the decretal sum plus accrued interest and costs of this suit.
  - c. Costs of this application be borne by the plaintiff/judgment debtor
2. The application is premised on the grounds set out therein and the supporting affidavit to said application.
3. A brief summary of the facts is that this honourable court entered judgment in favour of the defendants for the sum of Kshs. 5 Million costs of the suit and interest. Warrants of attachment of sale were thereafter issued to Saddabri Auctioneers for execution against the plaintiff. The Auctioneer proceeded to proclaim and attach the plaintiffs property recovered a total sum of kshs. 551, 382 from the sale by



auction of the plaintiffs attached goods. The applicants, allege that the plaintiffs' directors are disposing off of the assets of the plaintiff with an intention to leave the jurisdiction of the court hence they filing of the present application.

### **Applicant's Case**

4. The applicant contends that at the time of attachment, the plaintiffs directors had already started the process of transferring some of the plaintiffs properties to third parties and companies affiliated to them. the deponent further averred that this fact was brought to the attention of this honourable court. the move to cart away the attached goods amounted to a calculated move to frustrate the defendant's process of execution and to defeat the execution of the decree of this honourable court. The defendants have demonstrated how the plaintiffs Directors carted away goods that had been attached and proclaimed.
5. In the replying affidavit of Dennis Kirui dated 18/5/2020, a licensed class B auctioneer trading as Saddabri Auctioneers deponed that he obtained warrants of attachment and sale against the plaintiff and proceeded to proclaim and attach the plaintiff goods situated at the plaintiffs oloo street and uganda road Branches. However, upon expiry of the proclamation notice, he realized that the plaintiff debtor had carried away most of the proclaimed properties and taken them out of reach of the auctioneer and closed the said shops. the defendants submitted that goods or property once attached cannot be recalled and placed in the pool of assets belonging to the plaintiff as was held in the case of *Daniel Njuguna Chege & 4 others v Tusker Mattresses* [2021] eKLR. The defendants further rely on the provisions of Rule 14 of the *Auctioneers rules* 1997 which provide that;
6. A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.
7. The defendants also cited the case of *Joseph Isagi Nyando v Imagine IMC Ltd* [2018] eKLR where the court pierced the corporate veil of the judgment debtor where the judgment debtor actively concealed its property after proclamation and attachment so as to defeat execution of decree.
8. The objector has numerously argued that the defendants caused his personal property being motor vehicle registration number KBZ 043T to be sold. The defendants however maintain that the said motor vehicle was registered in the name of the plaintiff at the time of attachment and was only transferred to the name of the objector who is a director of the plaintiff on 18/11/2019 as per the copy of the log book annexed to the affidavit of Anilkumar Haria. The objector has not cared to offer an explanation as to how the said plaintiffs property came to his possession when the search conducted by the auctioneer during attachment of the plaintiffs' assets indicated that the said motor vehicle was registered in the name of the plaintiff.
9. The applicant submitted that the transfer of the said motor vehicle to the objector, who is also one of the plaintiffs Directors, is just but one of the examples of how the plaintiffs Directors fraudulently transferred the plaintiffs assets by way of secretive agreements to themselves and other companies affiliated to themselves. Being a director of the plaintiff, he is only entitled to the ownership of his shareholding in the company otherwise he is not entitled to any of the plaintiffs property as was held in the celebrated case of *Macaoura v Northern Assurance Co Ltd* (1925) AC 615.
10. In response to the claims that the plaintiff has been wound up and therefore the orders sought are not tenable and in response, the defendants submitted that the fact that the powers of the directors have



been suspended does not confer wanton impunity to be carried out with little regard to the law and the creditors who they are answerable to.

11. It is the applicant's case that the Directors abused the corporate personality of the judgment debtor and have continued to use the veil of corporation as a shield to commit fraud against the defendants who are creditors and therefore the said corporate veil ought to be lifted and the said directors be held liable for the fraud committed against the plaintiff and the creditors. Fraud is one of the grounds that a company's veil of corporation can be lifted as per *Gower's Principles of Modern Company Law* 4th Edition at pages 136 to 138 that corporate identity of a company can be pierced in the interest of the company's creditors where the company has not complied with certain provisions of the *Companies Act* which, historically, were regarded as essential conditions of incorporation or where a company has traded fraudulently.
12. They sought the prayers in the application be granted as prayed.

### **Respondent's Case**

13. The respondent opposed the application vide a replying affidavit. It is the respondent's case that the defendants have not disclosed all the goods repossessed from the plaintiff's Branches which goods are valued at over 30,000,000/= (thirty million) as confirmed by the inventory on record.
14. The orders sought are not legally tenable as the plaintiff is under liquidation and the present application has not sought leave to enjoin the liquidator. Further, that the court is yet to make directions on the inventory filed as well as the objection in order to determine the disputed amounts and the illegal sale of the said motor vehicle registration number KBZ 403T, pending the determination of the objection on record.
15. A perusal of the accounts filed by Saddabri Auctioneers confirm an extreme undervaluation of the properties repossessed with the aim of the defendants unjustly enriching themselves at the expense of justice. Further, the amount claimed by the defendants in the instant application is in dispute in light of the goods already repossessed by the defendants valued at over 30 million Kshs. The respondent contended that no evidence on the alleged sale of the plaintiff's properties has been provided to corroborate those allegations. Furthermore, the defendants already repossessed all the properties belonging to the plaintiff including fixtures forcing it to move the court for liquidation.
16. The plaintiff having been wound up, the defendants can only seek their recourse, if any, through the Liquidator and not through lifting the corporate veil as they seek through their instant application. Further, there is no evidence to confirm that the Directors are indeed intending to leave the jurisdiction of this court as alluded or at all.
17. The respondent prayed the court dismiss the application with costs.
18. Upon considering the application, affidavits sworn by both parties and the submissions, I find that the following issue arises for determination;

### **Whether the court should lift the corporate veil**

19. The main prayer sought by the applicant is the lifting of the corporate veil.
20. The law is settled on the circumstances under which an order to lift the corporate veil can be issued. *Halsbury's Laws of England* (4th Ed) at para 90 summarizes the principles governing the lifting of the corporate veil as follows: -
  90. Piercing the corporate veil.



Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced."

21. This court is alive to the distinct nature of a corporation and its members as was espoused in the celebrated decision of *Salomon v Salomon & Co* (1897) AC 22 where Lord Macnaghten stated as follows:
22. The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act. That a the body of corporate is a separate entity from its members, led to the use of phrase the veil of incorporation which is said to hang between the company and its members and in law at least act as a screen between them. Similarly, a company as a juristic person, separate from its members and its property is not the property of its members; its debts are not the debts of its members; and have perpetual succession. The independent legal status of the corporate entity is said to cast a veil between the company and its human constituents termed as the corporate veil.
23. Generally, courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:
  - a. First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
  - b. Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice. (See *Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd* [2021] eKLR).
24. In the present case, the applicant contends that the main ground to be relied upon is fraud. In *Pamba Ong'weno Amila v John Juma Kutolo* [2015] eKLR where the court stated that:

Fraud is a conclusion of law. The facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent.... We also bear in mind that allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt."
25. The actions amounting to fraud that the applicants allege involve the disposal of assets that were part of the company's property as at the time the decree was passed. I have perused the applicants' supporting affidavit dated 24/3/21 and the further affidavit dated 15/7/202.
26. From the annexures and deponements, there is no evidence provided to substantiate the claims of disposal of assets. It is trite law that he who alleges must prove. A perusal of the record of the court shows the complete opposite of proof of fraud. It is not enough to allege that one is aware of fraud,



there must be evidence tendered in court to buttress the claim. The court of Appeal in the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eKLR cited with approval of the case of *Vijay Mairaria v Nasingh Madhusing Darba & another* (2000) eKLR, where Tunoi, JA. (as he then was) stated as follows:

it is well established that fraud must be specifically pleaded that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

27. The fundamental point, is that a company has a juristic person is separate from its members and its property is not the property of its members, its debts are not the debts of its members or directors. Here what is more typical in this motion is an allegation that the directors of the company engaged in acts of entering into some transactions which amounted to fraud in the sense of disposing the assets which impacted the company’s operations. A more underlined question is the extent to which the conduct of the directors accounted to fraudulent intentions and purposes. Given the accepted common law formulation of the requirement of directors, that the proper test in the absence of the actual separate consideration must be whether an intelligent and honest man in the position of the impugned directors concerned could have reasonably believed that the transactions were to defeat the execution of the decree.
28. This fundamental common law principles was perhaps most famously stated by Lord Herschel in *Bray v Ford* (1886) AC. It is an inflexible rule of a court of equity that a person in a fiduciary position is not, unless otherwise expressly provided entitled to make a profit he not followed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is founded to me upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger in such circumstances of the person holding a fiduciary position being swayed by interest rather than by duty. And thus prejudicing those he was bound to protect. It has therefore, been deemed expedient to law down this positive rule.”
29. In the case at bar it has been argued that the directors exploitation of cooperate property was fir their own use to the exclusion of the company benefit. Although at a broad level it can be deduced from the averments in regard to the conferred obligations under the *Auctioneers Act*, the structure of the company as it existed is a little more complex given the fact of being under receivership. Therefore, piercing the corporate veil which is the legal jargon used to describe an action pursued against the company that ultimately this personal liability of the owners or directors runs perfectly into problems in view of the provisions on the powers of a receiver manager. It opens the room to find out the real owners of the company in order for them to accountable for the acts and omissions as the directing minds of the company. Given the range of notifiable interest for a company under receivership some exceptions needed to be provided in the interest of piercing the vail of the incorporated companies allegedly in the notice of motion. The strength of this argument has to be weighed against the fact that the company may not recover its lose from the directors unless in exceptional circumstances. It might not serve the best interest of justice to lift the corporate veil to hold the directors personally liable for corporate transgressions already stated to be under receivership.
30. The upshot of the foregoing is that the applicant has failed to prove the allegations of fraud and consequently, the prayer for lifting of the corporate veil cannot be granted.
31. The application is dismissed with costs to the respondent.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF JANUARY, 2023.**

**R. NYAKUNDI**

**JUDGE**

