



**J.G. Kariuki t/a Gachiri Kariuki & Company Advocates v Voi
Development Company Ltd (Miscellaneous Civil Application
373 of 2014) [2023] KEHC 2783 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 373 OF 2014**

DKN MAGARE, J

MARCH 29, 2023

**SERVICE RENDERED IN MOMBASA HCCC NO. 308 OF 2007
AGAM INVESTMENT LTD – VERSUS-VOI DEVELOPMENT
COMPANY LIMITED AND 2 OTHERS**

BETWEEN

**J.G. KARIUKI T/A GACHIRI KARIUKI & COMPANY
ADVOCATES APPLICANT**

AND

VOI DEVELOPMENT COMPANY LTD RESPONDENT

(Hon Justice P.J.O Otieno J, on December 4, 2020)

RULING

1. This is a relatively straight forward application. There is a decree of this court adjudging Voi Development company limited as liable to pay the applicant fees as taxed by the taxing master and adopted as the order of this court.
2. The applicant had his fees taxed as between advocate and client. This court, Hon Justice P.J.O Otieno J, on December 4, 2020 in a reference allowed a reference to substitute a sum of Kshs 240,3000.58 for a proper figure of 2,748,048.40. He also awarded costs of 15,000/= to the applicant for the reference. A certificate of costs was issued on December 16, 2002. It was later confirmed as a decree of the court on April 13, 2021.
3. After futile attempts to execute, the applicant made an application for issuance of summons to the three directors : -



1. Eliud Timothy Mwamunga
 2. Dr Lalitchandra Dwarkadas Kotak, and
 3. Vinu Ranji Shah
4. These were directors listed in CR 12 dated December 6, 2022. There are other shareholders listed but the directors including the three summoned and 2 company shareholders, that is: -
1. Kalinga Investments Ltd of P O Box 49201 GPO Nairobi.
 2. Ndarsa Ranch Ltd of P O Box 5109 Ltd.
 3. Eliud Timothy Mwamunga
 4. Dr Lalitchandra Dwarkadas Kotak, and
 5. Vinu Ranji Shah
5. The parties argued the application before me, wherein I allowed prayer 2, which facilitated the directors Dr Lalitchandria Dwarkadas Kotak and Vinu Ramji Shah to be examined. On examination Vinu Ramji Shah, did not provide evidence of his resigning from the company. Indeed Dr Lalitchandra Kotak confirmed he has never accepted the resignation of Vinu Ramji Shah.
6. On the other hand, Dr Lalitchandria Dwarkadas Kotak confirmed that he together with Vinu Ramji Shah and Eliud Timothy Mwamunga found the company. He did not till then know that he was a director. He blames the fraud in the company on a third party. He also attributes his and the companies woes to Eliud Timothy Mwamunga.
7. According to the parties Eliud Timothy Mwamunga is deceased and has been dead for some time. I could not understand how he continues to perpetuate fraud from beyond his grave. The parties were less than candid to me. Mr Vinu Ramji Shah's address and plot number are used as the registered office of the company. However, there is no physical location of the company. Further he has his brother in the company.
8. Further, Dr Lalitchandria Dwarkadas Kotak is the majority shareholder. I note the dispute is over property worthy at the time at Kshs 92,000,000/=. It is unfathomable that these deals could proceed without their involvement. How a company can operate property worthy that amount without a bank account, fixed office or regular meeting of directors and ultimately shareholders is beyond imagination.
9. When Robert Shaban wrote *Kusadikika*¹, a novel on an imaginary country, he had not seen Voi Development Company Limited. This is a mammoth company, where no one who ought to know knows and what is or what ought to be is what never was. The applicant does not need to worry any more. Even the people that I will be dealing with don't need to worry, there is enough indemnity to go round.
10. The directors confirm that the company is a shell, in that it is not trade, does not have books of account, one director was placing company funds in a private account. This therefore present to me a classic case of a sham company. A vehicle for collecting funds and not passing to creditors or paying the company creditors. a cardinal rule is that one must seek their creditors and pay them.
11. It is the obligation of the debtor to look of and pay the creditors. The directors don't seem to know or don't want to know dealings of the company. It makes no difference in either case. The company

¹ Robert, Shaaban , "Kusadikika: nchi iliyo angani [Kusadikika, a country in the heavens]," *KU Libraries Exhibits*, accessed March 22, 2023, <https://exhibits.lib.ku.edu/items/show/6032>.



must respect the veil of corporation by acting separately from the company's comingling company and private funds is recipe for chaos and mayhem

12. In *Salomon v Salomon & Co* (1897) AC 22 Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words: -

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.

13. The House of Lords provided that incorporation creates and protected the separate legal entity. However, with time it was discovered that the separate entity can be abused.

“The veil of incorporation ensures that the shareholders are separate from the company. However, where directors do not separate their interests and perpetuate from in the name of the company, the court is entitled to lift the corporate veil to find fraudsters behind the company in *Protus Opwora Wabwoto v Ken Manda & 2 others* [2020] eKLR, the court was of the view that: -

“From the evidence, it is clear that in reality it is the 2nd respondent rather than the company that perpetuated the fraud. I am, therefore, satisfied that it is the 2nd respondent and others who were the relevant actors behind the veil of Kevina Trading. I, therefore, find that this is a fit case for the court to lift the veil of Kevina Trading Company and find the 2nd respondent Adriano Manda liable for the satisfaction of the decree in Bungoma civil case No 269 of 2005.”

14. Evidence available so far is that the respondent though the directors were defrauding creditors though the company. It is not the company perpetuating the fraud but the directors. Some of the directors perpetuated defraud on the creditors, in particular the applicant in this case, the respondent is a shell, sham for perpetration of fraud against unsuspecting creditors and service provide. Here are thus occasions when the corporate veil must be pierced . in *The Halsbury's Laws of England*, 4thEdn para. 90; addresses the issue of piercing the veil of incorporation and states that;

“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 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 lifted”



15. In *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR, the court stated that it is not every company that is unable to pay its debt that piercing of the corporate veil is done. It is in only limited instances. The court stated as doth; -

“From this proposition every company has its own separate legal personality and identity separate to the identity of directors, shareholders, subsidiary and parent companies. Piercing the corporate veil means disregarding the separate personality of a company. As demonstrated in *Mugenyi* (supra) case to pierce the corporate veil is only permitted in very limited circumstances. Similarly in *KT & T Development Pty Ltd v Tay* (Unreported, Parker J, Supreme Court of Western Australia, 23 January 1995), that: “The selection of an incorporated entity as the vehicle for that endeavour brings with it the consequences of the vehicle. The most significant of those consequences...are that the company has a separate legal existence from its shareholders and that the ownership of shares in the company, while potentially valuable, does not give the shareholders any proprietary interest in the property of the company...”

25. In *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & another* (2014)eKLR

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] AC 22 HL that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of 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. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”

16. In *Kenya Bus Services Limited & 4 others v Mwaura Karuga t/a Limit Enterprises* [2019] eKLR, the court, Mary Kasango stated,

“The Court of Appeal in the case *Charles Ray Makuto* (supra) had this to say on incorporation, which can assist in this case:

“It is long-standing legal principle that a company is in law a separate person distinct from its members. (See *Salomon v Salomon* (1897) AC 78.) In *Victor Mabachi & Another v Nurtorn Bates Ltd* civil appeal No 247 of 2005 (2013) eKLR. The court held that a company “as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.” For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lifting of the veil is a question of fact in each case.”

17. The directors who attended, without any sense of remorse or shame admitted each and every ingredient that made the company a sham. It is a farce without more. It has no fixed office, no employees, account



- or any wealth. It has however, transacted land worth over 92 million. The money did not go to the company accounts. According to the directors, receipts are issued in the name of the company but money goes to private hands.
18. Either the directors were naïve or not up to their task. Their testimony was good material for fiction stories. I am therefore constrained to pierce the veil of incorporation to view the persons and faces represented by the company.
 19. Whereas piercing the veil will reveal all the directors, for now the most visible are 3. However, given that the cleverest of fraudsters do not expose themselves, the companies and directors of companies that are directors have their hinds exposed. There is no veil of incorporation to cover them the wind has blown and shone on their nakedness. They shall remain liable directly to settle the debt herein.
 20. There was postulation that Eliud Mwamunga is deceased. I did not see evidence of the death but I can take judicial notice that, the same may have happened. I am also not aware whether the estate has been succeeded. It will be unfair to exclude any of the directors of this sham corporation. I therefore direct that the veil of incorporation of Voi Development Corporation be pierced and reveals the directors namely: -
 - a. Kalinga Investments Ltd of P O Box xxxx GPO Nairobi.
 - b. Ndarsa Ranch Ltd of P O Box xxxx Ltd.
 - c. Eliud Timothy Mwamunga
 - d. Dr. Lalitchandra Dwarkadas Kotak, and
 - e. Vinu Ranji Shah
 21. These companies are aware that they are directors in a sham company. They have thus hidden themselves without exposing their hand. If I have to believe Dr Lalitchandra Dwarkadas Kotak, there has never been a meeting of the company. Who are these companies who added themselves to the respondent company?
 22. After lifting the corporate veil, the following will remain exposed and their properties and person will be liable to the fullest extent for attachment or arrest to meet both the applicant's decree, interest and costs but also the execution fees on scale and auctioneers charges, jointly and severally: -
 - a. The estate of the Eliud Timothy Mwamunga(deceased), where this debt will rank in priority. The administrators are at liberty to apply.
 - b. Dr Lalitchandra Dwarkadas Kotak
 - c. Vinu Ranji Shah
 - d. Kalinga Investments Ltd of P O Box xxxx GPO Nairobi together with its directors who are or between the date of the decree in the primary suit and now, excluding directors who were not directors between the date the date of the primary decree and the date the company became a director.
 - e. Ndarsa Ranch Ltd of P O Box xxxx Ltd together with its directors who are or between the date of the decree in the primary suit and now, excluding directors who were not directors between the date the date of the primary decree and the date the company became a director in Voi Development Limited.
 23. At the first instance those directors who shall shoulder to shoulder the burden of the judgment herein.



24. Given the extent of fraud on the applicant by the company and its directors, the order piercing the veil of incorporation does not only pierce the respondent but the companies who are directors of the respondent. In proceeding for execution, the applicant shall proceed as if the directors of the companies who are directors are directors directly and those director companies are partnership. In such a case, it will not make a difference whether execution is against the director companies or their directors.
25. The veil shall remain pierced for any subsequent proceedings parties may lodge.
26. Given the enormous costs used in this application for lifting the corporation veil, the applicant is given costs of 90,000/= for the application. This is because the application was literally a mini hearing.

Determination

27. I therefore make the following orders: -
 - a. Voi Development Company Limited is a shell, a sham and a conduit for defrauding creditors without an office, a bank account, known assets, books of account and with shadowy directors.
 - b. The veil of incorporation of Voi Development Company Limited is hereby pierced exposing the directors liable, jointly and severally to settle the applicant's costs, decree and any auctioneer's and execution costs.
 - c. The following are liable to settle the entire decretal of Kshs 2,748,048.40, costs of 15,000/=, costs of this application of Kshs 90,000/= together with interest the deputy registrar may certify, auctioneers costs and other auxiliary costs: -
 - i. The estate of the Eliud Timothy Mwamunga(deceased), where this debt will rank in priority. The administrators are at liberty to apply.
 - ii. Dr Lalitchandra Dwarkadas Kotak
 - iii. Vinu Ramji Shah
 - iv. Kalinga Investments Ltd of P O Box xxxxx GPO Nairobi together with its directors who are or there between the date of the decree in the primary suit and now, excluding directors who were not directors between the date the date of the primary decree and the date the company became a director.
 - v. Ndarsa Ranch Ltd of P O Box xxxx Ltd together with its directors who are or between the date of the decree in the primary suit and now, excluding directors who were not directors between the date the date of the primary decree and the date the company became a director in Voi Development Limited.
28. In proceeding for execution, the applicant shall proceed as if the directors of the companies who are directors are directors directly and those director companies are in partnership. In such a case, it will not make a difference whether execution is against the director companies or their directors.
29. Returns purporting that Vinu Ramji Shah has resigned are hereby struck out and the business registration service is directed to restore his name to the list of directors till a proper Annual General Meeting is convened and held at the registered offices and after the debt herein been paid.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE



JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Ms Barasa for the Vitu Ramji Shah

Origi for Applicant

No appearance for Mr. Kotak

Court Assistant – Ben Wambua

