



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 7 OF 2016

UKWALA SUPERMARKET.....PLAINTIFF

-VERSUS-

JAIDEEP SHAH1ST DEFENDANT

KAMAL SHAH 2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

M/S Kitiwa & CO. Advocates for the defendant

M/S Isiaho Sawe & CO. Advocates for the respondent

R U L I N G

1. By a Notice of Motion dated 23rd March, 2021, the Applicant herein Jaideep Shah seeks the following orders;

a) Spent

b) The Honourable court do lift the corporate veil of the Plaintiff and issue summons to Shah Rohit Maganlal, Anikumar Khimji Haria, Sandeep Kumar Nemchand Shah, Mansukh Premchand Shah, Dodhia Vijay Jayntilal and Manish Nemchand Shah all 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.

Applicants' case

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by Jaideep Shah on 24th March, 2021. The Applicants' case is that on 1st October, 2019 this Court did enter judgment in favour of the Defendants herein for the sum of Kshs. 5million, costs of this suit and interest. That the aforesaid sum of money continues to attract interest at court rates.

3. The 1st Applicant averred that the decree against the plaintiff/judgment debtor had been duly extracted by his advocates and remains valid to date. That the warrants of attachment and sale were thereafter issued to Ms. Saddabri Auctioneers who have since proceeded to proclaim and attach the plaintiff/judgment-debtor's properties.

4. The 1st Applicant further averred that, at the time of attachment, the plaintiff's Directors had already begun transferring and disposing off the plaintiff's properties to third parties and companies affiliated to them a fact that had been brought to the attention of this court. That the auctioneers had since sold the attached properties and had realized a sum of Kshs. 551,383/= from the sale by public auction. That to date a sum of Kshs.8,721,576/= remains unpaid and that it attracts interests and costs at court rates.

5. The Applicants are apprehensive that the Directors of the Plaintiff are disposing off assets of the plaintiff with the view of leaving the jurisdiction of this court.

6. The Applicants prayed that the corporate veil of the Plaintiff be lifted and notice to show cause be issued to the Directors of the plaintiff as to why they should not be committed to civil jail for failure to pay the aforesaid sum of money. That unless the orders are granted, the applicant will not be able to execute the balance of the decretal sum and stands to suffer irreparable loss.

Respondent's case

7. The application was opposed vide a Replying Affidavit sworn by Anilkumar Haria on 21st October, 2021 in which he deposed that he was one of the Directors of the Plaintiff/Respondent. That the application is tainted with bad faith and malice because while the same seeks to lift the corporate veil of the Plaintiff, the Applicants have already disposed of his personal motor vehicle registration number KBZ 403T which was not registered in the name of the judgment-debtor at the time of repossession. Further that, the Applicants have not disclosed all the goods repossessed from the Plaintiff/Respondent branches which goods are valued over Kshs.30,000,000/= as confirmed by the inventory on record. The Respondent contends that the non-disclosure by the Applicants was ill-motivated.

8. The Respondent contends that the orders sought herein are not legally tenable as the Plaintiff/Respondent herein is currently liquidation and that the Applicants have not sought leave of this court to enjoin the liquidator.

9. It was the Respondent's contention that the court is yet to give directions on the inventory filed as well as the objection so as to determine the disputed amounts and the illegal sale of the said motor vehicle registration number KBZ 403T.

10. The Respondent further deposed that a cursory perusal of the accounts filed by Saddabri Auctioneers confirm the repossessed properties were extremely undervalued. That the amount being claimed by the Applicants in this instant application is in dispute as the goods already repossessed by the Applicants is valued over Kshs.30,000,000/=. That no evidence on the alleged sale of the Respondent's properties has been provided by the Applicants and that the Applicants already repossessed all the properties belonging to the Respondent including fixtures and consequently forcing it to file insolvency proceedings. That the Applicants have not even mentioned the properties that are being allegedly sold by the Respondent herein.

11. The Respondent's case is that it having been wound up, the Applicants can only seek their recourse if any, through the liquidator and not through lifting of the corporate veil. That the Applicants have not presented any evidence before court to confirm that the Directors are indeed intending to leave the jurisdiction of this court. The dispute the amount of fees charged by the auctioneers as no evidence of the alleged payments have been provided. It was the Respondent's pray that the application be dismissed.

12. The Applicants filed their submissions on 26th August, 2021 whereas did not file any written submissions.

Determination

13. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions as the only issue of determination is; whether this court should pierce the corporate veil of the Plaintiff/Respondent

14. A Company is a judicial person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In **Salomon v Salomon & Co (1897) AC 22** where 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.

15. However, there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance. ***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"

16. The privilege of incorporation is not without its limits; and that Courts will disregard the corporate form and allow the piercing of the corporate veil so as to allow a creditor to reach the personal assets of shareholders or directors in certain circumstances.

17. In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company's alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute.

18. The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as 'A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.' (See **Jones vs. Lipman & Another [1962] 1 All ER 442**) and **H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd [1956] 3 ALL ER** where it was held;

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”

19. In general, therefore, 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.

20. Some of the factors the Court would likely look at to determine if the two requirements have been met include the following:

- i. Whether the company is adequately capitalized;
- ii. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;
- iii. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;
- iv. Whether the alter ego has treated the assets or finances of the corporation as his own.

21. Piercing the corporate veil is an equitable remedy. The burden rests on the party asserting such a claim to demonstrate, using the factors outlined above, that the two conditions have been met. Each case is determined on its own merits under a totality of circumstances test.

22. In this case, the substratum of the Applicants’ motion in asking the court to lift the veil of the Plaintiff was that the Directors of the Plaintiff/Respondent have been disposing the assets of the Plaintiff/Respondent with fraudulent intentions to defraud the Applicants. They further alleged that the Directors of the Plaintiff/Respondent are doing so with the intention of leaving the jurisdiction of this court and denying the Applicants the right to enjoying the fruits of their judgment.

23. The instant application fails to meet the threshold set out in **Mugenyi & Company Advocates –v- The Attorney General (1999)2 EA 199** in which the court adopting the **Principles in Palmers Company Law** expressed itself as follows on the ten instances the veil of corporate personality may be lifted. Thus

(i) Where companies are in the relationship of holding and subsidiary companies’

(ii) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;

(iii) In certain matters relating to taxation;

(iv) In the law relating to exchange control;

(v) In the law relating to trading with the enemy;

(vi) In the law of merger control in the United Kingdom;

(vii) In competition of the European Economic Community;

(viii) In abuse of law in certain circumstances;

(ix) Where the device of incorporation is used for some illegal or improper purpose; and

(x) Where the private company is founded on personal relationship between the members.

24. The Applicants save for mentioning in passing that the Directors of the Plaintiff/Respondent herein are disposing off their known assets, there is no evidence whatsoever that is offered to prove the allegation that Directors of the Plaintiff/Respondent are selling their known assets with the intention of defrauding the Applicants. Further, no evidence has been tabled before this Court to prove that the Directors of the Plaintiff/Respondent are leaving the jurisdiction of the court. A party who intends to benefit from the extraordinary relief of piercing the corporate veil must tender more concrete evidence to satisfy the two requirements set out above. There is no demonstration at all of the alleged fraudulent intent by the Directors of the Plaintiff/Respondent. It was incumbent upon the Applicants to provide such evidence in order to benefit from this relief. Without this evidence, the Application cannot succeed.

25. Echoing the definition of the corporate personality the court 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] A.C. 22 H.L 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 or 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”.

26. 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...”***

27. I consider piercing the corporate veil inappropriate in the instant case for the evidence presently before me is not within the scheme stipulated in the above case law. It is a suggestion by the applicant which disregards the companies separate entity and for me the applicant has gone too far as it is against our legal system. Quite apart from the concerns the applicant may have I am not satisfied that justice in the matter require the making of such an order of lifting the corporate veil.

28. The upshot, therefore, is that the Application dated 23rd March, 2021 is without merit. It is dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22nd DAY OF February, 2022.

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R. NYAKUNDI

JUDGE

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