



Essential Drugs Limited v OSS Chemie (K) Limited; Rafiki Microfinance Bank Limited (Interested Party) (Civil Miscellaneous Application E 202 of 2021) [2022] KEHC 237 (KLR) (24 March 2022) (Ruling)

Neutral citation: [2022] KEHC 237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E 202 OF 2021**

**MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

ESSENTIAL DRUGS LIMITED APPLICANT

AND

OSS CHEMIE (K) LIMITED RESPONDENT

AND

RAFIKI MICROFINANCE BANK LIMITED INTERESTED PARTY

RULING

Notice of Motion Application

1. The Application dated 22nd October 2021 under Sections 148, 787, 996 and 1002 of the *Companies Act* (Act No. 17 of 2015, Section 1A, 1B, 3A, 6 and 34 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 22 Rule 35 of the *Civil Procedure Rules*, 2020, the Applicant seeks the following orders;
 - a. Spent
 - b. THAT Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori being the directors of OSS Chemie (K) Limited the Respondent herein do attend court and be examined as to whether the Respondent has any property or means of satisfying the decree in Mavoko Chief Magistrate Court, Civil Suit No, 1539 of 2017 and to produce the Respondent's books of accounts and other documentary evidence showing the status of the business before the court.
 - c. That the veil of incorporation of the Respondent be lifted and the Directors Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori be made personally liable and be ordered to settle the decretal sum in Mavoko Chief Magistrate's



Court, Civil Suit No. 1539 of 2017 to the tune of Kshs. 4,848,918.76 with interest thereof from 11th February 2019 jointly and severally until payment in full.

- d. That a declaration be made pursuant to Section 1002 as read with section 996 of the Companies Act that the directors of the Respondent Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori were knowingly party to the carrying on of the business of Oss Chemie (K) Limited with intent to defraud creditor of the company and for fraudulent purposes and that they are responsible without any limitation of liability for the debt of the above company owed to the Applicant in Mavoko Chief Magistrates Court Civil Suit No. 1539 of 2017 amounting to Kshs. 4,848,918.76 with interest thereof from 11th February 2019.
 - e. That the said directors, Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori do immediately settle the said decretal sum of Kshs. 4,848,918.76 with interest thereof from 11th February 2019.
 - f. That in default of the said directors complying with the above orders, they be imprisoned and committed to civil jail for a period not less than six (6) months.
 - g. That costs of the Application be provided.
2. The application is supported by the affidavit of Amos Kibata the accountant of the Applicant, dated 22nd October 2021 in which he deposed the ground upon which the Application is premised on. He opined that once judgement was delivered in Mavoko Chief Magistrates Court Civil Suit No. 1539 of 2017 on 4th of December 2018 in which he was awarded Kshs. 4,848,918.76 plus interest and costs, he unsuccessfully made attempts to execute the decree through S.T Mugacha T/A Galaxy Auctioneers.
 3. He opined that the Respondent had made part payment amounting to Kshs. 170,000 having sought their indulgence citing hard economic times. Further, that they are unable to execute the decree as he alleged that the directors had transferred company assets which they use for running the business to themselves and third parties, purchasing assets in their individual names in order to avoid attachment.
 4. He deposed that the Respondent used the name Bee-Em-Kay Technologies to purchase his products like Sorbital. When they came to pick the products, one of the Applicant's employees recognized the co-driver Boniface Musyoki Kithome, detained the motor vehicle and interrogated the said driver who told them that the goods belong to the Respondent. They then proceeded to Samorata Police station where various documents were recovered and statements recorded.
 5. Further, results of a search through National Transport and Safety Authority of Motor Vehicle registration number KBN 935A Isuzu Lorry indicated that the car originally belonged to the Respondent who subsequently transferred it to its director, Catherine Wawira Kiama.
 6. The police recovered various documents that were in the custody of the 2 employees Sammy Kibul Tut Tallam and Boniface Musyoki Kithome employees for the Respondents.
 7. He opined that the Respondent is committing acts of dishonesty through its officers to shield the company from legal obligation to pay its creditors and is using the corporate veil as a shield which is an offence under Section 1102 and 996 of the Companies Act.
 8. That it is probable that the reasons that the ownership of the motor vehicle has been transferred from the Respondent to its director, it so avoid attachment of the assets of the Company.
 9. That in respect to the Motor Vehicle Registration Number KBN 935A Isuzu Lorry, the Interested party has filed objection proceedings in Mavoko Chief Magistrates Court, Civil Suit No. 1539 of 2017



on the basis of being a joint owner of the said Motor Vehicle Registration Number KBN 935 A Isuzu Lorry as security and claims to be owed kshs.836,580.75 by registered owner director Catherine Wawira Kiama. Whilst the Interested Party Claims to be owed money by the said director, the motor vehicle could be sold and the interested party and a portion of the Applicants decretal sum can be paid off.

10. That it is only fair and to the interest of justice that the directors of the said company be examined by this Court on the ability of the Respondent to settle the said costs; and the corporate veil of the Respondent be so pierced so as to make the directors, Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori, personally and severally liable for the decretal sum and interests owed to the Applicant.

Grounds of Opposition Dated 10.12.2021

11. The Respondent filed grounds of opposition on the grounds that;
 - i. The Respondent is a limited liability company and is a distinct and separate entity from its directors and/or shareholders.
 - ii. The Applicant has not satisfied conditions stipulated for lifting corporate veil.
 - iii. No sufficient cause has been demonstrated to warrant orders of stay of proceedings in Mavoko Chief Magistrates Court, Civil Court No. 1539 OF 2017.

Replying affidavit

12. The interested Party filed a Replying affidavit dated 19th November 2021 sworn by Stephen Kiama in which he deposes that the application is hasty, premature and an abuse of the court process that disregards the ongoing objection proceedings in Mavoko Chief Magistrates Court, Civil Court No. 1539 OF 2017 where similar issues are being discussed and is a ploy to justify the applicant's illegal attachment/impoundment. He deposed that he and Catherine Wawira Kiama are strangers in MCCC No. 1539 of 2017. Further, that the Respondent did not file a Defence in MCCC No. 1539 of 2017 with a promise to settle the debt owed and it is not true that the Respondent is struggling.
13. He opined that Bee-Em-Kay Technologies is a separate entity conducting business in the supply of Sorbital. He intimated that no criminal charges have been levelled against the Respondent's employees and the statements are allegedly a forgery and further, that the transfer was done legally. He opined that Catherine Wawira Kiama acted in her own capacity and not as a director nor in the interest of the Respondent. The interested Party deposed that the application does not meet the threshold for lifting the corporate veil and examination of directors. He deposed that Catherine Wawira Kiama was servicing her loan and they had a good bank-customer relationship
14. The matter came up for directions, parties agreed to dispose off the matter by way of written submissions.

Applicants submissions

15. The Applicant submitted on three grounds. He urged the Court to rely on its jurisdiction under Article 165 (3) of the Constitution of Kenya, 2010 and use its unlimited original jurisdiction to grants stay of the objection proceedings in Mavoko PMCC NO 1539 of 2017. He submitted that the corporate veil should be lifted on account of fraud by the directors. Further, that granting of stay would not prejudice the objector as it is not the day to day use of the Lorry and thus none of his rights are compromised.
16. While relying on the case of *Samuel Ojwang Juma vs Sapphire Collections Limited [2020] eKLR*, he submitted that from the Respondent's documents are still in business but is not settling the decretal sum. Reliance was also placed on the case of *Epass International Limited vs Picalilly International*



Limited & Another [2020] where the Court stated that a party should enjoy fruits of the judgment and it is only the directors who can shed light on the state of the company.

17. On the issue of lifting of the corporate veil, the Applicant alleged that the Respondent was engaged in fraudulent transfer of the motor vehicle and thus the corporate veil should be lifted.

Respondent's Submissions

18. The Respondent relying on the case of *Kenya Wildlife Service vs James Mutembei* [2019] eKLR and *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 and Kenya Power & Lightning Company vs Ester Wanjiru Wokebii* [2014] eKLR submitted that the threshold for granting stay of proceedings had not been met.
19. On the issue of lifting of the corporate veil, The Respondent submitted that only general allegations of fraud had been made to shield the Applicant from facing the ramifications of its illegal attachment and is forum shopping for a favourable ruling to delay proceedings in the lower court.

Interested Party's Submissions

20. While citing the case of *Global Tours and Travel Limited; Nairobi Hc Winding Up Cause no 43 of 2000* and *Christopher Ndolo Mutuku vs CFC Stanbic Limited* [2015] eKLR, the party submitted that granting stay would be prejudicial to him as the status quo would be restored and the Applicant would be able to attach the vehicle again and further that since the auctioneers who are in possession of the car were not party to the suit, then the orders, if granted would not apply to them. Further, that the Applicant is seeking to commence another mode of execution while he has not abandoned or withdrawn the one commenced in the lower court. The objector submitted that no prejudice would be occasioned on the Applicant as they can execute against any other property owned by the Respondent and further that Catherine Wawira is still servicing the car loan and so there is no imminent danger of the car being disposed off.

Analysis and Determination

21. I have considered the Application, the affidavits thereto, the grounds of opposition and the submissions of the parties and find the following as the issues for determination?
 - i. Whether the Corporate veil of OSS Chemie (K) Limited should be pierced and the conduct of Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori being the director of OSS Chemie (K) Limited as well as the status of examined.
 - ii. Whether Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori being the directors of OSS Chemie (K) Limited were engaged in fraudulent activities.
 - iii. Who should bear the costs of the Application.
22. The cause of action arises out of a decree in Mavoko PMCC NO. 1539 of 2017 between the same parties and judgement was entered in favour of the Applicant for Kshs 4,495,079.70 together with costs and interest. A decree extracted was which decree has not been fully satisfied because of the Respondent's conduct. The Interested party appears to be a joint owner of the motor vehicle registration number KBN 935A Isuzu Lorry from the NTSA search. The party stated that the issues raised in this suit are similar to those raised in Mavoko PMCC NO. 1539 of 2017 where the Applicant has commenced the execution process and has not indicated whether he intends to proceed with the matter in part or in full and has instead filed this suit leaving the execution process incomplete.



23. The definition of a company was made by the Court of Appeal in the case of *Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR*, where it stated 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.

24. In the case of *Arun .C. Sharma v Ashana Raikundalia & 5 Others[2015] eKLR* the Court held that;
Separate Corporate Personality

[13] This is a very important subject in company law as I stated in *Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano* (2014) eKLR that:

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.

[14] The above formulation is correct but the following is also correct.

Lifting or piercing the corporate veil

[15] The artificial person “created” in *Salomon v Salomon* exists only in contemplation of law and does not possess the body of natural person. It has had to act and acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc. And as time passed by, there were other developments in law in the nature of lifting or piercing the corporate veil which entails going behind the veil of incorporation of the company to identify the individuals who are the real beneficiaries of the corporate advantages; see *Gallagher v. Germania Brewing Company* that,

‘...for, while, by fiction of law, a corporation is a distinct entity, yet in reality, it is an association of persons who are in fact the beneficiaries of corporate property’.

The statute law and judicial interpretation has developed instances when corporate veil will be lifted for purposes of doing justice. See para 90 of *Halsbury’s Laws of England 4th Edition* (supra) 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.

And the instances when corporate veil will be lifted are not limited to fraud or improper conduct of the directors but also include all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. See again para 90 of *Halsbury’s Laws of England 4th Edition* that:-

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 feat



25. In the case of *Jiang Nan Xiang v Cok Fas-St Company Limited; Miscellaneous Application [2018] Eklr*, the court stated that;

“I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal legal separation between the Company and its shareholders’ personal financial affairs and/or that the Company is just a sham or the Company’s actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company’s creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.”

26. In addition, the court in the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR* 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.”

27. Lady Justice Okwengu in the case of *Carey Ngini v Dennis O. Ogolla & Another (2010) eKLR* cited the case of *Corporate Insurance Company Limited vs Savemax Insurance Brokers Limited and Another [2002] 1 EA 41* where Ringera J. stated 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”

28. The Applicant has raised serious allegations against the Respondent and to which the court cannot make a final determination without first hearing the directors of the Respondent and allowing them to give an explanation of what is happening in the company. The Applicant is also in possession of a court order that requires compliance. The interested party is not the right person to give an explanation of the position of the company. In balancing the rights of the parties, I find that it is just to summon the directors of the Respondent to court.

Disposition:

1. The Court lifts the Corporate veil and the Directors of the Company Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori being the directors of OSS Chemie (K) Limited shall be held directly liable for the settlement of the judgment and decree as follows:
2. As part performance and part payment was made through Kshs.170,000/ payment; the company directors shall deposit KShs.1,000,000/- in this Court or in a joint Account of parties Counsel within 60 days of this Ruling.
3. In default the Lorry Reg. No. KBN Isuzu Lorry shall be detained through Machakos Police station and Galaxy Auctioneers and the matter mentioned in this Court on the earliest date obtained through Deputy Registrar Machakos High Court.



4. The stay of proceedings of CM Court Machakos No. 1539 of 2017 is not granted by this Court as no specific and special grounds have been established by the Applicant to warrant grant of the said order. This Court is satisfied that there is a valid regular lawful judgment of 4/12/2018 and decree of 11/02/2019 awaiting execution.
5. By virtue of Section 996 of Companies Act, The Directors of the Company Catherine Wawira Kiama, Stephen Kiama Njimia, Macharia Maina Monyo Joseph and Rose Waithira Kingori being the directors of OSS Chemie (K) Limited do attend Court and be examined as to whether the Respondent has any property or means of satisfying the decree in Mavoko Chief Magistrate Court, Civil Suit No, 1539 of 2017 and to produce the Respondent's books of accounts and other documentary evidence showing the status of the business before the Court on 13/05/2022. In default to comply, the court shall make further or other orders as may be appropriate.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH, 2022 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Mutyango H/brief Mrs Mureithi for the Applicant

Ms Jasmine H/brief for Ms Kitaa for the Respondent

Mr. Musya H/Brief for Ms Mumo for the Interested Party

Geoffrey - Court Assistant

