



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 179 OF 2014

GANESH ENGINEERING WORKS LIMITED..1ST PLAINTIFF/APPLICANT

BANSONS HOLDINGS (KENYA) LIMITED.....2ND PLAINTIFF/APPLICANT

BHANDERI ENTERPRISES LIMITED.....3RD PLAINTIFF/APPLICANT

DIPAK BHADERI.....4TH PLAINTIFF/APPLICANT

= VERSUS =

YAMINI BUILDERS LIMITED.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants filed a Notice of Motion dated 27th September, 2019 under the provisions of Order 22 Rule 35 of the Civil Procedure Rules, Article 159 of the Constitution, Sections 34, 38, 1A and 1 B of the Civil Procedure Act seeking the following orders;

i. Spent

ii. THAT JOSHNABEN DIPAK KERAI being the director of the judgment debtor do attend court and be examined as to whether the defendant/judgment debtor has any property or means of satisfying the decree herein and to produce the defendant/respondent's books of accounts and other documentary evidence showing the same before the court.

iii. THAT in default of the said director complying with the above court order, the corporate veil be lifted and the director be ordered to personally pay decretal amount due to the plaintiffs or be imprisoned and committed to civil jail for a period not less than six (6) months.

iv. THAT the costs of this Application be provided for.

The application is premised on the grounds on the face of the application and the supporting affidavit of **DIPAK BHANDERI**, a director of the Plaintiffs/Applicants sworn on 27th September, 2019, a supplementary affidavit sworn on 8th November, 2019, a replying affidavit sworn on 19th January, 2021 together with the annexures thereunder. The Defendant/Respondent opposed the application through a Replying Affidavit dated 25th October, 2019 and a Supplementary Affidavit dated 22nd November, 2019 both sworn by **JOSHNABEN DIPAK KERAI**, a director of the Defendant/Respondent. The Defendant/Respondent further relied on a Further Affidavit sworn on 17th December, 2020 by **ISAAC KAKAI**, the Defendant's Accountant for the period between 2013 and April, 2015.

The background of the application before this court is that Judgment was entered in favour of the Plaintiffs/Applicants as against the Defendant/Respondent for Kshs. 7,081,957.37 in a claim for breach of contract on 20th December, 2017, however, the same is yet to be satisfied. The Plaintiffs/Applicants efforts to have the decretal amount settled has been unsuccessful since the Defendant/Respondent does not have any attachable assets.

THE CROSS-EXAMINATION:

Following a Court Order dated 27th January, 2020 issued by Justice Njuguna, **JOSHNABEN DIPAK KERAI**, a director of the Defendant/Respondent and **ISAAC KAKAI**, an accountant of the defendant, were examined on 26th January, 2021. In her testimony, **JOSHNABEN DIPAK KERAI** informed the court that the defendant is a construction company with only two directors, one of whom has been out of the country since 2016. It was her testimony that she joined the defendant as a director after the death of her husband and therefore she was not aware of most transactions that had taken place. She told the court that due to lack of work, they closed the offices in 2015 and paid off their creditors. **JOSHNABEN DIPAK KERAI** further informed the court that the company had two bank accounts which were closed in 2015 and that the co-director and herself were the only signatories. She further informed the court that she was not aware of

any company assets, and if they existed, she did not know of their whereabouts. On Re-examination, **JOSHABEN DIPAK KERAI** testified that she does not own any shares in the company and that the money that was deposited in the company accounts was in 2014 before judgment in the present suit was obtained. She further reiterated that the company did not have any money to pay the plaintiffs however they can attach any asset of the company.

MR. ISAAC KAKAI in his testimony confirmed that he had been an accountant for the defendant between 2013 to 2015 and that he did an audit of the company in 2018 which revealed that the company was making losses. He also confirmed that the directors had asked for a list of the company creditors with a view of agreeing on how to settle the debts. It was his evidence that most of those debts were settled between 2014 and 2015. On Re-Examination, he confirmed that indeed judgment against the company was entered in December, 2017 however at the time, the company had no money in its account. He testified that he was not aware of the house belonging to the company and stated that the account at Paramount Bank was dormant as it had no money.

The Plaintiffs/Applicants submissions is that from the examination of the director and the accountant, the court can make an order for lifting of the corporate veil because relevant information was concealed, finances were misapplied and the defendant's offices closed to deliberately defraud its creditors including the Plaintiffs/Applicants herein. The Plaintiffs/Applicants relied on the case of **Salomon v Salomon & Co.Ltd [1897] AC 22** as cited in **Arun .C. Sharma v Ashana Raikundalia & 5 Others[2015] eKLR** where the Court held that a company is a separate and distinct legal entity and its debts and liabilities cannot be placed on the shoulders of the directors and shareholders unless the corporate veil has been used either by the shareholders or the directors to perpetrate fraud or improper conduct. It was further submitted that another exception was explained in the case of **Jiang Nan Xiang v Cok Fas-St Company Limited; Miscellaneous Application No. 56 of 2015 [2018] eKLR** where the court held that; The Plaintiffs/Applicants referred to Paragraph 90 of Halsbury's Laws of England, 4th Edition as cited in the case of **Arun .C. Sharma v Ashana Raikundalia & 5 Others (Supra)** states as follows;

“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.”

It the Plaintiffs/Applicants' further submission that during her cross-examination, **JOSHABEN DIPAK KERAI**, failed to convince the court that the dealings of the judgment debtor was above board during the relevant period and that they acted in good faith. This the Plaintiffs/Applicants attribute to the fact that the Company's CR12 indicates that **JOSHABEN DIPAK KERAI** was one of the judgment debtors director and her failure to produce bank accounts statements for the period between February,2015 and December, 2017. It is the Plaintiffs/Applicants submission that since judgment was delivered on 20th December 2017, the period between 20th January, 2015 and 18th January, 2018 was necessary and crucial in helping the court decipher the transactions that occurred. The Plaintiffs/Applicants relied on the case of **Jiang Nan Xiang V Cok Fas-St Company Limited (Supra)** where the court in lifting the corporate veil noted 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.”

The Plaintiffs/Applicants contends that the bank account statement for Account Number 00200263821201 for the period between 13th January, 2014 and 20th January 2015 have questionable entries that were not sufficiently explained. The plaintiffs/Applicants have pointed out the entry on 27th January, 2014 indicating an inhouse cheque deposit of Kshs. 95 Million without subsequent entries on how the same was utilized and an internal deposit made to account number 01000263821210 on 20th January, 2015 just before the account was closed. Reliance was placed on the case of **Kenya Bus Service Limited & 4 others v PKK & Another [2017] eKLR**, where the court upheld the lower court's decision to hold the directors of the judgment debtor's personally liable after they sold/transferred buses after one of the buses was involved in an accident as their action amounted to improper conduct and fraud.

The plaintiffs/Applicants submit that the judgment debtor does not have known attachable assets and the only remedy is for court to lift its corporate veil due to the director's improper conduct. The Plaintiffs/Applicants further contend that although the judgment debtor closed its offices/ business in 2015, there were inventories valued at Kshs. 208,426,714 in the period between 2017-2018 which the accountant failed to give an explanation. This implies that the judgment debtor is still operating secretly despite closing its known physical office. Counsel referred to the case of **Justine Nyambu V Jaspa Logistic [2017] eKLR Cause 201 of 2013** where the court held that the act of closing or changing the location of offices in order to evade creditors amounts to dishonesty.

The Plaintiffs/Applicants also raises issue with the statement of accounts which shows that the judgment debtor has or had bank accounts in Standard Chartered Bank of Kenya, Investment and Mortgages Bank Limited (I & M Bank) and Paramount Universal Bank. However, there were no statement of accounts with regards to the accounts at Standard Chartered Bank of Kenya and Paramount Universal Bank. The Plaintiffs/Applicants also submit that the statement of accounts does not show any sale and the cost of sales under page 6 of the bank statement although page 7 shows a deferred tax of Kshs. 69,268, 795 as at 31st December, 2018. At page 7 of the statement of accounts, it is indicated that the value of the company assets stood at Kshs. 325,775,058 in 2018 from Kshs. 325,825,404 in 2017 thus making a loss of Kshs. 50,346 and tax amounted to Kshs. 256,506 263 which information the Plaintiffs/Applicants submit shows that the judgment debtor was in business up to December, 2018 contrary to its averments that it closed its business in 2015. That the failure by the accountant and the director to explain the meaning and implication of the huge figures in the statement as at December, 2018 and the existing claim that the company had no finances or attachable assets in 2017 impugns on the character and credibility of the Judgment Debtor's director.

The Plaintiffs/Applicants submit that although not a shareholder, JOSHABEN DIBAK KERAI was a substantive director controlling the affairs of the company thus making her personally liable for the actions and omissions of the company as she is the controlling mind of the Company and to buttress this position, the Plaintiffs/Applicants referred to the case of **Andrew Kahaemba v African Kenya Limited [2019]eKLR Cause 479 of 2016** where the court held that both the directors and shareholders shall settle the decretal sum.

The Defendant/Respondent has identified one issue for determination namely, whether fraud or improper conduct has been established on the part of the directors of the defendant/respondent to warrant the court lifting of the corporate veil of the Defendant/Respondent and hold the director personally liable.

It is the Defendant's/Respondent's case that a company is in law a separate legal entity from its members as laid down in the case of *Salomon v Salomon & Co. LTD (1897) A.C. 22HL* and that courts have upheld the doctrine of corporate veil and limited liability of a company. Therefore, it follows that since the Defendant/Respondent is a limited liability company, it is a distinct legal entity from its directors, shareholders and agents. Reference has been made to the case of **Ricatti Business College of East Africa Limited v Kyanzavi Farmers Limited [2016] eKLR** where the court citing with authority the case of **Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR** held that;

“[A company] as a body corporate, is persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

The defendant/Respondent admits that there are exception both under express statutory provisions of the Companies Act and judicial interpretation for intervention as set out in **Multi-choice Kenya Limited V Mainkam Limited & Another [2013] eKLR**. The defendant/respondent submit that the present application is not grounded on any statutory provision or any violation of Companies Act and that the same is grounded on common law and judicial precedents.

The Defendant/Respondent state that the court can pierce the corporate veil where it is being used to shield fraud and improper conduct on the part of the directors or shareholders of a company however this is a question of fact in each case. Reference has been made to the case of **Makuto v Almakony Limited & Another [2016]eKLR, Arun .C. Sharma v Ashana Raikundalia & 5 Others (2015)eKLR** where the court cited Para. 90 of Halsbury's Laws of England, 4th Edition which states;

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.

Further reference was made to the case of **Jiang Nan Xiang v Cok Fas-st Company Limited [2018]eKLR** where the court stated as follows:-

“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.”

The Defendant/Respondent contend that **Joshnaben Dibak Kerai's** explanation in court and the documents produced were satisfactory and demonstrated that her dealings with the Defendant's/Respondent's assets were above board and not intended on defrauding the company's creditors. The defendant/Respondent argues that the import of Order 22 Rule 35 of the Civil Procedure Rules, 2010 was laid down by Ringera J. (As he then was) in the case of **Ultimate Laboratories v Tasha Bioserve Limited (Unreported) Nairobi HCCC No. 1287 of 2000** where he stated:

“The court's duty under the order and rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree”.

It is the Defendant/Respondent's submission that JOSHABEN DIPAK KERAI, became a director after the death of her husband who was a Co-director and therefore any liability, as a director, can only accrue from the time she became a director and not prior. The argument by the Plaintiffs/Applicants that JOSHABEN DIPAK KERAI is a director of the Defendant/Respondent by virtue of the CR 12 Form issued by the Company Registrar dated 22nd January, 2019 is strongly disputed and denied since the same does not reveal when she became a director. This therefore according to the Defendant/Respondent justifies her lack of knowledge on the disposal of some of the Defendants/Respondents assets since these actions and decisions were taken before she joined the company.

The Defendant/Respondent's submit that the director produced relevant and necessary bank account statements and book of accounts reflecting the financial position of the Defendant/Respondent during the period the decree was issued i.e 2018 and the Plaintiffs/Applicants contention that the bank statements of some bank accounts were not produced is immaterial. Further, the Defendant/Respondent has asked this court to distinguish the facts in the court decision in **Jiang Nan Xiang v Cok Fas-st Company Limited (Supra)** as relied by the Plaintiffs/Defendants where the corporate veil was lifted because the directors totally failed to appear before court and produce necessary documents from the present case.

It is the Defendant/Respondent's further submission that it became aware of the judgment subject matter in this suit in 2018 and that by that time, the Defendant/Respondent had already disposed off some of its assets so as to keep the company afloat due to tough financial condition and that the closure of the offices were temporary measure and not meant to defraud the defendant/Respondent's creditors. The Defendant/Respondent further submits that the fact that the Plaintiffs/Applicants were not invited to a creditor's meeting is because they had not obtained any decree against the Defendant/Respondent.

It is the Defendant/Respondent's submission that the object of Order 22 Rule 35 was achieved and the inability to pay the decretal sum should not be a ground for lifting of the corporate veil and saddle the director with the Defendant/Respondent's debt. Reference was made to the case of *Corporate Insurance Brokers Limited [2002] EA 41* where Ringera J. (as he then was) found that:

“The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company”

Analysis/Determination:

The doctrine relating to corporate personality was laid down in the case of *Salomon Co. Ltd v Salomon [1897] AC 78* where the House of Lords held that a company is in law a separate person from its members. Closer home, the Court of Appeal in *Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR*, 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.”

However, there are circumstances that would demand lifting of the corporate veil so as to see what is happening behind it. These circumstances were highlighted by the Court of Appeal in the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR* where it 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.”

In the present case, following the cross-examination of the defendant's director and accountant, the Plaintiffs/Applicants want the corporate veil of the defendant to be lifted for the reason that relevant information was concealed, finances misapplied and offices closed to deliberately defraud the defendant's creditors. To further buttress its case, Plaintiffs/Applicants' argue that, JOSHNABEN DIBAK KERAI, being the substantive director controlling the affairs of the company is the controlling mind of the Company and should therefore be held personally liable.

In her testimony in court, JOSHNABEN DIBAK KERAI, stated that she joined the company as a director after the death of her husband. She further told the court that the company did not have any assets or money to pay the creditors. She informed the court that the company closed its offices in 2015 together with its bank accounts since business was bad. On the whereabouts of the company assets, she informed the court that she did not know how the assets were disposed off. The defendant's accountant, Mr. Isaac Kakai, in his testimony stated that as at the time the judgment in the present suit was entered, the company had no money in any of its accounts. He further testified that between 2014 and 2015, the defendant settled some debts it owed. Mr. Kakai testified that he conducted an audit in 2018 that revealed that the company had no income or expenses as it was making losses. The Company had a dormant account at Paramount Bank as it did not have any money.

The Respondent submitted its bank statements. A look at the said statements confirms the testimonies of the Director and the Accountant that the company disposed off some of its assets to stay afloat and that the transactions were done way before the judgment in the present suit was entered. From the testimonies and the documentary evidence on record, I see no evidence of fraud and/or improper conduct on the part of the Director which would necessitate lifting of the corporate veil. In the case of *Carey Ngini v Dennis O. Ogolla & Another (2010) eKLR* Justice Okwengu cited with authority 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”.

There is no indication that the director of the Defendant has acted in any fraudulent manner, closed its offices or transferred their property to another entity in order to avoid paying the Plaintiffs/Applicants herein. The respondent's bank account seems to have been dormant since 2015. Judgment in this matter was entered on 20th December, 2017. There is no indication that soon after the entry of the judgment the defendant started an exercise of selling or hiding its property. It is true that the company transacted some business sometimes in 2014 and 2015 but this was before the entry of judgment. From the testimony of JOSHNABEN DIPAK KARAI and that of ISAAC KAKAI, I do find that the affairs of the defendant company have not been conducted in a manner likely to suggest that there is any intention to deny settling its debts. There is averment from the director of the company that it called all its creditors so as to settle its debts and those who proved their claims were paid.

In the end, I do find that the application dated 27th September, 2019 lacks merit and the same is hereby dismissed. Parties shall meet their own costs.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE