



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 179 OF 2014

GANESH ENGINEERING WORKS LIMITED....1ST PLAINTIFF/APPLICANT

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

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

DIPAK BHANDERI.....4TH PLAINTIFF/APPLICANT

-VERSUS-

YAMINI BUILDERS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants took out the Notice of Motion dated 27th September, 2019 supported by the grounds set out on its face and the facts deponed in the affidavit sworn by the 4th plaintiff/applicant. The following are the orders which were sought in the aforesaid Motion:

i) Spent.

ii) THAT Joshnaben Dipak Kerai, being a director of the defendant/respondent/judgment debtor do attend court and be examined as to whether the respondent has any property or means of satisfying the decree and to produce the respondent's books of accounts and other documentary evidence showing the same before this court.

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

iv) THAT costs of the application be provided for.

2. In his affidavit, the 4th applicant stated that this court entered judgment in favour of the applicants and against the respondent in the sum of Kshs.6,557,173.20 in this suit and that subsequently, the applicants through their advocate lodged a party and party Bill of Costs which was taxed at the sum of Kshs.440,661/ and a certificate of taxation issued to that effect.

3. The 4th applicant asserted that despite having been served with a notice of entry of judgment, the respondent has failed to satisfy the decree.

4. It was also the 4th applicant's contention that the respondent has no known attachable assets, thus impeding the execution process against it.

5. *Joshnaben Dipak Kerai* put in a replying affidavit to resist the Motion, stating that she was not privy to entry of the aforementioned judgment as no copy of the same was ever served upon her.

6. The deponent averred that the respondent has been making losses in the past couple of years, hence there is no money left in its bank account.

7. The deponent concluded by asserting that the applicants have not laid ground to warrant a granting of the orders being sought in their Motion.

8. The 4th applicant rejoined with a supplementary affidavit in which he stated *inter alia*, that the law makes provision for the summoning of

directors and shareholders to shed light on a company's ability to satisfy a decree issued against it.

9. It was also the 4th applicant's contention that the statement of accounts annexed to the replying affidavit are misleading as they bear different account details from those tendered on behalf of the respondent at the hearing of the suit.

10. The 4th applicant further contended that the whereabouts of the respondent's remaining assets have not been disclosed.

11. *Joshnaben Dipak Kerai* equally rejoined with a supplementary affidavit explaining that the bank account being referred to by the applicants has been inactive since 2015 and that she has no knowledge of any motor vehicles registered in the name of the respondent.

12. This court invited the parties to present oral arguments on the Motion. *Mrs. Rotich* counsel for the applicants submitted that of the two surviving directors, one has since left the country permanently and the respondent inexplicably closed its offices and disposed of its assets to avoid meeting its debts, hence the need to have the remaining director summoned for purposes of ascertaining whether the respondent has any means by which to satisfy the decree.

13. The advocate argued that once the above is done and it is established that there was fraud or improper conduct in the running of the respondent company by its directors, this court is empowered to lift the corporate veil and hold the surviving directors liable on a personal level.

14. It was the advocate's contention regarding the respondent's account held with I&M Bank that its closure was purely intended to frustrate the applicants since the said account had adequate funds to satisfy the decree but the respondent opted to close the account instead.

15. For the foregoing reasons, *Mrs. Rotich* urged this court to grant the orders being sought in the application.

16. In response, *Mr. Kenneth Wilson* counsel for the respondent confirmed that out of the three (3) directors of the respondent company, one (1) is deceased while the other is overseas.

17. On behalf of his client, the counsel argued that the monies which were held with I&M Bank were used to pay KRA (Kenya Revenue Authority) hence there are no existing funds in that particular account, further maintaining that the accounts currently being held by the respondent do not have sufficient funds to satisfy the decree.

18. In that regard, *Mr. Wilson* in advancing the argument that the circumstances of this case are not suitable for lifting of the corporate veil, made reference to the case of **Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR** where the Court of Appeal rendered itself thus:

“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.”

19. In her rejoinder arguments, *Mrs. Rotich* contended that the respondent has offered no explanation for its failure to avail statement of accounts for the years 2015 to 2017, further contending that in failing to provide all its accounts and closing their offices while simultaneously disposing of their assets, the respondent through its directors was acting dishonestly.

20. I have cautiously considered the grounds set out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion, the competing oral submissions and the authorities relied upon.

21. The Motion in my view raises two key issues: the first concerns itself with whether the director of the respondent company should be summoned for examination in respect to payment of the decretal amount. The second issue has to do with lifting of the corporate veil.

22. On the first issue, it is not in dispute that upon hearing the parties on the suit, this court delivered its judgment on 20th December, 2017 in favour of the applicants in the manner set out hereinabove.

23. There is no indication by the respondent through any of its directors that the decretal sum has been settled either wholly or partly.

24. I noted that *Joshnaben Dipak Kerai* in her respective affidavits stated that the respondent has no funds and annexed statement of accounts to that effect. However, it is plausible that no full disclosure was made as to the extent of the respondent's assets, neither did the respondent give an indication as to the manner in which it intends to satisfy the decretal amount which is colossal in nature, especially given the argument that the respondent's business is making losses. In my view, the statement of accounts availed on the respondent's behalf are inconclusive.

25. Having considered the averment made by *Joshnaben Dipak Kerai* that she is the only available director since her husband and co-director, *Dipakkumar Premjibhai Kerai*, is now deceased and the other surviving director is out of the country permanently, I take the view that it is imperative that *Joshnaben Dipak Kerai* provides a detailed account of all the available assets of the respondent and that she sheds light as to the intentions of the respondent in settling the decretal sum. I am therefore satisfied that there is need for *Joshnaben Dipak Kerai* to be summoned for examination.

26. In respect to the second issue, the courts have established the instances under which the corporate veil of a company should be lifted. Both parties cited authorities that have aptly discussed this subject.

27. In the case of **Ahmed Shakeel Shabbir v Samuel Musaa Ndolo [2016] eKLR** the court held the following:

“In Masefield Trading (K) Ltd v Rushmore Company Ltd & Another [2005] eKLR, it was stated that the corporate veil of a corporate body may be lifted if it is found that the oral examination uncovers wrongdoing by an officer of the corporate body. During the oral examination, the witness clearly pointed out that the Defendant Company was wound up due to failure by the Company to pay its rent. This amounts to wrongdoing and improper conduct on the part of the Defendant. The Court therefore used its power to lift the corporate veil donated to it under Order 22 rule 35 Civil Procedure Rules as read with Section 323 of the Companies Act, Cap 486.”

28. A similar position was taken by the Court of Appeal in **Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another [2018] eKLR** when it rendered that lifting of the corporate veil will occur in instances of fraud, improper conduct or where the dealings of a corporate body or the persons dealing through it are of relevance.

29. Further to the foregoing, the respective courts in the authorities of **Kenya Bus Service Limited & 4 others v P K K & another [2017] eKLR** and **Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR** each found that the circumstances before them required the corporate veil to be lifted. Similarly, in both instances, the directors had previously been granted the opportunity to appear before court for examination.

30. In the present instance, I observed that no substantial evidence was placed before this court by the applicants to show that the directors of the respondent were either fraudulent or acted improperly or dishonestly. The circumstances surrounding the purported closure of the respondent’s offices remain unclear, as do the circumstances relating to the losses and payments associated with the respondent’s bank accounts.

31. In my opinion, the only proper way of ascertaining the above and further clarifying the respondent’s assets and means of satisfying the decretal amount is through the examination of its director(s).

32. In the end, the Motion is allowed in terms of order ii) and the following orders are made consequently:

a) Joshnaben Dipak Kerai, being a director of the defendant/respondent shall appear before this court on a date to be fixed by the Court for purposes of being examined on whereabouts of the assets and/or means of the respondent in satisfying the decree and to produce a full and detailed account of the respondent’s books of accounts and other documentary evidence showing the same before this court.

b) Costs of the application to be borne by the respondent.

In view of the orders made hereinabove, prayer iii) of the application is hereby deferred until such time as Joshnaben Dipak Kerai is examined, following which this court will consider and make its finding on the said prayer.

Dated, Signed and Delivered at Nairobi this 27th day of January, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiffs/Applicants

.....for the Defendant/Respondent