



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPLICATION NO. 271 OF 2018**

**KIMANGA & CO. ADVOCATES ..... ADVOCATE/APPLICANT**

**VERSUS**

**INVESCO ASSURANCE CO. LTD. .... CLIENT/RESPONDENT**

**RULING**

The application before me was brought by Advocate **GERALD O. KIMANGA, TRADING AS KIMANGA & COMPANY ADVOCATES**, pursuant to the provisions of **Order 22 Rules 28 and 31**, as read with **Order 51 Rule 1** of the **Civil Procedure Rules**. The Applicant also invoked the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.

1. The application arose from a judgment which had been granted in favour of the Applicant, on the strength of taxed costs.
2. The Respondent is **INVESCO ASSURANCE COMPANY LIMITED**, which is the Judgment-Debtor in this case.
3. The application seeks two prayers, as follows;

***“1. The Honourable court be pleased to issue an order directing the CEO of the Respondent, Mr. ROBERT MBUNYI and the CFO Mr. SIMON WEKESA to appear in court and show cause why the decree herein cannot be satisfied by the Respondent company.***

***2. The Honourable court be pleased to issue an order directing the CEO of the Respondent company, Mr. ROBERT MBUNYI and the CFO Mr. SIMON WEKESA to appear in court and show cause why they should not be committed to Civil Jail for a period not exceeding six (6) months for failing and/or ignoring to settle/satisfy a lawful decree of the Honourable court.”***

4. The Applicant also asked the court to grant him the costs of the application.
5. It is the Applicant’s case that the Chief Executive Officer and the Chief Finance Officer of the Respondent were literally in-charge of the day-to-day affairs of the company.
6. The Applicant was of the view that the 2 gentlemen had, for no apparent reason, refused, declined, ignored and/or neglected to honour the just and lawful decree in this case. It was for that reason that the Applicant sought orders to compel the said two officers to attend court, in person, to explain why action should not be taken against them.
7. When canvassing the application, the Applicant submitted that as a matter of law, the Chief Executive Officer of a company was the defacto Manager of the Company, to whom the Directors had donated their day-to-day powers.
8. In answer to the application, the Respondent first pointed out that the persons against whom orders were being sought were not parties to this suit.
9. As far as the company was concerned, if it failed or in any way defaulted in meeting its obligations, the Applicant should take action against the company; and not against the persons allegedly in-charge of the company’s day-to-day matters.
10. The company drew the court’s attention to the Applicant’s deposition at paragraph 6 of the affidavit sworn in support of the application. The said affidavit reads as follows;

***“THAT I know of my own knowledge that a Company such as the Respondent acts through its Directors, who have donated their authority to its Chief Officers, the CEO and CFO herein respectively.”***

11. That deposition prompted the company to submit that the Applicant was well aware that a limited liability company acts through its Directors.
12. Therefore, if that be the position, the company submitted that the officers of the company, who are empowered to take action on behalf of the company were merely agents of the said company.
13. If the officers of the company were agents, the company submitted that they cannot be held personally liable for actions they may have taken on behalf of the disclosed principals.
14. Finally, the company stated that it had not refused to remit payment.
15. As far as it was concerned, payments would be made as soon as the company will have verified the authenticity of the claims upon which the decree was founded.
16. In determining this application I begin by restating a fact which might perhaps appear obvious, but which needs to be said from the start.
17. The parties to this case are Gerald O. Kimanga, who practices law in the name and style of Kimanga & Company Advocates, as the Applicant; and Invesco Assurance Company Limited, as the Responded.
18. Neither the **CEO**, Robert Mbunyi, nor the **CFO**, Simon Wekesa are parties to the case.
19. Therefore as the Decree was obtained against the Company, it ought to be executed against the said company.
20. In his supporting affidavit, the Applicant described the Company as being vibrant, and thus having capacity to settle the Decree.
21. In my considered view, that fact implies that if the Applicant took steps to execute the Decree against the Company, he has no doubt that the Company will settle the Decree.
22. Therefore, it is not clear to me why the Applicant has not taken steps against the entity which is indebted to him.
23. As there is no decree against either the **CEO** or the **CFO**, they do not have any obligation to settle the decree.
24. And if they do not have any legal obligation to settle the decree, the CEO and the CFO cannot be said to have refused or declined or ignored or even neglected to settle the decree.
25. Pursuant to **Order 22 Rule 35 (c)** of the **Civil Procedure Rules**, a decree-holder who has a decree for the payment of money may apply to the court for an order that –  
  

***“any other person, be orally examined as to whether any or what debts are owing to the judgement-debtor, and whether the judgement-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor or officer, or other person, and for the production of any books or documents.”***
26. The person or officer, so ordered does not assume personal liability for the decree. He cannot be sent to jail if the corporation failed to settle the decree.
27. When the Applicant asks the court to order that the **CEO** and the **CFO** should be imprisoned for failing to settle or to satisfy the decree, that is akin to saying that those 2 persons have become personally liable for the company’s debt.
28. It is well settled that a limited liability company is an artificial legal entity. Its existence is independent of its shareholders, its directors and its officers.
29. The fact that a person is a director or a shareholder, or an officer of a company does not, ipso facto, make him liable for the actions or omissions of the company.
30. In order to render any of those persons personally liable for the actions or omissions of the company, the law stipulates that the veil of the corporate personality would have to be lifted.
31. In this case the Applicant has not satisfied the court that there was any legal reason that warrant the lifting of the corporate veil of the Respondent, so as to render either the **CEO** or the **CFO** answerable for the company’s decree.
32. The fact that the **CEO** or the **CFO** or both of them, were responsible for financial matters of the company does not make them liable to settle the Company’s debts.
33. In the case of **KOLABA ENTERPRISES LIMITED V SHAMSHUDIN HUSSEIN VARUANI & ANOTHER, HCCC NO. 627 OF 2005**, Gikonyo J. expressed himself thus;

***“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 a different person altogether from its subscribers and directors.***

***Although it is a fiction of the law, it is still 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.”***

34. There has not been any suggestion, leave alone proof, that the **CEO** or the **CFO** were using the company for fraud or any other criminal activity.

35. I therefore find no merit in the application before me. It is dismissed, with costs to the Respondent.

**DATED, SIGNED and DELIVERED at KISUMU This 25<sup>th</sup> day of February 2020**

**FRED A. OCHIENG**

**JUDGE**