



REPUBLIC OF KENYA



**Bebiji Petroleum Limited v Wanjiku & 3 others (Environment & Land Case 562 of 2012) [2023] KEELC 20234 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20234 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 562 OF 2012  
JM ONYANGO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**BEBIJI PETROLEUM LIMITED ..... PLAINTIFF**

**AND**

**SARAH WANJIKU ..... 1<sup>ST</sup> DEFENDANT**

**DUNCAN KARITU ..... 2<sup>ND</sup> DEFENDANT**

**THE BOARD OF MANAGEMENT UASIN GISHU SCHOOL ... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff Company instituted this suit against the Defendants on October 26, 2009 claiming that the defendants had trespassed upon the plaintiff's land parcel number Eldoret Municipality Block 6/193.
2. The case was fixed for hearing on November 2, 2018 but owing to the plaintiff's failure to attend court, the case was dismissed for non-attendance with costs to the Defendants. The defendants' Party and Party Bill of costs was subsequently taxed at Kshs 309,055. Despite being notified of the costs, the Plaintiff had refused and/or failed to settle the same prompting the Defendants to file an application dated May 6, 2021 pursuant to Order 22 Rule 35(b) of the *Civil Procedure Rules* seeking orders that:
  - a. Spent
  - b. Byron Gawon Kipngetch Choge and Eva Chepkirui Cheragony being the known directors of the Respondent's company do attend court and be examined on oath as to whether the Respondent has nay and what property or means of satisfying the sums herein.



- c. Byron Gawon Kipnetich Choge and Eva Chepkirui Cheragony do produce all books of accounts, inventory of assets, bank statements and any other relevant documents showing the property and/or means of the said company of satisfying the sums herein.
  - d. In default of appearance and/or failure to such circumstances as may be deemed fit, the said directors named herein above be deemed personally liable to settle the claim herein and warrants of attachment /arrest do issue against them personally.
  - e. Costs be provided for.
3. The application is premised on the grounds set out in the Notice of Motion and the supporting affidavit of Sheila Tirop.
  4. Upon being served with the application, the Plaintiff responded to the application through the Replying Affidavit of Byron Gawon Kipnetich Choge sworn on August 6, 2021. In the said affidavit he deposed that his co-director Eva Chepkurui Cheragong died on June 9, 2019 and was therefore unavailable for to participate in the proceedings. He further deposed that the Plaintiff Company had not been in any active business and it had no bank account.
  5. He stated that the only asset owned by the company was land parcel No Eldoret Municipality Block 6/193 which was registered in its name on February 7, 2002. The instant suit was instituted for purposes of protecting the company's interest in the suit property but the same was dismissed for non-attendance. The plaintiff subsequently filed a Notice of Appeal.
  6. Mr Choge deponed that the Applicants had not laid a basis for lifting the corporate veil in order to make the directors personally liable for the debts of the Company, which is a separate legal entity. He added that at the time the suit was instituted, he was not a director of the plaintiff company. He annexed a copy of the plaintiff's annual returns for the years 2016, 2017, 2018, 2019 and 2020.
  7. In response to the Replying affidavit, Mr Joshua Ogongo Advocate filed a Supplementary Affidavit sworn on April 18, 2023 in which he deponed that the plaintiff had not denied that its case was dismissed with costs. He asserted that it had been demonstrated that the Plaintiff Company was a going concern which had been filing annual returns and paying taxes and the allegation that it was not in active business was misleading. He further deponed that Byron Gawon Kipnetich Choge had not denied that he was a director and shareholder of the plaintiff company.
  8. The application was canvassed by way of written submission and the parties filed their submissions which I have carefully considered.

### **Analysis And Determination**

9. The only issue for determination is whether the corporate veil of the plaintiff should be pierced to make the plaintiff's directors personally liable to pay the defendants costs.
10. In his submissions earned counsel for the Defendants/ Applicants submitted that the court has jurisdiction to issue the orders sought. He relied on the case of *Aster Holdings Limited v City Council of Nairobi & 4 Others* (2019) eKLR where Obaga J allowed an application for examining the directors of the Defendant company and lifted the corporate veil when the said directors failed to attend court as directed.
11. Counsel relied on the case of *Tropical Wood Limited v Samilis International Investments* (2017) eKLR for the proposition that as long as the applicant has shown that the Respondent has information



regarding the company's assets and whether the company has means to of satisfying the decree, the court should summon him to provide the said information.

12. He also relied on the case of *Jiang Nan Xiang v Cok Fast Company Limited* (2018) eKLR where the court lifted the corporate veil of the Respondent after its directors failed to attend court.
13. On the other hand learned counsel for the Respondent submitted that the applicants had not met the threshold for piercing the corporate veil set out in the case of *Ukwala Supermarket v Jaideep Shah & Another* (2022) eKLR where the court held that Kenyan 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 its shareholders or directors who are asserted to be the company's alter egos have acted in a fairly egregious manner because the courts understand the benefits of limited liability as expressed in the statute. He further held that.....

“...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 shareholders or directors in question such that there is such unity of interest in ownership that one is inseparable from the other, and
- b. Secondly, the facts must be such that adherence to the fiction of separate entity would under the circumstances sanction a fraud or promote injustice”.

14. Counsel further relied on the case of *China Wuyi Company Lts v Eldermann Property Ltd & 2 Others* (2013) eKLR where the court quoted Ringera J in *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd* (2002) 1 EA 41 as follows:

“Further, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman (sic) v Saloman (sic) & Co Ltd* (1897) AC 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the plaintiff. To this end the court's attention was drawn to the finding of Ringera J in *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd* when he stated 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 situations the law provides for remedies other than the directors of the company being saddled with the debts of the company”

15. In the instant case, the Plaintiff has provided information regarding its current status. What emerges is that although the company is a going concern, it has not been carrying out any business and its only asset is the suit property which is the subject matter of this case. There is no suggestion that the only surviving director is engaged in acts of fraud so as to warrant the corporate veil being pierced. In the circumstances I am constrained to agree with counsel for the Respondent that the Applicants have failed to meet the threshold for lifting the corporate veil.
16. The upshot is that the application lacks merit and it is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023**

.....

**J.M ONYANGO**



**JUDGE**

In the presence of;

Mr. Mogambi for the Plaintiff

No appearance for the Defendant

Court Assistant:

<b>ELC.562 OF 2012 RULING</b>	0
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