



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.448 OF 2009

HOLIDAY BAZAAR LIMITED.....PLAINTIFF

VERSUS

COLUMBUS ADVENTURES LIMITED.....DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **14th February 2018** in which **HOLIDAY BAZAAR LIMITED** (the Plaintiff herein) seeks for Orders:-

“(a) THAT the Honourable Court be pleased to order the Director and majority shareholder of the Defendant Company namely Deepak Pandit, as personally liable for the Decretal amount in this suit.

(b) The Costs of this application be borne by the Defendant.”

The application which was premised upon **Section 3A** of the **Civil Procedure Act, Order 51 Rule 1** of the Civil Procedure Rules and all other enabling provisions of the law, was supported by the Affidavit sworn on **1st February 2018** by **KANTILAL SHAH** a Director of the Plaintiff Company.

(2) **COLOMBUS ADVENTURES LIMITED** (the Defendant/Respondent herein) opposed the application through the affidavit dated **26th March 2013** sworn by **“DEEPAK PANDIT”** a Director of the Defendant/ Respondent. Pursuant to directions given by this court the application was disposed of by way of written submissions. The Plaintiff/Applicant filed their written submissions on **18th September 2018** whilst the Defendant/Respondent filed their written submissions on **29th October 2018**.

BACKGROUND

(3) The genesis of this application is the Plaintiff filed in court on **24th June 2009** in which the Plaintiff prayed for judgment in its favour against the Defendant in the amount of **Kshs.3,035,575.25**. This claim was based on various services which the Defendant had allegedly procured from the Plaintiff Company. On **15th April 2011** the Defendant applied for and obtained judgment in its favour against the Defendant in default of entry of Appearance and Defence. Thereafter vide an application dated **16th November 2011**, the Plaintiff sought to have a Director or any other officer of the Defendant Company orally examined in Court as to the availability of any property or means to satisfy the decree as well as the Defendant Company's books of account for the past six (6) years. This particular application was allowed by the Court on **13th December 2011**. However no Director of the Defendant Company honoured these orders and none ever appeared in court for oral examination. The plaintiff/Applicant then filed this present application seeking to have the Director of the Defendant Company held personally liable for the company debt i.e seeking to have the corporate veil pieced.

(4) It came to light that the Defendant Company was in fact dissolved on **8th August 2008** vide **gazette Notice No.7278**. Counsel for the Plaintiff informed the Court that upon realizing that the Defendant Company had been dissolved, the Plaintiff petitioned the court for orders to restore the name of the Defendant Company in the Register of Companies. The said orders were duly granted by the court. The Plaintiff therefore insists that the Defendant Company having been so restored in the Register is in existence and the orders now being sought to lift the corporate veil can be validly granted.

(5) In its submissions the Plaintiff Company states that Vide a letter dated **16th June 2009** **Mr Deepak Pandit** a Director of the Defendant Company writing on the Defendant's Company official letterhead assured the Plaintiff that although the Company was no longer operational

the Plaintiff would be paid its debt in full. The said **Mr. Pandit** made no mention at all in his letter of the fact that Company had already been dissolved. The Defendant were later shocked to receive a letter from Counsel for the Defendant dated **18th August 2009** informing them that the Defendant Company had been wound up long before the Plaintiff filed their suit. The Plaintiff avers that despite the Defendant Company having been wound up **Mr Deepak Pandit** continued to act as if the Company was still a going concern by writing to the Plaintiff on the Company letterhead and by even instructing an Advocate to defend the suit filed against the Defendant. The Plaintiff avers that the actions of **Mr. Pandit** amounted to fraud and misrepresentation both of which are grounds upon which a court may legally lift the corporate veil.

(6) On their part the Defendant/Respondent in his submissions counters that the company having been dissolved on **8th August 2008**, the same ceased to be a body corporate and as such lost its legal personality. The Defendant posits that the orders upon which the Plaintiff sought to rely in restoring the Defendant Company into the Register of Companies are of no effect as said orders were never implemented by the Registrar of Companies. Accordingly the Defendant Company remains a non-existent entity in law. That being the case no action can be commenced for or against the Defendant Company. Finally the Defendant submits that no sufficient grounds have been advanced to warrant lifting of the corporate veil and urges this court to dismiss this application in its entirety.

ANALYSIS AND DETERMINATION

(7) I have carefully considered the written submissions from parties as well as the relevant statute law and case law. Two issues emerge for determination by this court:-

- (1) Whether the Defendant Company is a dissolved entity and if so what is the legal effect of such dissolution?
- (2) Whether the standard of proof required to lift the Corporate Veil has been met.

I will now proceed to deal with each issue individually.

(i) Dissolution of the Defendant Company

(8) The Defendants contention is that the company being sued is no longer in existence as it was dissolved way back in the year 2008 vide **Kenya Gazette Notice No.7278**. As such the Director **Mr Deepak Pandit** avers that he cannot be called upon to settle the debts of a company which has been lawfully wound up as one cannot obtain order against a non-existence entity.

(9) The Plaintiff while conceding to the existent of the Gazette Notice winding up the Defendant Company counters that they did on **11th October 2010** file a Petition in court seeking to quash the two gazette notices dissolving the Defendant company and further sought orders to have the said company restored to the Companies Register. That Petition was allowed on **19th November 2010**, vide a court order issued on **2nd December 2010**. The Plaintiff states that they then served a certified copy of this order on the Registrar of Companies.

(10) The Defendant states that the Order quashing the two gazette notices cannot avail any relief to the Plaintiff as the said order is null and void for failure to implement the same since as the Registrar has not yet effected the requisite changes in the Register. The Plaintiff however was of the view that delivery of a certified copy of the court order to the Registrar was sufficient.

(11) **Section 339(6)** of the **Companies Act Cap 486** (now repealed) which was the law in operation at the material time provided as follows:-

“(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the court on an application made by the company or member or creditor before the expiration of ten years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the register for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.” [emphasis supplied]

(12) A clear reading the above provision is that a delivery of the certified order to the Registrar of Companies was sufficient and upon such delivery the Defendant Company is automatically deemed to have continued in existence as if its name had never been struck off the Register. Annexed to the Plaintiffs supporting affidavit dated **1st February 2018** is a copy of the letter dated **23rd February 2011** forwarding the certified copy of the court order to the Registrar of Companies.

(13) I therefore find that the Plaintiff did follow laid down procedure in petitioning for the reinstatement of the Defendant Company and I further find that the Plaintiff complied with the provisions of **Section 339(6)** by delivering a certified copy of the court order to the Registrar of Companies. Accordingly the Defendant Company was reinstated to the Register of Companies and as such the Defendant Company is alive and is clothed with requisite legal corporate personality.

(ii) Lifting of the Corporate Veil

(14) It is a well-established principle of Company Law that a company is a body corporate with an identity which is distinct and separate from its members and shareholders. This principle which is meant to shield and protect the individual members of a company from taking on the liabilities of the company, was espoused in the leading case of **SALMON –VS- SALMON (1897) A.C 22 HL**.

(15) In **POSTBANK CREDIT LIMITED (In liquidation) –VS- NYAMANGU HOLDINGS LIMITED [2015] eKLR** the Court held that lifting of the veil is not a light matter because it opens up the Directors or members of the Company to personal liability for the debts of the company. The corporate veil can only be lifted or pierced by the Court on the basis of very good and compelling reasons.

(16) In **RICCATTI BUSINESS COLLEGE OF EAST AFRICA LIMITED –VS – KYANZAVI FARMERS COMPANY LIMITED [2016] eKLR**, the Court of Appeal citing the decision in **VICTOR MABACHI & Another –Vs – NURTUN BATES LIMITED [2013]eKLR** held as follows:-

“[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.”

A useful discussion on circumstances where a court will be entitled to lift the corporate veil appears at paragraph 402 of Halsbury’s Laws of England 4th Edition Vol.7(1) where the learned authors say:

“...or where the court will “pierce (or lift) the corporate veil, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the courts “piercing”(or lifting) the veil...”

(17) However like for all general rules there exist exceptions to the principle in **Salmon – Vs – Salmon**. There are certain cases where the courts will not hesitate to pierce or lift this corporate veil. In **JONES & Another –Vs – LIPMAN & Another [1962] 1 WLR 833** it was held thus:-

“Whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask of device for enabling the directors to hide themselves from the eyes of equity. Therefore if a company is thought to be a mere cloak or sham, a device or a mask which the Defendant holds to his face, in an attempt to avoid recognition by the eye of equity, the court will grant summary judgment even against the person behind the said company...”

In that same case the Court went onto observe that:-

“...the corporate vehicle has been used to commit serious and mega frauds and corruption. That realization has impelled the courts in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or improper or illegal acts.”

(18) The question in the present case therefore is whether there exists sufficient cause to warrant the lifting of the corporate veil. Has the Plaintiff/Applicant met the required standard of proof to convince court that the conduct of the director of the Defendant Company was improper and/or fraudulent?

(19) The Plaintiff contends that this directors’ actions prove fraud misconduct and misrepresentation. The Plaintiff relies on the letter dated **16th June 2009** written by **Mr Deepak Pandit** (the director) in which he stated that the company was no longer operational but assured the Plaintiff that the debt would be paid in full. The director penned this letter on company stationery bearing the company’s logo. Additionally this director proceeded to instruct counsel to act for the company. All these acts were done after the company had already been dissolved. There is no way this director could claim to have been unaware of that dissolution. Why then would he continue to act as if the company was still in existence? By trading in the name of a company which had already been wound up and by writing to the Plaintiff using the company letterhead the director gave the false impression that the company was still in existence. This amounts to misrepresentation.

(20) It is also important to take into account the history of this matter. On **13th December 2011 Hon Justice Mutava** (as he then was) ordered that a director of the Defendant company or any representative of the company appear in court to be examined on oath and to avail the books of account for the preceding six (6) years. The director never honoured this summons which again is clear evidence of his misconduct. The Defendant now declares that it cannot settle debts of a non - existent company. The intention of the director not to settle debt is quite evident. From the time this suit was instituted the Defendant has never demonstrated any commitment to reimburse the amount claimed by the Plaintiff. Instead they have used the court process to frustrate the payment of the same. In my view it is important for courts to safeguard business dealings from unscrupulous directors who seek to hide behind the curtain of corporate personalities.

(21) In **ULTIMATE LABORATORIES –VS – TASHIA BIOSERVICE LIMITED NAIROBI HCC NO.1287 OF 2000, Hon Justice Aaron Ringera** (as he then was observed as follows:-

“However the fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or inter-vention.

As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mark for fraud or improper conduct.”

(22) In this case it is clear to me that the Director of the Defendant Company **Mr. Deepak Pandit** was acting “**mala fides**”. He is seeking to hide behind corporate identity in order to evade paying the legitimate the debts of the company. This the court cannot countenance. Accordingly I find that this is one case which merits the court lifting the corporate veil.

Accordingly, I do allow this application as prayed and direct that **Mr. Deepak Pandit** shall be held personally liable for the decretal amount in this suit.

Dated in Nairobi this.....**26th**.....day of **April**, 2019.

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Justice Maureen A. Odero