



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL APPEAL CASE NO. 12 OF 2018**

**KENYA BUS SERVICES LIMITED.....1<sup>ST</sup> APPELLANT**

**KARANJA KABAGE.....2<sup>ND</sup> APPELLANT**

**SAMUEL KIMUCHU GICHURU.....3<sup>RD</sup> APPELLANT**

**EDWIN MUKABANA MASSIMBA.....4<sup>TH</sup> APPELLANT**

**STANLEY MURAGE.....5<sup>TH</sup> APPELLANT**

**-VERSUS-**

**MWAURA KARUGA T/A**

**LIMIT ENTERPRISES..... RESPONDENT**

*(Being an appeal from the Ruling and order of the Deputy Registrar Hon. D. W. Nyambu delivered on 7<sup>th</sup> October 2014 in Nairobi HCCC No.106 of 2005)*

**J U D G M E N T**

1. This appeal is filed by five Appellants. The first Appellant is **Kenya Bus Services Limited** (hereinafter the Company). The 2<sup>nd</sup> to 5<sup>th</sup> Appellants are **Karanja Kabage, Samuel Kimuchu Gichuru, Edwin Mukabana Massimba** and **Stanley Murage** (hereafter collectively referenced to as Directors of the Company).

2. The order to which this appeal is directed was made by the Deputy Registrar on 7<sup>th</sup> October 2014 in case No. Nairobi HCCC No 106 of 2005. By the ruling of that date the Deputy Registrar ordered the Directors of the Company to be personally liable for the debt of the Company.

3. The Appellants being aggrieved by that ruling have raised eleven grounds of appeal, which because they are repetitive I will bring out the salient issues they raise rather than reproducing them.

4. The Appellant faulted the ruling on the ground that the Deputy Registrar made an order which was inconsistent with the doctrine of corporate personality and failed to appreciate that the Director of the Company were not fraudulent; that the order ought not to have been made under Order 22 Rule 35 of the Civil Procedure Rules; that the Learned Deputy Registrar erred in considering an un-signed and un-certified judgment of a criminal trial; and that the Deputy Registrar erred to have made the orders against the Directors when there was no evidence, produced before Court, that they were Directors of the Company.

**BACKGROUND**

5. By a Plaintiff filed in Nairobi HCCC No. 106 of 2005 **Mwaura Karuga t/a Limit Enterprises**, the Respondent herein, sued Kenya Bus Services Limited, the Company. On 27<sup>th</sup> June 2005 parties entered judgment in favour of the Respondent in that case, by consent, for KShs. 2,619,292 plus interest and costs. Costs in that suit were subsequently certified on 22<sup>nd</sup> July 2005 by the Deputy Registrar at KShs. 152,114.38.

6. The Respondent subsequently filed a Notice of Motion dated 30<sup>th</sup> May 2006 and sought the following orders:

i. That the Directors of the judgment – Debtor/Respondent Messrs. Karanja Kabage, Edwin Mukabana, J.P. Mbugua S.K Murage, S.K. Gichuru and Town Clerk Nairobi City Council be summoned to attend Court personally and be orally examined as to what property or other means of satisfying the decree the Judgment Debtor has and to produce the latest audited accounts and current bank statements.

ii. That the said Directors Messrs. Karanja Kabage, Edwin Mukabana, J.P. Mbugua S.K. Murage, S.K. Gichuru and Town Clerk Nairobi City Council be held personally liable for the satisfaction of the decree against the Judgment-Debtor.

iii. That the judgment-Debtor/Respondent be condemned to meet the costs of this application.

7. That application was supported by the affidavit of the Respondent. The Respondent deponed that after he obtained judgment against the Company he instructed an auctioneer to attach moveable assets of the Company. On or about 30 August 2005 Whitestone Auctioneers attached five buses belonging to the Company. That attachment led to an agreement being reached between the Respondent and the Company. The agreement was that the Respondent would instruct the auctioneer to release the attached buses and the Respondents' debt be paid by instalment. In that regard the Respondent was given 13 cheques totaling Kshs. 2.6 million. Those cheques were issued by the sister Company, Bustrack Ltd, to the Company. That only one cheque for Kshs. 100,000 was honoured, the others were dishonored. When the Respondent however re-instructed the auctioneer to attach assets of the Company he was unsuccessful. The Respondent finally deponed:

***“That the Directors of the judgment-debtor have been dishonest in concealing the judgment-debtor’s property to avoid their attachment and sale in satisfaction of the decree issued by this honourable Court. The Directors have continued to operate their business as passenger carriers and to generate income but have persisted in their failure to satisfy the decree against the judgment-debtor and should therefore be held personally liable to satisfy the same.”***

8. The Notice of Motion dated 30<sup>th</sup> May 2006 was the one that the Deputy Registrar ruled on 7<sup>th</sup> October 2014. That is the ruling which is the subject of this appeal.

#### **APPELLANT’S SUBMISSIONS**

9. The Appellant submitted that the Deputy Registrar erred to have issued the order of 7<sup>th</sup> October 2014. That it was an error because Order 22 Rule 35, of the Civil Procedure Rules (hereinafter the Rules) under which the Notice of Motion application was filed why permitted examination of the Company’s Directors for purpose of discovery. The Learned advocate for the Appellant in the written submissions, relied on Mulla (Code of Civil Procedure). However since the excerpt of the same was not provided by Counsel I decline to rely on it. The Appellant also relied on the case **MICHAEL KYAMBATI –V- PRINCIPAL MAGISTRATE (2016) eKLR**, where it was stated that Order 22 Rule 35 of the Rules does not expressly provide for the lifting of the corporate veil.

10. It was the Appellant’s submission that the corporate veil could only be lifted under the provisions of the Section 323 of the Companies Act, when a Company is in the course of being wound-up.

11. The Appellant submitted that fraud had not been proved on the part of the Directors and that the Deputy Registrar erred to have issued the orders she made on 7<sup>th</sup> October 2014.

#### **RESPONDENT’S SUBMISSIONS**

12. The Respondent opposed the appeal through his written submissions. He submitted that the Deputy Registrar had jurisdiction under Order 22 Rule of the Rule to lift the Company’s corporate veil. Respondent relied on the decision in the case **NYAMBU – V- JASPER LOGISTICS (2017) eKLR** where the Court found:

***“I agree with defence submissions and the Judicial precedents cited that since the decision in Salomon and Salmon co Ltd (1897) A.C 22HL, Courts have upheld the doctrine of the corporate veil and limited liability of a Company. However, I agree with the applicant the same Courts have also pierced the corporate veil to see what is happening behind it if there is evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the Company”***

13. The Respondent cited another case, thus:

***“In HCCC NO.1287 OF 2000 ULTIMATE LABORATORIES V TASHA BIOSERVE LIMITED on the issue of jurisdiction Ringera J (as he then was) stated:***

***“While I agree with the defendant’s/judgment-debtor’s advocate that the objective of an examination of a Company’s Director or officer under Order XXI Rule 36 is to obtain discovery, for the purpose of execution of a decree against the Company, as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what property or means of satisfying the decree, I don’t agree that the Court does not have the power in an application in execution which is grounded under the above provisions as to well as the inherent power of the Court and all other provisions of the law to lift the corporate veil of the Company and order the Director to personally discharge the debts of the Company.”***

14. Respondent submitted that the Director were summoned to attend Court for cross examination and were ordered to produce the latest audited accounts of the Company and its bank statements. That the Directors, except one that is Edwin Mukabana, failed to attend cross examination and Mukabana failed to produce, for that cross examination, the current audited accounts and bank statements.

15. The Respondent further submitted that there was evidence of fraud proved before the Deputy Registrar because there was concealment by Directors of material documents.

### **ANALYSIS AND DETERMINATION**

16. What was before the Deputy Registrar, when she delivered her ruling of 7<sup>th</sup> October 2014 was a Notice of Motion application dated 30<sup>th</sup> May 2006. Reference has been made to that application above. That application was filed under Order 22 Rule 35 of the Rules. That Rule provides:

*“Where a decree is for the payment of money, the decree-holder may apply to the Court for an order that –*

*a) .....*

*b) In the case of a corporation, any officer thereof;*

*c) Any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfy 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.”*

17. Looking closely at the above Rule it becomes clear that the purpose for which cross-examination, under that Rule, is undertaken. Just to repeat, cross-examination is to assist to find out, what debts are owing to the judgment-debtor to identify what property or means of satisfying the decree are there.

18. The Learned Deputy Registrar in reaching a decision to lift the corporate veil stated thus, in her considered ruling:

*“I have carefully considered Section 323 of the Companies Act guides conditions upon which the Court can rely to lift the veil as fraudulent trading. It is (an) offence whether the Company is being wound up or not. Not necessary to prove intent to defraud, but to show that the Director knew or should have concluded that insolvency was inevitable. A Director was inevitable. A Director found guilty of fraud or wrongful trading is required to make contribution to the Company assets or personally discharge the debts of the Company.”*

19. The Learned Deputy Registrar in lifting the corporate veil did so because of the provisions of the Companies Act and because she found the Directors actions justified the lifting of the veil.

20. The Ruling of the Deputy Registrar was in October 2014. The operative Companies Act was Cap 486, before it was repealed in 2015. That Act defined the Court as the High Court. It follows that the Deputy Registrar had no power/jurisdiction to invoke the Companies Act to lift the veil under the Companies Act. Only High Court could have invoked the Companies Act.

21. Further I find that the evidence before the Deputy Registrar did not all prove fraud as the part of the Directors. The Directors had not committed fraud against the Company. Even the cheques that were issued to the Respondent were cheques of another Company Bustrack, not the Company hereof. There was no evidence that those two companies were sister companies, as submitted by the respond; I must say that I don't understand the terminology of sister Company. But suffice it to say that the fact the cheques were dishonored or that the buses of the Company were not available for attachment does not in itself prove fraud. The Deputy Registrar did note that the Company was undergoing hard times and that its liabilities exceeded its assets. That on its own does not show fraud, it only showed a Company going through hard times. I do find that the Deputy Registrar lowered the bar of proving fraud far too much. For that reason she erred in her determination. The Court of Appeal in the case **CHARLES RAY MAKUTO (Supra)** had this to say on incorporation, which can assist in this case:

*“It is long-standing legal principle that a Company is in law a separate person distinct from its members. (See Salomon v Salomon (1897) AC 78.) In Victor Mabachi & Another v Nurtarn Bates Ltd. Civil Appeal NO.247 of 2005 (2013) eKLR. The Court 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.” For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lifting of the veil is a question of fact in each case.”*

22. I also find that the Appellants were correct to submit that the Deputy Registrar erred to have relied on un-certified and un-signed judgment. But perhaps more to the point is, it was not correct to consider that judgment which was brought to the attention of the Deputy Registrar through submission. Obviously the Appellants were denied the opportunity to rebut the evidence on that judgment.

23. There was no evidence, before the Deputy Registrar that the Appellants were indeed Directors of the Company. The Deputy Registrar therefore also erred to have issued orders against persons who were not proved to be the Directors of the Company.

**24. In the end the Appellants' have succeeded in this appeal. Having succeeded the costs of the appeal are hereby awarded to them.**

**25. It follows that the Appellants having succeeded in this appeal the money deposited into the joint account of the advocates in this matter shall be release to the Appellants within 30 days from this date hereof.**

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of MAY, 2019.

MARY KASANGO

**JUDGE**

*Judgment Read and Delivered in Open Court in the presence of:*

Sophie..... COURT ASSISTANT

..... FOR THE 1<sup>ST</sup> APPELLANT

..... FOR THE 2<sup>ND</sup> APPELLANT

..... FOR THE 3<sup>RD</sup> APPELLANT

..... FOR THE 4<sup>TH</sup> APPELLANT

..... FOR THE 5<sup>TH</sup> APPELLANT

..... FOR THE RESPONDENT