



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. 896 OF 2009**

**RAMABEN RAMNIKAL PATANI.....1<sup>ST</sup> APPLICANT**

**ASHIT PATANI.....2<sup>ND</sup> APPLICANT**

**SELINA PATANI.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**GARDEN CHAMBERS LIMITED.....RESPONDENT**

**RULING**

1. By Notice of Motion dated 8<sup>th</sup> November 2018, the applicants herein seek the following orders:

***1. That the respondent/Judgment Debtor's officers, Directors, Manager and/or any of the company officials do appear personally before this Honourable court to be orally examined as to whether the judgment – debtor has any property or means of satisfying the decree herein.***

***2. That the Judgment Debtor's officers, Directors, Managers and any other person be compelled to attend and appear before this Honourable Court and produce such all and any book of accounts and documents relating to operations of the respondent company between the years 2008 to date and be orally examined as to its means of satisfy the decree herein.***

***3. That DHIRAJLAL V. PATANI being the Managing Director of the judgment –Debtor/respondent and is hereby summoned to appear for cross examination and production of the respondent's records together with the company bank statements and his personal bank statements as stated above.***

***4. That in default of appearance and/or in failure to such reasonable circumstances as may be deemed fit, the said director named herein above be deemed personally liable to settle the claim herein and warrants of attachments do issue against him personally.***

***5. Those costs of this application be provided for.***

2. The application is brought under Order 22 Rule 35 of the Civil Procedure Rule is supported by the affidavit of **ASHIT PATANI** and is further premised on the grounds that:

***1. That the decree herein for payment of money remains unsettled.***

***2. That the auctioneers have been unable to trace any assets belonging to respondent company and efforts to execute the judgment have been thwarted.***

***3. That it is prudent in the circumstances for the officers and/or persons named above or related to the respondent company to appear in court and be examined orally as to operations and means of the company for satisfying the decretal amount which remains unsettled.***

***4. That the documents filed in court by the respondent show the named person as its Managing Director of the respondent company.***

3. A summary of the applicants case is that the respondent company instituted a civil suit against then being HCCC 896 of 2009 to recover the sum of Kshs 10,000,000 which suit was subsequently dismissed with costs to the applicants after which party and party costs were taxed at kshs 414,332/=.

4. The applicants' case is that they have been unable to execute for the said costs as all attempts and efforts by the auctioneer to trace the respondents company's assets have been fruitless thereby necessitating the filing of this application.

5. The respondent opposed the application through the replying affidavit of its director one **Dhirajlal Virpal Patani** sworn on 18<sup>th</sup> March 2019 wherein he avers that the respondent company had 4 directors namely: one **Sanatkumar Shantilal Trivedi**, himself and his two brothers **Ramnikkal Virpal Patani** and **Mansuklal Virpal Patani**. He states that his two brothers (directors) are now deceased and that the late **Ramnikkal Virpal Patani** is the 1<sup>st</sup> applicants husband and the father of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.

6. He further states that the other director **Sanatkumar Shantilal Trivedi** has since moved to America and has not been in touch with him for many years. He avers that the only property owned by the respondent company is Garden Chambers building situate at Moktar Daddah Street in Nairobi on LR No. 299/2632 and 209/4355 where the respondents' offices are situated and further, that the said building was sold to a buyer introduced to the company by the 2<sup>nd</sup> applicant after which the proceeds were shared out to all the family members including the applicants herein.

7. He states that the new owners of the Garden Chambers Building took possession of the premises and locked out the previous directors who are now unable to gain access to the company records or books even if they were summoned in court. He further states that the company stopped its operations over 10 years ago long before a verdict was reached in the instant case.

8. He further avers that he is 82 years old, ailing and is therefore physically unable to attend court or deliver his personal bank statements as he is not the judgment debtor in the case.

9. It is the respondent's deponent's case that the applicant has no reason to demand that he held personally liable to settle the claim since there is no evidence that the company engaged in fraudulent activities so as warrant the lifting of the veil and further, that the judgment was entered against the company and not its individual directors.

10. Parties canvassed the application by way of written submissions which I have carefully perused and considered. The main issue for determination is whether the applicants have made out a case to warrant the granting of the orders sought in the application.

11. Order 22 Rule 35 of the Civil Procedure Rules which stipulates as follows:

***35. Where a decree is for the payment of money, the decree-holder may apply to the court for an order that—***

***(a) the judgment-debtor;***

***(b) in the case of a corporation, any officer thereof; or***

***(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 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.***

12. The above provision grants the court power to summon any officer of a company to attend before it and be examined on whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any means of satisfying the decree. The duty of the court in this respect was aptly stated by Ringera J. in Nairobi HCCC No. 1287 of 2000 *ultimate Laboratories v Tasha Bioservice* (unreported) Ltd as follows:

***“The court’s duty under the Order and Rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree”,***

***Ringera J(as he then was ) continued***

***“ 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 XX1 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 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”.***

***Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed with the purpose set out in the rule. That is;***

***.....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, therefore, take the view that, as long as the applicant has shown that the respondent is in a position to provide information in the nature of discovery....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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the respondent, that the applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the applicant to seek for information in the nature of discovery to assist the decree - holder to follow through on the execution. If the decree-holder already has such definite information of the debts and properties of the judgment debtor, there will be need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor’s known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule”.*

13. In the instant case, what the applicants seek is what has been referred to as Discovery in Aid of Execution since they seek to have the company directors, officers and/or Managing Director summoned to appear in court for cross examination and production of the respondent’s records together with the company bank statements and director’s personal bank statements. In essence, the applicants also seek orders for the lifting of the corporate veil and order that the Managing Director be held personally liable to discharge the debts of the company.

14. In the case of *Masefield Trading (K) Ltd v Rushmore Company Limited & Another* [2008] eKLR, it was held:

*“I think the above rule grants this court jurisdiction to summon an officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”*

15. In the present, a reading of the respondent’s replying affidavit reveals the following salient and undisputed facts:

- a) That the respondent company was/is a family business in which the respondent’s deponent and his two brothers (now deceased) were directors.
- b) That one of the deceased directors, one **Ramnijklal Virpal Patani** was the husband to the 1<sup>st</sup> applicant and the father of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.
- c) That the company’s sole property known as Garden Chambers Building situated at Muktar Daddah Street in Nairobi was sold off more than 10 years ago to a third party, at the instance of the 2<sup>nd</sup> applicant and the proceeds there from shared among all family members including the applicants.

16. What clearly emerges from the undisputed facts contained in the respondent’s replying affidavit is that the applicants are well-versed with the goings-on in the company and fully participated in the sale of the company’s asset in their capacities as the family members/administrator of one of the deceased directors.

17. From the above facts and scenario, I find that it goes without saying that the applicants are in a position to know all the available assets of the company, if any, and it will be foolhardy for the court to summon the respondents Managing Director, who is really the 1<sup>st</sup> applicants brother in law and the 2<sup>nd</sup> and 3<sup>rd</sup> applicants uncle to appear in court to restate what is already within their knowledge with the family ranks.

18. The applicants, as family members of the respondent’s deponent, have stated that they are not aware of any of the properties belonging to the respondent company. As I have already stated, the company is a family business, in which case, I note that if it had any property, then such ownership would be in the applicants knowledge. The question which then arises is what new information regarding the company would the respondents director reveal to the court that is not already within the knowledge of the applicants?

19. My humble view, as can be confirmed from the contents of annexure “**DVP2**” is that the instant application is a manifestation of the longstanding family feud between the applicants and the respondent’s deponent herein.

20. Be that as it may and considering that a company is a separate legal entity distinguishable from its directors, and further taking into account the fact that the applicants have a decree in their favour that is overdue for execution, it would only be fair and just that the company’s officials be called upon to shed light on the company’s assets, if any, in order to assist in the execution.

21. The respondent’s deponent contended that he is old, ailing and that the company is moribund having ceased its operations for more than 10 years. The deponent did not however attach any medical documents to confirm his physical status and inability to attend court and neither did he avail any banks statements records from the Registrar of Company has been dormant for the entire 10 years. In essence, this court has nothing to go by in determining either the existence or the financial health of the company. I therefore find that the applicants have shown that the respondents deponent is in a position to provide information in the nature of discovery 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. Accordingly, I order that **Dhirajlal V. Patani** attends court on such date as shall be agreed by the parties and be orally examined on whether any or what debts are owing to the company and whether the judgment debtor has any or what property or means of satisfying the decree herein. He will also be required to produce any relevant documents or copies thereof on the assets of the company, if any, books of accounts company title documents, if any, which he may have obtained as a director or shareholder of the judgment debtor.

## **Lifting of the corporate veil.**

22. The applicants also sought orders that the director names **Dhirajlal V. Patani** be deemed personally liable to settle the claim herein and that warrants of attachment be issued against him personally in the event that he fails to appear in court for oral examination.

23. It is a long-standing legal principle that a company is in law a separate legal entity distinct from its members. The judicial precedents cited since the decision in *Salmon and Salmon and Co. Ltd* (1897) A.C. 22HL, courts have upheld the doctrine of the corporate veil and limited liability of a company. However, courts have in certain instances 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 directors or shareholders of the company. In other words, where it is established that there is fraud or improper conduct, the corporate veil may be lifted.

24. In *Victor Mabachi & Another v Nurturn 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.”***

25. The above legal position notwithstanding, there have been other developments in law that have had effect of piercing or lifting the corporate veil in recognition of the fact and reality that the business of a company, as an artificial entity, is carried on by and for the benefit of living persons.

26. In the case of *Jones and Another v Lipman & Another* [1962] IWL 833 it was held:

***“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 or device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And 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 proper or illegal acts. This act of removing the façade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil.”***

27. The exercise of lifting the corporate veil is however a delicate and strict one regulated by either statutory provisions or through judicial interpretation. Courts have over time identified the specific circumstances which warrant the lifting of the corporate veil in order to directly deal with the individuals behind the fraudulent schemes within the company.

28. In the instant case, I am not satisfied that any material has been placed before me to support the lifting of the corporate veil against the named director. The named director has not been shown to have participated in any fraudulent acts or underhand dealings within the company so as to warrant his being held personally liable for the debts of the company. In any event, the company has been shown to have been a family business in which several family members, including the applicants herein were beneficiaries. In the circumstances of this case, I find that if there are any debts or liabilities, arising under circumstances that would warrant the lifting of the corporate veil, then it would only be fair and just that the same be shared among the all directors/shareholders rather than holding only one director liable.

29. Accordingly, allow the instant application, albeit partly, and only to the extent that **Mr. Dhirajlal V. Patani** attends court for examination as stated earlier in this ruling. I reiterate that having found that there is no material to support the lifting of the veil, I decline to grant prayer No. 4 of the application.

30. I make no orders as to costs, given the nature of the application and the relationship between the parties.

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of September 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wanyoike for Wandago for defendant.

No appearance for plaintiff.

Court Assistant- Otieno