



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 404 OF 2012

KARACHIWALLA (NAIROBI) LIMITED.....PLAINTIFF

VERSUS

BURRELL INTERNATIONAL LIMITED.....DEFENDANT

RULING

1. Following the entry of judgment for the plaintiff against the defendant on 5th December, 2014 in the sum of Kshs. 11,271,765.00/- being the value of hardware goods supplied by the plaintiff to the Defendant Company to facilitate a government tender/project, the plaintiff filed the instant application dated 3rd November, 2015 seeking the following orders:

(i) That PAUL MACHARIA MWITHAGA and LUCY CHERUTO KIPSAINAI, being directors of the defendant do personally appear in court on a date directed by the Honourable Court for purposes of examination as to the property of the company capable of satisfying the Judgment Debt herein.

(ii) That the said directors be ordered to furnish the decree holder, in advance of such oral examination, with the books of accounts, bank statements and annual tax returns filed for the period commencing 15th July 2007 when the transaction, the subject matter of this suit took place up to now in compliance with the statutory provisions.

(iii) That the Court do lift the corporate veil shielding the directors of the company from personal liability and to hold the directors of the company personally liable for the decree herein if the court finds that the company has no assets or property capable of satisfying the decretal sum and further if no proper books of accounts, statements and returns are furnished within the time stipulated by the Courts.

(iv) That the costs of this application be provided for.

2. The application is brought under Order 22 Rule 35 of the Civil Procedure Rules and is supported by the applicant's director's affidavit sworn on 3rd November 2015.

3. The gist of the applicant's case is that the decree of this court has not been settled and that the plaintiff's efforts to execute for the same has not yielded any fruits because the defendant has no known attachable assets and that the defendant's directors hold the assets in their personal names. The applicant's deponent avers that the defendant Company is an empty shell that was crafted by the directors to obtain goods on credit and to hide behind the fact that the defendant is a separate legal entity in order to avoid settlement of debts.

4. He further avers that the defendant Company has changed the company's name from Burrel International Limited to Burrell Engineering and Construction Limited as indicated in the CR12 form. The applicant therefore prayed for action against the said Directors/shareholders of the Defendant Company.

5. At the hearing of the application, counsel for the applicant submitted that the applicant seeks only the 3rd prayer in the application regarding the lifting of the corporate veil as the first two prayers had already been dealt with by the Deputy registrar. This ruling will therefore be only in respect to the issue of whether the corporate should be lifted on the defendant's directors/shareholders.

6. The defendant opposed the application through the replying affidavit dated 18th February 2016. It also filed their written submissions to the application.

7. I have considered the application dated 3rd November 2015, the response filed by the respondent, the parties' submissions together with

the authorities that they cited.

8. It was not in dispute that judgment was on 15th July 2007 entered against the defendant in favour of the plaintiff for the sum of Kshs. 11,271,765.00/= which amount remains unpaid to date. It was also not disputed that the Defendant issued the plaintiff with cheques to hold as security for the court decree but that it has not given any undertaking to the Plaintiff on how and by what means, it intends to satisfy the outstanding decretal amount.

9. Order 22 rule 35 of the Civil Procedure Rules under which the motion is brought stipulates as follows:

“... 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.”

10. In the instant case, as I have already stated, the decree herein is a money decree. The applicant's case was that their application to examine the directors or officers of the defendant company regarding any assets or debts owing to the judgement debtor did not elicit any positive reaction from the said officers who did not attend court despite proper service. Counsel also submitted that the defendant's reason for failing to settle the decretal sum was not plausible in view of the contents of annexure “SCP4” to the applicant's affidavit in support of the application which shows that the defendant was paid a whopping sum of kshs. 223,231,448.75 by the government. It was the applicant's contention that the defendant has enough funds to settle the decree but has been adamant in its refusal to settle the debt thereby necessitating the lifting of the corporate veil. It was also submitted that the defendant's directors, who are husband and wife.

11. The applicant sought orders that the defendant's directors be held personally liable for the debt as they had failed to attend court to provide the detailed accounts of the defendant's financial standing. The defendant however submitted that its directors were not personally served with any summons to provide for examination as to the assets of the company or to provide books of accounts.

12. 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.

13. 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.”

14. In the present case, the foundation of the plaintiff's motion for the corporate veil of the defendant company is that the company is an empty shell and that it was used as a conduit to obtain goods from the plaintiff which goods the defendant has adamantly refused to pay for despite proof that it received the payments that it alleged it was still awaiting from the government. To further buttress the applicant's case, they noted that the defendant's directors declined to attend court to be examined on the defendant's financial affairs despite service with notices.

15. My finding is that even though it is trite law that a company is a separate legal entity from its directors, in the instant case, the applicant has exhausted all the available avenues towards getting to know the defendant's financial standing in order to execute the decree to no avail. The defendant's directors did not attend court to shed light on the company's finances or assets despite service with the notices. I have perused the replying affidavit of the defendant's director, Paul Macharia Mwithaga, dated 18th February 2016 and I note that even though the defendant's deponent acknowledges that the defendant owes the applicant the decretal sum, nowhere in the said affidavit does the deponent state how, if at all, the company intends to settle the debt.

16. The court is presented with a company whose directors remain tight-lipped on its existence and financial status despite the acknowledgement that it owes the debt. My finding is that in the circumstances of this case, the court cannot sit back and do nothing by allowing the defendant's directors to continue hiding behind the corporate veil, more so in the face of their failure to heed court summons.

Disposition

17. For the reason that the law allows for examination of directors of a corporation on credit worthiness of a judgment debtor, and having found that the defendant's directors **PAUL MACHARIA MWITHAGA** and **LUCY CHERUTO KIPSAINAI**, who are husband and wife respectively, did not attend court to be examined on Defendant/judgment debtor's property and/or means of satisfying the decree herein and to produce the Defendant's books of accounts and other documentary evidence showing the same before the court, I find that this is an appropriate case for lifting the Defendant's Corporate Veil and pursuing the individual Directors/Shareholders.

18. Consequently, I allow prayer (iii) of the application dated 3rd November 2015 and order that the corporate veil shielding the directors of the defendant company from personal liability be lifted and that the said directors be held personally liable for the decree herein.

19. Considering however that the plaintiff was in its motion before court effectively seeking enforcement of a judgment in his favour, the appropriate order on costs is that each party shall bear its own costs.

Dated, signed and delivered in open court at Nairobi this 26th day of September 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Olonde for the plaintiff /applicant

No appearance for respondent

Court Assistant - Otieno