



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 31 OF 2018

IN THE MATTER OF THE ESTATE OF MARK KIPTARBEI TOO (DECEASED)

CHEPKOECH TOO.....APPLICANT

VERSUS

MARY JEPKEMBOI TOO.....1ST RESPONDENT

SOPHIE JELIMO.....2ND RESPONDENT

FANKIWA LIMITED.....3RD RESPONDENT

CIMBIRA EAST AFRICA LIMITED.....4TH RESPONDENT

RULING

1. The applicant filed this application under a notice of motion dated 6th June, 2017 seeking for orders: -

i. That pending the hearing of this application interparties, this Honourable court be pleased to restrain Cimbira East Africa Limited from releasing the sum of Kshs. 100,000,000.00 or any sum thereof held by it on account of the 3rd Respondent.

ii. That pending the hearing and determination of this application, this Honourable court be pleased to restrain Cimbira East Africa Limited from releasing the sum of

iii. Kshs. 100,000,000.00 or any sum thereof held by it on account of the 3rd Respondent.

iv. That pending the appointment of administrators of the estate of the deceased and/or distribution of the estate, this Honourable court be pleased to restrain Cimbira East Africa Limited from releasing the sum of Kshs. 100,000,000.00 or any sum thereof held by it on account of the 3rd Respondent.

v. That pending the appointment of administrators of the estate of the deceased, this court be pleased to order that there be no dealings in any manner whatsoever in the affairs of Fanikiwa Limited.

vi. That pending the appointment of administrators of the estate of the deceased, this court be pleased to order that there be no dealings in any manner whatsoever with the assets of the deceased whether registered in his personal name or in the names of the companies where the deceased was a majority shareholder.

vii. That this Honourable court be pleased to order the Registrar of companies to avail information as to the directorship and shareholding structure of the following companies that the deceased had an interest; Fanikiwa Limited, East African Investment Trust Limited, Charterhouse Investments Limited and Bins (Nairobi) Limited as at the date of the deceased's death on 31st December 2016 and also at the date of this order.

viii. That this Honourable court be pleased to grant any further orders that it may deem fit and just to grant in the circumstance.

2. The application is based on the grounds that the deceased was a majority shareholder of the 3rd Respondent and at the time of his death, he

was in the process of entering into a business venture with the 4th Respondent.

3. Pursuant to the said venture, a sum of Kshs. 100,000,000.00 was paid out to the 4th Respondent by the deceased. The applicant has found out that the 1st and 2nd Respondent are in the process of seeking release of the funds from the 4th Respondent to themselves.
4. The estate of the deceased has an interest in the funds on account of the deceased's shares in Fanikiwa Limited.
5. Lastly, that the deceased had also interests in several limited liabilities companies including the 3rd Respondent, East African Investment Trust Limited, Charterhouse Investments Limited, Kingswal Holdings Limited, Jamala Holdings Limited, Grad East Africa Limited and Bins (Nairobi) Limited and attempts by the applicant to carry out a search of the company at the company's registry has not been successful.
6. The 1st, 2nd and 3rd Respondents opposed the application through a replying affidavit sworn by Sophie Jelimo. She stated that on 28th May, 2013 the 3rd and the 4th Respondent entered into a contract where the 4th Respondent undertook to buy all equipment specified in the contract for the purposes of pre-cleaning, drying and storage plant at Chemoset Farm at the cost of Euro. 1,516,330.00.
7. In their response, the 4th Respondent through a replying affidavit sworn by Kissinger Kiprotich stated that on 28th May, 2013 the 3rd and 4th Respondent entered into an agreement for the sale, supply, installation and commissioning of a pre-cleaning, drying and storage plant valued at Euro 1.5 million.
8. The sum of Kshs. 925,209 was paid as advance deposit of the purchase price of the plant. After the order, the 3rd respondent varied the size of the plant and requested for one valued at Euro 5 million.
9. The 3rd respondent later terminated the agreement and there was a forfeiture of 30% of the total amount of the order and that the balance could only be refunded after resale of the goods as per the terms of the agreement.
10. The 4th respondent is therefore holding a sum of Euros 470,310 only which is further to partial refunds made at the request of 3rd Respondent, a position that the 4th Respondent is well informed of.
11. The 4th Respondent is not holding any amount of money for the late Mark Too and the 3rd Respondent is not entitled to Kshs. 100,000,000.00 as alleged in the applicant's application or at all. The 3rd Respondent is only entitled to the sum of Euros 470,310 which is subject to partial refunds made at the request of the 3rd Respondent.
12. That upto date, the 3rd Respondent has made payment to Cimbria East Africa which accounts for 50% of the entire contractual sum.
13. The 4th respondent has never delivered the machine and is in patent breach of the contract and that breach formed the basis for the repudiation of the entire contract.
14. The deceased owned shares in Fanikiwa Limited where she is the co-director. The contract involved the 3rd and 4th Respondent and not the deceased in his personal capacity.
15. The issue of breach of contract is yet to be finalized and there is no money being released by Cimbria East Africa Limited to the 3rd Respondent.
16. The applicant submitted that the 3rd Respondent is a company of limited liability. At the time of the deceased death, it had two shareholders, Charterhouse Limited with 99 shares and the deceased with 1 share.
17. The shareholding of Charterhouse Limited is 3250 shares in the name of the deceased and 1750 shares in the name of the 2nd respondent.
18. The 2nd Respondent has brought on board her son Kevin Kipkemboi Too as a director of both Fanikiwa Limited and Charterhouse Limited without involving the estate.
19. Further, that in the interest of doing justice, no party should hide under the corporate veil in the current circumstances. The real parties with interests and owners of the assets in the names of the companies, are share holders of Charterhouse and Fanikiwa limited who are beneficiaries of the estate of Mark Too and the 2nd Respondent.
20. The 1st and 2nd Respondents as widows of the deceased and the persons with priority to apply for a grant, filed the petition only after citation and after being served with two court orders to file for letters of administration. Since Petition No. 16 of 2018 was filed, its over a year and there is no progress on it.
21. The 2nd Respondent has been interfering with the two companies, Fanikiwa Limited and Charterhouse Limited by putting her son as the director. The applicant wants to protect the interests of the deceased's property owned by the companies.
22. The 1st, 2nd and 3rd Respondents submitted that from the shareholding certificates attached, the deceased only owned 1% of the Fanikiwa Limited out of the 100 shares available.

23. A limited company is a juristic person with separate legal entity from the directors and shareholders and as such cannot and should not be held at ransom upon the demise of any of its owners.

24. The 3rd Respondent agreed to purchase from the 4th Respondent equipment which will enable them to set up a grain cleaning, drying and storage complex. The total cost was Euro 1,516,330 and the contract was to conclude by March 2014.

25. The 3rd Respondent paid the down payment at an agreed time but the 4th Respondent had yet to deliver any equipment. Aggrieved by the breach of their contractual agreement, the 2nd Respondent, a director of the 3rd Respondent wrote to the 4th Respondent requesting for a refund of the down payment so that they could acquire equipment from another company.

26. The deceased had nothing to do with the frozen transactions and the issues at hand are for breach of contract between two companies and should not be intertwined with the issues of the estate.

27. The 1st, 2nd and 3rd Respondents referred to Succession Cause No. 1871 of 2002 In the matter of the *Estate of Wagiko Ndibaru (deceased) (2014)eKLR* where it was held that **“Regarding the second application, I find that Nyakio Investments Ltd is a separate legal entity for its shareholders, therefore it had a separate legal existence from the deceased and consequently this court is not the appropriate court to deal with issues affecting it. the only matter of interest to probate court is the distribution of the shares held by the deceased in that company. All other matters concerning the company ought to be placed before the commercial court.”**

28. Lastly, the deceased owned only 1% share of Fanikiwa Limited. This is the share that forms part of the estate which fact is not in dispute. However, the court should bear in mind that the estate shall be entitled to the dividends and not the assets of the company.

29. In that sense many of the prayers sought in the Motion are of mandatory nature and to grant them will be to practically determine the main suit. But the law is that, in absence of special circumstances, an order of mandatory injunction will not be granted at an interlocutory stage. It will only be granted in clearest of cases and where, inter alia, the Court is satisfied that the matter ought to be decided at once.

30. The Court must be satisfied that the case is unusually strong and clear. In *Tom Onyango vs. Mimoso Investments ltd [2017] eKLR* where the Court of Appeal after setting out the principles for granting of a mandatory injunction at the interlocutory stage, stated,

“In exceptional case, the Court has discretion to grant an Interim relief although it amounts to granting the final relief itself prayed in the suit”.

31. A limited company is a juristic person with separate legal entity from the directors and shareholders. Upon demise of one of the directors, the remaining directors continues with the business of the company. The estate of the deceased is only entitled to dividends.

32. The Court in *Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR* while dealing with the issue of the distinct legal entity of corporate bodies held that:

“[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.”

33. The 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 court’s ‘piercing’ (or ‘lifting’) the veil.

Where, however, this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced. Nor is the court entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the company will fall on another member of the group rather than the defendant company.

It may be that liabilities or obligations will arise without piercing the corporate veil because there is an agency relationship between a parent company and subsidiary, or between a company and its shareholders, but this may not be inferred merely from control of the company or ownership of its shares or from the level of paid up capital. It will depend on an investigation of all aspects of the relationship between the parties and there is no presumption of such agency.”

34. The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for meeting the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.

35. Ringera, J (as he then was) in Corporate Insurance Company Limited v Savemax Insurance Brokers Limited [2002] EA 41 found 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 a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.”

36. As regards to the prayer that this Court suspends any further operations, management and activities of the Company until the hearing and determination of the main suit. This is a very drastic order to make.

37. To grant it would be to halt the operations of the Company. The business of a Court is not to interfere with the internal management of a Company unless there is clear and cogent evidence of mismanagement or fraud. Although the applicant alleges that the 3rd defendant is holding Kshs.100,000,000.00 and is in the process of transferring the same to the 1st and 2nd Respondents, she has not adduced or produced any evidence in support of the same. The application is not merited, the issues raised cannot be granted at an interlocutory stage. The application is therefore dismissed with costs to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of November, 2019.

In the presence of:-

NS Thongori for the petitioner (Absent)

Miss Rutta holding brief for Kisoo for 1st, 2nd & 3rd the Respondent

Mr. Ngigi holding brief for Mr. Mathai for the 4th Respondent

Ms Abigael - Court clerk