



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO.115 OF 2013**

**SOMOCHEM KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**SHRI GANESHA MANUFACTURERS LIMITED.....DEFENDANT**

**SANTOSH JHA.....APPLICANT**

**RULING**

(1) Before this Court the Notice of Motion dated 27<sup>th</sup> February 2019, by which **SANTOSH JHA**, (the Applicant/Judgment/Debtor) seeks the following Orders:-

**“1. SPENT**

**2. SPENT**

**3. THAT the Court orders made on 5<sup>th</sup> May of March 2018 and 25<sup>th</sup> September 2018 respectively be set aside.**

**4. THAT the Respondent/Decree holder be ordered to pay the cost of the application.”**

The Application was premised upon **Sections 3, 3A and 63, Civil Procedure Act Order 10 Rule 11, Order 22 rule 22, 35, 45**, of the **Civil Procedure Rules 2010** and was supported by the Affidavit of even date sworn by the Applicant. The Applicant in addition filed a supplementary Affidavit dated **4<sup>th</sup> March 2010**.

(2) The Plaintiff/Respondent **SAMOCHEM KENYA LIMITED** opposed the application through the Replying Affidavit dated **22<sup>nd</sup> March 2019**, sworn by **HEMANG DESAI**, the Country Head of the Plaintiff Company. The Court directed that the application be canvassed by way of written submissions. The Applicant filed its written submissions on **26<sup>th</sup> March 2019** whilst the Respondent filed their submissions on **27<sup>th</sup> March 2019**.

**BACKGROUND**

(3) By a Ruling delivered on **29<sup>th</sup> April 2016**, **Hon Lady Justice Olga Sewe** granted orders striking out the Applicant’s Defence to the suit filed on **15<sup>th</sup> April 2015** and entering judgment in favour of the Plaintiff/Respondent in the sum of **Kshs.6,856,791.12** together with interest at Court rates and costs.

(4) Thereafter the Plaintiff/Respondent filed a Notice of Motion dated **18<sup>th</sup> August 2017** seeking the following orders:-

**“1. THAT the Defendant’s directors do produce for inspection of the Court all the books and documents in respect of the Defendant’s assets and liabilities.**

**2. THAT the Defendant Company’s Directors, SATHEESAN MADATIL and SANTOSH JHA be orally cross examined under oath as to whether Defendant/Judgment-debtor has any and what property or means of satisfying the debt owing to the Plaintiff.**

**3. THAT if the said Directors do not provide a satisfactory account after their examination, the corporate veil be lifted and the said directors of the Defendant Company as at the time of filing the suit herein be held personally and severally liable for the amount due under the Decree passed against the Defendant.**

**4. THAT the costs of this application be awarded to the Plaintiff.”**

(5) That application was scheduled to be heard on **5<sup>th</sup> March 2018**. On that date the Applicant did not appear in court. The **Hon Lady Justice Sewe** in a brief ruling found that the Applicant had been properly served with hearing notice and stated that:

**“There being no response or attendance by the Defendant the said Notice of Motion is hereby allowed and orders granted in terms of prayer (1)(2), (3) and (4) thereof”**

The Hon Judge then set the matter down for examination of the Directors of the Defendant Company on **23<sup>rd</sup> April 2018**. By that date the **Hon Judge Sewe** had been transferred to Eldoret High Court and I took over the matter.

(6) On **23<sup>rd</sup> May 2018** the Hon Deputy Registrar set down the matter for examination of the Directors on **16<sup>th</sup> July 2018**. On that date there was no appearance by the Directors/Applicants. The Court directed that summons be issued to the Applicant to appear in court for cross-examination on **25<sup>th</sup> September 2018**. On that date once again the Applicant failed to attend court. Being satisfied that the Applicant had been properly served with Hearing Notice. I proceeded to grant the prayer for lifting of the Corporate Veil which meant that the Applicant would be held personally liable for the debts of the Defendant Company.

(7) A Notice to Show Cause why he should not be committed to civil jail was issued against the Applicant. The same was heard by the Hon Deputy Registrar on **28<sup>th</sup> February 2019** who issued a Warrant of Arrest against the Applicant. Thereafter the Applicant filed the present application dated **22<sup>nd</sup> February 2019**, challenging the Courts decision to lift the corporate veil.

#### **ANALYSIS AND DETERMINATION**

(8) I have carefully considered the submissions filed by both parties in this case as well as the relevant law. The grounds upon the application is premised are as follows:-

**“(a) THAT Applicant was never personally served with an application giving rise to the said order.**

**(b) THAT the summons to attend court issued herein was never served upon the Applicant as alleged by the process server.**

**(c) THAT the Affidavit of Service by the Leonard Muendo filed herein is total falsehood.**

**(d) THAT the impugned orders were made in breach of the rule of Natural justice as the Applicant was not granted an opportunity to be heard.**

**(e) THAT the Court did not have jurisdiction and/or any basis to make the order lifting the veil on 2<sup>nd</sup> September 2018.**

**(f) THAT the conditions for granting the said impugned orders were not met.**

**(g) THAT the court had no power of lifting the veil of the Defendant Company without confirming that indeed a fraud was committed against the company at all material time to the cause giving rise to the suit.**

**(h) THAT the order made on 25<sup>th</sup> September 2018 for lifting the veil was prematurely made.**

**(i) THAT decree holder advocate deliberately misled the court into making of the order knowing very well that the same was premature and non-issue at the time.**

(9) The Applicant submits that the Court had no jurisdiction to lift the corporate veil given that, the same was not the issue before the court on **28<sup>th</sup> September 2018**. It is further submitted that corporate veil could only be lifted once the court had established that a fraud had been perpetrated by the Directors of the Defendant Company and in any event such an order ought not to issue unless the court had examined the books of the Company. The Applicant also stated that he was not served with the relevant hearing notice and terms the Affidavit of Service filed by one **Leonard Muendo** as misleading. Finally the Applicant laments that the orders were made without his having been heard which goes against the Rules of Natural Justice.

(10) As stated earlier the application is opposed by the Plaintiff/Respondents who maintain that the Applicant was properly served with hearing notice and submit that the court had the requisite jurisdiction to lift the corporate veil as it did.

(11) Two issues arise for determination:-

(i) Was the Notice of Motion dated **27<sup>th</sup> February 2019** unopposed?

(ii) Was there proper service of hearing Notices upon the Applicant?

(iii) Did the Court have jurisdiction to lift the corporate veil?

### **WAS THE APPLICATION UNOPPOSED**

(12) Is the present application unopposed as alleged by the Applicant? In his written submissions the Applicant has claimed that the Notice of Motion dated 27<sup>th</sup> February 2019 was not opposed. This is however not factually correct. There is in the court file a Replying Affidavit filed on behalf of the Plaintiff Company on 22<sup>nd</sup> March 2019. Therefore the application was in fact opposed by the Plaintiff/Respondent.

### **SERVICE OF NOTICES**

(13) The Applicant alleges that he was never served with the Notice of Motion Application dated 18<sup>th</sup> March 2017 nor was he served with the summons to appear in court for cross-examination. The Applicant claims that the Affidavit of Service sworn by Leonard Muendo were misleading. In both cases, the court looking at the Affidavits of Service pronounced themselves satisfied that the Applicant had been properly served. I have looked at the Affidavit of Service filed by the process server Leonard Muendo. In the Affidavit dated 25<sup>th</sup> February 2019 it is indicated that service was effected upon the Applicant personally at his residence in Nairobi South B Estate. The Applicant has not denied that he resides at South B Estate.

(14) It is noteworthy that the Notice to Show Cause which the Applicant admits to having received was also served at the same address. This places doubt on the Applicant's earlier claims of non-service. This court cannot rule out the fact that these allegations of non-service are nothing but mischievous attempts by the Applicant to evade the consequences of his non-attendance at the scheduled hearings.

(15) Despite the Applicants denial that he had been served, he did not make any application to have the process-server summoned for cross-examination. In the case of AMAYI OKUMU KASIAKA & 2 others –Vs- MOSES OKWARE OPARI & ANOTHER [2013] eKLR, the Court of Appeal held as follows:-

**“The parties did not agree on whether there was service of the summons to enter appearance upon the appellants. The learned Judge considered the affidavits of the parties and that of the process server and accepted the process server’s averments in the affidavit of service, that the appellants had been served. The learned Judge expressed the view that the affidavit of service could have been impeached if the process server was cross-examined, a course which the appellants failed to take.”**

(16) The Applicant failed to take legal steps to impeach the Affidavit of Service. Accordingly I reject the Applicant's allegation of non-service. I find that the Applicant was properly served and had notice of the hearing dates. His failure to attend court was therefore deliberate and as such he cannot now challenge the consequences of his own non-attendance.

### **LIFTING OF THE CORPORATE VEIL**

(17) It is the Applicants position that the court had no jurisdiction to lift the corporate veil as it did on 25<sup>th</sup> September 2018 as that issue was not a matter before the court on that date. A look at the Plaintiffs notice of Motion dated 18<sup>th</sup> March 2017 reveals that Prayer (3) of that application sought the following:-

**“THAT if the said Directors do not provide a satisfactory account after their examination, the corporate veil will be lifted and the Directors of the Defendant Company as at the time of filing the suit herein be held personally and severally liable for the amount due under the Decree passed against the Defendant.”**[own emphasis]

(18) In MASEFIELD TRADING (K) –VS- RUSHMORE COMPANY LIMITED & ANOTHER [2008] eKLR, Hon Justice Luka Kimaru stated as follows:-

**“I think the above rule grants this court jurisdiction to summon any 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.”**

(19) There was a specific prayer sought in the Application to lift the corporate veil. Having been properly served the Applicant failed to attend court and failed to avail himself of the opportunity to provide a satisfactory account. He cannot be heard now to cry foul because the court granted this prayer.

(20) In the case of POSTBANK CREDIT LIMITED (In liquidation –VS- NYAMANGU HOLDINGS LIMITED [2015] eKLR, the Court citing a decision of HON JUSTICE RINGERA (as he then was) stated as follows:-

**“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.”[own emphasis]

(21) I find that the question of lifting the corporate veil was live in the matter. The Applicant may have hoped that by not coming to court, he would tie the courts hands and render it impossible to make such orders. However that is not how the law works. By deliberately failing to attend court when required for cross examination, the Applicant lost his chance to persuade the court not to lift the corporate veil. In the circumstances the court had jurisdiction to make the orders it did by granting Prayer (3) of the Notice of Motion dated **18<sup>th</sup> March 2017**. Accordingly I find no merit in the present application. The same is hereby dismissed in its entirety with costs to the Plaintiff/Respondent.

**Dated in Nairobi this 25<sup>th</sup> day of November, 2019.**

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**Justice Maureen A. Odero**