



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC. APPLICATION NO. 56 OF 2015

JIANG NAN XIANG.....DECREE-HOLDER

-VERSUS-

COK FAS-ST COMPANY LIMITED.....JUDGMENT-DEBTOR

RULING

1. This ruling relates to a Notice of Motion Application dated 17th March 2017, brought under Order 22 Rule 35, of the Civil procedure Rules and Section 3A of the Civil procedure Act. The Application is supported by the grounds on the face of it and an affidavit dated 17th March 2017, sworn by the Decree-Holder herein, Jiang Nan Xiang.

2. The Applicant is seeking for orders that:

a) Summons do issue compelling one Peter Gashero Muraya and Lucy Githinji, the known Directors of the Judgment Debtor 's Company to attend Court on such date as may be ordered or allocated, to be orally examined on oath as to the Judgment Debtor's means and assets;

b) The said Directors be ordered to produce the Judgment Debtor's books, papers, documents and /or evidence showing the affairs of the Company;

c) In default of such attendance and/or providing suitable means and assets for the satisfaction of the decree of the Honourable Court, the said Directors be jointly and/or severally held personally liable to satisfy the decree of the Court in full;

d) The Decree-holder be granted leave to execute the decree herein against the said Directors of the Judgment-Debtor herein personally, in default of payment of the decretal amount claimed herein;

e) The costs of this Application be borne by the Judgment Debtor and/or its said Directors in any event.

3. The Applicant avers that, the dispute between him and the Judgment Debtor has been pending before the Honourable Court and Arbitral Tribunal since 2012, and that on 25th July 2014, Honorable Justice Aaron Ringera, delivered the final Award in his favour, for the sum of Kshs 42,593,468.27 plus costs. Subsequently, on 30th April 2015, the said final Award was adopted as a Judgment of the Honourable Court.

4. However, the Judgment Debtor refused to negotiate on the quantum of costs impelling the Applicant to resubmit the matter to further Arbitration for determination on the issue of costs. On 13th July 2016, the Honorable Arbitrator issued a further Award, directing the Judgment Debtor to pay the Applicant, costs of Kshs 2,195,909.92. On 22nd July 2016, the Applicant applied for the execution of the decree, and thereafter, the Judgment Debtor was served with a notice to show cause why execution should not proceed against it.

5. The matter was fixed for hearing on 13th September 2016, but the Judgment Debtor did not bother to attend Court on that date and the Applicant was granted orders of attachment and sale of the Judgment debtor's assets. Subsequently, the firm of; Messers. Ochieng' Onyango, Kibet & Ohaga Advocates, instructed the firm of; Connection Services Auctioneers to execute the warrants for attachment and sale the attached to satisfy the total decretal sum of Kshs 53,560,976.30. On 23rd September 2016, the Auctioneer proclaimed stock in trade worth Kshs. 22,230,000.00 and issued the Judgment Debtor with a seven (7)days' notice of sale by public auction.

6. The Applicant avers that on 27th September 2016, its Advocates wrote to the Auctioneer advising him that, the Judgment debtor had a second shop from which the Auctioneer could proclaim stock in trade for the balance of the decretal sum, but the Auctioneer did not and has not, to date, made any attempt to proclaim any of that stock and/or took custody of the stock in trade he proclaimed, thereby allowing the

Judgment Debtor to steal a march on him by carting away most of the proclaimed goods and then rushing to Court for stay orders.

7. That in order to obtain stay orders at an ex-parte stage, the Judgment Debtor misled the Court to believe that the proclaimed stock in trade was the subject of a Debenture. Further, while enjoying the stay orders, the Judgment debtor went and white washed its name off its shop in a bid to defeat execution.

8. It is further averred that during the pendency of the Judgment debtor's application for stay, the Honourable Court directed the Judgment debtor to file its financial statements to assist it in reaching a determination on its financial viability and thereby determine whether the Judgment debtor could liquidate the decretal sum in reasonable installments. But the judgment debtor did not furnish any statements or at all and the Court subsequently directed that execution proceed forthwith.

9. The Applicant states that due to Auctioneers reticence, the Judgment debtor has since re-opened its shop but under a different name thereby complicating matters herein further, and that Auctioneer's conduct clearly indicates that he has been compromised by the Judgment debtor and is pawn in keeping the Applicant away from the fruits of his judgment.

10. Further, from his past interactions with the Judgment debtor and during his short stint as a Director of the Judgment debtor's Company, he is aware that Peter Gashero Muraya and Lucy Githinji are the Directors of the Judgment Debtor's Company and owing to the fact that the Judgment debtor has now changed the name of the shop it operated its business in, the Applicant is unable to proceed with execution. Hence the prayer that the Directors be summoned to Court in order to be examined on oath as to the means and assets and the books of account, to determine whether there are other assets which could be attached in order to settle the decretal sum and costs or to be compelled to meet the same personally. That unless this Court allows the orders thus sought, the Judgment debtor will continue to do everything in its power to deprive him of what is rightfully his.

11. However, the Application was opposed vide a Replying affidavit dated 6th April 2017, sworn by Lucy Githinji, Director of the Judgment debtor herein. She deposes that, the Defendant has cooperated, acted in good faith and submitted itself fully to the legal process in the execution process since the commencement of the unfortunate commercial dispute and after the case was lost.

12. That the outcome of this case and the legal costs thereof has left the Company insolvent and the Directors destitute and that prior to the execution proceedings, the Company operated two shops selling automobile accessories at L. R. No. 12953, Race Course Road and L. R. No. 209/360/156, Lower Kirinyanga Road. On 23rd September 2016, M/s Nairobi Connection Services Auctioneers, proclaimed all the stock in trade and fixtures and fittings, in execution of the decree of the Honourable Court.

13. Subsequently, the Company vide an application dated 28th September 2016, sought to liquidate the decretal sum in installments and obtained an order of stay of execution pending inter parties hearing. However on 1st December 2016, the Honourable Court dismissed the application and ordered that execution should proceed. Further, contrary to what has been stated by the Applicant, the shops were closed and ceased trading on the day of the proclamation. Therefore, it is not true that the Respondents removed or carted away any of the proclaimed goods.

14. The Respondent averred that the Auctioneers did not remove the proclaimed goods for two weeks therefore it became apprehensive that the goods could be distressed for rent or stolen, and instructed its Advocates to write to the Applicant's Advocates advising them to act and the goods were carried away on 20th December 2016.

15. That the Auctioneer never raised any issue of missing goods as everything was intact and in fact the goods attached were more than those proclaimed because, the Auctioneer did prepare a comprehensive inventory upon proclamation. It is not therefore within their knowledge what the Auctioneer did with the attached goods and any dispute in that regard is between the Auctioneer and the instructing client

16. Further, following the attachment and owing to the accumulative rent arrears, the landlord in the Race Course shop terminated the Lease and took possession of the shop which has since been leased to another tenant, to whom the Respondents are totally unrelated and branded "Unilights limited". That even then, the Company is still indebted to a landlord one Geoffrey Njenga in the sum of Kshs. 419,000.00.

17. Similarly, the Company was evicted from the other shop on Kirinyaga Road and it is indebted to the landlord one Mr. Titus Mburu, in the sum of Kshs. 1,020,000.00. The shop has been leased to another tenant and branded "Naft Blessed" who are also totally unrelated to the Company. As a result, the Company is unable to pay its creditors including the aforesaid two former landlords and Barclays Bank of Kenya Limited, a Debenture holder.

18. The deponent denied that the Directors of the Company have engaged in any fraud or other malpractices in the running of the Company or in the conduct of these proceedings. It was argued that in view of the foregoing, the application is unmerited, vexatious and only meant and intended to further harass, hound the Judgment debtor and ought to be dismissed with costs.

19. The parties agreed to depose the application vide written submissions. I have considered the prayers in the Application, the arguments for and against them and the submissions by the parties. From the Respondent's submissions and the oral address to the Court on 11th July 2017, during the highlighting of submissions, the Respondents conceded to prayers (2) and (3) of the Application. Subsequently, the Court ordered that, the Directors named herein be orally examined as requested. On 7th June 2018, the Directors were subjected to oral examination. In the given circumstance, prayer (2) and (3) are spent.

20. I shall now consider prayers (4) and (5) together, as they are closely related, in that the Applicant seeks, in default of providing suitable means and assets of the Judgment debtor for the satisfaction of the decree of the Court, the said Directors be jointly and severally held personally liable to satisfy the decretal sum. Basically, the Applicant seeks that the Court lifts the veil of incorporation and hold the Directors liable for the Company's debts.

21. In this regard, the Applicant submitted that, the general principle in Company law is that, a Company has a separate personality from the personalities of its shareholders and directors and they are protected from being personally liable for the Company's debts and other obligations. However, the protection is not a carte blanche for the Company's shareholders and/or directors. Reference was made to the cases of; Ultimate Laboratories vs Tasha B Loservice Ltd Nbi HCCC No. 1287 of 2000, Masefield Trading (K) Ltd vs Rushmore Company Limited & Another (2008) eKLR, and Mult-choice Kenya Ltd vs Mainkam Ltd & Another (2013) eKLR 2013, where the Courts held that, fundamental principle of incorporation may be disregarded, lifted or pierced in exceptional circumstances both under express statutory provisions of the Companies Act and judicial interpretation or intervention.

22. Further, the Court has the power in an application in execution, as well as, the inherent power of the Court and all other provisions of the law, upon examination of the directors, if the circumstances warrant lifting the corporate veil of the Company and ordering the Director to personally discharge the debts of the company.

23. The Applicants reiterated that, the entire conduct of the Judgment debtor from the time judgment was entered to execution has been tainted with dishonest and mala fides, and points to the fact that the corporate personality is being used to escape liability. That the corporate veil is not a cure-all for Directors actions premeditated to escape liability, neither is it a vehicle for Directors to abuse, in the dispensation of justice and hope that it will cure and mend all their ills, misdeeds and defaults.

24. However, the Respondents submitted that, this is not a proper case to lift the veil of incorporation. The mere fact that, one is a director or shareholder of a Company does not ipso facto make him or her liable for the debts of the Company unless circumstances are such that the veil of incorporation can be lifted. The corporate veil can only be lifted in exceptional circumstances both under express statutory provisions and under judicial intervention principally, if the corporate personality is being used as a mask for fraud or improper conduct.

25. That the Judgment debtor's directors in this case have not in any way whatsoever acted fraudulently and or improperly and that in fact, they applied to the Honourable Court to be allowed to liquidate the decretal sum in monthly installments of Kshs. 300,000.00 but the application was dismissed. Reference was made to the case of; Post Bank Credit Limited (in liquidation) vs Nyamangu Holdings Ltd (2015) eKLR.

26. I have considered the above submissions. I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal legal separation between the Company and its shareholders' personal financial affairs and/or that the Company is just a sham or the Company's actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company's creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.

27. In the instant matter, the directors of the Judgment debtor's Company who are named in the subject application herein, appeared before the Court as aforesaid on 7th June 2018, and admitted that they are indeed the Directors of the Judgment debtor's Company. On being cross examined on the Judgment debtor's assets and state of affairs, whose main objective is to obtain discovery for the purpose of execution as to what property or means the Judgment debtor has to satisfy the decree, Mr. Peter Gashero Muraya told the Court that he did not have the Company's books of account as they were with his Lawyer in another Court. Similarly, the other director Lucy Wambui Githinji, informed the Court that, she did not have audited statements of accounts of the Company and given time she could get them from the Auditor and/or the Accountant.

28. It suffices to note that, the subject matter of these proceedings stem from an Arbitration process, which culminated into an Arbitral Award made on 25th July 2014. The same was subsequently recognized and adopted as Judgment and/or decree of the Court vide, a ruling delivered on 30th April 2015. There is no evidence that any payment has been made in satisfaction of the decree arising therefrom to date.

29. The Court record further reveals that, on 13th September 2016, the judgment-debtor was served with a notice to attend Court to show cause why warrants of attachment and sale should not be issued against it but failed to show up. Subsequently, the Judgment debtor's application for stay of execution and offer to offset the decretal amount in monthly installments of Kshs. 300,000 until payment in full, was filed, heard and dismissed on 18th November 2016. Again there is no evidence that since then any payment has been made.

30. It is averred in the affidavit sworn by Lucy Githinji, that the Judgment-debtor is insolvent and is unable to meet its debts. However that state of affairs can only have been verified if the Company's financial statements were provided. There are only two documents annexed to the Replying affidavit sworn by Lucy Githinji marked "LG10" and "LG11" showing the Bank statements of the Judgment debtor account held at Barclays Bank of Kenya Limited and Equity Bank Limited for the year 2016. These are certainly not the Audited accounts of the Judgment-debtor. Surprisingly, the Respondents argued in their submissions that, "it may be a waste of judicial time as the judgment debtor has provided all the information, books, documents, assets and liabilities in the Replying affidavit. The examination will therefore be reproduction of the same." This submission certainly is not correct. None of these documents were produced and/or provided.

31. Having considered all the circumstances of this case, I am satisfied that the two directors having failed to produce the necessary records and/or documents of the Judgment debtor's Company, as required under Order 22 Rule 35 of the Civil Procedure Rules, and after having been accorded an opportunity to do the same, this case is thus suitable for this Court to order and hereby do order that, the corporate veil in relation to the Judgment debtor be lifted and the two directors be held personally liable to satisfy the decree of this Court in this matter. It is clear the decretal sum is not satisfied and the Directors have not acted in good faith to validate the decretal sum.

32. The application is allowed in terms of prayers (c), (d) and (e) thereof.

33. Those are the orders of the Court.

Dated, delivered and signed in an open Court this 31st day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Ms Musangi for Mr. Ochieng for the Decree holder/Applicant

Mr. Anyona for Mr. Muthema for the Judgment Debtor/Respondent

Dennis.....Court Assistant