REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NUMBER 168 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE PRINCIPAL MAGISTRATE MILIMANI COMMERCIAL COURTS, NAIROBI AND MARK KENANI NYAKWEBA THE 2ND RESPONDENT

AND

IN THE MATTER OF NAIROBI CMCC NO 3925 OF 2011

MARK KENANI NYAKWEBA VS BATIZA LIMITED

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES MADE THEREUNDER AND THE CONSTITUTION OF KENYA, 2010

EXPARTE: THE REPUBLIC OF KENYA

MICHAEL KYAMBATI.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE, MILIMANI COMMERCIAL COURTS, NAIROBI.....1ST RESPONDENT

MARK KENANI NYAKWEBA.....2ND RESPONDENT

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 10th June, 2016, the applicant herein, **Michael Kyambati**, seeks the following orders:

1. That by way of judicial orders of certiorari be and are hereby issued directing that the proceedings and orders made in Nairobi CMCC No. 3925 of 2011 Mark Kenani Nyakweba – vrs- Batiza Limited on 3/2/2016 and subsequent thereto by the 1st Respondent herein to be brought unto this honourable court and be quashed forthwith.

2. That by way of judicial review orders of prohibition be and are hereby issued prohibiting the execution of the orders made in Nairobi CMCC NO. 3925 of 2011 Mark Kenani Nyakweba –vrs- Batiza Limited made on 3/2/2016 and subsequent thereto by the 1st respondent.

3. That other appropriate orders be made.

4. That the respondent be condemned to pay the costs of these proceedings.

Applicant's Case

2. According to the Applicant, he is a Director of **Batiza Limited** which is the Defendant in Nairobi CMCC No. 3925 of 2011 - Mark Kenani Nyakweba vs. Batiza Limited (hereinafter referred to as "the judgement debtor"). He averred that he was not personally a party to the said suit in which on 19th April, 2012 a default judgment was entered against the judgement debtor owing to the negligence of its then counsel. He disclosed that a subsequent attempt to set aside the said default judgment of Kshs 1,474,056/= with costs and interests was dismissed and the judgement debtor preferred an appeal to this Court vide HCCA No. 460 of 2013 - Batiza Limited vs. Mark Kenani Nyakweba which appeal is still pending hearing.

3. However on 31st August, 2015 the plaintiff in the said suit filed an application in the lower court in which it sought *inter alia*:-

1. That Michael Kyambati, being one of the Directors of the defendant company (judgment debtor) herein be summoned to attend this court for his examination on the judgment debtor's assets, and to produce all its books of account including but not limited to the judgment debtor's annual financial statement.

2. That a notice to show cause issue why the decree should not be executed, be issued against Michael Kyambati, the Managing Director of the Defendant/respondent

4. The Applicant averred that on 25th September, 2015 even without being heard and despite informing the Court that he had not been served the Learned Magistrate proceeded to unilaterally grant prayers 1 and 2 of the said application against him and then ordered that he appears in court for further hearing on 9th October, 2015.

5. The Applicant averred that his complaint that he had been condemned unheard and his constitutional rights violated seemed to have angered the Learned Magistrate because during the further hearing of 9th October, 2015 without the application of any of the parties the Magistrate issued a warrant for his arrest allegedly for failing to appear in Court despite being represented by counsel. Subsequently, to apply for the warrant of arrest to be lifted. On the said date, the Applicant averred, the said warrants were lifted but instead of the pending application being heard he was placed in the witness box and asked a few questions about the finances of the company after which the Court made the following order:

"Mr. Michael Kyambati being a Director of the Defendant company and there being no stay order the court orders execution proceedings against him".

6. It was the Applicant's case that a court cannot order execution against a Director of a company on the ground that the company has refused to/or is unable to pay the decretal sum. It was deposed that on 12th February, 2016, purportedly in enforcement of the said order a notice was issued against him to show

cause why he should not be arrested and committed to civil jail in execution of the said decree which notice was listed for hearing on 14th April, 2016 and it was served upon him on 31st March, 2016.

7. Based on legal advice, the Applicant averred that an execution order cannot legally issue against him unless he is a party or a defendant to the suit and was served with a plaint and summons to enter appearance; failed to enter appearance or to file defence and a judgment/decree issued against him; and the suit has been heard and a judgment has been delivered against him. In the alternative, following the determination of the suit, a fresh suit has to be filed against him and other Directors/shareholders of the company for the recovery of the decretal sum in the concluded suit seeking the alleged lifting of the veil in which case the subsequent suit would proceed in manner outlined above.

8. Based on the foregoing, the Applicant contended that the entire proceedings, before the learned magistrate were a nullity and are therefore null and void *ab initio*; that he was denied his constitutional rights to a fair and lawful hearing; that the principles of natural and his entitlement to the due process of law were violated; that the learned magistrate acted in excess of or in the absence of jurisdiction; and that the learned magistrate acted in an arbitrary, prejudicial, oppressive, irrational, high handed, biased, vindictive and frivolous manner not know to the law. He therefore sought the orders herein.

2nd Respondent's Case

9. On the part of the 2nd Respondent it was averred that the intitulement of this Application at the leave stage was improper since in Judicial Review Applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. It was therefore contended that the Applicant's advocate appears to have failed entirely to realise that prerogative orders are issued in the name of the crown at the instance of the Applicant and are directed to the person or persons who are to comply therewith.

10. To the 2nd Respondent, the Applicant's application is full of falsehood, incompetent and fatally defective since it does not meet or fulfil the threshold to enable granting of the order(s) sought as part of the issue in dispute as evidenced in the Applicant's verifying affidavit in para 6 was granted on 25th September 2016 which is now past a period of six (6) months and this clearly violates the provisions of order 53 rule (2) of the ***Civil Procedure Rules***.

11. According to the 2nd Respondent, on the 13th day of October 2011, interlocutory judgment was entered against the judgement debtor in Milimani CMCC number 3925 of 2011 and on 19th day of April 2013, a decree for the sum of Kshs 1,474,058.10 was passed by the Honourable Court. Though the judgement debtor preferred an appeal to the judgment to the High Court, Civil Appeal Division, being Nairobi HCCA Number 160 of 2013 - Batiza Limited vs Mark Kenani Nyakweba – it was contended that the judgement debtor has failed to prosecute his appeal, having not complied with the directions given by **Justice Waweru**, in failing to deposit the decretal sum in Court. Accordingly, the 2nd Respondent instructed his counsel on record to file an application seeking dismissal of the appeal for want of application, whose ruling is still pending. It was therefore the applicant's case that the Applicant had come to this Honourable Court with unclean hands, against the principles of equity.

12. The 2nd Respondent lamented that from the date the decree was issued, he has been unable to execute the same against the judgement, having no known assets and any traces of the Company at the Companies registry cannot be found. He therefore instructed his advocates on record to file an application seeking orders that the corporate veil of the judgement debtor be lifted; that the Applicant herein being one of the Directors of the judgment debtor be summoned to attend Court for his examination on the judgment debtor's assets, and to produce all its books of account including but not limited to the judgment debtor's annual financial statements; and that a notice to show cause why the decree should not be executed against the Applicant. The said application, it was averred was set down for hearing on 25th September 2015, when it was canvassed by both advocates for the parties and the Court in its discretion allowed the application in terms of prayers 1 and 2 and the matter fixed for mention on 9th October 2015.

13. It was therefore contended that the Applicant was misleading this Court when he claimed that he was not heard and that the Learned Magistrate issued orders unilaterally without hearing the parties.

14. The 2nd Respondent asserted that despite being served with the orders to appear in court on 9th October 2015, the Applicant failed, refused, declined and or defied the orders of the Honourable Court and did not attend court on that day hence being in contempt of the orders the Court was well within its jurisdiction and on its own motion to order for warrants of arrest to be issued against the Applicant. It was the 2nd Respondent's position that if the Applicant was really sincere and believed that the orders issued on 9th October 2015 were unilateral, he should have moved the court as soon as possible. He however took four months to have the matter mentioned and present himself to court. According to the 2nd Respondent, if indeed the Applicant felt like his rights had been violated, he had the legal right to move the Constitutional Court and petition that his fundamental rights had been violated.

15. It was deposed that on 3rd February 2016, the Applicant presented himself to court when the warrants were lifted and he was examined as to the judgment debtor's assets, books of accounts and financial statements, which in the 2nd Respondent's view was proper. After taking down the Applicant's evidence and being cross examined by the 2nd Respondent's advocates on record, the Court was satisfied that there being no stay orders issued by the High Court in the said appeal, execution should proceed against the Applicant.

16. The 2nd Respondent's case was that the orders of the Court were justified because the corporate veil having been lifted, the Applicant, being one of the directors of the Defendant Company, was liable to be personally prosecuted, and the court accordingly exercised its discretion. He disclosed that on 12th February 2016, his advocates, in enforcement of the decision of the court, took out a Notice To Show Cause why the Applicant should not be committed to civil jail in execution of decree.

17. In his view, the action taken by the Court was provided under Order 22 rule 35 of the ***Civil Procedure Rules 2010*** hence the Learned Magistrate acted judicially, expeditiously and in accordance with the law. He added that in lifting the corporate veil, the Court was satisfied that the Applicant was acting fraudulently in closing down the Defendant Company immediately after the passing of the judgment and further that no records of the defendant company could be traced at the Companies registry hence no rules of natural justice had been contravened as alleged by the Applicant.

18. It was contended that once the corporate veil of a company is lifted, the Directors of a Company can be held personally liable for the acts and omissions of the company. In this case the Applicant had not demonstrated how the Learned Magistrate acted in excess or in the absence of jurisdiction and how such orders made are illegal or untenable. He has also not shown that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

19. In the 2nd Respondent's view, the Applicant is not being truthful to this Honourable Court and the present Application is a mere afterthought and a delaying tactic meant to deny him the fruits of the judgment of the Learned Magistrate. He therefore accused the Applicant of coming to this Court with unclean hands yet he who seeks equity must do equity. Evidently, from the Applicant's conduct since judgment was passed more than five years ago, that the Applicant has been mischievous and his intention is to frustrate him, and that litigation must come to an end.

20. According to the 2nd Respondent, if the Applicant is seeking to challenge the merit of the order of the trial court in the lower court, the best available remedy is to prefer an appeal at the High Court since the present Application does not raise any breach to procedure and/or excess of jurisdiction, but raises substantial issues which ought to be challenged by way of appeal and not through Judicial Review proceedings. In his view, what was being challenged here are the merits of the 1st Respondent's decision which is properly a matter to be determined upon appeal.

21. It was therefore asserted that the present application is an abuse of the court process, frivolous,

brought in bad faith and meant to deny him the fruits of the judgment, and ought to be dismissed with costs.

Determinations

22. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made by the respective counsel for the parties.

23. It was contended by **Mr Nyangito**, learned counsel for the 2nd Respondent that the application for leave was improperly intituled since judicial review applications are brought in the name of the Republic. It is not in doubt that the application for leave was brought in the name of **Michael Kyambati** as the Applicant. The same was brought against the Principal Magistrate and **Mark Kenani Nyakweba**.

24. The issue of intitulement of judicial review proceedings has been the subject of several decisions of this Court. With respect to the issue whether these proceedings ought to have been commenced in the name of the Republic, this issue was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563,** in which the learned Judge held that an application for leave ought to be intituled as hereunder:

> **In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition**
>
> **And**
>
> **In the Matter of Kenya Ports Authority Act**
>
> **And**
>
> **In the Matter of the National Environmental Management and Co-ordination Act 1999.**

25. This was in tandem with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intituled:

> **"In the matter of an application by (applicants) for leave to apply for an order of Certiorari**
>
> **and**
>
> **In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal."**

26. Once leave is granted, the applicant in the substantive Motion then becomes the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

27. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

28. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**
>
> **"REPUBLIC…….....……..APPLICANT**
>
> **V**
>
> **THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.**
>
> **EX PARTE JOTHAM MULATI WELAMONDI"**

29. It must be remembered that judicial review proceedings proper are commenced by the Notice of Motion and not the Chamber Summons. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it expressed itself *inter alia* as follows:

> **"The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion."**

30. Similarly, in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996,** it was held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

31. In this case the application for leave was commenced in the name of the persons aggrieved. It follows that at that stage the stage at which the Republic becomes the applicant had not been reached. It is therefore my view that these proceedings were properly intituled.

32. It is however clear that the substantive Motion was not properly intituled. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

33. It is therefore my view that whereas the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

34. On behalf of the Applicant it was submitted by **Mr Nzamba Kitonga**, **SC** that the application before the trial Court was brought under Order 22 rule 35 which does not apply to execution. That the application was expressed to have been brought under the said provision is not in doubt. The said provision provides as follows:

> ***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.***

35. It is true that the above provision does not expressly provide for the lifting of the corporate veil. This Court has had occasion to deal with the same provision in **Peter O. Ngoge T/A O P Ngoge & Associates vs. Ammu Investment Company Limited [2012] eKLR.** In that case the Court expressed itself as follows:

> **"It is however my view that the lifting of a corporate veil is not the same thing as an application under Order 22 rule 35 of the Civil Procedure Rules. In the latter an officer is examined as an agent of the Company while in lifting the corporate veil, the mask of incorporation is lifted with the result that the shareholders are nolonger agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity. The general law, however, is that a corporation is an artificial legal entity. Accordingly it must of necessity act through agents, usually the Board of Directors. In other words the corporation's brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. The day to day management of the company may, however, be handled by specific officers tasked to do so on behalf of the Board. However, the ultimate responsibility rests with the directors. It therefore follows that the management of the corporation must be deemed to be carried by or on behalf of the Board save in cases where the *ultra vires* principle applies. The legal position as regards incorporated entities is well settled. In Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183, the Court of Appeal citing Salomon vs. A. Salomon & Company Ltd [1897] AC 22 and Adams vs. Cape Industries Plc [1990] 1 Ch 433 held that it is a principle of company law of long antiquity that a limited company has a legal existence independent of its members and that a company is not an agent of its members. The Court further said that the principle of *alter ego* attributes the mental state of company's directors or other officers to the company itself in order to fix the company with either criminal or civil liability.**
>
> **It follows that the mere fact that one is a director or shareholder of a corporation does not, *ipso facto*, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199 following Palmers Company Law Vol. 1 (22 ed) lists 10 instances under which the veil of**

corporate personality may be lifted or as is sometimes put, look behind the company as a *legal persona* and these are:-

1. **Where companies are in the relationship of holding and subsidiary companies;**

2. **Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;**

3. **In certain matters relating to taxation;**

4. **In the law relating to exchange control;**

5. **In the law relating to trading with the enemy;**

6. **In the law of merger control in the United Kingdom;**

7. **In competition of the European Economic Community;**

8. **In abuse of law in certain circumstances;**

9. **Where the device of incorporation is used for some illegal or improper purpose; and**

10. **Where the private company is founded on personal relationship between the members.**

In Salomon vs. Salomon (supra) and Jones & Another vs. Lipman & Another [1962] 1 WLR 833 it was held that whereas a registered company is a legal person separate from its members this 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. Therefore if a company is thought to be a mere cloak or sham, a device or a mask which the defendant holds to his face, in an attempt to avoid recognition by the eye of equity, the court will grant summary judgement even against the person behind the said company.

However, the decision to lift the corporate veil will not be lightly undertaken. In the present case there is no allegation that the applicant has attempted to execute against the defendant company and such attempts have failed. The only allegation made is that the applicant is not aware of the assets of the respondent. Whereas that may be a ground for invoking the provisions of Order 22 rule 35 aforesaid, in my view, that does not necessarily satisfy the conditions stipulated for the lifting of corporate veil of a corporation.

In the premises I am not satisfied there exist, as of now, circumstances that would justify the lifting of the corporate veil of the Company in order to find the directors of the respondent liable. Further it is not alleged that Alan Cleophas Mulango, the director against whom the order of arrest is directed is the sole shareholder and/or director of the Company. Whereas it was submitted that it is this director who gave instructions, such an averment does not appear anywhere in the affidavit and even if it were, without seeking orders against all the shareholders and/or directors, it would not be possible for the Court even if it was so minded to lift the veil of incorporation and find only one shareholder and/or director liable in these circumstances. Such an action may be construed to amount to contravention of Article 27 of the Constitution which provides for freedom from discrimination."

36. Therefore whereas corporate veil may, in appropriate circumstances be lifted, such remedy cannot be sought under Order 22 rule 35 of the ***Civil Procedure Rules***.

37. It is therefore clear that the Learned Magistrate had no jurisdiction under the said provision to grant orders whose effect were to lift the corporate veil of the judgement debtor in order to render the Applicant personally liable for the debts of the judgement debtor. Lack of or excess of jurisdiction is clearly one of the grounds upon which judicial review remedies may be granted.

Orders

38. It follows the amended Notice of Motion dated 10th June, 2016 is merited and succeeds and I grant the following orders:

> **1. An order of certiorari is hereby issued removing into this Court for the purposes of being quashed the proceedings and orders made in Nairobi CMCC No. 3925 of 2011 Mark Kenani Nyakweba vs. Batiza Limited on 3rd February, 2016 and any consequential orders which proceedings and orders are hereby quashed.**
>
> **2. An order of prohibition is hereby issued prohibiting the execution of the orders made in Nairobi CMCC NO. 3925 of 2011 Mark Kenani Nyakweba vs. Batiza Limited made on 3rd February, 2016 and subsequent thereto by the 1st respondent.**
>
> **3. In light of my sentiments on the improper intitulement of the substantive motion, there will be no order as to costs.**

39. Orders accordingly.

Dated at Nairobi this 16th day of August, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzamba Kitonga, SC for the Applicant

Miss Kosgey for Mr Nyangito for the Respondent

Cc Mwangi