REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

CIVIL SUIT NO. 2285 OF 1996

POST BANK CREDIT LIMITED (IN LIQUIDATION)…….PLAINTIFF

VERSUS

NYAMANGU HOLDINGS LIMITED…….....DEFENDANT

RULING

Discovery in aid of execution

[1] The Motion before me is dated 6th December, 2013. It made by the Plaintiff and is expressed to be brought under section 51 rule 1 of the Civil Procedure Rules, 2010 for orders that;

a. ***That Peter Karingu of St. Ellis House, City Hall Way, Nairobi, being one of the Directors of the Defendant Company (judgment debtor) herein to 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 statements.***
b. ***That the cost of this application be provided for.***

The application is based on the grounds set out in the application and the affidavit of Chacha Odera sworn on 6th December, 2013. It was canvassed by way of written submissions whereby the Plaintiff filed its submissions on 16th June 2014, while Mr. Peter Karing'u's learned counsel, filed their submissions on 2nd July, 2014.

[2] There is yet another pending application dated 6th December, 2012 which also seeks orders that one Catherine Njeri Kimani of P.O. Box 33353-00600 Nairobi, being also a director of the Defendant company be summoned to attend this court for examination on the whereabouts of the Defendant's assets or any debts owing to it or to produce its books of accounts. But, upon reading the affidavit of service by Peter Mburu Waithaka sworn on 7th December, 2012, it is clear that the said application was not served on the said Catherine Njeri Kimani personally; it is was deponed that she resides in the United States of America. From the foregoing, and owing to the fact that the said person, was not served with the application, the Court is left with no choice but to decline to consider the application dated 6th December, 2012 until the same is served upon Catherine Njeri Kimani. I shall now turn to assess the merits or otherwise of the application dated 6th December, 2013.

Brief synopsis of the matter

[3] The brief background to this application is that the Plaintiff successfully sued the Defendant and judgment was entered for the sum of Kshs. 21,628,161.55/= and interest thereon at the rate of 18% per annum compounded on monthly balances with effect from 1st May, 1996 until payment in full. A decree was issued on 26th June, 2003 against the Defendant by the Hon. Justice Osiemo (as he then was). The said decree has not been satisfied especially because the decree-holder has not been able trace the Defendant's assets. This makes it necessary for the judgment-holder to seek the help of the court through discovery in aid of execution as provided in Order 22 rule 35 of the Civil Procedure Rules. They, therefore, seek an order for the attendance of Mr. Peter Karing'u, a former director of the judgment-debtor to be examined orally on 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. Mr. Peter Karing'u, nevertheless, resisted being summoned for examination as proposed and he made eminent replies and submissions on his standpoint-those submissions shall be dealt with shortly.

Plaintiff's submissions

[4] The Plaintiff filed its submissions on 16th June 2014. Learned Counsel to the Plaintiff, submitted that the Plaintiff was a limited liability company incorporated in Kenya and currently in liquidation. And as per the decree issued on 26th June, 2003, the Defendant owes a decretal sum of Kshs, 49, 528,489.95/= together with the interest thereon at the rate of 18% per annum last applied on 26th June, 2003 until payment is made in full. The Plaintiff alleged that the same remains unsatisfied as the Plaintiff is unable to trace the assets of the defendant company. Therefore, the Plaintiff as the decree holder has applied to this court under Order 22 rule 35 of the Civil Procedure Rules, 2010 to have the directors of the judgment debtor orally examined. Order 22 allows the Court to examine any officer of the corporation or any other person and it does not make any distinction between present or past officer. It is, therefore, necessary and in order to call upon the two directors of the company identified, that is, Mr. Peter Karingu and Mrs. Catherine Kimani, for examination to establish whether the judgment debtor has any property or means of satisfying the decree in question. The Plaintiff cited the case of ***Maclaine Watson & Company Limited –v- International Tin Council (No. 2) 3 (1987) 886.***

[5] The Plaintiff further urged the court to lift the corporate veil and hold the directors personally liable to satisfy the decree in default of the judgment-debtor failing to provide a suitable means for the satisfaction of the same. It was also the plaintiff's claim that even though one of the directors purports to have resigned from the defendant company in 2002, from the affidavit of Doris Mugambi and the annexures therein, the said directors appeared before the Goldenberg inquiry on 13th October, 2004 to give evidence on the matters in question as directors of the Defendant Company. Therefore, if they could give evidence then, they are not precluded from giving evidence now. In any event, this suit was filed in 1996 before the purported resignation of Mr. Karing'u and it would still be proper for Mr. Karing'u to be examined by this court. The Plaintiff therefore urged the Court to allow the application and orders sought.

Mr. Karing'u opposed application

[6] Mr. Karing'u reiterated the contents of his replying affidavit sworn on 27th February, 2014 and filed submissions. He insisted that he resigned as a director of the Defendant Company on 13th November, 2002 which was a year before the decree in question was issued by the court. According to Mr. Karing'u, since his resignation from directorship, he has had no dealings or involvement in the Defendant Company. Now, he claims he is not even aware of the whereabouts of the records of the company, or the current directors of the company and/or shareholders, or whether the Defendant Company still exists. He had even transferred his shares long before this suit was instituted. In the circumstances, it would be impossible for him to comply with any order that the court may issue on the application dated 6th December, 2013. The application by the plaintiff is, therefore, without merit and should be dismissed with costs.

DETERMINATION

[7] I have carefully considered the Applicant's application together with the affidavit in support, the affidavit in reply and the submissions of Counsels whose essential arguments have been set out above. Under Order 22 Rule 35 of the Civil procedure Act, 2010 the Court has the power to summon any officer of a company to attend before it to be examined on 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. See how Kimaru J expressed himself in the case of ***Masefield Trading (K) Ltd v Rushmore Company Limited & Another Civil Suit No. 1794 of 2000; [2008] eKLR*** , on the Court's jurisdiction under Order 22 Rule 35:

> ***"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."***
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> See also a work of the court in ***Margaret Soares vs. Jane Otieno [2014] eKLR:-***
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> ***But let me cite what Ringera J (as he then was) said in the case of NBI HCCC NO 1287 OF 200 ULTIMATE LABORATORIES v TASHA B LOSERVICE LTD (unreported) that:***
>
> > ***''The court's duty under the Order and Rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree-holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree''.***
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> ***Ringera J (as he then was) continued:***
>
> > ***''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 XXI 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''.***
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> ***Two things emerge from the above proposition. One, the power of the court to summon a person to attend and be examined under Order 22 rule 35 is circumscribed within the purpose set out in the rule. That is;***
>
> > ***...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.***
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> ***I, therefore, take the view that, as long as the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery ...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, the court should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I do not think, the rule places such a high and onerous standard as it has been argued by the Respondent, that the Applicant must establish; 1) the debtor's debts***

and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment-debtor's identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the Applicant to seek for information in the nature of discovery to assist the decree-holder to follow through on the execution. If the decree-holder already has such definite information of the debts and properties of the judgment-debtor, there will be no need of applying for examination of a person on what is already available. In such situation, the decree-holder should just proceed and execute on the judgment-debtor's known properties. The second thing; any person may be summoned under the rule, and such person need not have any or direct connection with the issues in the case whatsoever as urged by the Respondent. What needs to be satisfied is the threshold I have mentioned above and the person shall be summoned under the rule.

[8] The main reason for the application is to call upon the Defendant Company's directors to be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. This is what is called in law *Discovery in Aid of Execution*. Is Mr. Peter Karing'u, a relevant person to assist in the discovery herein? Mr. Peter Karing'u, says he is not although he was once a director of the Defendant Company at one time. He says that he resigned on 13th November, 2002. The documents attached to the Replying Affidavit of Mr. Karingu, more particularly, the letter to the Registrar of Companies dated 13th November 2002 as well as a Notification of change of directors Form No. 203 A of the same date bear the signature of Mr. Karing'u and that of the Company Secretary, but they have not been stamped as duly received by the Registrar of Companies. In the state of the documents, it is unclear whether they were filed at the Companies Registry. In the circumstances, and given the nature of the request to court, the documents are not sufficient to refuse his examination. A search of the current directors of the defendant company would have been more useful to this court. I also note the contention of the Plaintiff that the file on Nyamangu Holdings Limited is missing. Another important factor is that the judgment-debtor is in liquidation. All these things make it more desirable that the court should take a much wider view of the matter in the interest of justice. Order 22 Rule 35(c) of the Civil Procedure Rules allows the court to order any other person to attend court and be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. A former director could also be called upon to attend court and be examined under Order 22 Rule as long as it is shown he is appropriate in an inquiry to establish to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. This case was filed in 1996 long before Mr. Karing'u resigned from directorship; the debt is owing; the company is in liquidation; the file of the company in the registry cannot be found; and the other director is abroad. In the circumstances, Mr. Karing'u is appropriate having sat in the board of directors when this suit was pending and it was a suit against the company. The position he occupied makes him appropriate person to be summoned under Order 22 Rule 35(c) of the CPR and provide information on the property of the company. Any information as at the time of his resignation on the property of the company will be useful in this case. Notably, his resignation is barely six months before the decree was issued. I, therefore, take the view that, the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery ...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 should summon the person to attend and be examined in relation to the purpose stated in the rule. Accordingly, I order Mr. Karing'u to attend court on such date as shall be agreed by the parties and be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein. He will also be required to produce any relevant documents or copies thereof on the assets of the company or books of account including but not limited to the judgment debtor's annual financial statements, documents of title to property of the company in his possession and which he may have obtained as a director and or shareholder of the judgment-debtor.

Lifting or piercing the corporate veil

[9] The Applicant submitted on the lifting of the corporate veil and urged the court to hold the directors of the Defendant Company personally liable for the decretal sum in case the Company cannot satisfy the same. This issue is not raised as a formal request to the court in the formal applications being considered by the court. It was raised in the submissions of the Plaintiff. Nonetheless, it is worth a discussion. The separate corporate personality of a company as a legal person in ***Salomon v Salomon*** is the greatest legal innovation in company law. And, although it is artificial person that does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves. Thus, the Directors, Members or shareholders of a limited liability company are not liable for the debts or liabilities of the company; the company is. Once the shareholders have contributed and paid up the nominal value of their shares, they are no longer liable to contribute anything further. However, it is quite different for companies which are formed with unlimited liability of members, or with members' guarantee to a particular amount.

[10] But there were other developments in law in the nature of lifting or piercing the corporate veil. The chief advantage of incorporation of a company is, of course, the separate legal entity. In reality, however, the business of the artificial person is always carried on by, and for the benefit of, some individuals. In the ultimate analysis, some human beings are the real beneficiaries of the corporate advantages; see ***Gallaghar v. Germania Brewing Company*** that,

> ***'...for, while, by fiction of law, a corporation is a distinct entity, yet in reality, it is an association of persons who are in fact the beneficiaries of corporate property'.***

As a general rule, courts do not interfere with and essentially go by the principle of separate legal entity laid down in the Solomon's case, but with the passage of time, courts have come to realize that indeed some promoters and members of companies have formulated and executed fraudulent and mischievous schemes through the corporate vehicle. See the case of ***Jones & Another vs. Lipman & Another [1962] 1 WLR 833*** where it was held that whereas a registered company is a legal person separate from its members, the 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. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or improper or illegal acts. This act of removing the facade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil. But, the exercise is strict one and is regulated by statutory provisions or through judicial interpretation; courts have to identify the specific circumstances which warrant lifting of the corporate veil and directly deal with the individuals behind the fraudulent schemes. The statutes may provide expressly the circumstance for lifting or piercing the corporate veil of a company. See such provisions as on *Reduction of membership* below the statutory minimum; *Misrepresentation in prospectus;* every director, promoter and every other person, who authorizes such issue of prospectus, incurs liability toward those who subscribed for shares on the faith of untrue statement; *Mis-description of name;* Where officer of a company signs on behalf of the company any contract, bill of exchange, or any kind of order of money, such person shall be personally liable if the name of the company is either not mentioned, or is not properly mentioned; *Fraudulent conduct*: Where in case of winding up of the company by members of the company, it appears that any business of the company has been carried on

with intent to defraud creditors of the company, or any other person, or for any fraudulent purpose, the court may hold such persons liable personally for any liability of the company; *Liability for ultra vires acts*: Directors and other officers of a company will be personally liable for all those acts which they have done on behalf of a company if they are ultra vires of the company. See provisions on directors' liability in the Companies Act. Under judicial interpretation, it is difficult to compress an exhaustive list of cases where courts have lifted or might lift the corporate veil. But to mention some few examples where the veil was lifted by courts would help to form an idea as to the kind of circumstances that could permit the court's intervention to pierce the corporate veil. For instance, the court may use Agent-Principal relationship between parent and subsidiary company to find that where a company took over a business and continued it through a subsidiary company, such subsidiary company acted as agent of the parent company. Yet another example, the concept of a*lter ego of a company*: Rule of attrition of liability to the person who is the controlling mind of the company. The person may not be a director or officer of the company but he is the alter ego, controlling mind of the company.

[12] See what **Ringera, J** (as he then was) in ***Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000,*** stated on lifting of the corporate veil that:

> "***However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of GILFORD MOTOR CO. VS. HORNE [1933] Ch. 935 and JONES VS. HIPMAN [1962] 1W.L.R. 832)."***

[12] In light of above discussion, although it is undisputed principle of law since Solomon's case that a company is an independent and legal personality distinct from the individuals who are its members, it has also been firmly established that the corporate veil may be lifted, and the individual members recognized for who they are in certain exceptional circumstances. Generally, and broadly speaking the corporate veil may be lifted where the statute itself contemplates lifting the veil or fraud, or improper conduct is intended to be prevented. It is neither necessary nor desirable to enumerate classes of cases where lifting the veil is permissible, since that must necessarily depend on relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of element of public interest, the effect on parties who may be effected, etc. in the case before me, even if the request for piercing the veil was made it ought to have met the high threshold of the law. 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)*** gave a list of 10 instances in 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:-

a. ***Where companies are in the relationship of holding and subsidiary companies'***
b. ***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;***
c. ***In certain matters relating to taxation;***
d. ***In the law relating to exchange control;***
e. ***In the law relating to trading with the enemy;***
f. ***In the law of merger control in the United Kingdom;***
g. ***In competition of the European Economic Community;***
h. ***In abuse of law in certain circumstances;***

i. ***Where the device of incorporation is used for some illegal or improper purpose; and***
j. ***Where the private company is founded on personal relationship between the members.***

[13] Having stated the law on lifting the veil, I should state that, this court has jurisdiction to lift corporate veil in an application under Order 22 rule 35 of the Civil Procedure Rules and I am content to cite a work of ***Ringera J (as he then was)*** in the case of ***Ultimate Laboratories (supra)*** that:

> ***''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 XXI 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''.***

However, despite the jurisdiction the court, the decision to lift the corporate veil should not be undertaken lightly as it opens the directors or members of the company to personal liability. There should be sufficient circumstances provided in statutory law or judicial precedents which allow the court to do so. In the present case, there is no formal request for the lifting of the veil, and also, there is not any material to support lifting of the veil at the moment. The only allegation made in the submissions and on shallow pitch is that the Plaintiff is not aware of the assets of the Defendant Company; in my view, that is a good ground for invocation of the jurisdiction of court under Order 22 rule 35 of the CPR for purposes of examination of Mr. Peter Karing'u rather than lifting of the corporate veil. I have already ordered attendance of Mr. Peter Karing'u for examination. And I quickly, add that, information which may be provided in the examination of a person summoned under Order 22 rule 35 alone or together with other relevant evidence which the judgment-holder may command, could be a basis for the lifting of the veil as long as it satisfies the threshold of the law. Accordingly, I grant the application dated 6th December, 2013 but I do not condemn Mr. Peter Karing'u to pay costs given the nature of the application. It is so ordered.

Dated, signed and delivered in court at Nairobi this 24th February 2015

F. GIKONYO

JUDGE