



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 31 OF 2010

IN THE MATTER OF: ADOPT-A- LIGHT LTD.

AND

**IN THE MATTER OF: THE COMPANIES ACT, CAP 486 OF
THE LAWS OF KENYA**

R U L I N G

1. For the determination of the Court is an application by the Applicant dated 26th March, 2010, brought pursuant to the provisions of **Order 22 Rule 35** of the *Civil Procedure Rules*. The Applicant seeks the following prayers *inter alia*:

“1. The Directors of the Respondent Neptune Credit Management Limited, namely Brian Yongo and Joseph Otumba be examined on oath as to the judgment debtor’s means and assets and to produce its books of the account and other documentary evidence showing the same;

2. In default of the said Directors complying with the above order, this Honourable Court be pleased to order that the said Directors be held personally liable to pay the Applicant the taxed costs herein in the sum of Kshs. 428,461.61 plus interest;

3. In any event, costs of this application be awarded to the Applicant”.

2. The application is predicated upon the grounds set out therein substantially that it is necessary to determine whether the Respondent Company has the necessary means to settle the taxed costs, to facilitate the lifting of the corporate veil and to determine whether the Directors have been engaging in fraudulent trading during their tenure in office. The application is further supported by the Affidavit of **Kyalo Mbobu** of **Messrs. Kyalo & Associates Advocates**. It is contended that the Respondent has hidden its assets and made sure that they are not available for attachment in satisfaction of the decretal sum and in execution of the Court process. Further, the Applicant avers that the books of account of the Respondent, if any, should be produced before the Court to ascertain its ability to satisfy the judgment debt, or in the alternative, the Directors be held personally liable for the taxed costs.
3. In opposing the application, the Respondent filed both its Replying Affidavit and Grounds of Opposition on 7th May, 2013. The Respondent contends that the application is misconceived, bad in law and incurably defective and discloses no reasonable grounds to warrant the orders sought

by the Applicant. In further contention, the Respondent avers that it is owed over Kshs. 1,000,000,000/- by its debtors, with a number of claims pending in Court over the same. It is deponed that the Respondent has been facing liquidity problems and that the taxation before Court has been challenged vide an application dated 30th August, 2012 which is pending hearing and determination.

4. From a perusal of the application, the affidavit in support and in response thereto as well as the Grounds of Objection filed, two issues emerge for the determination of the Court: **(1) whether the directors of the Respondent Company have interfered with the process of execution of the Court decree** and **(2) whether there is sufficient evidence adduced by the Applicant to warrant the orders to summon the directors as per the provisions of Order 22 Rule 35 of the Civil Procedure Act.** Those provisions reads:

“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”. (Emphasis mine).

5. The Respondent Company, has through the Replying Affidavit of its Managing Director, **Bryan Yongo**, refuted the allegations made by the Applicant and further, that the directors, should not be summoned by virtue of the fact that the Company and its directors are separate legal entities. Mr. Yongo contended that there is no legal basis for such summons or for the lifting of the corporate veil as portended by the Applicant. The Respondents relied on the cases of **Corporate Insurance Company Ltd v Saveman Insurance Brokers Ltd [2002] 1 E.A 41**, **Guinness PLC v Saunders & Another [1990] 1 All E.R 652**, **Foss v Harbottle, 2 Hare 461**, **Burland v Earle [1902] AC 83** and **Aberden Rail Company v Blarkie Brothers [1843-60] All E.R Rep. 249**. On the distinctive nature of entities between a Company and its directors, the Respondents relied on **Fursys (K) Ltd v The De Gama Rose Group of Companies & Another H.C.C.C No. 2005 of 2001**, **Friendship Container Manufactures Limited v Mitchell Cotts (K) Limited [2001] 2 E.A 338**, **Misc. Civil Appl. No. 114 of 1997 In the Matter of Floriculture International Limited, Satsh Naker & Julius Maina (Consolidated) and Williams & Another v Natural Life Health Foods Limited & Another [1998] 2 All E.R 577**.
6. The Applicant submitted that the main reason for the application was for the Respondent Company’s directors to be examined as to whether the company or they were in a capacity to settle the decree, and if so, what property or means were available to satisfy the debt. The Applicant further relied on the authority of **Jackson N. Wachuga v Eastern Kitui Store Limited [2006] eKLR** on establishing the grounds for the examination of the officers of the Respondent Company as provided under **Order 22 Rule 35 (b)**. On the issues of lifting of the corporate veil, the Applicant relied on **Salomon v Salomon & Co. Ltd (1897) AC 22**, **Mea Ltd v SCB Cheputuk & JJ Cheruiyot T/A Rift Valley Feeds & General Supplies Ltd [2005] eKLR** and **Ngugi Holding Ltd v Joseph Kamau Mwangi [2009] eKLR**. The Applicant reiterated that the Respondent Company’s directors were involved in fraudulent and unlawful behavior and activities by disposing of the Respondent Company’s assets for their personal benefit to the detriment of the Applicant as a decree holder in the execution process.
7. The Court has carefully considered the rival arguments made by the opposing parties, the authorities submitted in support of their respective positions and the arguments and pleadings made before the Court. Under **Order 22 Rule 35** the Rules give the Court the power to summon

any officer of a company to attend before it to be examined on the issue of the company's assets and the ability to settle Decree debts. Under the same provision, the Court is mandated to ascertain the position of the judgment debtor as regards the payment and/or settlement of the judgment debt and whether any reasonable and compelling reasons have been adduced by the judgment debtor as to the inability to settle the judgment debt. In **Masefield Trading (K) Ltd v Rushmore Company Limited & Another Civil Suit No. 1794 of 2000; [2008] eKLR** Kimaru, J reiterated as follows with regards to 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.”

To my mind, the argument put forward by the Respondent that the Applicant has not shown that Mr. Yongo is a director of the company, to the Court, holds little water. In the Replying Affidavit in response to the Application, it is tacitly stated at paragraph (1):

“1. *THAT I am the Managing Director of the Respondent herein, well versed with the subject matter herein and duly authorized to swear this affidavit on behalf of Neptune Credit Management Limited, hence competent to depone to this affidavit*”.

By Mr. Yongo's own admission therefore, the Court is of the opinion that no further evidence is needed to prove that he was a director of the Respondent company.

8. As regards the lifting of the corporate veil the case referred to of **Salomon v Salomon & Co. Ltd** (supra) offers a clear insight as to the separation of the legal entities of the directors and shareholders of a company and the company itself. In **Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000** referred to in **Masefield Trading (K) Ltd v Rushmore Company Limited & Another** (supra), Ringera, J (as he then was) on the issue of lifting of the corporate veil held *inter alia*:

“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).”

9. This finding was similarly reiterated in **Fursys (K) Ltd v The De Gama Rose Group of Companies & Another** (supra) as well as **General Tyre Sales Ltd vs Garex (K) Ltd Civil Suit No. 153 of 1998; [2002]eKLR** where the Court dismissed applications to lift the corporate veil on the grounds that there was no evidence shown that the directors acted in any fraudulent or mischievous manner to warrant the reliefs sought. However, Kimaru, J in **Masefield Trading (K) Ltd v Rushmore Company Limited & Another** (supra) reiterated that on examination of the officers of a company under **Order 22 Rule 35**, it may thereafter emerge as to whether it would be necessary to lift the corporate veil. The learned judge held *inter alia*:

“It is upon examination of the interested party that this court may, if the circumstances warrant, lift the veil of incorporation and hold the directors of the company personally liable to satisfy the amount decreed to be paid by the 1st defendant.”

10. However and in my view, the Application before Court is premature. The Respondent company has challenged the Ruling of the Taxing Officer vide its Reference pending before Court dated 30th of August 2012 has yet come before Court for hearing and determination. That application seeks, *inter alia*, an order for this Court to enlarge time within which the Respondent Company

should file a Reference against the Certificate of Taxation issued by the Honourable Deputy Registrar dated 13th December 2011. In my opinion, should that application be successful and a Reference allowed, the sum of money demanded as against the Respondent Company may well change and have the effect of nullifying the execution herein.

As a result, at this stage of the proceedings I decline to make the Orders Sought in the Application dated 26th March 2013 with costs to the Respondent Company. I direct that the Respondent Company will set down for hearing on a priority basis its said Application dated 30th August 2012 by taking an early date therefore at the Registry.

DATED and delivered at Nairobi this 26th day of June, 2014.

J. B. HAVELOCK

JUDGE