REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 31 OF 2014

EMKUS COMPANY LTD.....PLAINTIFF

VERSUS

CHARLES ASIKOWA OKOLO.....DEFENDANT

R U L I N G

1. At the hearing of an application dated 9/4/2014, Mr Kiarie for the respondents argued a preliminary objection on behalf of the respondent based on the following grounds;-

(a) That the application is misconceived, bad in law and fatally defective.

(b) That there is no Judgement on record which can be stayed.

(c) That the applicant/Defendant has no judgement on record to execute against the plaintiff and hence the prayer for lifting of the veil of incorporation does not arise.

(d) That the order sought to be executed has not been annexed to the affidavit in support of the application.

(e) That the filing of the application amounts to serious abuse of the due process.

2. Mr Kiarie argued that prayer two of the application seeks stay of execution yet there is no judgement in this matter. He also argued that prayer 3 of the application seeks lifting of the corporate veil yet such prayer is normally ordered under Order 22 Rule 35 of the Civil Procedure Rules. He argued that there is no judgement in favour of the defendant and there are no execution proceedings in place.

3. Mr Kiarie further argued that the application is seeking to review an application which has not been specified. Mr Kiarie argued that the position in law is that when a party is seeking for review he has to extract an order sought to be reviewed and annex it to the application. In support of this point Mr Kiarie relied on High Court of Kenya at Kitale decision in the case of Kenya Seed Co. Ltd -Vs- Ann Chandi Civil Application No 7 of 2000. He also relied on Milimani Commercial Court Civil Case No. 4085 of 1992 between B. K. Mathenge and Credit Kenya Limited.

4. The preliminary objection was opposed by Mr Ochanda for applicant. Mr Ochanda argued that since the ruling of the court had been annexed to the application, there was no need to extract an order from the same. On the issue of failure to specify which ruling was sought to be reviewed, Mr Ochanda argued that there is only one ruling by the court. On the issue of lifting of corporate veil Mr Ochanda argued that

there is no need to have a decree before one can call for lifting of corporate veil. He urged the court to invoke the provisions of section 3A, 3 and 63 (e) of the Civil Procedure Act.

5. In response to Mr Ochanda's plea to court to invoke its inherent powers, Mr Kiarie submitted that the inherent power of the court can only be invoked where there are no provisions of law applicable. He pointed out that section 323 of the companies Act deals with lifting of the corporate veil.

6. I have considered the rival submissions by counsel. I have now to decide whether the preliminary objection is merited. As regards failure to annex an extract of the order the first case cited by Mr Kiarie quoted a passage from the ***case of Gulamhusein Mulla Jivanji and another -Vs- Ebrahim Mulla Jivanji and another (1929 – 1930) 12 E.A.C.A. 4***. The East African Court of Appeal Judges held in that matter as follows;-

> ***"It is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order"***

In the present application the applicant not only failed to specify which ruling he was seeking to review but also failed to annex an extract of an order from which he seeks review. This should not be wished away. Applicants must be clear on what they want. They should not throw applications at the court and assume that since an application is already in the court file, there is no need of specifying the same or extracting an order as required. The Gulamhusein case decided several decades ago is still alive. What the applicant failed to do cannot be cured under Article 159 of the Constitution. For the sake of orderly proceedings parties have to comply with certain basic procedures.

7. Mr Ochanda conceded that order 22 Rule 35 was inapplicable in this case. His prayer for lifting of corporate veil is therefore without basis. If he wished to be heard on the same, he should have moved the court under the relevant provisions of law. Inherent power of the court can only be invoked where there are no other provisions of law applicable. I find that the preliminary objection is well founded. The same is hereby upheld with the result that the notice of motion dated 9/4/2014 is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 18th day of September, 2014.

E. OBAGA

JUDGE

In the presence of Mr Ingosi for Mr Ochanda for defendant/Applicant and Mr Ndarwa for 3rd defendant.
Court Clerk- Kassachoon.

E. OBAGA

JUDGE

18/9/2014