



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**MISC. CIVIL CASE NO.113 OF 2013**

**JOHN GIKANDI MAGONDU ..... APPLICANT**

**VERSUS**

**CHARLES GAITURI NDEI and**

**EUNICE WANJIKU GAITURI**

both trading as **CHARBROS CONSTRUCTION COMPANY LIMITED.////.....RESPONDENT**

**RULING**

By a Notice of Motion under **Order 22 Rule 40 (1) (a)** and **Order L Rule 1** and **Section 81** of **Civil Procedure Act**, the applicant moved the court for an order that:-

*The Honourable Court order that the veil of incorporation of the respondent company be lifted and that both CHARLES GAITURI NDEI and EUNICE WANJIKU GAITURI who are Directors of the respondent company and be made liable to pay to the applicant Decretal Amount in Chief Magistrate's Court Civil Suit No.41 of 1994.*

The application was supported by the affidavit of JOHN GIKANDI MAGONDU the decree holder in PMCC No.41 of 1994 Nyeri in which he deponed that both the judgment debtors are Directors of the defendant company and that after the suit was filed, Mr. Charles Gaituri Ndei signed a personal note that he will pay the decretal amount personally by installment of Kshs.10,000/=.

That upon filing of an application to court for execution by personal arrest of Mr. Ndei on 19th April 2012, the court advised that the corporate veil of the company be lifted to enable him execute the decretal sum which stands at Kshs.164,240/=.

In response to the said application, Charles Gaituri Ndei filed a replying affidavit in which he deponed that he together with the 2nd respondent are Directors of the judgment debtor known as CHARBROS CONSTRUCTION COMPANY LIMITED and that the applicant has not made up a case for unveiling the corporate personally and that this application should have been dealt with in CMCC No.41 of 1994.

**Submissions**

Directions were issued that the application be heard by written submissions which have now been filed.

**Applicant's submissions**

On behalf of the applicant, it was submitted that on the authority of **Caneland Ltd -vs- Dolphin**

**Holdings Ltd & another Milimani Commercial Court Nrb Civil case No.1135 of 2000** where Justice Mbaluto as he then was said:-

**“In my judgment, this is one of those cases where the corporate Veil ought to be lifted given the special circumstances of this case, it would be tantamount to allowing a debtor to hide behind the cloak of corporate identity to avoid meeting its obligation.”**

That this was a clear case for uplifiting corporate identity for execution against the respondents.

### **Respondent**

It was submitted that the application was supposed to be made in the matter of company under the **Companies Act Cap 486 Laws of Kenya**. It was further submitted that the application should have been made in CMCC No.41 of 1994. It was submitted that since the applicant's application had been dismissed in CMCC No.41 of 1994, he should have lodged an appeal against the said dismissal.

It was submitted that the only known instance for unveiling a corporate are well set out in statute and common law as follows:-

- a. *Under **Section 33** of the **Company Act**, where a company Articles cognizant of the fact that there are few members than are required by the law and therefore the members are in contravention of the law;*
- b. *When a business is carried out wholly with an intention to defraud under **Section 323**;*
- c. *Under **Section 154** where the debtor is a wholly owned subsidiary of the principal debtor;*
- d. ***Section 109** where there is mis-description of company name;*
- e. *Under common law where a company is timely an agent of the person.*

It was submitted that the applicant had not made up a case for order sought and pray that the application be dismissed.

### Issues

The following issues are identified for consideration:

- a. *What are the conditions upon which the corporation veil can be uplift for execution against the Directors?*
- b. *Has the applicant met the said conditions?*

The following facts are undisputed:-

*The respondents are Directors of the judgment debtor company.*

1. *The Directors are separate from the company which has its own corporate identity.*
2. *The applicant has judgment against the judgment debtor which has not been executed.*

The conditions for lifting corporate veil have been set out in **Halsbury's Laws of England 4th Edition Vol.7 paragraphs 90** as follows:-

**“90. Piercing the corporate veil notwithstanding the effect of a company's incorporation, in some cases the court will pierce the corporate veil in order to enable it to do justice by treating a particular company for purposes of litigation before it as identical with a person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the person who control it is a relevant feature. In such a case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even agents, directors and controlling the**

**activities of the company. However this is not the position, even though an individual's connection with the company may cause a transaction with that company to be subject to strict scrutiny the corporate veil will not be pierced.”**

Expounding this principle Ringera J as he then was in **Corporate Insurance Co. Ltd -vs- Savemax Insurance Broker Ltd & another HCCC No.125 of 2002** *“the veil of incorporation is not to be lifted merely because the company has no assets. In such a situation the law provides for remedies other than the director of the company being saddle with the debts of the company.”*

Since the applicant has not pleaded fraud or dishonesty on the part of the Directors of the judgment debtor and further since the same has not exhausted all the available means of execution against the judgment debtors, I see no reason to uplift the corporate veil at this stage.

It is further clear that the application herein is res judicata having been a subject of a similar application before the Chief Magistrate's Court in CMCC No.40 of 1994 for execution of the decree against the Directors of the judgment debtor. I have found no merit on the application herein dated 25th June 2013 which I hereby dismiss with costs to the respondents.

**Signed and dated day of 2014**

**J. WAKIAGA**

**JUDGE**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

**J. NGAAH**

**JUDGE.**

In the presence of:-

----- for Applicant

----- for Respondents