



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 745 of 2009**

**PETER O. NGOGE T/A O P NGOGE & ASSOCIATES.....APPLICANT/ADVOCATE**

**VERSUS**

**AMMU INVESTMENT COMPANY LIMITED.....RESPONDENT/CLIENT**

**RULING**

The Applicant herein, **Peter Oduor Ngoge** is an advocate of the High Court of Kenya Trading under the Firm name and style of **O P Ngoge & Associates**.

Apparently the applicant acted for the defendant High Court Environment and Land Case No. 252 of 2008. Thereafter the applicant instituted these proceedings and his costs were taxed in the sum of Kshs. 778,569.50 and judgement in the said sum was duly entered in the said sum together with interest at the rate of 9% under the Advocates Act on 19<sup>th</sup> September 2012.

The applicant has by his Notice of Motion dated 18<sup>th</sup> October 2012 expressed to be brought under section 40 of the Civil Procedure Act, Overriding principles section 1A and 1B of the Civil Procedure Act, Articles 10 and 159 of the Constitution plus all other enabling provisions of the law moved this Court for the following orders:

- 1. That the application be certified urgent and heard ex parte in the first instance.**
- 2. That the veil of incorporation be lifted and warrants of Arrest be issued to the Commissioner of Police forthwith to arrest Alan Cleophas Mulango – Director of Ammu Investments Company Limited and bring him in Court with speed to show cause why he cannot be committed to civil jail for a period of 6 months for refusing to pay the Applicant/Advocate his legal fees which has been taxed and converted to a Judgement of Court herein under section 51(2) of the Advocate Act against the respondent company an Act which amounts to contempt of Court.**
- 3. That the costs of this application be borne by the respondent.**

The said application is supported by an affidavit sworn by the applicant on 18<sup>th</sup> October 2012 in which he deposes that the respondent company has refused to pay his said taxed legal fees and that by so refusing to pay the said sum, the respondents and its director are eroding the dignity and authority of this Court to the applicant's detriment. That action according to the deponent is illegal and contrary to Article 14 of the **African Charter on Human and People's Rights**. Accordingly the applicant seeks that the respondent's veil of incorporation be lifted and the Directors of the company be arrested and brought to Court to show cause why they should not be committed to civil jail.

In opposition to the said application, the respondent on 25<sup>th</sup> October 2012 filed the following grounds of opposition:

- 1. The Application is premature.**
- 2. The Application is contrary to the Law.**
- 3. The Application is an abuse of the Court Process.**

In his submissions the applicant contended that this Court has the jurisdiction to entertain this application since the powers of the Registrar are spelt out under Order 49 and as the present application is brought under the overriding objective principles and section 40 of the Civil Procedure Act the Registrar has no jurisdiction to entertain such an application which ought to be heard by the Court. By not entertaining the application, it was submitted, the Court would be encouraging parties who have disobeyed the orders of the Court to continue doing so contrary to Article 10 of the Constitution which protects the socio-economic rights. Once the decree has been made the Judgement Debtor ought to pay. According to the applicant the provisions of section 1A and 1B of the Civil Procedure Act enacted specifically to avoid delay and minimize expenses as well as procedural technicalities while disposing of disputes expeditiously. According to the applicant not all the provisions under Order 22 are administered by the Registrar and therefore he has no alternative but to seek his remedy elsewhere if the application is not allowed. Further it is impunity according to him for the judgement debtor to hide in courts and since no prejudice will be occasioned if the application is allowed, the court ought to allow the application in order to alleviate his suffering since the Court has to be humane in the interests of all parties.

In his submissions, **Mr. Wanjama**, learned counsel for the respondent submitted that the application is premature because the procedure for execution has been skipped. According to counsel the respondent is a limited liability company and there are clear provisions as to how to go about executing against a limited liability company which procedures have not been followed. The applicant, it is submitted, has picked on a director of the company without informing the court whether he is unable to execute against the company and hence the application besides being premature is also an abuse of the process of the Court and ought to be dismissed with costs. Further learned counsel submitted that he was not sure whether there was a decree and the respondent is not aware of the contents of the judgement.

In his response the applicant submitted that the registrar has the powers to lift the corporate veil of a company under section 3A. Since no explanation has been offered why the taxed fees cannot be paid and since he does not know where the assets of the company are and he received instructions from the director against whom the execution is intended, it is submitted that the application ought to be taken seriously as the delay is unfair to him and the veil of the incorporation ought to be lifted so that the defendant can see the necessity to pay.

Since the applicant has taken issue with the powers of the registrar to entertain the present application, it is important to explore the provisions under which the present application is brought. Section 40 of the Civil Procedure Act provides as follows:

***(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained:***

***Provided that—***

***(i) for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;***

***(ii) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the***

***occupancy of the judgment-debtor and he refuses or in any way prevents access thereto; but when the officer authorized to make the arrest has duly gained access to any dwelling-house he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;***

***(iii) if the room is in the actual occupancy of a woman who is not the judgment-debtor, and who according to the custom of her community does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room.***

It is clear that section 40 aforesaid prescribes the substantive law dealing with *inter alia* arrest and detention of a judgement debtor in execution of a decree. It does not deal with the procedure for such arrest. The body entrusted by the task of making rules of procedure is the Rules Committee in the exercise of powers donated under Section 81 of the Civil Procedure Act. In its wisdom the said Committee provided for execution under Order 22 of the Civil Procedure Rules. By virtue of Order 49 of the same Rules, the said Committee donated special powers to the Registrars and under rule 7(1)(a)(x) all applications under Order 22 other than rules 28 (detention of the judgement debtor or attachment of his property in execution of a decree for specific performance or for an injunction) and 75 (application for setting aside sale on grounds of irregularity) may be dealt with by the Registrar. Applications for notice to show cause under Order 22 rule 31 are therefore part of the applications that may be dealt with by the Registrar. Similarly an application calling upon the judgement debtor or an officer of a corporation or any other person to be orally examined as to his property may be dealt with by the Registrar. Since the word employed under Order 49 rule 7 aforesaid is “may”, a Judge of the High Court is not necessarily deprived of jurisdiction to entertain any of the applications which the Registrar is empowered to entertain. It must however be noted that the decision of a Registrar under Order 49 rule 7 may be appealed to a Judge in chambers pursuant to Order 49 rule 7(2) thereof. Where a Judge therefore decides to undertake the duties for which a Registrar is empowered under Order 49 rule 7(1) it means that the parties are thereby denied an opportunity of appeal to the Judge and any appeal can only be to the Court of Appeal where the rules permit. In my view, it would not be proper unless it is absolutely necessary for a Court to take a deliberate step of denying a party a necessary stage in legal litigation for which a party would have been entitled but for the action of the Court even if the Court has jurisdiction to deal with a matter. There are good policy reasons underpinning the requirement that actions be taken at the lowest tier of the judicial hierarchy so as to afford a party as many opportunities as possible of testing the correctness of a decision.

Therefore whereas I do not hold that a Judge of the High Court has no jurisdiction to entertain an application falling under Order 49 rule 7 of the Civil Procedure Rules it is my view and I so hold that a Judge ought to be reluctant in entertaining such applications unless it is absolutely necessary and in the interest of justice.

With respect to the provisions of Sections 1A and 1B of the Civil Procedure Rules, it is my view that the said provisions do not confer jurisdiction upon the Court to hear or grant any orders. Just like the inherent powers of the Court reserved under section 3A of the Civil Procedure Act these provisions only recognize the need to attain the overriding objective in the exercise of the powers conferred on the Court under the Act or any of its provisions. In other words the said provisions do not purport to overrule any of the provisions of the Act but only provide that in the exercise of the powers under the Act the Court ought to ensure that the overriding objective of the Act is attained. Therefore to ground an application under sections 1A and 1B and purport to argue that by so doing Order 49 rule 7 of the Civil Procedure Rules is inapplicable is, in my respectful view, a misconception. In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

***“In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act”.***

In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 Of**

2010, Githinji, Visram & Nyamu, JJA on 24/03/10 held inter alia that:

**“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.**

Therefore the mere fact that a party cites sections 1A and 1B of the Civil Procedure Act does not necessarily disentitle the Registrar from entertaining an application under Order 49 rule 7 aforesaid.

With respect to Articles 10 and 159 of the Constitution it must be appreciated that the rules of procedure are there to see that constitutional rights are exercised in an orderly and fair manner. They have no other value. They ensure that each litigant has an equal chance and that the rules of natural justice have been observed. Over the ages the rules of procedure have acted as faithful handmaids of justice and should and must be followed where available or prescribed unless to strictly adhere to the same would occasion a miscarriage of justice. That in my view is the idea behind the provisions of Article 159 of the Constitution. The idea is to ensure that the Courts strive towards the attainment of substantive justice where to religiously adhere to the technicalities of procedure would lead to an injustice. Article 159 in my view was not meant to do away with all rules of procedure but to ensure that the rules of procedure are applied properly towards the attainment of substantive justice.

Article 10 of the Constitution on the other hand is meant to ensure that the national values and principles of governance are attained whenever the Constitution is being applied or interpreted, laws are enacted, applied or interpreted and public policy decisions are implemented. One of the national values and principles of governance is the rule of law which encompasses the adherence to the principles of natural justice the attainment of which the rules of procedure are aimed.

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 no longer 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.

Whereas I agree that an advocate who offers professional services is entitled to be remunerated for services rendered and that it is only fair and just that the respondent meets its obligations as adjudged by the Courts of law and that the Courts, it was held in **Kyangavo vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126**, must not be converted into a haven of refuge by parties who want to shy away from meeting their financial and legal obligations, justice must be done in accordance with the law which require that the rules of procedure be adhered to unless to do so would amount to a miscarriage of justice. The mere fact that adherence to the rules of procedure involves some element of delay in realizing one's rights does not necessarily amount to a miscarriage of justice unless the delay is contumelious that the words of **Kuloba, J** in **Savanna Development Company Ltd. vs. Mercantile Finance Company Ltd Nairobi HCCC No. 2113 of 1989 [1992] KLR 463** may be said to ring true. In that case the learned Judge poetically expressed himself as follows:

**“It is in the interest of justice that litigation must be got on with at reasonable speed – reasonable expedition, the wise say: not too quickly; not too slowly. In the administration of civil justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceeding sluggishly fossilize it. Has it not come down to us through the ages from men of old and wisdom, that justice delayed is justice denied?...In Shakespeare, through *Hamlet*, we see the law's delays condemned and ranked among the whips and scorns of time, a grievous wrong hard to bear, just as the oppressor's wrong, the proud man's contumely, the pangs of dispraised, and the insolence of office, are hard and painful to endure. In Dickens, through *Bleak House* we see it lamented that delays in the Court of Chancery (here read any court of justice), exhausts finances, patience, courage and hope. It is an evil recognised over the centuries; it has been fought against throughout the annals of history. It gathers fog over justice. It is not a reputable thing at all; it brings disrepute to the administration of justice. It confers neither honour nor solace to anyone. It is a repudiation of right”.**

I am not, however, prepared to describe compliance with execution proceedings under our Civil Procedure Act in such strong terms. Whereas I recognise that under Article 14 of the ***African Charter on Human and People's Rights*** the right to property is guaranteed and that it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate law, it must also be recognised that under Article 3 of the same Charter every individual is equal before the law and is entitled to equal protection of the law. Article 6 on the other hand provides that every individual has the right to liberty and security of his person and no one may be deprived of his freedom except for reasons and conditions previously laid down by the law. Article 7 on the other hand provides that every individual has a right to have his cause heard. It therefore follows that whereas the applicant is entitled to be remunerated for the work done, the respondent is equally entitled to the due process as laid down by our laws.

Accordingly, the application dated 18<sup>th</sup> October 2012 fails for being incompetent and is struck out with costs.

Dated at Nairobi this 16<sup>th</sup> day of November 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of Mr. Okwaro for Mr. Wanjama for the Respondent