



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 2228 OF 1997**

**ANDREW MOKORA & ANR .....**  
**PLAINTIFF**

**VERSUS**

**BML DOWNTOWN LTD & OTHERS .....**  
**.....DEFENDANT**

Coram : Mwera J.  
Orina for Plaintiffs

Mose Non Appearance for 1<sup>st</sup> Defendant

Njoroge court clerk

**RULING**

Under the old Civil Procedure Rules the plaintiffs filed a chamber summons dated 29.11.04 under Order XXI rules 36, 91 and section 3A of Civil Procedure Act for orders:

- i) that the directors/officers of the 3 defendant/judgement- debtors M/s BML Downton Ltd, Sheflo Services Ltd and Intime Services Ltd do appear in court for oral examination on the assets and liabilities of those companies;
- ii) that those directors/officers do produce in court books of account, statements, annual returns and any other information relating to the present and past status of the named companies;
- iii) the corporate veil of the said companies be lifted so that execution proceeds against the directors/officers of the judgement-debtor companies personally.
- iv) that the directors/officers do pay the decretal sum or they be committed to civil jail.

In the grounds it was contended that the named 3 companies had been run and managed by the directors whose names were given as Brian Lees, Stephen Juma Onyango, Gitau Wa Ng'ang'a and Edward Matovu. They knew the whereabouts of the assets of the 3 companies – a thing the plaintiffs have failed to locate despite investigations. On examining the named directors/officers, the assets of the debtor – companies will be found to settle the plaintiffs' claim.

The supporting affidavit sworn by Elizabeth Mokora, the 2<sup>nd</sup> plaintiff – decree-holder averred that they got a judgement in their favour on 28.11.02. Despite diligent investigations the decree – holders have not been able to ascertain the location and assets of the 3 companies. The director/officers named who ran those companies, knew and they can disclose that while being examined by the court. If they do not give that information, then they ought to personally bear the debt herein.

There appears to have been no response – to oppose or not this summons by the 1<sup>st</sup> to 3<sup>rd</sup> defendant companies or their named directors/officers. Indeed the court could not on its own say whether that summons was served. The court was told that Aluoch J, as she then was, directed that a deputy registrar examine those officers on oath.

The next thing in relation to the present summons are submissions filed on behalf of the 1<sup>st</sup> defendant and Brian Lees on 20.4.10 stating that the latter swore an affidavit on 5.12.08 and he would rely on it. Such an affidavit appears on record but it does not refer to the present application in any way. It bears a hand-written note – “Examination of Directors 16.12.2008.”

The plaintiffs’ submission was filed on 3.6.11. In the state of this cause probably the best approach is to delve into the submissions to get what it all means.

The plaintiffs submitted that on 4.7.06 the directors of the 1<sup>st</sup> defendant company were ordered to place before court books of account, statements, annual returns for the requested examination on 20.11.08. The court further ordered that the 1<sup>st</sup> defendant was to furnish similar material to the plaintiffs in 30 days w.e.f 29.7.07 but that was not done. So the applicants proceeded to inspect the few books availed, it was not said to who, and contained in about ten 10 cartons.

The contents of each carton were reproduced in the submission; books of accounts, motor vehicle registration details, cheque books, receipt books, rent analysis papers etc. Reference was made to BML Downton Ltd (1<sup>st</sup> defendant), Toprank Holdings Ltd (not a party here).

After documenting all those, focus seemed to have remained with the 1<sup>st</sup> defendant mainly (BML) with further observation being penned that even as that company claimed to have liquidity problems and therefore not operational, examination of the documents and its director demonstrated that that company spent lots of money on repairing, maintaining and effecting insurance covers for its motor vehicles and even those that did not belong to it. That the 1<sup>st</sup> defendant also preferentially paid its trade creditors e.g. Barclays, Habib, and Middle East banks at the expense of the plaintiffs. That that was an improper conduct on the part of the 1<sup>st</sup> defendant company. Further, that sh. 4m was injected in the company in 1997 but it was not accounted for. Carton 10 indicated income of sh. 43, 204, 599/= which was not accounted for and an excess of sh. 26m could not be explained – that sum should have been hidden to defeat justice under the guise of corporate veil.

To the plaintiffs, examination of the 1<sup>st</sup> defendant’s director was concluded on 21.1.10, and the following observations emerged:

- a) the 1<sup>st</sup> defendant company ceased operations at the end of 2001.
- b) when it became clear to the directors that the 1<sup>st</sup> defendant had become non-operational, they took no step towards voluntary winding up.
- c) the directors failed to file regular returns and they were not able to produce all annual returns or any income tax returns.
- d) even as the 1<sup>st</sup> defendant was indebted to the plaintiffs and other creditors, it did not take steps to pay decretal sum.

So, it was urged, the conduct of the 1<sup>st</sup> defendant amounted to complicity by not filing due returns while its directors neglected/refused to go into voluntary winding-up of the 1<sup>st</sup> defendant. There were no assets to satisfy the plaintiffs' claim and so the directors must pay up personally, because they mismanaged that company thereby defrauding the creditors. The cases, NRI HCCC 1287/00 **Ultimate Laboratories Vs Tasha Bioservice Ltd**, NRI HCCA 785/98, **Carey Ngini Vs Dennies Ogolla & Anr**, NRI HCCC 453/1998, and **Mea Ltd Vs E.S.B Cheputuk & Ors** were cited without elaboration to support the plaintiffs position.

On its part the 1<sup>st</sup> defendant company began by going over its history from inception to its winding up in January 2002, with no assets at all. That when this application was brought invoking the powers donated by Order XXI rule 36 Civil Procedure Rules, the intention was simply to see if the 1<sup>st</sup> defendant had any property or means of satisfying the decree. There was no claim/allegation of dishonesty or fraud laid against it.

Further, it was submitted that the plaintiffs' prayer to have the 1<sup>st</sup> defendant's director made personally liable for the company's debts would be contrary to the principle laid down in **Salomon Vs Salomon & Co. Ltd** [1897] Act 22 regarding the distinct and separate identities of a limited liability company *vis a vis* its directors/shareholders. A limited company being a separate legal entity ought to pay its own debts, not its directors/shareholder.

That a corporate veil can only be lifted where it is shown that a given company was incorporated and it transacted business using the incorporation as a mask or device to enable the directors to hide their acts from the eyes of equity. The veil cannot be lifted because a company is insolvent. Judgement of 29.11.02 was entered against the 1<sup>st</sup> defendant when it had ceased to operate some 10 years earlier because it could not meet its financial obligations. Examination of its director did not reveal any fraud or dishonesty. It had operated above board but then it became insolvent. It had no assets to be attached. Its liabilities cannot therefore be born by its directors. OXXI rule 36 Civil Procedure Rules could thus not be invoked here. The cases of **Interchemie EA Ltd Vs Nakuru Veterinary Centre** NRI HCCC 1658/00 and **Corporate Insurance Co Ltd Vs Savemax Insurance Brokers Ltd** [2002] I E A 34 were cited.

The old OXXI rule 36 Civil Procedure Rules (current Order 22 rule 35) under which this application was brought read:

**“ 36. 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; or**
- 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 judgement – debtor; and whether the judgement – 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.”**

The history of this cause is that the 1<sup>st</sup> defendant and others were found liable in the delivered judgement in question. This application was brought against those judgement debtors (OXX1 rule 36 (b) ) but then examination of the director/officer was only in respect of the 1<sup>st</sup> defendant. It is not said what was/is to happen with the others. But be that as it may. The purpose of the examination was to ascertain if the 1<sup>st</sup> defendant was owed debts or had means to satisfy the decree herein. OXX1 rule 36 did not in its essence entail lifting the corporate veil as the plaintiffs sought here, because proceeding in such an exercise is to invoke:

**“..... a well known principle of company law that the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors hide themselves from the eye of equity. That may be so if, on evidence, it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts may well be disclosed in the examination of the directors or in affidavits filed ..... [There] may be no reason why the veil of incorporation cannot be lifted at the execution stage .... [But] ..... the veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent.....”**

**(see the Corporate Insurance case, supra).**

And with the above quote this court needs to go no further in the plaintiffs’ application. They brought this application, not because it was suspected that the 1<sup>st</sup> defendant’s directors had played fraud or acts of dishonesty by using the company’s assets as if they were their own. It was claimed that the company had been unable to pay the decretal debt. But when its director was examined, and the plaintiffs acknowledge this it, was found that the company became insolvent and then it ceased operations. It had no assets. In fact this court was minded to observe that the plaintiffs should have been content with and confined themselves to simply examining the 1<sup>st</sup> defendant’s directors as to its means and assets. It did not have to go to lifting the corporate veil. It did not serve any purpose. It was not necessary in the circumstances. Anyway, as to the state of the company’s means and assets, the examination of its director concluded that there were none; the company ceased operations long before judgment was delivered against it with others. It had been insolvent and a corporate veil need not be lifted off a company because it cannot pay its debts or it is insolvent.

In sum this application is dismissed with costs.

Delivered on 24.10.11.

**J. W. MWERA  
JUDGE**