REPUBLIS OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Civil Appeal 785 of 2006

CAREY NGINI…….APPELLANT

VERSUS

DENNIS O. OGOLLA……1ST RESPONDENT

PEARL DRY CLEANERS……2ND RESPONDENT

(Being an appeal from the ruling of Mr. E.C. Cherono, Senior Resident Magistrate dated 26th October, 2006 in CMCC No.7083 of 2001)

J U D G M E N T

1.The appellant Carey Ngini is dissatisfied with the ruling delivered by a Senior Resident Magistrate on 26th October, 2006. The ruling was delivered in a suit filed by Denis O. Ogolla, (hereinafter referred to as the 1st respondent), against Pearl Drycleaners Ltd (hereinafter referred to as the 2nd respondent). The 1st respondent obtained judgment against the 2nd respondent but was unable to execute the judgment. The 1st respondent therefore brought an application under Order XXXI Rule 36 and 91 of the Civil Procedure Rules, and Section 265 and 266 of the Companies Act, seeking the following orders:

(i) That Mr. D.K. Ngini, Mr. P. Waiganjo and Mr. C. Ngini being the current registered directors of the defendant company be examined on oath as to the judgment/debtor's company's assets as at 20th March, 2000 when the applicant was unlawfully declared redundant.

(ii) That the said directors to show cause to the court why they should not personally satisfy the pending judgment herein.

(iii) That in default of the said directors complying with the above such further orders that the court may deem fit to be made against them personally for having closed the defendant company secretly while the instant suit was pending before the court. (sic)

(iv) That the respondents be condemned to pay costs of all this suit. (sic)

2. Pursuant to orders granted by the court for the directors of the 2nd respondent to be examined on oath, Mr. Kerry Muruthi, a director of the company was examined. He revealed that the 2nd respondent company stopped operations in the year 2000. The company had 5 vehicles which were taken by auctioneers to settle certain liabilities. The only other asset owned by the company was shares in immovable property Nairobi Block 75/1012 which was owned jointly with a 3rd party who objected to the property being disposed of.

3. In his ruling the trial magistrate noted that although the 2nd respondent ceased operation in the year 2000, the 2nd respondent's directors had not taken any positive steps to voluntarily wind up the company. The trial magistrate further noted that the 2nd respondent's directors had taken no action in regard to its indebtedness including the sale of shares in its only remaining property. The trial magistrate concluded that there were no assets belonging to the 2nd respondent company capable of satisfying the decree of the court, and that since the directors had taken no action to sell the shares owned by the company in Block 75/1012, the directors were guilty of complicity.

4. Being dissatisfied with that judgment, Mr. Carrey Ngini, (hereinafter referred to as the appellant), has lodged this appeal raising 4 grounds as follows:

(i) The learned magistrate erred in law and fact in finding that the appellant as a director of Pearl Drycleaners Ltd was liable as a director to the 1st respondent in satisfying the decree in CMCC No.7083 of 2001.

(ii)The learned magistrate failed to appreciate the corporate and legal identity of the appellant as being separate and distinct from that of the second respondent.

(iii) The decision of the learned magistrate was not supported by the law evidence and submissions tendered in court.
(iv) The learned magistrate failed to appreciate the courts jurisdiction under Order XXI Rule 36 of the Civil Procedure Rules.
5. Pursuant to an agreement agreed by the parties, counsel for the 1st respondent and the appellant filed written submissions. There was no appearance for the 2nd respondent. The court is now invited to determine this appeal based on the submissions and the record of appeal before it.

6. It was submitted for the appellant that Order XXI Rule 36 of the Civil Procedure Rules, which the trial magistrate ought to have addressed required the trial magistrate to determine what the 2nd respondent's assets were, with a view to determining whether those assets could be attached in order to satisfy the pending decree. It was submitted that the 1st respondent sought to have the directors of the 2nd respondent show cause, why they should not personally satisfy the decree. This amounted to lifting the corporate veil.

7. It was contended that the 1st respondent did not establish any basis for lifting the corporate veil, and therefore the trial magistrate was wrong in allowing that prayer. It was pointed out that under common law, the trial magistrate was required to make a finding on whether the 1st respondent had pleaded and proved fraud and improper conduct by the company during its existence. It was submitted that the cross-examination of the director revealed no evidence of fraud or impropriety. Nor was there any evidence of improper use of company assets, or use of company assets as personal bounty. It was further contended that there was no evidence that the company was incorporated or carrying on business as a cloak, a sham, or stratagem for enabling the directors of the company to hide from the eye of equity.

8. In support of these submission, the following cases were cited: -
· ***Corporate Insurance Company Ltd vs Savemax Insurance Brokers Ltd [2002] 1EA 41***
· ***Salomon vs Salomon [1987] AC 22***
· ***Interchemie EA Ltd vs Nakuru Veterinary Centre HCCC [Milimani] No.1658 of 2000.***
9..For the 1st respondent, it was submitted that the cross-examination of Kerry Muruthi revealed that the directors of the 2nd respondent company mismanaged the 2nd respondent company in a way that resulted in the creditors being defrauded. It was submitted that the 1st respondent was unable to recover the sum decreed by the lower court because of the mismanagement of the assets of the 2nd respondent company. The court was urged to aid the 1st respondent who has a valid decree by lifting the veil of incorporation in order to give effect to that decree. In this regard, the following cases were relied upon:
· ***Mea Ltd vs C. S. B. Cheputuk and J. J. Cheruiyot t/a Rift Valley Feeds and General Supply Ltd HCCC No.453 of 1998***.
· ***Ultimate Laboratories vs Tasha Bioservice Ltd 9HCC No.1287 of 2000***

10. It was submitted that the 1st respondent had made out a case of exceptional measure for lifting the corporate veil of the 2nd respondent company. The court was therefore urged to take into account all the circumstances of this case and to uphold the finding of the trial magistrate.

11. I have carefully reconsidered and evaluated the record of the lower court and the submissions which were made before the trial magistrate. I do note that the application before the trial magistrate was wrongly brought under Order XXXI. However, I find that nothing turns on this as this was a mere typographical error, which was easily curable by way of amendment under Section 100.

12. Under Order XXI Rule 36 as read with Section 323 of the Companies Act, the court has powers to lift the corporate veil and order the directors of a company to pay the debts of the company. However, as was held by Ringera J. in ***Corporate Insurance Company Ltd vs Savemax Insurance Brokers Ltd*** (supra), 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 devise or stratagem for enabling the directors to hide from the eye of equity.

13 In this case, there was absolutely no evidence upon which allegations of mismanagement, fraud or impropriety could be anchored. The cross-examination of the director of the 2nd respondent simply revealed that the 2nd respondent was unable to pay its debts. And, that it had already disposed of some of its assets, while other assets were attached by auctioneers. As was observed by Ringera J. in ***Corporate Insurance Company Ltd vs Savemax Insurance Brokers Ltd*** (supra):

"***The veil of incorporation is not to be lifted merely because the company has no assets or is unable to pay its debts and thus insolvent. In such a situation, the law provides a remedy other than the director of the company being saddled with the debts of the company*".**

14. I find therefore, that there was no justifiable reason for the veil of incorporation to be lifted. Moreover, a careful perusal of the application and the ruling of the magistrate reveal that the trial magistrate was not moved nor did he make any specific order for lifting of the veil of incorporation. For the above reasons, I find that this appeal succeeds. I set aside the ruling of the trial magistrate and substitute thereof an order dismissing prayer (3) of the 1st respondent's chamber summons dated 17th July, 2004. I make no orders as to costs.

Dated and delivered this 22nd day of October, 2010

H. M. OKWENGU
JUDGE
In the presence of: -
Charagu for the appellant
Orwa for the respondent
B. Kosgei - Court clerk