



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 1794 of 2000

MASEFIELD TRADING (K) LTD..... PLAINTIFF

VERSUS

RUSHMORE COMPANY LIMITED.....1ST DEFENDANT

FRANCIS M. KIBUI.....2ND DEFENDANT

AND

JACKSON KAHUNGURA.....INTERESTED PARTY

RULING

This is a long and protracted case. Judgment was on 29th July 2004 entered in favour of the plaintiff against the 1st defendant on for the sum of KShs.22 million plus interest at the rate of 16% per annum from the date of filing suit until payment in full. The plaintiff was awarded the costs of the suit against the 1st defendant. The plaintiff's suit against the 2nd defendant was dismissed with costs. Upon obtaining the said judgment, the plaintiff attempted to execute against the 1st defendant. The plaintiff learnt that the only asset of the 1st defendant, being LR No. 209/10577/2, had been transferred to the interested party, Jackson Kahungura Kariuki, a director of the 1st defendant, during the pendency of the suit. The said property was later charged to Standard Chartered Bank to secure a loan of KShs.5 million. The borrower is the interested party.

On 10th December 2004 the plaintiff filed an application pursuant to the provisions of **Section 3A** of the **Civil Procedure Act**, **Order XXI Rule 36** and **Order XXXIX Rule I** of the **Civil Procedure Rules** seeking several orders of the court. The plaintiff sought orders restraining the interested party from transferring, further charging, alienating or in any other way dealing with the property known as LR No. 209/10577/2 (*hereinafter referred to as the suit property*). The plaintiff further sought an order of the court to compel the interested party to produce all books of account of the 1st defendant and more specifically the audited accounts covering the period October 2000 to July 2004. The plaintiff further sought an order to secure the interested party's attendance in court for the purposes of his examination on oath on the 1st defendant's means and assets. The plaintiff sought an order compelling the interested party to personally satisfy the decree herein and also pay the costs of the application. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Stanislaus Wijenje, the general manager of the plaintiff.

The application is opposed. The 1st defendant filed grounds in opposition to the application. The interested party filed a replying affidavit in opposition to the application. The parties filed skeleton submissions prior to the hearing of the application. It should be noted that before the said application was canvassed before this court, the interested party had earlier raised a preliminary objection to the application. Kasango J considered the said preliminary objection and dismissed the same. Pending the hearing of this application, the learned Judge restrained the interested party from transferring, further charging, alienating or in anyway dealing with the suit property pending the hearing and determination of the application. The said ruling was delivered on 4th May 2005.

At the hearing of the application, Mr. Munyu for the plaintiff submitted that the plaintiff obtained judgment against the 1st defendant but has been unable to execute and satisfy the decree on account of the fact that the only asset of the 1st defendant had been transferred to the interested party during the pendency of the suit. He submitted that the plaintiff was seeking the assistance of the court to lift the veil of incorporation of the 1st defendant by compelling the interested party to attend court to explain to the court the means and assets of the 1st defendant, by producing evidence including its books of accounts. Mr. Munyu was of the view that the interested party transferred the suit property to himself in order to defeat the plaintiff's claim. He urged the court to issue an order preserving the suit property pending cross-examination of the interested party. He reiterated that the court should aid the plaintiff realize the fruits of its judgment. He urged the court to allow the application as prayed in order for a determination to be made whether the transfer of the suit property and the subsequent registration of the same in favour of the interested party was fraudulent. He submitted that this could only be established if the interested party was cross-examined on the assets and means of the 1st defendant. He submitted that the court had jurisdiction to lift the veil of incorporation and hold a director liable to settle the decretal sum decreed against a company where the court forms an opinion that a wrong was committed by such a director.

Mr. Njuguna for the 1st defendant opposed the application. He submitted that the court had no jurisdiction to grant the application sought by the plaintiff since the entire application was pegged on the issue of fraud. He maintained that the issue of fraud was a substantive issue which could not be determined in an interlocutory application but rather in a full trial. He argued that since proceedings in the suit had been concluded, this court lacked jurisdiction to grant the order of injunction sought since such orders could only be issued at an interlocutory stage. He submitted that a corporate veil could not be lifted on an application for examination of directors. He maintained that such lifting of the corporate veil could only be undertaken in winding up proceedings under **Section 323 of the Companies Act**. He was of the view that the court was *functus officio* once judgment was rendered and could not allow any party to canvass an application for execution against a person who was not a party to the suit. He urged the court to dismiss the application with costs since, in his view, the same was incompetent.

Mr. Mbigi for the interested party opposed the application. He relied on the replying affidavit sworn by the interested party in opposition to the application. He also relied on the skeleton submissions filed in court. He submitted that there were no materials placed before the court to entitle this court make the orders sought by the plaintiff in the application. He explained that the object of calling a director for examination was discovery. He referred the court to the provisions of **Order XXI Rule 36 of the Civil Procedure Rules** on what the court is expected to do when examining a director. He maintained that the full assets of the company (1st defendant) had already been disclosed by a director of the company and therefore the application for discovery was not genuine in the circumstances. He was of the view that the plaintiff was in actual fact seeking to obtain the satisfaction of the debt of the 1st defendant by the interested party.

Mr. Mbigi urged the court to ignore the affidavit sworn by Stanislaus Wijenje since he was not a director of the plaintiff. He submitted that the basis of the plaintiff's application was hearsay evidence adduced by a co-director of the interested party. He urged the court to strike out the paragraphs of the affidavit in support of the plaintiff's application that were in infringement of the hearsay rule. He explained that the question as to whether the suit property was fraudulently transferred to the interested parties was the subject of a suit filed by the 2nd defendant against the interested party. The said suit was pending

determination before the High Court, Central registry. He maintained that since the application was based on fraud, and since no judgment had been rendered on the said issue of fraud, the prayers sought in the application were premature and could not be granted by the court. He reiterated that the application before the court was in actual fact an application for execution of the decree under the guise that it was an application for discovery. He urged the court to dismiss the application with costs since in his view the same was misguided.

I have carefully considered the rival arguments made by the parties to this application in support of their respective opposing positions. I have also considered the pleadings filed by the parties in this application. The authorities cited have also been of help to the court. There are several issues which arose for determination by the court. The first issue is whether the plaintiff filed a competent application before court. The 1st defendant and the interested party argued that the plaintiff's application cannot be granted in the circumstances since the plaintiff was seeking the court's determination on whether fraud was committed by the interested party. It was the 1st defendant's and the interested party's argument that the court lacked jurisdiction to compel the interested party to appear in court to be cross examined on the assets of the 1st defendant since an explanation had already been given regarding the said assets. The 1st defendant submitted that an application seeking to lift the veil of incorporation could only be made in a winding up cause pursuant to the provisions of **Section 323** of the **Companies Act**.

I considered the said objections raised by the 1st defendant and the interested party. **Order XXI Rule 36** of the **Civil Procedure Rules** provides that:

“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 judgment-debtor, and whether the judgment-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.”

I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation. Although the 1st defendant and the interested party argued that the application was premature, it is evident that such an application can only be made after judgment has been entered in favour of a decree holder.

As regard whether the court may lift the veil of incorporation in an application predicated upon **Order XXI Rule 36** of the **Civil Procedure Rules**, and whether such an application can be only made in winding up causes, Ringera J had this to say in **Ultimate Laboratories vs. Tasha Bioservice Limited** Nairobi HCCC No. 1287 of 2000 (*unreported*) at page 9:

*“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of **GILFORD MOTOR CO. VS. HORNE [1933]** Ch. 935 and **JONES VS. HIPMAN [1962]** 1W.L.R. 832).”*

It is therefore clear that the 1st defendant's and the interested party's objections are in the circumstances not merited since what is before the court is a simple application regarding whether a director of a company may be summoned to the court to be orally examined to enable the court determine whether the company has any assets or means to settle the amount decreed as payable to the plaintiff.

In the present application, the plaintiff did establish that the interested party, a director of the 1st defendant company transferred the suit property from the company to himself in circumstances that clearly suggest that the interested party may have intended to frustrate the plaintiff from realizing the fruits of its judgment. The said transfer was effected during the pendency of the suit. I think it is only just and fair that the interested party be summoned to court and be orally examined on the circumstances under which the suit property was transferred from the ownership of the 1st defendant. The fact that there exists a pending suit between the two directors of the 1st defendant regarding the suit property is no bar for this court examining the interested party to determine if any law was broken in the said transfer. The 1st defendant and the interested party jumped the gun when they reached the premature conclusion that the veil of incorporation of the company was being lifted before the said director of the 1st defendant was orally examined by the court. It is upon examination of the interested party that this court may, if the circumstances warrant, lift the veil of incorporation and hold the directors of the company personally liable to satisfy the amount decreed to be paid by the 1st defendant.

In the premises therefore, I will grant the prayers sought in the plaintiff's application in terms of prayers 3 and 4 of the application. Jackson Kahungura Kariuki shall attend court to be examined on oath in regard to the 1st defendant's means and assets. To assist the court in reaching a determination whether the 1st defendant has assets to satisfy the decree, the said Jackson Kahungura Kariuki shall produce all the books of accounts of the 1st defendant, and more specifically, the audited accounts covering the period October 2000 and July 2004. The other prayer in the application i.e. prayer 5 shall be considered after the said Jackson Kahungura Kariuki, the interested party herein, has been orally examined by the court. The orders granted by Kasango J restraining the interested parties from adversely dealing with the suit property shall remain in place pending examination of the interested party by the court. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 12th day of NOVEMBER, 2008.

L. KIMARU

JUDGE