



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

Civil Case 652 of 2004

DE RUITERS ROSES EAST AFRICA LIMITED PLAINTIFF

VERSUS

ALORA FLOWERS LIMITED DEFENDANT

R U L I N G

In an application brought by way of a Chamber Summons filed on 22.8.2005 the plaintiff decree holder in this case, De Ruiters Roses East Africa Ltd. prays for the following orders:

- (1) That the court do make an order that the defendant's directors produce for inspection of the Court all the defendant's books and documents in respect of the debt the subject matter herein.**
- (2) That the Court do make an order for the oral examination under oath of the defendant company's directors as to what debts are owing to the plaintiff.**
- (3) That the directors of the defendant company as at the time of filing the suit herein to wit John Kiplimo and Charity Musinguzi Ketter be held personally liable for the amount due under the decree passed against the defendant.**

The application is expressed to be brought under the provisions of Section 3A of the Civil Procedure Act and Order XXI Rule 36 of the Civil Procedure Rules. The primary grounds for the application are that the plaintiff holds a decree and certificate of costs against the defendant company; that the defendant company's physical address is not known thereby frustrating the plaintiff's efforts to execute the said decree; that the defendant company's property has been wifully transferred and/or concealed by its directors and that it is mete and just that the directors of the defendant company be held personally liable for the amount owed to the plaintiff by the defendant company.

The application is supported by an affidavit sworn by one Carolyn Obara, an advocate in the firm of Waruhiu & Co. Advocates for the plaintiff.

No replying affidavit(s) have been filed by the respondent or its directors. Nor were grounds of opposition filed by either the respondent or its directors.

The application was placed before the Deputy Registrar on 11.11.2005 who dealt with prayers 1 and 2 of the application. On 30.3.2006 the Deputy Registrar declined to deal with prayer 3 of the application on grounds that she had no jurisdiction. On 28.4.06 the application came up for hearing before Ransley, J. who made an order that the Order of the Deputy Registrar and a Penal Notice be served upon the Directors of the defendant company.

The application was then placed before me for hearing on 30.6.2006 when Ms. Obara, Learned Counsel for the plaintiff urged me to grant prayer 3 of the application there being no appearance for the defendant or its directors.

On perusal of this record, there is no evidence from the Registrar of Companies, on who the directors of the defendant company were as at the time of institution of these proceedings. The only averment on this point was made by the process server, Paul Lukendo Mafura, in his affidavit of service sworn on 21.4.2006. In paragraph 3 of the said affidavit he deponed that he was told by a shop keeper called Joseph Cheron Kipngetch that the defendant company ceased operations and the “owner or the Director was Hon. Tony Ketter and his wife.” That averment in fact was not conclusive as to who the directors of the defendant company were at the time of institution of this suit.

On this doubtful information, I am being asked to order that the directors of the defendant company be held personally liable for the amount due under the decree passed against the defendant.

Besides the doubtful or inadequate information about the directors of the defendant company, the supporting affidavit of Carolyne Obara aforesaid does not explain in what way the defendant company’s property has been willfully transferred and/or concealed by its directors, thereby frustrating the plaintiff’s efforts to execute the decree.

In **Solomon vs. Solomon and Co. Ltd [1897] AC 22**, it was established that a registered company is a legal person separate from its members. This principle is often referred to as the veil of incorporation. The veil 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 a device for enabling the directors to hide themselves from the eyes of equity. An example of such a mask is for instance, where the directors have dealt with the property of the company as their personal property for use for their own purposes. Such material would probably have been shown if the directors had been examined or in affidavit evidence filed. No examination of any director was carried out. Indeed, no acceptable evidence of who the directors of the defendant company are was adduced. On the material availed to me I do not think the veil of incorporation can be lifted. In my view – even where there is no doubt as to who the directors of the company are, the veil of incorporation cannot be lifted merely because the company is insolvent or otherwise unable to pay its debts. In the case at hand, the applicant has given as one of the grounds for the application the reason that the directors of the defendant company have willfully transferred and/or concealed the company’s property. However, the supporting affidavit of Carolyne Obara, sworn on 18.8.2005 makes no such allegation. The order sought by the applicant is a drastic order and in my view cannot be granted on the material availed by the applicant.

In the result prayer 3 of the application dated 18.8.2005 is refused with no order as costs.

Orders accordingly.

DATED at NAIROBI this 20th day of JULY, 2006.

F. AZANGALALA

JUDGE

20/7/2006

DATED and DELIVERED on 20TH day of JULY, 2006.

M. KASANGO

JUDGE

20/7/2006

Read in the presence of:-