



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. APPLICATION NO. 340 OF 2014**

**NZAKU AND NZAKU ADVOCATES.....APPLICANT**

**=VERSUS=**

**CHIMAKO HOMES LIMITED.....RESPONDENT**

**RULING**

1. This is the notice of motion dated 5<sup>th</sup> March 2019 brought under section 148, 187 of the Companies Act-2015, Section 1A, 1B, 3A and 34 of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 22 Rule 35 of the Civil Procedure Rules, 2010).

2. It seeks:-

***1. The honourable court be pleased to make an order that Fadhili Mbarak Namoya and Fredrick Mutumbua Kivuva, directors of the judgment debtor be summoned and be orally examined to establish if the judgment debtor has means and assets capable of satisfying the decree.***

***2. The veil of incorporation of the judgment debtor be lifted and directors Fadhili Mbaraka Namoya and Fredrick Mutumba Kivuva, be made personally liable and be ordered to settle the decretal sum to a tune of Kshs.2,788,080.00 and interest therefrom 6<sup>th</sup> March 2015 from jointly and severally until payment in full.***

***3. The costs of this application and cross-examination proceeding be awarded to the decree-holder on the higher scale.***

3. The grounds are on the face of the application and are set out in paragraphs (a) to (f).

4. The application is supported by the affidavit of Steven Nzaku, advocate, sworn on the 5<sup>th</sup> March 2019.

5. On the 29<sup>th</sup> January, 2020, Mr. Mungala for the respondent sought and was granted twenty-one (21) days to file a response to the application. By the time of writing this ruling, there is no response to the notice of motion dated 5<sup>th</sup> March 2019.

6. On the 29<sup>th</sup> January 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

**The Applicant's Submissions**

7. They are dated 8<sup>th</sup> July 2020. Order 22 rule 35 of the Civil Procedure Rules 2010 allows the applicant being the Decree Holder to seek help of this court through discovery in aid of execution. This means that the applicant/decreed holder may proceed to seek orders from this court, that directions of the defendant's company/judgment debtor to be examined orally on whether any or what debts are owing to the decree holder and whether the judgment debtor has any and what property or means to satisfy the decree.

8. The applicant/decreed holder has previously made tireless and now futile attempts/efforts to execute the decree issued on 12<sup>th</sup> June 2018 by engaging Nairobi Channels Auctioneers to investigate and execute the same but the said firm of auctioneers could not trace any assets of the respondent within the jurisdiction of this court or elsewhere.

9. This court has the mandate to ascertain the position of the judgment debtor/respondent as regards the payment and/or settlement owed and whether any reasonable and compelling reasons have been adduced by the judgment debtor as to the inability to settle the judgment

debt. The applicant has put forward the case of **Masefield Trading (K) Ltd vs Rushmore Co. Ltd & Another [2008] eKLR**.

10. Section 145 and 148 of the Companies Act 2010, impose fiduciary duty upon the respondent's directors in performing their functions as company directors in a manner that would be exercised by any reasonable diligent person failure to which, any other fiduciary duties owed to the company by its directors shall be enforceable as any other fiduciary duties owed.

11. The general principle in company law is that a company has a separate personality from the personalities of its shareholders and directors and they are protected from being personally liable to the company's debt and other obligations. The protection under the act should not be abused or used as an excuse for the company's shareholders and/or directors to act as they please. They have put forward the cases of **Post Bank Credit Ltd (in liquidation) vs Nyamangu Holdings Limited [2015] eKLR**; **Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR**. It is in the best interest of justice that the veil of incorporation be lifted seeing the directors of the respondent's company are unresponsive on its financial status dispute being privy to the information that the company is in debt.

12. The applicant has exhausted all the available avenues towards getting to know the defendant's financial standing in order to execute the decree. They pray that the application be allowed.

#### **The Respondent's Submissions**

13. They are dated 26<sup>th</sup> November 2020. It is a general principle as it was held in the *locus classicus* of **Salomon vs Salomon** that a company has its own identity distinct and separate from its members and directors.

14. The mere fact that a firm of auctioneers instructed by the applicant failed to trace the assets of the respondent company does not warrant the lifting of the veil. They have put forward the case of **Electrowatts Limited vs Countryside Suppliers Ltd & Another [2014] eKLR** where the Court of Appeal quoted the case of **Corporate Insurance Co. Ltd vs Savemax Insurance Brokers Ltd & Another [2002] IEA 41**. It is only permissible for a court to lift the corporate veil where the court finds that there exists special circumstances indicating that the company is a mere façade concealing the true facts.

15. It has also put forward the case of **Charles Ray Makuto vs Almakony Limited & Another [2016] eKLR**. For the corporate veil to be lifted the applicant herein has to prove before this court, which the applicant has failed to prove that the respondent company is or was used as a vehicle of fraud. It has put forward the case of **Emfil Limited vs Registrar of Titles Mombasa & 2 Others [2014] eKLR**.

It is trite law that he who alleges must prove. The applicant has failed to plead and prove fraud on the part of the respondent company or its directors. The applicant has not exhausted all the available measures available.

16. The applicant has not exploited the options available to him under section 385 (1) of the Insolvency Act. They pray that the application be dismissed with costs to the respondent.

17. I have considered the notice of motion and the affidavit in support I have also considered the written submission and the authorities cited. The issue for determination is whether this application is merited.

18. As stated earlier, the notice of motion herein is not opposed. On the 29<sup>th</sup> January 2020 the respondent sought and was granted leave to put in response within 21 days. To date there is no response on record and no explanation has been given.

**Order 22 rule 35** 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;*  
(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.*

19. In the case of **Masefield Trading (K) Ltd vs Rushmore Company Limited [2008] eKLR**, Kimaru J stated thus with regard to the courts jurisdiction under Order 22 rule 35:

*“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 sums decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation”.*

It is the applicant's contention that he has been unable to find attachable assets for purposes of executing the decree. I find that the applicant has satisfied the court that the directors of the respondent ought to be summoned to appear before this court to be examined on the assets and means of the company to settle the decretal sum.

20. The law on lifting the veil of incorporation is now settled. I am guided by **Halsburys Laws of England, 14<sup>th</sup> Edition Volume 7, Paragraph 90** quoted by the applicant in his submissions. It states.

***“Piercing the corporate veil notwithstanding the effect of a company’s incorporation; in some cases the court will pierce the corporate veil in order to enable it to do justice by treating a particular company for purposes of litigation before it as identical with a person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the person who controls it is a relevant feature. In such a case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even agents, directors and controlling the activities of the company”.***

It is the applicant’s case that the directors in their fiduciary capacity as directors of the company have failed and/or refused to make good the decretal sum. I find that the directors ought to have sworn a replying affidavit to show that the respondent company is insolvent and that it is unable to meet its debts. As they did not file any, the applicant’s averments are unchallenged.

21. In conclusion I find merit in this applications and grant the orders sought. In essence prayer 1 and 2 are allowed. Prayer (2) will however take effect depending on what will transpire once directors are examined in court. The costs of this application shall be borne by the respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>th</sup> day of February 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

**Mr. Muriithi for Mr. Nzaku for the Applicant**

**No appearance for the Respondent**

**Phyllis -Court clerk**