



**Oni Properties Limited v Sigal Investments Limited (Environment & Land
Case 1554 of 2014) [2024] KEELC 579 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1554 OF 2014
OA ANGOTE, J
FEBRUARY 8, 2024**

BETWEEN

ONI PROPERTIES LIMITED APPLICANT

AND

SIGAL INVESTMENTS LIMITED RESPONDENT

RULING

1. By way of a brief background, the Applicant/Decree Holder filed a suit against the Respondent/Judgment Debtor claiming ownership of the parcels of land known as LR. Nos 1160/654, 655, and 656-Nairobi by virtue of having purchased them. The suit was compromised vide a consent filed on 12th September, 2018, and adopted by the Court on 19th September, 2019.
2. As per the terms of the consent, Judgement was entered as against the Respondent for the sum of Kshs 48,000,000. The Respondent was to settle the decretal sum by releasing to the Applicant Kshs. 38, 000,000, which had been deposited in Court. The balance of Kshs 10,000,000 was to be paid in two equal installments of Kshs 5,000,000/= or before 31st December, 2018 and on or before 31st December, 2019 respectively.
3. The Respondent failed to pay the balance of the decretal sum leading to the Appellant filing a Motion dated 20th May, 2020. Vide the Motion, the Applicant sought for the following orders:
 - i. That this Honorable court be pleased to order that the said Kshs. 10, 000, 000.00 be released to the Applicant in settlement of the balance of the decretal sum.
 - ii. That in the event that the Respondent fails to deposit the said Kshs 10,000, 000.00, the Honorable Court be pleased to issue summons directed to Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti who are the Directors of the Respondent/Judgment Debtor to attend court on an appointed day to be orally examined, as to the business and affairs of the Respondent Judgment Debtor, and/or property or properties of the Respondent/



Judgment debtor, and/or the Respondent/Judgment Debtor's means of satisfying the decretal sum.

- iii. That in the event the Respondent fails to deposit the said Kshs. 10,000,000.00, the Honorable Court be pleased issue an order directed to Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti, in their capacity as the Directors of the Respondent/ Judgment Debtor to produce before Court books of accounts, audited financial statements, cheques books and other statutory documents relating to the operations and transactions of the Respondent/ Judgment Debtor and its affiliates for the last three (3) years from the date hereof and the said Directors be examined on oath on the said documents.
 - iv. That in default of the said Directors complying with orders V & VI above, this Honorable Court be pleased to lift the veil of incorporation and order that Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti be held personally liable to settle the decree of the Court obtaining from this suit together with other sums expressed and or implied therein or be imprisoned and committed to civil jail for a period of not less than 6 months.
 - v. That the Honourable Court be and is hereby pleased to make such further orders in the interest of justice upon examination of Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti.
 - vi. That the costs of this application be in the cause.
4. In support of the application, Mr Patrick Muchemi, the Applicant's Director, deponed that the Respondent had failed to settle the decree despite having disposed off the suit properties; that the properties were sold with the understanding that the proceeds of the sale would be used to settle the balance of the decretal sum and that the Respondent's Directors had channeled the proceeds of the sale to third parties and/or utilized the same on their own personal affairs.
 5. It was deposed that the Applicant was unable to trace other assets of the Respondent to satisfy the decree and that the Respondent subsists and carries out business with Mr Samson Kiprugut Bundotich and Mr Wilson Kipkemboi Kipkoti as its Directors and that the aforesaid Directors have conducted the affairs of the Respondent in a fraudulent manner so as to defeat the creditors.
 6. In response, Mr Wilson Kipkemboi, one of the Respondent's Directors, deponed that the properties were sold in the years 2012 and 2014, long before the filing of the suit; that after the sale of the suit property and receipt of the purchase price, they retained the sum of Kshs 38 Million paid by the Applicant which sum was later on deposited in Court and that sometime in 2018, the Applicant's Director approached him to discuss an out of Court settlement proposing the re-payment of Kshs 38,000,000 and interest estimated at Kshs 10,000,000.
 7. Mr. Kipkemboi deponed that he informed Mr. Muchemi that the company was not operational and had no other assets apart from the Kshs 38 Million deposited in Court; that Mr. Muchemi in response assured him that they would indulge the Respondent and allow it to pay the sum of Kshs 10 Million when its fortunes improved and that this was the basis of the consent.
 8. Whereas the Respondent had every intention of honoring the balance of the decretal sum, it was deposed, it had not made any income after 2014 and that further, the Respondent had no assets, employees, or bank accounts and its Directors had not been paid any remuneration since 2014.
 9. Vide a Supplementary Affidavit, the Applicant through its Director deponed that the Respondent willingly agreed to the terms of the consent and they had not sought to set the same aside and that the claim that the company had no bank accounts whereas it undertook financial transactions constituted



an admission that the Directors had been operating the same without proper books in an attempt to defraud the creditors.

10. It was deposed by the Applicant's Director that the evidence by the Respondent revealed that the Respondent's Directors personally received monies through their accounts/ Advocates accounts instead of the company's' accounts and that having refused to produce its books, it was apparent that the Respondent was a shell company behind which the Directors were hiding to avoid obligations.
11. The Court rendered its determination on the 28th June, 2021. In it, the Court noted that the Application was improper in so far as it simultaneously sought orders under Order 22 Rule 35 and the lifting of the corporate veil, noting that the orders for lifting the corporate veil could only be issued after the orders envisaged under Order 22 Rule 35 of the Civil Procedure Rules.
12. Nonetheless, the Court observed that it was apparent and indeed undisputed that the Respondent's assets could not be easily ascertained and further that the Respondent had no intention to settle the decretal sum in the near future, only indicating that they would settle the same once their fortunes improved.
13. The Court found that the circumstances warranted the making of an order under Order 22 Rule 35 of the Civil Procedure Rules and ordered that the Directors of the Respondent appear before the Court to be examined pursuant to Order 22 Rule 35 aforesaid.

Cross-Examination

14. The cross-examination of the Respondent's Director, Mr Wilson Kipkemboi Kipkoti, proceeded on 17th January, 2023. He placed reliance on the documents filed in support of his Replying Affidavit dated 30th October, 2020. It was his testimony that the Agreement between the Respondent and Rothal Properties Limited is dated the 23rd August, 2012 and that clause 3:3 of the Agreement provided for payment of the purchase price directly to his account and not to the company.
15. According to the Respondent's Director, there is an Agreement dated 20th November, 2014; that pursuant to clause 2:2, the proceeds of Kshs 45 Million being the sale of land by the Judgement Debtor was to be paid to the lawyer for onward transmission and that the company only engaged in the sale of the property to pay Muchemi.
16. Mr Kipkemboi further stated that he had financial dealings but did not have the bank accounts; that apart from the company's loan account, they have no other bank accounts for the company; that the company nonetheless had financial transactions; that the proceeds for the first agreement were paid directly into his account; that he paid the company but does not have any evidence in that respect; that the company is a going concern and that it is a dormant company.
17. In re-examination, PW1 stated that the order was for accounts for three years from the year 2020; that in the said last three years from 2020, the company never made any transactions; that the transactions that he carried out were in 2014 and had nothing to do with the orders herein and that the first Agreement was in 2012 while the second Agreement was in 2014.
18. It was stated by the Respondent's Director that they never transacted during the period the Court orders were made; that the money he deposited in Court was from the sale of the property to satisfy the decree; that the principle amount was Ksh 38 Million that has been released to the Judgement Debtor and that the said Kshs 38 Million was from the sale of the land.
19. It was his testimony that he received the money in trust for the company; that he never personally benefited from the proceeds of the sale; that the company never transacted in the 2018-2020 period in



question; that Covid-19 affected the operations of the company; that the company is a going concern and its operations can be revived and that he holds 3% of the company's shares.

Submissions

20. The Applicant/Decree submitted that despite the Court order directing the Directors to produce relevant books of accounts for the last 3-year period, none was produced; that the Director indicated that none was maintained despite the company being registered and a going concern and that the failure to provide proper books of accounts as ordered by the Court without a proper explanation or evidence to support any such explanation is evidence that the corporate veil was being used as a shield by the Directors.
21. Counsel cited the case of *Kaydee Quarry Limited vs Baileys Rocktech Limited [2021] eKLR wherein the Court, determining a similar application*, found that the failure to produce books of accounts was evidence that the corporate veil was being used to shield the Directors of the Defendant Company from execution of the decree. Reliance in this respect was also placed on the cases of *Jiang Nan Xiang vs Cok Fas-St Company Limited [2018] eKLR* and *Mea Ltd vs C.S.B Cheputuk & J. J. Cheruiyot / A Rift Valley Feeds & General Supplies Ltd [2005] eKLR*.
22. It was submitted that the evidence before the Court reveals that the Directors were receiving the company's funds in their personal accounts and no viable explanation was offered for this nor evidence provided to shed light into these payments.
23. It was counsel's submission that in *Euphrasia Wariara Mukui vs Naken Motors Ltd [2008] eKLR*, the Court found that it had the power to lift the veil upon cross examination of the Directors and a finding of conversion of company's funds into personal funds; that in this case, the payments of the company's funds to the said Director's personal accounts is clear evidence that the Directors are guilty of misappropriating the company's funds and converting the same for their own benefit to the detriment of the creditors and that this is a proper case for lifting the veil and finding the Directors liable.
24. Reliance was placed on the case of *Jetlink Express Limited vs East African Safari Air Express Limited [2012]eKLR* where the Court found that no legitimate explanation having been given for transfers made directly to the Directors, the only conclusion the Court could make is that the said transfers were not for the benefit of the company but an outright act of stripping its assets.
25. Counsel submitted that in the absence of viable evidence justifying the alleged payments to the Director's personal accounts, the only logical conclusion is that they are guilty of converting the company's funds for their own personal use and thus defrauding the creditors.
26. Counsel urged that as long as there is evidence that the conduct of the Directors has resulted to the creditors' rights being defeated, then the veil ought to be lifted and the Directors found liable for the company's debts in their personal capacity and that the Applicant/ Decree Holder has been left with no means of satisfying the decree due to the Directors' misappropriation of the company's funds and conversion of the same for their own benefit. Reliance in this respect was placed on the case of *Hansson vs Jetba & Sons Limited [2004] eKLR*.
27. The Respondent/Judgment Debtor's Counsel submitted that during cross-examination, the Judgment Debtor's Director confirmed that the Respondent has not engaged in any form of income-generating ventures in the last few years nor does its own any assets, its last asset having been the properties the subject matter of this suit which was sold over 7 years ago.



28. Counsel for the Respondent submitted that it is misleading for the Applicant to allege that the Respondent and its Directors are concealing the assets of the company and that they have conducted the business affairs of the Respondent fraudulently in order to defeat the Judgment Debtor's rights.
29. It was submitted that the Respondent's actions in depositing the sum of Kshs 38 Million in favour of the Applicant and willingness to pay by entering into a consent judgment demonstrated good faith and that the Respondent's good faith was further demonstrated by its consenting to the release of the decretal sum of Kshs 38 Million deposited in Court to the Applicant.
30. Counsel for the Respondent submitted that there is no evidence of any income generated by the Respondent after the entry of the judgment to warrant an inquiry as to the Respondent's use of the same without satisfying the balance of the decretal sum and that the Respondent has undertaken its business in a transparent manner and took efforts to set aside money to settle its liabilities.
31. Counsel submitted that the order compelling the production of books of accounts or documents, and the examination of what property if any, the Judgment-Debtor had to satisfy the decree, should be restricted to the period in focus of three (3) years from the date of the order being 2018 -2021 and that the above notwithstanding, during the cross-examination of the Director, no question was put forward by the Applicant with respect to the company affairs in the said period (2018 – 2022) but on unrelated periods.
32. It was submitted that the Respondent's Directors authorized the purchase amount of KES 38 Million to be paid directly into Court rather than to the company; that any remaining amounts were applied towards legal fees and other antecedent expenses related to this court case and that the company's affairs grinded to a halt after the institution of this suit as it could not raise resources to continue with the operations of the company.
33. It was the Respondent's counsel's submissions that as stated by the Court in *China Wu Yi Company Ltd vs Edermann Property Ltd & 2 Others* [2013] eKLR, 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 that no sufficient grounds have been offered by the Applicant to lift the veil of incorporation.

Analysis & Determination

34. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is:
 - i. Whether this Court should pierce the corporate veil of the Respondent and hold its Directors personally liable for the debt?
35. To begin with, it is undisputed that the decretal sum of Kshs. 10,000,000/= due to the Applicant by the Respondent has not been settled. It is further undisputed that execution of the decree by attachment has failed because the Applicant has been unable to trace the Respondent's assets.
36. The doctrine relating to corporate personality was laid down in the case of *Salomon Co. Ltd vs Salomon* [1897] AC 78 where Lord Macnaghten affirmed the separation between the corporation and its members thus;

“The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the



agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

37. Closer home, the Court of Appeal in *Victor Mabachi & Another vs Nurnturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR, held that:

“A company as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

38. However, the privilege of incorporation is not cast in stone. The Courts will disregard the corporate form and allow the piercing of the corporate veil so as to allow a creditor to attach the personal assets of a corporation’s shareholders or directors in certain circumstances.

39. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors. *Halsbury’s Laws of England, 4th Edn* para. 90, addressing the issue of piercing the veil of incorporation stated thus;

“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 the purpose of the litigation before it, as identical with the 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 persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted.”

40. Similarly, the Court of Appeal in the case of *Riccatti Business College of East Africa Limited vs Kyanzavi Farmers Company Limited* [2016] eKLR posited thus;

“The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”

41. Expounding on the same, the Court in the case of *Jiang Nan Xiang vs Cok Fas-St Company Limited; Miscellaneous Application* [2018] eKLR stated as follows:

“I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal legal separation between the Company and its shareholders’ personal financial affairs and/or that the Company is just a sham or the Company’s actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company’s creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.”



42. The case of *Mugenyi & Company Advocates vs The Attorney General* [1999] 2 EA 199 following Palmers Company Law Vol. 1 (22 ed) sets out 10 instances under which the veil of corporate personality may be lifted to include;
- “ 1. Where companies are in the relationship of holding and subsidiary companies;
 2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;
 3. In certain matters relating to taxation;
 4. In the law relating to exchange control;
 5. In the law relating to trading with the enemy;
 6. In the law of merger control in the United Kingdom;
 7. In competition of the European Economic Community;
 8. In abuse of law in certain circumstances;
 9. Where the device of incorporation is used for some illegal or improper purpose; and
 10. Where the private company is founded on personal relationship between the members.”
43. It has however been stated that 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 [See *Ngini vs Dennis O. Ogolla & Another* (2010) eKLR citing the case of *Corporate Insurance Company Limited vs Savemax Insurance Brokers Limited and Another* [2002] 1 EA 41].
44. The Court will be guided by the foregoing principles.
45. The Applicant asserts that the Respondent’s Directors are not conducting the business of the company above board; that they are guilty of misappropriating the company’s funds and converting the same for their own benefit; that no books of account were produced for the 3-year period in issue despite the company being registered and being a going concern and that critically, no books of account were availed even for the period it was stated that the company was operational.
46. Mr Wilson Kipkoti, appeared before this Court on 17th January, 2023. He admitted that he is indeed a Director of the Judgment Debtor’s Company. On being cross examined on the Judgment Debtor’s assets and state of affairs, it was his evidence that the company last carried out business in 2014 when it sold the suit property; that the company has no other assets and is incapable of satisfying the decree and that the company, though dormant, is a going concern.
47. Mr Kipkemboi did not produce any bank accounts. He indicated that whereas indeed the company had undertaken financial dealings, there were no bank accounts save for the loan account. This too was not provided.
48. As regards the claims of misappropriation of funds, he conceded to having received cash with respect to the first transaction in 2012; that as regards the second transaction, the moneys were paid to the



Advocate for onward transmission; that nonetheless, the transactions occurred in the years 2012 and 2014 before the aforesaid orders and that the proceeds of the sale are what were used to pay the Kshs 38,000,000 to the Judgment Creditor. Ultimately, he conceded to having no documents to verify that the company cannot satisfy the decree.

49. Whereas indeed the transactions highlighted by the Applicant did not occur in the period in question, it is concerning that no evidence has been adduced in respect of the period that the Company was fully operational. The Respondent's Director wants this court to accept and to believe that it is normal for the Respondent, a company, dealing in transactions worth millions of shillings has no bank account.
50. While this may not in itself meet the parameters of fraud, it certainly points to wrongful and/or reckless management of the affairs of the company.
51. It is trite that he who alleges must prove. In this case, while it has been alleged that the Judgement Debtor has not been operational since 2014, and has no assets and is subsequently unable to satisfy the decree, no evidence was produced by the Respondent's Director to prove this position, except for the returns to KRA, which is not sufficient in the circumstances.
52. In the absence of the books of accounts, and the bank statements, it is the finding of the court that the company's claimed inability to meet its financial obligations has not be substantiated.
53. Ultimately, the Court finds that this is a proper case warranting the lifting of the veil. The Court therefore allows the application dated 20th May, 2020 and makes the following orders:
 - a. The corporate veil shielding the Directors of the Judgement Debtor Company from personal liability be and is hereby lifted.
 - b. The said Directors, Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti be held personally liable for the decree herein.
 - c. Execution of the decretal amount to proceed as against Mr. Samson Kiprugut Bundotich and Mr. Wilson Kipkemboi Kipkoti.
 - d. The Judgement Debtor's Directors shall bear the costs of the Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kendi for Decree Holder/Applicant

Mr. Omwenga holding brief for Imanyara for Judgment Debtor

Court Assistant - Tracy

