



REPUBLIC OF KENYA



**Kibatia & Company Advocates v Kings Group of Schools Limited & another (Miscellaneous Civil Application 57 of 2020) [2024] KEHC 5464 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS CIVIL APPLICATION 57 OF 2020  
SN MUTUKU, J  
APRIL 8, 2024**

**BETWEEN**

**KIBATIA & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**KINGS GROUP OF SCHOOLS LIMITED ..... 1<sup>ST</sup> CLIENT**

**MARY NYAWIRA CHOMBA ..... 2<sup>ND</sup> CLIENT**

**RULING**

1. This matter is for determination of two applications, the Notice of Motion dated 24<sup>th</sup> July, 2023 brought by the Clients/Respondents and the Notice of Motion dated 23<sup>rd</sup> August, 2023 brought by the Advocate/Applicant. This honorable court directed that the two applications be handled simultaneously.
2. The Notice of Motion dated 24<sup>th</sup> July, 2023 is brought under Article 159(2)(d) of *the Constitution* of Kenya, sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 50(6) and Order 51 (1) of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to stay the execution of the final judgement and decree/ or any consequential orders/ processed thereto by the Advocate/Respondent by himself, his servant, agents, employees and/or any other person authorized by him pending the hearing and determination of this application.
  - iii. That this Honourable Court be pleased to vacate and or set aside orders issued by the court on 19<sup>th</sup> July, 2023 pending the hearing and determination of the application dated 18<sup>th</sup> January, 2023.



- iv. That this Honourable Court be pleased to vacate and/or set aside orders issued by the court on 19<sup>th</sup> July, 2023 pending the hearing and determination of this application.
  - v. That cost of this application be in the cause.
3. The grounds in support of the Application are found on the face of it and in the supporting affidavit sworn on 24<sup>th</sup> July, 2023. It is argued that it would not be in the best interest of justice for the advocate to execute the final judgement without them being heard; that they did not get an opportunity to file their Notice of Objection in the matter and therefore the judgement ought to be set aside as they stand to suffer irreparable loss and damage if the same is not granted. Further, that the application has been brought without undue delay and that it would not prejudice the Advocate.
  4. This application was opposed through a Replying Affidavit dated 31<sup>st</sup> July, 2023 that the application is misplaced and a total abuse of the court process; that the application dated 18//1/2023 has already been determined by this Honourable Court and therefore the court is functus officio and cannot sit on its own appeal and that the Applicant's advocates have no audience before the court as they are not properly on record as they did not file a notice of change of advocates.

### **Notice of Motion dated 23<sup>rd</sup> August, 2023**

5. This application is brought under section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 22 Rule 35, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:
  - i. The Directors of the 1<sup>st</sup> Respondent namely; Michael Bundi Chomba, Mary Nyawira Chomba, Reinhard Kaburo Chomba, Jane Wanjiku Chomba, of Kajiado County, Olturuto Namanga Road of P.O Box 53818 City square Nairobi be summoned to attend on a date to be determined by the court and (a) directed to produce for inspection all books of accounts, cheque books, audited accounts and all other relevant documents of the 1<sup>st</sup> Respondent Company for the period 29<sup>th</sup> July, 2015 – 31<sup>st</sup> August, 2023 and (b) be examined under oath as to the 1<sup>st</sup> Respondent's/ judgement debtor's assets or other means of satisfying the decree issued against the 1<sup>st</sup> Respondent on the 26<sup>th</sup> July, 2023.
  - ii. In default of complying with the orders of the court issued in terms of prayer (1) above the Court do direct that the decree issued in favour of the Applicant issued on 26<sup>th</sup> July, 2023 be executed personally as against the directors of the 1<sup>st</sup> Respondent/judgement- debtor.
  - iii. Any other or further orders that the court may deem just to grant.
  - iv. The cost of this application be borne by the Defendant.
6. This application is supported by the grounds on the face of it and on the supporting affidavit dated 23<sup>rd</sup> August, 2023 that judgement was entered in their favour for the sum of kshs. 7,620,159/-; that the said sum has not been paid by the Respondents; that the 2<sup>nd</sup> Respondent resides in the USA and therefore cannot be reached for purposes of execution and that some of the directors of the 1<sup>st</sup> Respondent are based in Kenya and would be best placed to present the accounts of the 1<sup>st</sup> Respondent to this Honourable Court. It is further deposed that the Respondents have no intention of settling the decretal sum hence the need for this application and that the Applicant will suffer irreparable harm if the orders sought are not granted.
7. The application was opposed vide a Replying Affidavit dated 13<sup>th</sup> October, 2023 that in the Bill of costs, the Applicant advised them to sell and was given an opportunity to sell Kajiado/Kaputei- North



22309 and 23249 Isinya Kajiado County to meet various costs associated with the dispute; that the property was sold for Kshs. 25,000,000/- which was an undervalued price; that according to them the property had been valued at Kshs.90,000,000/- and that they had instructed that the property be sold at Kshs. 75,000,000/-; that had that been done they would have been able to take care of all expenses including the Applicant's costs.

8. They stated further that the aforementioned property was the only one that they owned and that the 1<sup>st</sup> Respondent has since closed shop. It is their case that they have no intention of defrauding the creditors; that she has not dishonestly transferred, concealed or removed any property or acted in bad faith in relation to any property; that the issue of lifting the corporate veil is a delicate one and should not be handled lightly as it opens up the directors of the company to personal liability; that for this to happen there should be sufficient circumstances firmly centered on statutory law and judicial precedent; that this has not been done and that no material has been placed before the court to warrant lifting of the corporate veil.

### **Submissions**

9. The Applicants filed their submissions dated 18<sup>th</sup> December, 2023. On the application dated 24<sup>th</sup> July, 2023 they submitted that the same is res judicata as the court cannot sit on its own appeal and therefore this court lacks jurisdiction to hear the application afresh.
10. On the application dated 23<sup>rd</sup> August, 2023 they relied on Order 22 rule 35 of the Civil Procedure Rules which 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
11. It is their case that the directors of the 1<sup>st</sup> Respondent are hiding behind the corporate veil to act improperly by avoiding the payment of the Decree due to the Applicant. That they have never had any intention to settle the fees due to the applicant. They relied on a number of cases on the face of their submissions including the case of Jayden Limited-vs- Bradley Limited(Miscellaneous Application E202 of 2019) [2021] KEHC 127 (KLR) (Commercial and Tax), where the court found that in default of failure by the directors to honour the summons to attend court to produce the respondents book, then the court could make further orders including orders to lift the corporate veil and have the directors personally liable for debt of the corporate.
  12. They also relied on the case of Multichoice Kenya Ltd-vs- Mainkam Ltd & Anor (2013) eKLR, where it was stated that:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 Courts have applied the principle of corporate personality strictly.



But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

13. They also relied on the decision in *Ultimate Laboratories -vs- Tasha Bio service Limited* Nairobi H.C.C.C No 1287 of 2000 to support their arguments.
14. The Respondents filed their submissions dated 8<sup>th</sup> January, 2024. On the application dated 24<sup>th</sup> July, 2023 they stated that they have a right to be heard as per Article 50 of *the Constitution* and that where a party has an arguable case, it ought to be allowed to ventilate its case. They relied on the case of *Machakos High Court Constitutional Petition No 8 of 2020 Andrew Nthiwa Mutuku -vs- Court of Appeal & 3 others* [2021] eKLR.
15. On the application dated 23<sup>rd</sup> August, 2023 they argued that courts are disinclined to lift the corporate veil except in the rarest of circumstances, where the corporate veil is being used by a controlling director to shield himself from the eyes of equity. They relied on *Eldoret High Court Civil Suit No 7 of 2016 Ukwala Supermarket -vs- Jaideep Shah & Another* (2022) eKLR, where it was stated that:

“In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company’s alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute.

In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
- b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

Some of the factors the Court would likely look at to determine if the two requirements have been met include the following:

- i. Whether the company is adequately capitalized;
- ii. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;
- iii. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;
- iv. Whether the alter ego has treated the assets or finances of the corporation as his own.

Piercing the corporate veil is an equitable remedy. The burden rests on the party asserting such a claim to demonstrate, using the factors outlined above, that the two conditions have been met. Each case is determined on its own merits under a totality of circumstances test.”



16. It was their submissions that the Application has not met the threshold set out by the authority above. They further relied on Nairobi High Court Civil Suit No 179 of 2014 Ganesh Engineering Works Limited & 3 others -vs – Yamini Builders Limited [2021]eKLR to support their case.

### **Analysis and Determination**

17. I have considered both applications and the evidence adduced in form of affidavits as well as submissions and authorities cited. On the first application dated 24<sup>th</sup> July, 2023 the Applicant seeks stay of execution. Order 22 rule 22(1) and (3) of the Civil Procedure Rules which provides as follows:

The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

18. The application is also brought under Order 50 rule 6 of the Civil Procedure Rules on Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

19. The Respondent has argued that the said application has no merit as the court is functus officio as it is being called upon to set aside its orders of 19<sup>th</sup> July, 2023. That this court cannot sit on its own appeal.
20. The Supreme Court in the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR while discussing the doctrine functus officio had this to say;

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



21. The Court of Appeal in the case of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR stated thus;
- “Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
22. The Application dated 24<sup>th</sup> July 2023 seeks the following substantive orders:
- a. That this Honourable Court be pleased to stay the execution of the final judgement and decree/ or any consequential orders/ processed thereto by the Advocate/Respondent by himself, his servant, agents, employees and/or any other person authorized by him pending the hearing and determination of this application.
  - b. That this Honourable Court be pleased to vacate and or set aside orders issued by the court on 19<sup>th</sup> July, 2023 pending the hearing and determination of the application dated 18<sup>th</sup> January, 2023.
  - c. That this Honourable Court be pleased to vacate and/or set aside orders issued by the court on 19<sup>th</sup> July, 2023 pending the hearing and determination of this application.
23. The record of the court shows that the judgment sought to be stayed and the orders sought to be vacated or reviewed pending the hearing and determination of this application and the application dated 18<sup>th</sup> January 2023 were issued by this court in its ruling delivered on 19<sup>th</sup> July 2023. That ruling was in respect of two applications. The first application was the Notice of Motion dated 11<sup>th</sup> August 2020 brought by the Applicant seeking to have judgment entered in the sum of Kshs 7,620,159. This application was allowed.
24. The second application was the Chamber Summons dated 18<sup>th</sup> January 2021 seeking stay of execution of the execution of the certificate of costs and the ruling thereto pending hearing and determination of that Chamber Summons and enlargement of time to file Notice of Objection. That application was dismissed. This court has already pronounced itself on the Application dated 18<sup>th</sup> January 2021. In this regard, this court is functus officio as this court will be sitting on its own appeal on the matter.
25. The Respondent/Client has failed to demonstrate that they deserve the orders they are seeking. Consequently, the Notice of Motion dated 24<sup>th</sup> July 2023 cannot stand and is hereby dismissed with costs.
26. On the Notice of Motion dated 23<sup>rd</sup> August 2023, this court has been called upon to order the directors of the 1<sup>st</sup> Respondent produce the books of accounts, failure to which the decree issued on 26<sup>th</sup> July, 2023 shall be executed personally against the directors.
27. The Law, under Order 22 Rule 35 of the Civil Procedure, 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.

28. In *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd* (2002) 1 EA 41, the court pronounced itself as follows:

“Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman v Saloman & Co Ltd* (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court’s attention was drawn to the finding of Ringera J (as he then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor.* HCCC No. 125 of 2002 (unreported) when he stated:

“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 is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.”

29. Further, in *Halsbury’s Laws of England*, 14th Edition Volume 7, Paragraph 90 it is stated that:

“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”.

30. I have considered the position held by each party on this matter. The Client/Respondent argues that they have no further property that can be sold to satisfy the Decree while the Applicant/Advocate argued that the directors in their fiduciary capacity as directors of the company have failed and/or refused to make good the decretal sum and that since judgement was entered, no attempts have been made by the Clients to settle the decretal sum.

31. From my own analysis of the circumstances of this case it is my considered view that justice will be served by allowing the Notice of Motion dated 23<sup>rd</sup> August 2023, which is hereby do with costs.

32. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 8<sup>TH</sup> APRIL 2024.**

**S. N. MUTUKU**

**JUDGE**

