



Homelex Limited v Peermohamed Boutique Limited & 2 others (Commercial Case 216 of 2006) [2024] KEHC 7500 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 216 OF 2006**

MN MWANGI, J

JUNE 14, 2024

BETWEEN

HOMELEX LIMITED PLAINTIFF

AND

PEERMOHAMED BOUTIQUE LIMITED 1ST DEFENDANT

ZAHID ALNASIR PEERMOHAMED 2ND DEFENDANT

ALNASIR PEERMOHAMED 3RD DEFENDANT

RULING

1. The plaintiff/decree holder filed a Notice of Motion application dated 7th December 2021 pursuant to the provisions of Section 635 of the *Companies Act*, No. 17 of 2015, Order 51 & Order 22 Rule 35 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A, 6 & 63 of the *Civil Procedure Act*, Cap 21 and all enabling provisions of the law, seeking the following orders –
 - i. Spent;
 - ii. That the Honourable Court be pleased to make an order that Zahid Alnasir Peermohamed who is the Director 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;
 - iii. That the Court makes orders for the attendance in Court and examination of Zahid Alnasir Peermohamed in his capacity as the Director of the defendant company for production of any books of accounts or documents, for purposes of satisfying the decree herein;



- iv. That in default of the said Director complying with the above orders, this Honourable Court be pleased to order that the said Director be held personally liable to pay the plaintiff/applicant the decretal sum and costs herein in the sum of Kshs.2,197,000.00 plus accruing interest; and
 - v. That the costs of this application be awarded to the plaintiff on the higher scale.
2. The said application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Gulhamid Mohammedali Jivanji, the plaintiff's Managing Director. In opposition thereto, the 1st defendant/judgment debtor filed a replying affidavit sworn on 25th April, 2022 by Zahid Alnasir Peermohamed, the 2nd defendant herein and the 1st defendant's Managing Director.
 3. The substance of the said application is that summary judgment was entered in this suit in favour of the plaintiff against the 1st defendant in the sum of Kshs.2,842,942.50 and Kshs.12,000.00 to cater for bank charges. Thereafter a decree on the same was issued on 7th February, 2007, which decree was compromised between the parties herein whereby the 1st defendant agreed to pay the decretal sum of Kshs.3,600,000.00 in monthly instalments of Kshs.200,000/= but the 1st defendant has failed to fulfill the terms of the said consent. The 1st defendant in its replying affidavit acknowledged its indebtedness to the plaintiff but averred that it has already paid the plaintiff a total sum of Kshs.1,403,000.00.
 4. The 1st defendant further averred that it has been unable to clear the balance owing to the plaintiff due to unavoidable financial challenges that it has kept the plaintiff apprised of. In the end, the application dated 7th December, 2021 was allowed by the Court in a ruling delivered on 25th November, 2022.
 5. On 24th November, 2023, the 1st defendant filed an affidavit sworn on 23rd November, 2023 by Zahid Alnasir Peermohamed, the 2nd defendant herein and the 1st defendant's Managing Director, in a bid to give the particulars being sought by the plaintiff.
 6. Cross-examination of the 1st defendant was then scheduled for 14th March, 2024 when Mr. Zahid Alnasir Peermohamed testified. During examination- in-chief, he stated that the 1st defendant ceased trading on account of financial difficulties and it has no assets. He stated that the fact that a company is no longer trading or has no assets is not proof of fraud or intention to defraud creditors. He stated that the 1st defendant has been experiencing financial difficulties since the year 2006 but as at January 2010, it had paid the plaintiff a total sum of Kshs.1,403,000.00 in honour of the decretal sum.
 7. Mr. Zahid stated that the business currently trading as Rodeo Drive at the Village Market which the plaintiff presupposes belongs to the 1st defendant, is incorporated as Aiglemont Enterprises Limited, an entity that is distinct from the 1st defendant. He stated that he is neither a Director nor a Shareholder of the said company.
 8. On being cross-examined, Mr. Zahid stated that in as much as the 1st defendant has paid the plaintiff a total of Kshs.1,403,000.00., there is still a balance to be paid. He further stated that even if the company has not been trading since the year 2007, it is still registered and he has never thought of winding it up. Mr. Zahid testified that the 1st defendant has not been able to pay its debt since it has not been trading.
 9. In re-examination, he stated that the 1st defendant has submitted nil returns to KRA, bank statements and documents to show that it is unable to meet its liabilities.
 10. Thereafter, parties were directed to file submissions. The 1st defendant's submissions were filed on 19th April, 2024 by the law firm of Mohammed Muigai LLP, whereas the plaintiff's submissions were filed by the law firm of Angela Mwadumbo Law on 4th April, 2024.



11. Ms. Kaunda, learned Counsel for the 1st defendant relied on the case of Visaro Construction Limited v Hello Properties Development Company Limited [2017] eKLR, where the Court cited the case of Ultimate Laboratories v Tasha Bioserve Limited (unreported) Nairobi HCCC No. 1287 of 2000 and submitted that the fact that the 1st defendant has not been wound up, should not be the basis for this Court to pierce its corporate veil. She referred to the case of Corporate Insurance Company Limited v Savemax Insurance Brokers Limited and another [2002] 1 EA 41 quoted d by the Court in Carey Ngini v Dennis O. Ogolla & Another [2010] eKLR and stated that the evidence of filing of nil returns, the bank statements provided by the 2nd defendant and documents speaking to financial difficulties are evidence of the 1st defendant's inability to settle the decretal sum and not of concealment of status as alleged by the plaintiff.
12. Counsel cited the Black's Law Dictionary 9th Edition definition of the doctrine of the corporate veil and piercing the corporate veil. She also cited the case of Ricatti Business College of East Africa Limited v Kyanzavi Farmers Limited [2016] eKLR and stated that a company exists as a different persona from its Directors. She relied on the case of Mugenyi & Company Advocates v the Attorney General [1999] 2 EA 199, where the Court set out ten instances where the veil of corporate personality may be lifted. She asserted that the 1st defendant has not abused any law or been engaged in any illegal action, there is no evidence of the 1st defendant committing any wrong through its Directors or anyone else, and/or proof of any improper or fraudulent conduct by the 2nd defendant in respect to the matters in issue, to warrant the lifting of the corporate veil in this case.
13. Ms. Mwandumbo, learned Counsel for the plaintiff submitted that the 2nd defendant vide his three affidavits produced various documents that date back to 2010 except the KRA tax returns from 2013 to 2022. She further submitted that it should be noted that the KRA tax returns for the period 2013 to 2022 and the tax compliance certificate dated 2nd November, 2023 were obtained on 2nd November, 2023, a few days before the date when the 2nd defendant was first scheduled to be cross-examined, which amounts to fraudulent acts on the part of the 1st defendant. In addition, she stated that in as much as the 2nd defendant contended that the 1st defendant has not been operational since the year 2006, he could not explain why no steps had been taken to wind it up. For this reason, learned Counsel contended that the 2nd defendant was concealing facts as to the current status of the 1st defendant to avoid settling the decretal amount owed to the plaintiff.
14. It was stated by Counsel for the plaintiff that sometime in the year 2012, the 2nd defendant went as far as reporting the plaintiff for harassment, yet all that the plaintiff had done was to attempt to execute a lawful and valid decree. Counsel argued that this amounted to improper conduct on the part of the 2nd defendant, thus the 1st defendant's corporate veil should be lifted. She further stated that in view of the foregoing and the fact that the 2nd defendant confirmed that he was aware of the outstanding decretal sum due to the plaintiff from the 1st defendant but failed to take any steps as a Director to offset the said debt, the 2nd defendant as the 1st defendant's Managing Director, has not acted in good faith.
15. Ms. Mwandumbo contended that a company is a juridical person that operates through the actions of its Directors and if it is alleged that the company is unable to settle the outstanding decretal amount, then the only solution left is for the Directors to take up that burden. She relied on the case of *Embakasi Management Limited & 8 others v Imperial Bank Limited (In Receivership) & another (Civil Appeal 113 of 2019)* [2022] KECA 7 (KLR) (21 January 2022) (Judgment) and asserted that the plaintiff has pursued the balance of the decretal sum for over fourteen (14) years. She urged this Court to issue orders that will ensure that justice is served, which can only be done by holding the 1st defendant's Director personally liable for the balance of the decretal amount.



Analysis And Determination.

16. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying and further affidavits filed by the 1st defendant, as well as the written submissions by Counsel for the parties. The issue that arises for determination is whether this Court should lift/pierce the 1st defendant's corporate veil and hold the 2nd defendant, being the 1st defendant's Managing Director, personally liable for the debt due to the plaintiff.

Whether this Court should lift/pierce the 1st defendant's corporate veil and hold the 2nd defendant, being the 1st defendant's Managing Director, personally liable for the debt due to the plaintiff.

17. A company is a separate legal entity from its members and shareholders, this position was espoused by the Court in the English case of *Salmon v Salmon* [1987] AC 78. There are instances where the corporate veil may be pierced and/or lifted so as to hold its members/shareholders and/or Directors personally liable. The Court in the case of *Jones and Another vs Lipman & Another* [1962] IWL 833, set out instances that warrant piercing/lifting of a company's corporate veil by stating that -

“Whereas a registered company is a legal person separate from its members, the veil of incorporation 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 device for enabling the directors to hide themselves from the eyes of equity. Corporate vehicle has been used to commit serious and mega frauds and corruption. And that realization has impelled the courts, in the interest of the law, the members in general, or in public interest to identify and punish the persons who misuse the medium of corporate personality for fraudulent, or proper or illegal acts. This act of removing the façade of corporate personality to identify the persons who are really guilty is what is known as lifting or piercing the corporate veil.”

18. Further, the Court of Appeal in the oft-cited case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR in addressing this issue held that -

“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.”

19. Bearing in mind the above decisions, in determining whether or not this Court should issue an order lifting/piercing the 1st defendant's corporate veil, I shall consider whether there are any fraudulent activities on the part of the 1st & 2nd defendants, proof of improper conduct of the members, shareholders or Directors of the 1st defendant company, and/or whether the circumstances of this case warrant lifting of the corporate veil of the 1st defendant in order to do justice.
20. It is not disputed that the plaintiff has a decree against the 1st defendant and that the plaintiff and the 1st defendant entered into a consent where the 1st defendant agreed to settle the said decretal sum of Kshs.3,600,000.00 by way of monthly instalments of Kshs.200,000.00. The 1st defendant did not fully abide to the terms of the said consent. The 1st defendant through the 2nd defendant confirmed in Court that out of the entire decretal sum, it has only paid the plaintiff a total of Kshs.1,403,000.00, and acknowledged that there is a remaining balance that is due and owing to the plaintiff. The 1st defendant



contended that it has not been able to pay the plaintiff the balance of the said decretal sum as a result of financial challenges that are unavoidable.

21. The 1st defendant through the 2nd defendant stated that it has not been trading since the year 2006, and it does not have any assets that can be realized so as to settle the said decretal sum. In a bid to demonstrate that it has not been trading since the year 2006, the 2nd defendant produced correspondence between the 1st defendant and NW Realite Limited, who are valuers and property consultants, confirming that the 1st defendant surrendered the lease of the premises where it used to run its business. A letter from Equatorial Commercial Bank Limited dated 3rd August, 2010 addressed to the 1st defendant, notifying it of the bank's intention to disclose its default information to all registered Credit Reference Bureaus for failure to settle its outstanding debt to the bank, a summary of returns the 1st defendant filed with KRA demonstrating that it has been filing nil returns, and statements of account from Sothern Credit now Equatorial Commercial Bank for the years 2007 and 2010 to show the 1st defendant's debt owed to the bank, were produced by the 2nd defendant.
22. In cross-examination of the 2nd defendant, he confirmed that in as much as the 1st defendant company has not been trading since the year 2006, it is still registered, and he has not thought of winding it up. It is however worth noting that no explanation was offered by the 2nd defendant as to why the 1st defendant has not been wound up, and/or whether it intended to go back to doing business. Further, in as much as the 1st defendant demonstrated to this Court that it had other debts and/or liabilities to other persons/entities, it did not demonstrate whether or not the said debts have since been paid and if not, what their status is. No explanation was also offered as to why the 2nd defendant did not produce the 1st defendant's books of accounts and copies of its statements of account, for the Court to ascertain the status of the 1st defendant's accounts, and the balance (if any) that was in the said accounts as at June 2023, when the 1st defendant sought for leave to file an affidavit so as to give the particulars being sought.
23. As was correctly pointed out by Counsel for the plaintiff, all the KRA returns produced by the 1st defendant were filed on 2nd November, 2023, which shows that the 1st defendant is still a registered Tax Payer with Income Tax obligations. The 1st defendant did not explain why it had to wait for its Directors to be summoned by this Court for purposes of cross-examination as to whether the 1st defendant has means and assets capable of satisfying the plaintiff's decree, for it to file its returns.
24. In view of the foregoing, the 1st defendant's Managing Director, being the 2nd defendant herein, has left this Court with more questions than answers. The 2nd defendant's failure to provide the 1st defendant's current statement of accounts and its books of accounts, and failure to offer an explanation as to why the 1st defendant company has never been wound up despite the fact that the last time it traded was back in the year 2006 which is approximately eighteen (18) years ago, leaves a lot to be desired.
25. In the premise, I am persuaded that there is improper conduct on the part of the 1st defendant's Managing Director (the 2nd defendant), and that the corporate veil is being used to shield the said Director from execution of the decree by the plaintiff. Further, this Court finds that the 1st & 2nd defendants have acted in bad faith towards the plaintiff and denied it the right to enjoy the fruits of its judgment, despite having entered into a consent for payment of the decretal sum. The circumstances of this case therefore warrant this Court to exercise its discretion in favour of the plaintiff by lifting the 1st defendant's corporate veil, thus holding the 2nd defendant, who is the 1st defendant's Managing Director personally liable for the 1st defendant's debt to the plaintiff.
26. In view of the above, I hereby order that the Managing Director of the 1st defendant, Mr. Zahid Alnasir Peermohamed (the 2nd defendant), to personally pay the plaintiff the balance of the decretal sum in this



suit, being Kshs.2,197,000.00 plus accrued interest. Costs of the instant application are awarded to the plaintiff and shall be settled by Mr. Zahid Alnasir Peermohamed, the 2nd defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 14TH DAY OF JUNE, 2024. RULING
DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mwandumbo for the plaintiff/decreed holder/applicant

Ms Muturi h/b for Mr. Kaunda for the defendants/respondents

Mr. Luyai - Court Assistant.

