



**Ngatia v Afric Park International Limited (Civil Suit  
66 of 2009) [2024] KEHC 8286 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 66 OF 2009  
SM MOHOCHI, J  
JULY 9, 2024**

**BETWEEN**

**MWANGI NDERITU NGATIA ..... APPLICANT**

**AND**

**AFRIC PARK INTERNATIONAL LIMITED ..... RESPONDENT**

**RULING**

1. The Plaintiff/Applicant's Notice of Motion Application dated 26<sup>th</sup> February, 2024, brought under Sections 148, 787, 996 and 1002 of the [Companies Act](#), Sections 1A, 1B, 31, 6 and 34 of the [Civil Procedure Act](#) and Order 22 Rule 35 of the [Civil Procedure Rules](#) seeks as against the Defendant/ Respondent the following orders that:-
  - a. Spent
  - b. Iqbal Wasim and Mohamed Nadeem Iqbal being the Directors of Afric Pak International Limited, the Respondent herein, do attend Court and be examined as to whether the Respondent has any property or means of satisfying the decree in Nakuru High Court Civil Case No. 66 of 2009 *Mwangi Nderitu Ngatia v Afric Pak International Limited* and to produce the Respondent's books of accounts and other documentary evidence showing the status of the businesses before the Court.
  - c. The veil of incorporation of the Respondent be lifted and the Directors Iqbal Wasim and Mohamed Nadeem Iqbal be made personally liable and be ordered to settle the decretal sum in Nakuru High Court Civil Case No. 66 of 2009 *Mwangi Nderitu Ngatia v Afric Pak International Limited* to the tune of Kshs. 2,018,700 and 75% legal costs with interests thereof from 25<sup>th</sup> May, 2017 jointly and severally until payment in full.
  - d. A declaration be made pursuant to Section 1002 as read with Section 996 of the [Companies Act](#) that the directors of the Respondent Iqbal Wasim and Mohamed Nadeem Iqbal knowingly



carried on the business of the Respondent with intent to defraud the creditors of the company and for fraudulent purposes and that they are responsible without any limitation of liability for the debt of the above Company owed to the Applicant in Nakuru High Court Civil Case No. 66 of 2009 *Mwangi Nderitu Ngatia v Afric Pak International Limited* amounting to Kshs. 2,018,700 and 75% legal costs with interests thereof from 25<sup>th</sup> May, 2017.

- e. The said Directors Iqbal Wasim and Mohamed Nadeem Iqbal do immediately settle the said decretal sum of Kshs 2,018,700 and 75% legal costs with interests thereof from 25<sup>th</sup> May, 2017.
  - f. In default of the said directors complying with the above orders, they be imprisoned and committed to civil jail for a period not less than (6) months.
  - g. Costs of the Application be provided for
2. The Application is premised on the ground on its face and the Supporting Affidavit of Mwangi Nderitu Ngatia wherein he deposes that he filed Nakuru High Court Civil Case No. 66 of 2009 and the Respondent filed a statement of defence and counterclaim dated 4<sup>th</sup> April, 2009 which they later abandoned, the trial proceeded and judgment was entered in his favour on 25<sup>th</sup> May, 2017 for the sum of Kshs.2,018,700 together with 75% legal costs and interests. Decree issued on 22<sup>nd</sup> January, 2018 but the Respondent deliberately failed to pay.
  3. He also deposed that before delivery of judgment, the Applicant filed an application seeking return of motor vehicle registration number KAW 246V which was opposed by the Respondent through Mohammad Nadeem Iqbal. The existence of a contractual agreement between the parties herein was not objected. That the sale agreement dated 18<sup>th</sup> March 2006 contains the signature and passport of Mohammad Nadeem Iqbal as well as the directors' mobile numbers which they used to interact with often.
  4. He added that the Respondent has transferred all its assets to different jurisdiction and operating under a different name in order to avoid liability. The Respondents are Pakistani and have been linked to various crimes in Pakistan. The question on how they got work permits to live and work in Kenya was raised by the Saturday Nation 16<sup>th</sup> August 2014, Sunday Nation 17<sup>th</sup> August 2014 and Sunday Standard on 15<sup>th</sup> January, 2017.
  5. He stated that despite several attempts to have the Respondent settle the decretal sum, it has refused and or neglected to do so. That further the Respondent closed the Nakuru office and opened one in Nairobi along Ngong road which he has seen in an apparent bid to deny him fruits of his judgment.
  6. The Iqbal Wasim opposed the Application and filed Replying Affidavit sworn by himself and on behalf of his co-subject on 13<sup>th</sup> May, 2024 and deposed that any transactions subject to the suit were between the Respondent and Applicant and documents executed were done so in their capacity as officers of the Company. he also argued that him and his co-subject are not shareholders or directors and the fact that his co-subject executed an affidavit on behalf of the Defendant or that the advocates described him as such in the affidavit did not make him a director as the position is legal and factual.
  7. He also deposed that the company was incorporated on 25<sup>th</sup> February, 1993 and after the passing of Rashid Mohammed Rafiq, one of the founders, on 3<sup>rd</sup> February 2012, the Company faced difficulties and was dissolved in 2013. The Notice of intended dissolution of the Company was given vide Gazette Notice No. 438 dated 11<sup>th</sup> January, 2013. The notice of dissolution was done vide Gazette Notice No 5328 dated 19<sup>th</sup> April, 2013. That a random search will reveal that there is no such entity.



8. That the Applicant slept on his rights and is now forcing third parties to bear the burden for answering for his claim yet they are not shareholders and do not have company records with them. It has been over 10 years since dissolution and the Applicant is thus guilty of laches. He argued that the law does not contemplate keeping company records for more than 6 years and the orders sought are unavailable and defeated by the law of limitation.
9. He also added that they have never been involved in the running of the company, are not aware of the whereabouts of the documents or assets or their worth and the Applicant's claim was never pleaded or proved against them. Prayer 3 and 4 are untenable and that a declaration of liability can only be made in a substantive suit. The prayer for declaration that the incorporation of the company was done with intent to defraud is without merit. The transaction with the Respondent was not the only transaction made in twenty years and the intent to defraud customers was without merit and farfetched.
10. The Court on 13<sup>th</sup> May, 2024, directed that the Application shall be disposed by way of written submission. The Applicant's submissions were filed on 31<sup>st</sup> May, 2024 whereas the Subjects filed written submissions on 20<sup>th</sup> May, 2024 and supplementary submissions on 10<sup>th</sup> June, 2023.

### **Applicant's Submissions**

11. The Applicant submitted that the subjects were the nerve center of the Respondent and cannot come now and claim they were mere employees yet they reaped the benefits of the Respondent. Nadeem swore an affidavit on oath that he was a director Iqbal stating that he wasn't one means he lied on oath.
12. It was contended that by signing the documents as directors they bound the company. Reliance was placed on [Essential drugs Limited v OSS Chemen \(K\) Limited; Rafiki Microfinance Bank Limited \(Interested Party\)](#) (Civil Miscellaneous Application No E202 of 2021 [2022] KLR to submit that the Applicant had advanced valid reasons to warrant the summoning of the two subjects.
13. Secondly, on the circumstances that would necessitate the lifting of the corporate veil, the Applicant relied on the case of [Arun C Sharma v Ashana Rainkundalia & 5 others](#) [2015] eKLR where the Court stated that there has to be fraud and improper conduct. It was the Applicant's argument that the two directors acted dishonestly and with intent that the Applicant would not enjoy the motor vehicle purchased.
14. On the third issue, the Respondent submitted that Equity should not suffer a wrong without a remedy. To emphasize the Respondent place reliance on the pronouncement in [Local Empowerment for Good Governance & 6 Others v Community Executive Committee Members Finance and Economic Planning- County Government of Mombasa](#) [2021] eKLR and [Robert Kinaga Waweru v NorthCorr Enterprises Ltd](#) [2021] eKLR. That the subjects should not unjustly enrich themselves at the expense of the Applicant.

### **Subject's Submissions**

15. The Subjects on the other had submitted that the Application is incurably defective as it is seeking lifting the corporate veil but has been brought under Order 22 Rule 35 of the [Civil Procedure Rules](#) which deals with execution of a decree as was the position in the case of [Jaden Limited v Bradley Limited](#) [2021] KEHC 127 (KLR).
16. Further it was submitted that the Applicant has failed to demonstrate the nexus between the existence and subsequent operations of the Respondent and the subjects and therefore has no justifiable claim against the subjects.



17. The Subjects contend that the company is a judicial person and separate between the corporation and its members thus bears separate liability as highlighted in *Salmon v Salmon & Co* [1897] AC 22. It was submitted further that the Respondent has not met the threshold of proving existence of fraudulent activities for lifting the veil of incorporation or that the company was formed to advance fraud.
18. As regards meeting the threshold for proof of fraud, the Respondent brought to the Court's attention the case of *Gladys Wanjiru Ngacha v Teresa Chebsaat & 4 Others* [2013] eKLR where the Court opined that that it was not enough to impute fraud or fraudulent activities, the onus of proof was higher than in ordinary cases. It was the Respondent's argument that there no explicit proof how the subjects engaged in fraudulent activities and the Applicant has failed to prove the elements of fraud.
19. Pertaining the equitable remedy of piecing the veil, it was submitted that the remedy cannot be exercised because a company is unable to honour its debts or is insolvent. Reliance was placed on the case of *Ganesh Engineering Works Limited & 3 Others v Yamini Builders Limited* [2021] eKLR where the Court illustrated that position and further added that the law provided for remedies other than the director being saddled with debts of a company.
20. Finally, that the Applicant is guilty of laches and the prayers sought are not available to him and can only be sought in a substantive suit.

### **Analysis and Determination**

21. Judgment was entered by J.N Mulwa Judge, on the 25<sup>th</sup> May 2017 and a decree in execution was issued on the 22<sup>nd</sup> January 2018 and it would appear that the Applicants unsuccessfully attempted to execute the judgment decree, the Applicant does not explicitly admit that they discovered the dissolution of the Respondent as a legal entity almost four years prior to judgment.
22. Upon considering the Applicants case, the evidence adduced in support, the written submissions, the Subjects replying affidavit, evidence adduced, and written submissions, the sole issue herein for consideration by the Court is whether the Applicants have made out a case for grant of the prayers sought?
23. Lifting of the corporate veil is a procedure that flows from the *Companies Act* 2015 and is done in circumstances where the directors are unable to show that the company is a legitimate enterprise. One of the things that show legitimacy of an enterprise is its books of account and evidence of assets owned. It is not enough to lift a corporate veil because a company is unable to pay its debts.
24. It is when a company is a shell, sham and meant to defraud creditors that it is said to be a sham. The Court lifting the veil should never limit liability of the directors to shareholding. It should be to a fullest extent possible to pay the judgment debt.
25. In the case of *Jiang Nan Xiang v Cok Fas-St Company Limited*; Miscellaneous Application [2018] eKLR, the Court stated that;

“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.”

26. In addition, the Court in the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR 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.”

27. Lady Justice Okwengu in the case of *Carey Ngini v Dennis O. Ogolla & Another* [2010] eKLR cited the case of *Corporate Insurance Company Limited v Savemax Insurance Brokers Limited and Another* [2002] 1 EA 41 where Ringera J. 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”

28. I am unpersuaded that the Respondent entered into a fraudulent commercial transaction with the Applicant giving rise to an unforced judgment decree against it.

29. I am convinced that the Applicant prosecuted his case successfully to judgment only to realize that the legal entity ceased to exist upon dissolution four years prior to the judgment.

30. The Applicant interchangeably refers the Subject sought to be summoned as the Respondent and the Applicants assertion that the Respondents are Pakistanis that have been linked to various crimes in Pakistan. The question on how they got work permits to live and work in Kenya was raised by the Saturday Nation 16<sup>th</sup> August 2014, Sunday Nation 17<sup>th</sup> August 2014 and Sunday Standard on 15<sup>th</sup> January, 2017 are unproven facts and reference to newspapers report falls short of the evidence in proof.

31. On the converse I am persuaded by the replying affidavit by subject Iqbal Wasim dated 13<sup>th</sup> May 2024, that the Respondent was dissolved on 19<sup>th</sup> April 2013. The Notice of intended dissolution of the Company was given vided Gazette Notice No. 438 dated 11<sup>th</sup> January, 2013. The notice of dissolution was done vide Gazette Notice No 5328 dated 19<sup>th</sup> April, 2013 and the same is adequately evidence.

32. I am unpersuaded by any evidence indicating that, the primary transaction giving rise to the suit between the Applicant and the Respondent was fraudulent. I am equally unpersuaded that the Respondent was created to defraud the Applicant. This Court is persuaded that the Applicant is guilty of laches for not realizing dissolution of the Respondent four years prior to the judgment

“In dealing with laches, *Halsbury’s Laws of England*, 4th ed. Vol. 16(2) at §910 has this to say:

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).”

33. This Court finds that, the Respondent ceased to exist by way of dissolution pursuant to Section 339(5) of the Repealed *Companies Act* Cap 486 on the 17<sup>th</sup> April 2013 and for all intents and purposes no



action can be brought out in its name. To therefore bring out an action against such a non-existent entity is nullity ab initio.

34. This Court is thus unable to commence the primary process of lifting of a corporate veil as the Respondent no longer exists and purporting to summon former directors of an extinct entity shall bastardize judicial process and would amount to converting proceedings to execute judgment against former directors in the Respondent on its behalf without legal basis.
35. The Unfortunate realization by the Applicants of having a judgment decree against a non-existent entity
36. For those reasons, I find the Notice of Motion Application dated 26<sup>th</sup> February, 2024 to be without merit and the same is accordingly dismissed.
37. It remains inexcusable that the Applicant initiated action against a non-existing legal entity and as such the Subjects are awarded the costs of the Application.

It is so Ordered

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9<sup>TH</sup> DAY OF JULY, 2024**

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**MOHOCHI S.M**

**JUDGE**

