



**Safaricom PLC v Iphone Global Systems Limited & 2 others (Civil Case E409 of 2018)
[2024] KEHC 10188 (KLR) (Commercial & Admiralty) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E409 OF 2018
DO CHEPKWONY, J
JULY 11, 2024**

BETWEEN

SAFARICOM PLC APPLICANT

AND

IPHONE GLOBAL SYSTEMS LIMITED 1ST RESPONDENT

STEVEN JAMES MORAN 2ND RESPONDENT

LESLIE THOMPSON 3RD RESPONDENT

RULING

1. The applicant moved this court by way of a Notice of Motion application dated 28th October, 2020. The Notice of Motion is brought pursuant to the provisions of Sections 223 and 224 of the *Companies Act* No 7 of 2015, Order 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010*. The Motion is couched on the following terms:-
 - a. That the 2nd and 3rd Respondents be held personally liable for the Judgment and Decree dated 30th April 2019 against the 1st Respondent Company.
 - b. That execution proceeding do issue personally against the 2nd and 3rd Respondents.
 - c. That costs of this Application be borne by the Respondents.
2. The application is premised on the grounds as set out on its face and the Supporting Affidavit of Isaac Kibere, an in house counsel of the Applicant sworn on even date. In the said affidavit, he states that on 4th December, 2018, the Applicant instituted a suit against the 1st Respondent Company to recover a debt it owes the Applicant. On 11th April, 2019, Judgment and decree were entered against the 1st



- Respondent Company in the sum of USD 1,246,694.41 and Kshs 20,000,000.00 being the amount owed and appurtenant general damages respectively.
3. According to the deponent, the said Judgment and decree has not been satisfied by the 1st Respondent Company and due diligence has revealed that in 2016, all the shares in the 1st Respondent Company were transferred to IPG Systems Limited, a Company registered in Seychelles whereby Directorship of the 1st Respondent Company changed to the 2nd and 3rd Respondents, and the 1st Respondent closed its local offices.
 4. Further diligence on the 2nd and 3rd Respondents, revealed that at the time of taking over the Directorship of the 1st Respondent Company, the 2nd and 3rd Respondents were un-discharged bankrupts. The investigations also revealed that the said Seychelles Company, IPG Systems Limited, is directly linked to the 2nd and 3rd Respondents in that they are Directors in the said Company.
 5. He further deposes that the assumption of Directorship by the 2nd and 3rd Respondents albeit being in direct contravention of the law, was without notice to the Applicant, subsequent to which the 1st Respondent Company fell into the subject debt. He states that the transfer of shares in the 1st Respondent Company to the Seychelles Company and closure of the local office was an engineered ploy by the 2nd and 3rd Respondents to escape paying the debt due and owing to the Applicant.
 6. Additionally the debt of the 1st Respondent Company was incurred when and/or during the time when the 2nd and 3rd Respondents assumed and exercised directorship, management and control of the 1st Respondent Company. The assumption of Directorship of the 1st Respondent Company while being un-discharged bankrupt, the 2nd and 3rd Respondents are by law personally liable for the debts incurred by the 1st Respondent Company during the period they acted as directors. Finally, it is in the interest of justice that the 2nd and 3rd Respondents be held personally liable for the Judgment and Decree herein.
 7. In response to the application, the 2nd Respondent, Steven James Moran filed an undated Replying Affidavit. He deposed that pursuant to a resolution passed by the 1st Respondent Company on 22nd August, 2017, his resignation from the 1st Respondent Company was accepted and the Company Secretary was authorized to file the same with the Registrars of Companies.
 8. He contends that he submitted the necessary duly executed documents to wit; Resolution in writing by Director, Letter of Resignation, Affidavit in Support of the Resignation and the Share Transfer to the Company Secretary for due filing. And upon his resignation, he ceased to act as a Director or in any capacity whatsoever for the 1st Respondent Company. He avers that his effective date of resignation was on 22nd August, 2017 and he did not participate in the affairs of the Company since then and has no contact with the Company or any of the Directors.
 9. The application was canvassed by way of written submissions. Both parties complied and filed their respective submissions in support and opposition to the application. The Applicant's submissions are dated 6th September, 2022 while the 2nd Respondents filed two sets of submissions dated 21st March, 2022 and 15th September, 2022.

Analysis and Determination

10. The Court has considered the application, the response and the written submissions filed by both parties and find the sole issue for determination being whether the corporate veil of the 1st Respondent Company should be lifted and the Directors held personally liable.



11. The doctrine of corporate personality originated from the case of *Salomon Co. Ltd v Salomon* [1897] AC 78 where the Court held that a company is in law a separate person from its members. Similar position was echoed by the Court of Appeal in the case of *Victor Mabachi & another v Nurtun Bates Ltd* [2013] eKLR,

“Mediacom (Company) as a body corporate is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.
12. Therefore, a Company being a legal person capable of suing and being sued, several circumstances must be proved for any court to lift the veil of corporate personality. These circumstances were outlined in the Court of Appeal decision in the case of *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR where it held 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.”
13. In the present case, the Applicant submitted that vide annexure IK2 the 2nd and 3rd Respondents assumed Directorship of the 1st Respondent Company on 25th May, 2016. The official search also indicated that as at 25th July, 2019 the 3rd Respondent was still a director of the 1st Respondent Company. Again in the same annexure, the letter from the Registrar of Companies reports that the 2nd Respondent remained a Director of the 1st Respondent Company until 6th February, 2018 when he resigned as a Director.
14. The Applicant urged that both the 2nd and 3rd Respondents were declared bankrupt before 25th May, 2016 when they assumed Directorship of the 1st Respondent Company. The notice publication for the 2nd Respondent was dated 7th November, 2006 while the 3rd Respondent was dated 30th October, 2009.
15. It was submitted on behalf of the 2nd Respondent that he ceased to be a director of the 1st Respondent Company and the effective date of resignation was 22nd August, 2017. Further, the 2nd Respondent did not participate in the agreement between the 1st Respondent Company and the applicant. Again, the 1st Respondent Company was not enjoined as a party to the suit and the application seeks to condemn him unheard in contravention to the tenets of natural justice and Article 50 of the *Constitution*.
16. In the further submissions by the 2nd Respondent, he submits that having resigned in August, 2017 he cannot be held personal liable for the Judgment and Decree dated 30th April, 2019. In regard to the issue of bankruptcy, he submitted that the evidence in respect of the discharge of bankruptcy proceedings has not been rebutted therefore the allegation of fraud ascribed to the 2nd Respondent cannot hold. It was the 2nd Respondent’s submissions that he had capacity to take up Directorship of the 1st Respondent Company on 25th May, 2016 as evidenced by the certificate of discharge dated 28th July, 2011.
17. It is not in dispute that the Applicant obtained a Judgment against the 1st Respondent Company vide a decree issued on 5th March, 2019. The said decree remains unsatisfied hence prompting the filing of the current application before court.



18. Section 223(1) of the *Companies Act* provides that:-

“A person who, except with the leave of a Court-

- a. Acts as a director or secretary of a company; and
- b. Directly or indirectly participates in its promotion, formation or management, while an undischarged bankrupt commits an offence”.

19. Further, Section 224(1) of the *Companies Act* No 17 of 2015 provides that:-

1. For purposes of this section, a person is personally responsible for all the relevant debts of a company if at any time-
 - a. The person is concerned in the management of the company in contravention of a disqualification order or of section 223; or
 - b. As a person who is involved in the management of the company, the person acts or is willing to act on instructions given without the leave of the Court by another person whom the person knows at that time to be the subject of a disqualification order or to be an undischarged bankrupt.”
2. A person who is personally liable under this section for the relevant debts of a company is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.
3. For the purposes of this section, the relevant debts of a company are—
 - a. in relation to a person who is personally responsible under subsection (1)(a)—such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company; and
 - b. in relation to a person who is personally responsible under subsection (1)(b), such debts and other liabilities of the company as were incurred at a time when that person was acting or was willing to act on instructions given as referred to in that paragraph.
4. For the purposes of this section, a person is involved in the management of a company if the person—
 - a. is a director or secretary of the company; or
 - b. is concerned, whether directly or indirectly, or participates, in the management of the Company.

20. The Court has considered all the evidence on record in this matter and it is clear that the 2nd and 3rd Respondents breached the provisions of the law cited above in assuming directorship of the 1st Respondent Company. However, until Order 22 rule 35 of the *Civil Procedure Rules* is complied with, the prayers sought in the application shall not be granted.

21. This court is guided by the case of *Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited* [2015] eKLR, where it was held that:-

“Order 22 Rule 35(c) of the *Civil Procedure Rules* allows the court to order any other person to attend court and be orally examined as to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of



satisfying the decree herein. A former director could also be called upon to attend court and be examined under Order 22 Rule as long as it is shown he is appropriate in an inquiry to establish to whether any or what debts are owing to the company, and whether the judgment-debtor has any and what property or means of satisfying the decree herein”.

22. For the reasons given above and considering the provision of Order 22 Rule 35 of the Civil Procedure Rules which allows this court to summon the Directors or former Director of a Company to be examined on the debts of a Company or modalities of satisfying any decree, this Court proceeds to make the following orders:-
- a. The 2nd and 3rd Respondents namely; Steven James Moran and Leslie Thompson Directors of the 1st Respondent Company to personally attend court and be examined on the Judgment debtor’s property and means of satisfying the decree.
 - b. Failure to comply with order (a) above, the application dated 28th October 2020 will be deemed as allowed.
 - c. The Applicant shall have costs of this application.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS8TH DAY OFJULY....., 2024.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...11TH DAY OFJULY....., 2024.

JOSEPHINE MONG’ARE

JUDGE

In the presence of:

For Applicant

For Respondents

Court Assistant -

