



Kikambala Housing Estate Limited v Anjarwalla & Khanna & another (Civil Suit 2 of 2018 & Civil Case 58 of 2015 (Consolidated)) [2023] KEHC 18220 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 2 OF 2018 & CIVIL CASE 58 OF 2015 (CONSOLIDATED)**

DKN MAGARE, J

MAY 9, 2023

BETWEEN

KIKAMBALA HOUSING ESTATE LIMITED PLAINTIFF

AND

ANJARWALLA & KHANNA 1ST DEFENDANT

BANK OF AFRICA KENYA LIMITED 2ND DEFENDANT

RULING

1. The matter is for ruling on the application dated April 6, 2021. The court hitherto granted prayers 2 and 3 of the motion. Only one prayer is remaining and this is the one I have to decide on in this ruling. It is a ruling that should not real be made. The prayer remaining is as follows: -
 - (iv) That in default, with orders 2 and 3 above, the said director, namely Osman Erdinc Elsek be deemed to be personally liable to settle the party and party costs of 30,303,956.35, and
 - (v) That costs of this application be in the cause.
2. The plaintiffs filed suit where they sued the defendants over Ksh 364,00,000/=. They withdrew the suit. The taxing master of this court taxed the applicant's costs at Ksh 30,305,956.35. The court matter started off in the process of execution. However, no tangible assets could be found. Upon application the court issued an order to examine the directors of the plaintiffs on their assets to settle the taxed costs. No assets have been traced. Despite service, the directors did not attend court and account for the assets of the judgment debtor.



3. The power of this court to handle the cross examination of directors has been settled. In *In Re Matter of Adopt-A-Light Ltd* [2014] eKLR, the court, hon justice J B Havelock, as then he was, stated as follows: -

“Under order 22 rule 35 the rules give the court the power to summon any officer of a company to attend before it to be examined on the issue of the company’s assets and the ability to settle decree debts. Under the same provision, the court is mandated to ascertain the position of the judgment debtor as regards the payment and/or settlement of the judgment debt and whether any reasonable and compelling reasons have been adduced by the judgment debtor as to the inability to settle the judgment debt. In *Masefield Trading (K) Ltd v Rushmore Company Limited & Another Civil Suit No 1794 of 2000*; [2008] eKLR Kimaru, J reiterated as follows with regards to the court’s jurisdiction under order 22 rule 35:

“I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation.”

4. The order for lifting the corporate veil as some of the statutory and regulatory provisions that are an exception to the concept of the separate legal personality. It needs to be understood that the inability to pay debts is nor a ground for lifting the corporate veil. There are mechanisms under the *insolvency act*. The veil is lifted when the company is a shell, façade.

5. This was well enunciated in the case of *Carey Ngini v Dennis O Ogolla & Another* [2010] eKLR, the court H M Okwengu, as then she was had this to say: -

“And, that it had already disposed of some of its assets, while other assets were attached by auctioneers. As was observed by Ringera J in *Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd* (supra):

“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”.

14. I find therefore, that there was no justifiable reason for the veil of incorporation to be lifted. Moreover, a careful perusal of the application and the ruling of the magistrate reveal that the trial magistrate was not moved nor did he make any specific order for lifting of the veil of incorporation.”

6. In *Ultimate Laboratories v Tasha Bioservice Limited* Nairobi HCCC No 1287 of 2000, Ringera, J (as he then was) stated the following on the concept of lifting of the corporate veil as follows: -

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of *Gilford Motor Co v Horne* [1933] Ch 935 and *Jones v Hipman* [1962] 1WLR 832).”



7. In the locus classicus case of *Salomon v Salomon & Company Ltd*, [1896]1(1897 AC 22, Where the English house of Lords, held that a company is a legal person separate from its directors, shareholders, employees and owners.
8. This separate entity hold true where a company truly in business runs into headwinds. In that case, shareholders are liable to the extent of their shareholding. In cases where, shareholder, directors or were are using the separate legal personality to create a shell though which is used to defraud or defeat commerce, then the veil may be lifted.
9. In *Ramaben Ramnikal Patani & 2 others v Garden Chambers Limited* [2019] eKLR, Justice W. A. Okwany stated as follows: -
 - “24. In *Victor Mabachi & Another v Nurturn Bates Ltd*, Civil Appeal No 247 of 2005 [2013] eKLR, the Court 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.”
 25. The above legal position notwithstanding, there have been other developments in law that have had effect of piercing or lifting the corporate veil in recognition of the fact and reality that the business of a company, as an artificial entity, is carried on by and for the benefit of living persons.
 26. In the case of *Jones and Another v Lipman & Another* [1962] IWL 833 it was held:

“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.”
 27. The exercise of lifting the corporate veil is not an easy one. It is not a substitution of insolvency. The procedure is not available for companies in business but are financially stressed.
 28. The court granted the prayers it was to grant, that is prayers 2 and 3 and on the basis of the doctrine of ripeness, the decision of the lifting of the corporate veil was to be made after cross examination. the director did not turn up. In making the order the case of for cross examination in this matter the court relied the case of the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* [2014] eKLR.
 29. the said director, Osman Erdinc Elsek was to attend court to be examined orally on whether the plaintiff has property to settle the decree.



30. That was never to be. The said director was indulged to attend court, all in vain.
31. I have said enough to show that the Plaintiff is a shell, an edifice, build to scam the public. Order 22 Rule 35 states as doth: -

“35. Examination of judgment-debtor as to his property

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.”

10. There is enough time given to the director to be cross examined. He did not take on the Advantage and answer the summons. Failure to attend court is to be construed that had he attended court, the evidence will have been adverse to him or the company.
11. I find that the plaintiff is a shell, a façade, meant to defraud or scam the public. I am satisfied that Osman Erdnic Elsek is a director and the brain behind the shell. I find no difficulty allowing the same.
12. I therefore pierce the veil of incorporation to expose the directors therein. Osman Erdnic Elsek, is personally liable to settle the adjudged party having defaulted and party bill of costs of Kshs 30,303,956/35. Costs of this application of Ksh 60,000/= to the Bank of Africa Ltd

Determination

13. I therefore allow the application as follows: -
- a. I pierce the veil of incorporation to expose the director therein, Osman Erdnic Elsek. Direct that Osman Erdnic Elsek who is hereby directed to be personally liable to settle costs of Ksh 30,303,956/35 in the suit together with incidental costs.
 - b. Costs of this application of Ksh 60,000/= to the Bank of Africa Kenya Limited.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mc Court the 2nd Defendant

Wamotsa for the Plaintiff

Court Assistant - Firdaus

