



**Koninklijke Luchtvaart Maatschappij N.V v Africair
Management & Logistics Limited (Commercial Case 431 of 2018)
[2023] KEHC 23534 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 431 OF 2018
FG MUGAMBI, J
OCTOBER 13, 2023**

BETWEEN

KONINKLIJKKE LUCHTVAART MAATCHAPIJ N.V PLAINTIFF

AND

AFRICAIR MANAGEMENT & LOGISTICS LIMITED DEFENDANT

RULING

Brief Facts

1. This ruling determines the application dated 29th June 2020 brought under Order 22 rule 35 of the [Civil Procedure Rules](#) and section 1A, 1B, 3A, 92 of the [Civil Procedure Act](#) Chapter 21, Laws of Kenya.
2. Following previous orders made by this Honourable Court, the majority shareholder and director of the judgment debtor company, Guy Jan Mertens (hereinafter the director), attended court on 28th March, 2022. He was examined as to the company's means and assets to satisfy the decretal amount and produced records showing the affairs of the company. The present application arises as a consequence of that examination, having not provided suitable means and assets for the satisfaction of the decree. The application seeks to lift the corporate veil and to have the director held personally liable to satisfy the decree.

Analysis

3. I have carefully considered the application, affidavits and the rival submissions filed by parties herein. As earlier stated, the only issue for determination is whether the corporate veil of the company should be lifted making the director of the judgment debtor personally liable to the decree holder for the debt of USD 558,291.69.



4. A cursory look at the record reveals that the company, which was in the business of shipping and logistics, no longer operates as a going concern and was therefore unable to satisfy its debts. The examination reveals that the company had non-current assets worth USD 434,295 and current assets worth USD 1,990,776. It was also stated that a personal guarantee issued by the director with respect to a loan facility advanced by Bank of Africa to the company led to the director's personal liability.
5. The fact that there are ongoing bankruptcy proceedings pursuant to the director's petition filed in Insolvency Cause E025 of 2019 has not been controverted. In my view, this is not reason enough to stop the court from determining the application currently before it. This is because the execution proceedings relate to the decree holder and judgment debtor, who in this case is the company, which is not a party in the bankruptcy proceedings, being a debtor's petition.
6. Even more, no evidence has been presented before the court indicating that there are orders for stay of proceedings or stay of execution by the bankruptcy court in respect of the director or the company. I do however agree with the submission by the respondent that the decree holder will eventually find it effective to join in the bankruptcy proceedings alongside other creditors. Perhaps I should say no more about this.
7. It is trite that a company is a distinct legal entity from its members. This court appreciates the decree holder's existence and the individuality and distinct nature of a company from its directors and shareholders as espoused in the landmark case of *Salmon and Salmon and Co. Ltd*, (1897) AC 22HL.
8. I however note that just like in the above case, courts have also taken the position that there are instances that call for the piercing of the corporate veil. The need to see what happens behind the corporate personality arises where there is evidence that the company is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the company. A few examples of the judicial pronouncements as relates to lifting the corporate veil will suffice.
9. In *Stephen Njoroge Gikera & Another V Econite Mining Company Ltd & 7 Others*, [2018] eKLR, the court noted that:

“...there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance.”
10. In that case, the court referred to the *Halsbury's Laws of England*, 4th Edition at paragraph 90 where the circumstances calling for lifting the veil of incorporation are discussed. It provides in part as follows:

“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 the purpose of the litigation before it, as identical with the 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 persons who control 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 or even as agents, directing and controlling the activities of the company...

The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘a creature of [the controlling director], a device and



a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity...in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company.” (emphasis mine)

11. The applicant has relied on the case of *Jiang Nan Xiang v Cok Fas-St Company Limited* [2018] eKLR, where the Court held that:

“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.”

12. The parties have referred to other judicial pronouncements including *Protus Opwora Wabwoto v Ken Manda & 2 Others*, [2020] eKLR and *Charles Ray Makuto v Almakony Limited & Another*, (2016) eKLR which express similar sentiments. I am also alive to the words of caution that insolvency is an ordinary incident of business and does not, of itself, necessarily connote fraud which would result in piercing the corporate veil. This position was expressed by Ringera, J (as he then was) in *Corporate Insurance Co. Ltd V Savemax Insurance Brokers Ltd & Another*, [2002] EA 41. The Learned Judge noted that:

“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.”

13. The applicants rely on two grounds to justify piercing the veil of incorporation in this instance. They have submitted that there was no distinct separation of the affairs of the judgment debtor and the directors and that there had been fraud and mismanagement of the respondent by the directors and shareholders, to warrant the director being made personally liable for the debt.
14. The applicant avers that the director had chosen to intermingle his personal affairs with those of the company as evidenced from the statement of affairs presented in the bankruptcy petition. They suspected the same to have been done with the aim of fraudulently avoiding, frustrating and delaying the recovery of the sums owed to the decree holder and other creditors. The applicants also contend that it would be unjust for Mr. Guy Jan Mertens the founder, director and owner of the company to simply walk away from the significant financial liabilities he created in the company after mismanaging the same, to the detriment of the decree holder.
15. In his defence, the director acknowledged that the financial problems of the company were caused by collusion between the employees and the suppliers of the judgment debtor, which led to its insolvency.
16. The main issue for consideration is whether the failure of the company should be wholly placed on the shoulders of Guy Jan Mertens by so lifting the corporate veil.



17. I have perused the audit report presented to the court for the year ended 31st December 2016 prepared by Ms. Catherine and Associates, Certified Public Accountants. The report raises serious financial mismanagement issues such as lumping together of suppliers' accounts, income that was not being accounted for either from bank drawings or cash sales, the absence of a cash register, missing invoices, lack of proper documentation on transactions such as rent payments, tax irregularities, high operational costs that riddled the company with heavy debts from loans and overdraft facilities, unusually high medical covers for directors that could not be explained and lack of internal control systems.
18. These findings raise serious questions on the integrity of the judgment debtor's financial transactions. The fact that the director herein was the founder, majority shareholder and director of the company leaves no doubt that he was the mind, heart beat and hands of the company. He was literally in control of the activities and decisions made by the company and must therefore have sanctioned these activities. The reason given by the director of the mismanagement of the company by the staff is not feasible. As director and founder, he would be the one responsible for the strategies and running of the commercial undertakings of the company.
19. The audit report's findings are not controverted. Those findings would lend credence to the applicant's claim that there may have been fraudulent dealings which led to the financial problems and insolvency of the respondent company thereby frustrating the applicant's realization of the fruits of its decree. I am left with no doubt but to find that he had knowledge of the fraudulent activities and that he ought to be made personally liable for the loss occasioned by the judgment creditor.
20. For the avoidance of any doubt, I adopt the definition of fraud as held by the Court of Appeal in *Arthi Highway Developers Ltd v West End Butchery Limited & others*. It was stated that:
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
21. Consequently, the legal position enunciated at paragraph 90 of *Halsbury's Laws of England* 4th Edition is applicable, that in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. I am satisfied that the applicant has made out a strong case for the lifting of the corporate veil.

Determination

22. In conclusion, I am satisfied that it is proper for the ends of justice that the corporate veil of the defendant company be lifted and the said director Guy Jan Mertens, be held personally liable to satisfy the decree of the court in full. The application dated 29th June 2020 is therefore successful. The applicants shall have the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF OCTOBER 2023.



F. MUGAMBI
JUDGE

