



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 501 OF 2010

K-REP BANK LIMITED.....PLAINTIFF

-VERSUS-

SEGMENT DISTRIBUTORS LIMITED.....DEFENDANT

PAUL KIPROP KANDIE.....1ST JUDGMENT DEBTOR/APPLICANT

BENJAMIN KIMELI TANUI...2ND JUDGMENT DEBTOR/APPLICANT

R U L I N G

1. Before Court is the applicants Motion on Notice dated 29/6/2020. It is brought under **sections 1A, 1B and 3A of the Civil Procedure Act, Order 49, Rule 7(3), Order 50 Rule 7 and Order 51, Rule 1 of the Civil Procedure Rules.**
2. In the Motion, the applicants sought a stay of execution of the orders issued by Hon. D. W. Nyambu DR on 20/1/2014 pending the hearing and final determination of an intended appeal. They also sought leave to appeal out of time against that order.
3. The grounds for the application were set out in its body and the affidavit of **Paul Kiprop Kandie** and **Benjamin Kimeli Tanui**, sworn on 29/6/2020. They contended that in late February, 2020, they were served with a Notice to Show Cause why they should not be personally arrested and committed to civil jail in respect of a decree issued against the defendant. That on perusing the court file, they discovered that a Notice to Show Cause had been issued against them on 20/1/2014 holding them personally liable for the decree issued against the defendant.
4. They averred that, the said order was never served upon them nor were they informed of the same by the defendant's advocates. That they had never been served with any application to lift the corporate veil of the defendant. They contended that the orders were null and void *ab initio* as they were issued in excess of jurisdiction since the Deputy Registrar had no power to order the lifting of the defendant's corporate veil under the repealed **Companies Act Cap 486 or the Civil Procedure Act and Civil Procedure Rules.**
5. They intend to appeal against the said order but the timeline for filing an appeal has run out. The intended appeal is meritorious and unless the orders sought are granted, they risk being committed to civil jail.
6. The application was opposed vide a replying affidavit sworn on 7/10/2020 by **Sarah Chepsoi**, the plaintiff's Legal Manager. She contended that the order of 20/1/2014 was issued following an earlier order of the Court made on 5/6/2013. In that order, the Court had ordered for the cross examination of the applicants as to the whereabouts of the assets of the defendant and to furnish its books of accounts and any other relevant documents. Pursuant to the said Order, the applicants were served with witness summons dated 29/7/2013 which was duly served on them as per the Affidavit of service filed in court on 17/9/2013.
7. That in spite of being served as aforesaid, the applicants failed to attend Court and as a result the Order of 20/1/2014 was made. The said Order was made in accordance with the powers donated to the deputy registrar by the rules of this Court. In the premises, the applicants' contention that the said order was made by the Deputy Registrar in excess of her jurisdiction is incorrect.
8. It was contended that since the Order of 20/1/2014 was made, there had been numerous court appearances by both the plaintiff's and the defendant's advocates. That in the premises, the application was an afterthought and was being made after an inordinate delay.
9. That the applicants were served personally with the Notice to Show Cause on 22/8/2016 and an Affidavit of Service was filed in Court. In the premises, it would be unjust for the applicants, who are the directors of the defendant, to be allowed to delay any further execution of the decree dated 20/5/2012.

10. I have considered the record and the contestations of the parties. The applicants sought leave to appeal against the Order of 20/1/2014 in which the deputy registrar, Honorable D.W.Nyambu gave orders allowing the execution to personally issue against them. The Order was given after the defendant's directors were scheduled to appear for a cross examination in order to find out the whereabouts of the assets of the defendant.

11. The first issue that falls for determination is whether the Deputy Registrar had the power to lift the corporate veil under the repealed **Companies Act 486, the Civil Procedure Act and Civil Procedure Rules**. If not, can the orders be left to stand.

12. In the case of **Kenya Bus Services Limited & 4 others v Mwaura Karuga t/a Limit Enterprises [2019] eKLR** the court was faced with a similar matter where the Deputy Registrar had lifted the corporate veil and held the directors personally liable, the court held: -

“The Ruling of the Deputy Registrar was in October 2014. The operative Companies Act was Cap 486, before it was repealed in 2015. That Act defined the Court as the High Court. It follows that the Deputy Registrar had no power/jurisdiction to invoke the Companies Act to lift the veil under the Companies Act. Only High Court could have invoked the Companies Act.”

13. Similarly, in the present suit, the ruling of the Deputy Registrar was delivered in 2014 under the repealed **Companies Act, Cap 486** (“the Act”). **Section 323** of the Act provided that the court may hold persons who knowingly participated in fraudulent activities of a company personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

14. From the above provision, it is arguable clear that the intended appeal will be on whether the Deputy Registrar had the power to lift the corporate veil and issue the order in question. This is so because the court is defined as the High Court under the same Act. It will therefore be arguable whether the Deputy Registrar had jurisdiction to issue the orders she made.

15. I have anguished over the delay in applying for leave and stay. The delay is inordinate. However, because of the overwhelming chances of the intended appeal succeeding, as this Court cannot leave orders that are said to have been issued without power to be enforced, I will grant the prayers sought but with a caveat.

16. I allow the application. Leave and stay is granted as sought. However, the appeal should be filed within 14 days of this ruling in default the stay granted herein shall stand discharged.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

A. MABEYA, FCI Arb

JUDGE