



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 335 OF 2016

LUCY MUKEMBURA KIMANI.....PLAINTIFF

VERSUS

NZURI FEEDS SUPPLIERS LTD.....DEFENDANT

RULING

1. The Applicant herein sued Nzuri Feeds Suppliers Ltd (hereinafter, the “Company”) in *Nakuru Chief Magistrate’s Civil Suit No. 1117 of 2010*. She obtained judgment against the Company on 20/03/2015 for Kshs. 325,000/-. Thereafter, she extracted a decree as per the judgment. The Company failed to satisfy the decree. All attempts to execute against the Company failed as the Applicant learnt that the Company had closed its shop and did not have any known assets.

2. Having failed to recover the decretal sum from the Company, the Applicant has brought the present Application. It seeks the following prayers:

1) That the Honourable Court be pleased to disregard, lift and or pierce the corporate entity of Nzuri Feeds Suppliers limited and order Jackson Kamau Muriithi, a director of the Defendant, to settle the decretal sum, costs and accruing interests in the instant suit.

2) That costs of this Application be borne by the Defendant/Respondent

3. The Application is opposed. The Grounds of Opposition are filed by Frank Mwangi & Co. Advocates. They indicate that they are “Advocates for the Defendant/Respondent.” The named Respondent in the Application is the Company. It is not clear if Frank Mwangi & Co. Advocates have instructions from Jackson Kamau Muriithi to defend the Application on his behalf. Indeed, it is not even clear that Jackson Kamau Muriithi who should be the real Respondent in the Application was ever served with the Application.

4. The Grounds of Opposition are as follows:

1) That the Application dated 1st August, 2016 is misconceived and a gross abuse of the process of the Honourable Court.

2) That the Application lacks merit as the Plaintiff/Applicant has not demonstrated sufficient grounds that the corporate personality is being used for fraud or improper conduct to warrant the lifting of the corporate veil other than the reason that there was a judgment entered on 20th March, 2015 in favour of the Applicant as against the Respondent.

3) That the said Jackson Kamau Muriithi was not the sole director of the Defendant/Respondent.

4) That the Plaintiff/Applicant has confirmed in their Application that the Defendant/Applicant closed its operations and has no tangible assets and therefore its liabilities cannot therefore be borne by its directors. The lifting of the corporate veil would thus be an exercise in futility and/or would serve no purpose.

5) That lifting of the veil of incorporation is not automatic merely because the company has no assets or it is unable to pay its debts and it thus insolvent.

6) That the Plaintiff/Applicant has not demonstrated fraud on the part of the Defendant/Respondent directors to defraud its creditors as pleaded in his application by dint of Section 107(1) of the Evidence Act. The evidential burden lay with the Applicant which burden has never been discharged.

7) *The Application is frivolous, vexatious and hence should not be allowed.*

5. In any event, the gravamen of the Application is the prayer that the Court pierces the corporate veil of the Company and hold Jackson Kamau Muriithi as responsible for the corporate debt of the Company which is owed to the Applicant.

6. Both the Applicant's Counsel and the Company's Counsel for I have assumed that Frank Mwangi & Co. Advocates can only, logically, have been instructed by the named Respondent, the Company) filed Submissions and a List of Authorities. I have read them keenly.

7. Both the Applicant and the Company (readily appreciate that corporations have their own juridical persons. They both readily appreciate that, the law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. Both the Applicant and the Company cited the famous decision in **Salomon v Salomon & Co (1897) AC 22** where Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words:

The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.

8. However, again, both the Applicant and the Company acknowledge that the privilege of incorporation is not without its limits; and that Courts will disregard the corporate form or, to deploy the term used in the Application, "pierce the corporate veil" and allow a creditor to reach the personal assets of shareholders or directors in certain circumstances.

9. In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company's alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute.

10. In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

a. *First*, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and

b. *Second*, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

11. Some of the factors the Court would like at to determine if the two requirements have been met include the following:

a. Whether the company is adequately capitalized;

b. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;

c. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;

d. Whether the alter ego has treated the assets or finances of the corporation as his own.

12. Piercing the corporate veil is an equitable remedy. The burden rests on the party asserting such a claim to demonstrate, using the factors outlined above, that the two conditions have been met. Each case is determined on its own merits under a totality of circumstances test.

13. In the present case, the Applicant has made two assertions which she seems to believe entitles her to the extra-ordinary relief of piercing the corporate veil:

a. *First*, she asserts that Jackson Kamau Muriithi is the only known director of the Company;

b. *Second*, she asserts that the Company closed its doors and has no known other physical address and that Jackson Kamau Muriithi closed the Company's premises "with fraudulent intentions...to defraud creditors including the [Applicant]. She further avers that the actions of Jackson Kamau Muriithi were "motivated by malice as and are meant to deny the Plaintiff right to enjoy the fruits of [her] judgment."

14. Other than the Applicant's bland averments in the affidavit, there is no evidence whatsoever that is offered to prove the allegation that Jackson Kamau Muriithi closed the premises of the Company solely or even with the part intention to defraud the Applicant and other creditors. Needless to say, the mere fact that a Company has become insolvent or no longer has assets is not proof of fraud or intention to defraud creditors. A party who intends to benefit from the extraordinary relief of piercing the corporate veil must tender more concrete evidence to satisfy the two requirements set out above

15. In the present case, not only is there no demonstration that Jackson Kamau Muriithi, the asserted *alter ego*, operated the Company such that there was a unity of interest and ownership between him and the Company but there is no demonstration at all of the alleged fraudulent intent. It was incumbent upon the Applicant to provide such evidence in order to benefit from the extra-ordinary relief she sought.

16. In any event, the Applicant did not even demonstrate that Jackson Kamau Muriithi is, indeed, the sole director of the Company or even that he is a director at all. No corporate returns or search returns were filed to show that Jackson Kamau Muriithi was a director at all; and neither was their demonstration that he was the director or shareholder who impermissibly operated the Company so as to collapse the legal separation between the Company and himself. Without this evidence, the Application cannot succeed.

17. **The upshot, therefore, is that the Application dated 01/08/2016 is without merit. It is dismissed with costs.**

18. Orders accordingly.

DATED AT NAIROBI THIS 3RD DAY OF JUNE, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.