



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.627 OF 2009

ROBERT KINAGA WAWERU.....PLAINTIFF

VERSUS

NORTHCORR ENTERPRISES LTD.....DEFENDANT

RULING

1. Before me is the plaintiff's Motion on Notice dated 28/1/2020. It is brought under **Order 22 rule 35 and Order 51 Rule 1 of the Civil Procedure Rules**. It seeks the lifting of the corporate veil of the defendant and have its directors and shareholders, namely, **Nahashan Ngigi Githinji** and **Hannah Wambui Ngigi**, satisfy the decree in this suit.
2. The application is supported by the affidavit sworn by the plaintiff on even date. The grounds thereof are; that on 12/4/2011, judgment was entered for the plaintiff against the defendant for Kshs.3,491,743/- plus costs and interest.
3. On 13/7/2011, the parties entered into a consent whereby the defendant was to pay a sum of Ksh.460,000/- and monthly installments of Ksh.300,000/- until final settlement. However, the defendant defaulted whereby the plaintiff applied for warrants of attachment and sale of the movable assets of the defendant. The defendant has only paid Kshs.810,000/- out of the entire decretal amount. The defendant is no longer operational and there is apprehension that its assets have been hidden.
4. The application was opposed vide a replying affidavit of **Nahashon Ngigi Githinji** sworn on 2/3/2020. He avers that he is not aware of any consent alleged with the applicant. That he has made several payments to pay off the decree according to the defendant's ability. That the defendant is in operation contrary to the applicant's allegations.
5. He further avers that the applicant has not demonstrated the need for the lifting the defendant's corporate veil. That the defendant is willing to continue making payments. He urges the Court to dismiss the application.
6. I have considered the depositions and submissions on record. The issue is whether the applicant has established a basis for the lifting of the corporate veil of the defendant and thereby hold its director personally liable for the payment of the decree herein.
7. It is a well known legal principle that a company is a distinct legal entity from its members. See **Salmon v Salmon [1987] AC 78**. In **Victor Mabachi & Another v Nurturn Bates Ltd, [2013] eKLR**, the Court held that a company as a body corporate, is a persona juridica, with separate independent identity in law that is separate and distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.
8. The instances where the corporate veil may be pierced are well established. In **Stephen Njoroge Gikera & another v Econite Mining Company Ltd & 7 others [2018] Eklr**, it was held: -

“However, 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. The Halsbury's Laws of England, 4th Edn para. 90; addresses the issue of piercing the veil of incorporation and states that;

“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.”

9. In **Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another [2018] eKLR**, the Court of Appeal held:

“In the present instance, Mr. Baiya claimed that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent’s account. Why would Mr. Baiya, a director in the 2nd respondent and who definitely had full knowledge of its affairs (that it had no attachable assets or financial means to satisfy the decree) insist that the decree be settled by it? We draw the same inference as the 1st respondent that the same was meant to defeat the satisfaction of the decree, an improper purpose warranting the court to go behind the veil of incorporation. This is especially since the benefit of the works carried on by the 1st respondent was realized and continues to be enjoyed by the appellant. Surely in the circumstances of this case, the appellant did not expect a court of equity to shut its eyes to the 1st respondent’s plight and leave it without a remedy. The appellant incorporated the 2nd respondent and then had it enter into an agreement with the 1st respondent knowing well that it had no financial means or assets to meet the obligations related with the contract. In the absence of any reasonable excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2nd respondent’s veil of incorporation for purposes of ensuring justice to both parties.”

10. From the foregoing, it is clear that the corporate veil of a company may be lifted and or pierced due to fraudulent activities, improper conduct of the members or directors of a company or where the circumstances of the case warrant in order to do justice.

11. In the present case, a decree for Kshs.3,491,734/- plus costs and interest was passed against the defendant on 12/4/2011. To-date, only a sum of Kshs.810,000/- is said to have been paid. A consent on how the said sum was to be settled was never adhered to by the defendant. The same was produced as ‘**RKW-1**’ despite denial of its existence by the deponent of the replying affidavit.

12. The decretal sum has not been fully settled. In an application under **Order 22 Rule 35**, it is upon the directors and shareholders of a defendant company to show that the company has assets that are capable of satisfying the decree. It will be a travesty of justice for a court of equity to close its eyes where it is clear that a person incorporates a company, enters into agreements through it, derives benefits therefrom and leaves the parties to such agreements licking financial wounds while he continues to enjoy the benefits therefrom. The directors and shareholders must give full account of the assets of the company or its whereabouts.

13. The deponent of the replying affidavit was not truthful when he alleged that he was unaware of the consent between the plaintiff and the defendant. That consent waded off any attachment of the assets of the defendant at the time with hope that the defendant would make arrangements to repay the decretal sum at a future date. By executing the consent, the plaintiff was hoodwinked into postponing the realization of its rights under the decree to its detriment.

14. This is a Court of equity and such mischief cannot be ignored. The court finds that the actions of the two directors amounts to improper conduct, which is one of the grounds for piercing the corporate veil.

15. In view of the foregoing, the Court finds the application to be meritorious and holds the two directors of the defendant, namely **Nahashon Ngigi Githinji and Hannah Wambui Ngigi** personally liable to settle the decree herein. The applicant will have the costs of the application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 17th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE