



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.105 OF 2013

KAYDEE QUARRY LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

BAILEYS ROCKTECH LIMITED.....DEFENDANT/JUDGMENT DEBTOR

RULING

1. By way of **Notice of Motion** application dated **3rd November, 2016** and filed on the **4th November, 2016**, the Applicant has moved this court seeking the following orders, that: -

1. Spent;

2. The Directors of the Defendant be orally examined as to whether any or what debts are owed to the Judgment/debtor and whether the Judgment debtor has any and what property or means in its possession or in possession of third parties to satisfy the Decretal sum herein failure of which the corporate veil will be lifted and the above named Directors be held personally liable to satisfy the decree herein;

3. The Directors of the Defendant to produce all books of audited accounts, statements of accounts, cheque books and all other documents relating to financial affairs of the company for the period between January to June 2015, or any other period as may be directed by the Court, failure of which the corporate veil be lifted and the above named Directors be held personally liable to satisfy the decree herein.

2. The Application is brought under **Sections 1A, 1B, 3A** of the **Civil Procedure Act; Order 22 Rule 35** and **Order 51 Rule 1**, both of the **Civil Procedure Rules** and other enabling legislation.

3. The **Motion** is supported by the grounds presented on its body and the **Affidavit** of **Nishit D. Maru**, the Applicant's Counsel. He has averred therein that an ex-parte Judgment was entered for the Decree Holder in this matter on the **18th September, 2014** for the sum of **Kshs.16,964,627.00** plus costs and interest.

4. It has been deponed that the Judgment Debtor was duly notified of the Judgment on the **14th October, 2014** and the same was received by their appointed advocates on the **15th October, 2014**.

5. The Applicant has averred that their attempts to execute for the decretal amount have been futile as there are no known attachable assets that belong to the Defendant and the Defendant's last known place of business was closed down.

6. It has been deponed that the details of the Defendant's Company Directors; **Mohamed Hanif Shamshudin Noorani** and **Phil Routledge** were obtained from **Replying Affidavits** sworn in court on the **8th October, 2013** and **19th November, 2013** respectively.

7. The Applicant has averred that the purpose of the application herein is to compel **Mohamed Hanif Shamshudin Noorani** and **Phil Routledge** to attend court and be orally examined to explain how the decretal sum will be satisfied. Further, it has been averred that the Directors show what is in their possession or possession of third parties to satisfy the decretal sum herein, failure of which the corporate veil will be lifted and the Directors in the Application herein be held personally liable to satisfy the decree.

8. In response, **Mr. Mohamed Hanif Shamshudin Noorani**, a Director of the Defendant/Judgment Debtor filed a **Replying Affidavit** sworn on the **23rd October, 2018**, which was later expunged by the court vide a Ruling dated **23rd October, 2018** for the reasons that the Defendant did not comply with the mandatory provision of **Order 51 Rule 14 (2)** of the **Civil Procedure Rules, 2010**.

9. On the said **23rd October, 2018**, the parties herein were heard and the Applicant's application was allowed. The court gave directions that the Directors of the Defendant be orally examined on the **3rd December, 2018** and that they produce all books of accounts as sought for by the Applicant.

10. The Director, **Mr. Mohamed Hanif Shamshudin Noorani**, was cross-examined on the **3rd December, 2018**. He stated that he is one of the Director at **Baileys Rocktech Limited** and **Baileys Plant and Hire Ltd**. He testified that the two companies aforementioned had other Directors, being **Mr. John Forsyth, Mr. Dalbir Singh, Mr. Philip John Routlege** and **Mr. Sumir Soni**.

11. **Mr. Mohamed Hanif Shamshudin Noorani**, stated that each director holds 20% of the shares in each Company to make a total of 100%. He testified that **Mr. Sumir Soni** died sometime in **December, 2017**; **Mr. Philip John Routlege** left Kenya for the United Kingdom and is yet to return; **Mr. Dalbir Singh** was said to be in India and **Mr. John Forsyth** was said to be in Kenya. He maintained that he was in contact with all the directors.

12. The Defendant's Director testified that the Defendant Company had not engaged in any business since the **year 2015** and that there were books of accounts prepared for that year. He stated that the last books of accounts were prepared in **2013** and he referred the court to the annexures of his expunged Affidavit wherein the attached books of accounts were for the years **2012** and **2013**.

13. He further testified that the Defendant Company had no assets at all, the only existing assets being two excavators/crawlers were sold to **JCB Ventures** at **Kshs.21,000,000/=** to settle a loan that had been advanced to the Company by **Equity Bank Ltd**.

14. The Director stated that the Defendant's Company had not been dissolved but it does not trade and thus they had not submitted any returns for that said period.

Directions of the Court

15. On the **3rd December, 2018**, the court gave directions that the Application be canvassed by way of written submissions. The Applicant's submissions are dated the **15th February, 2019** and were filed on **18th February, 2019** while the submissions written on behalf of **Mr. Mohamed Hanif Shamshuddin Noorani** (a Director of the Defendant/Judgment Debtor) are dated the **8th April, 2019** and were filed on the **9th April, 2019**. The parties elected to rely on their written submissions as presented.

The Applicant's Submissions

16. The Applicant has submitted that the Application herein should be determined on the basis of the well-known principle espoused in the famous case of **Salmon –vs- Salmon & Co. Ltd (1897) AC 22HL**, on a company being a juristic person. The Applicant has urged the court to consider judicial precedents that have upheld the doctrine of lifting the corporate veil for a Company used to shield fraud and improper conduct on the part of shareholders, directors and controllers of the Company.

17. It has been submitted that the ingredients for lifting the corporate veil include:-

- i. Fraud, illegality and improper conduct on the part of the Company Directors/Shareholders/ Controllers.*
- ii. Company's intention to evade tax obligations.*
- iii. Company being used to engage in criminal activities.*

18. The Applicant has submitted that the testimony of **Mr. Mohamed Hanif** brought to light that the Defendant was only intent to evade its responsibility towards the Applicant as it did not produce books of accounts for **January to June 2015** as was ordered by court, nor did it produce any documentation to show that its only asset, the excavators were sold to settle a loan with **Equity Bank Ltd**. Further, it has been submitted that it emerged during cross-examination that there exists another Company by the name **Baileys Plant and Hire Ltd**, whose Directors are the same as the Defendant herein, that is operational and in business hence making it strange that the Defendant Company has been ignored and is not operational.

19. According to the Applicant, the Directors of the Defendant have conducted themselves dishonestly, improperly by failing to give books of accounts and some Directors absconding by leaving the jurisdiction of the court herein which issued the decree and thus the court ought to pierce the corporate veil and hold the Defendant's Directors personally liable.

20. The Applicant has relied on the Court of Appeal case of **Githunguri Dairy Farmers Co-operative Society –vs- Ernie Campbell & Co. Ltd & Another [2018]eKLR**, where the decision of the High Court to pierce the corporate veil behind two legal entities with the same Directors and or shareholders was upheld by the Court of Appeal. The Applicant made the said comparison with the case herein with the two companies **Baileys Rocktech Limited** and **Baileys Plant and Hire Ltd**.

21. It has been submitted that the corporate veil should be pierced as it is unfair that the demand for **Kshs.16,964, 627** was made by the Applicant on the **22nd July, 2013**, way before the excavators were sold, which only shows that Directors conducted themselves improperly and dishonestly by ignoring the Applicant's demands.

Mr. Mohamed Hanif Shamshudin Noorani's Submissions

22. According to Mr. Mohamed Hanif Shamshudin Noorani's submissions, the Applicant has not given a reason as to why it required only two Directors out of the five (5), that is himself, **Mr. Mohamed Hanif Shamshudin Noorani** and **Mr. Philip John Routlege** to be summoned and cross-examined.

23. **Mr. Mohamed Hanif Shamshudin Noorani** has also submitted that he testified that the Defendant had a contract with a **Japanese Company Toyo Limited** for the expansion of the Port of Mombasa and once it had concluded a part of the said contract, the said company did not renew this contract as was expected thus the Defendant did not have work from the **year 2013**. Further, he has confirmed that the Defendant Company does not have any assets or cash in the bank or any means whatsoever to satisfy the said decree.

24. It has also been submitted that there was no fraud or wrong doing imputed on the part of the Directors, as no proof has been tabled by the Applicant to that effect nor has it been shown that the directors have diverted the money from the Defendant Company in breach of any company law or rules.

25. Reliance has been placed on the case of **Joel Ndemo Ong'au & Another –vs- Loyce Mukunya [2015]eKLR**, where it was held that the veil of incorporation is not to be lifted merely because a company has no assets or it is unable to pay its debts. Further, reliance has been placed on the case of **Vihiga Farmers Co. Ltd –vs- Nathan Indombelo [2018]eKLR**, where the court relied on the *locus classicus* case of **Mugenyi & Company Advocates –vs- The Attorney General [1999]2 EA 199** that lists the ten (10) instances when the veil of a corporate personality may be lifted.

26. The Director has submitted that the court has the jurisdiction and mandate to pierce or lift the veil of incorporation but it does not have the jurisdiction to pierce the veil partially as applied for by the Applicant. It was stated that a party cannot choose to proceed against some directors or shareholders without giving a compelling reason for leaving the other three (3) out.

27. Mr. Mohamed has stated that it has not been shown that out of all the other Director, he acted outside the scope of his authority or that he acted without consulting the other Directors. It is his case that the Applicant's application is defective and devoid of merit for failure to summon or enjoin the other Directors and Shareholders of the Defendant.

28. It was submitted that the Applicant has not even proved one out of the ten (10) instances of fraud or illegality as cited in the case of **Mugenyi & Company Advocates (supra)** against the Defendant or **Mr. Mohamed** as required.

29. According to **Mr. Mohamed**, the failure of the Defendant's nil returns for the years it has been inactive is a matter of the Kenya Revenue Authority and the Applicant is not its appointed agent to hold its brief and nor is it a reason to lift a corporate veil. It has been stated that the fact that the shareholders are the same in **Baileys Rocktech Limited** and **Baileys Plant and Hire Ltd** does not mean they are in a relationship of holding and subsidiary company. That if the Company wanted to attach the properties of **Baileys Plant and Hire Ltd**, no proper application has been placed before court for determination.

30. Further, it has been submitted that the allegations that the directors have acted dishonestly, illegally or fraudulently has not been proved and the Applicant has not met the threshold under **Order 2 Rule 10 (1)(a)** of the **Civil Procedure Rules** that provides that a party alleging fraud must provide particulars of the alleged fraud.

Analysis and Determination

31. In considering the application before court, I find that before analysing the issue arising, it is important to state that no evidence was adduced before this court in response to the Application herein. The Director, **Mr. Mohamed Hanif S. Noorani** responded to the application by way of submissions and not a **Replying Affidavit**. It is trite law that submissions are not evidence as was clearly stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014]eKLR:-**

“...Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

32. In compliance with the above, Mr. Mohamed's submissions cannot come to his aid as the same have no evidence filed in its support.

33. The issue that arises for determination is *whether this court should lift the Defendant's corporate veil and its directors held personally liable to pay the decree herein.*

34. It is important to state that there is no dispute that the decree of **Kshs.16,964, 627/=** plus costs and interest has not been settled. Further, there is no dispute that execution of the decree by attachment has failed because the Applicant has been unable to trace the Defendant's assets.

35. The court has the discretion to pierce the corporate veil of a Company, but the same is meant to be done with caution and only under exceptional circumstances used to mask fraud or improper conduct.

36. It is trite law and as established in the case of **Salomon & Co Ltd vs Salomon (1897) AC, 22. HL**, that a Company is a separate legal entity from its Directors/Shareholders. However, from time to time, courts have moved away from this position and held the Directors and members of a Company liable for a Company's actions and or debts.

37. The circumstances under which the corporate veil may be pierced were discussed in paragraph 90 of The Halsbury's Laws of England 4th Edition Volume 7(1) 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 case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.

38. In the instant case one of the directors, **Mr. Mohamed** testified and alleged that the Defendant Company has no assets and or money to settle the decree herein, but the same has not been supported by any evidence. Mr. Mohamed testified that the Defendant's only assets were excavators that were sold for **Kshs.21,000,000/=** to pay a loan at **Equity Bank Ltd** which was done way back before Judgment was entered in the matter herein on **18th September, 2014**.

39. Further, there was an allegation that the Defendant Company has not been operational since the **year 2013**, but no evidence was brought before court to support this claim.

40. On the **3rd December, 2018**, the Defendant Company was ordered to produce all books, statement of accounts, cheque books and any other documents relating to its financial affairs for the period between **January to June 2015**, but it did not comply with the said order. The Court in the case of **Jiang Nan Xiang –vs- Cok Fas-St Company Limited [2018] eKLR**, lifted the veil against the Judgment-debtor and observed that:

“ Having considered all the circumstances of this case, I am satisfied that the two directors having failed to produce the necessary records and/or documents of the Judgment debtors Company, as required under Order 22 Rule 35 of the Civil Procedure Rules, and after having been accorded an opportunity to do the same, this is thus suitable for this Court to order and hereby do order that, the corporate veil in relation to the Judgment debtor be lifted and the two directors be held personally liable to satisfy the decree in this matter. It is clear the decretal sum is not satisfied and the Directors have not acted in good faith to validate the decretal sum”

41. The Application herein is brought under **Order 22 Rule 35** of the **Civil Procedure Rules, 2010** which provides that:-

“Where a decree is for 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.”

42. The above Rule requires that any officer of a Corporation can be orally examined. It does not require all officers of a Company to be examined, thus making it proper that the Applicant only summoned two Directors to explain the running of the Defendant's Company, not all five Directors as claimed by **Mr. Mohamed**. It was also alleged, albeit with no proof, that some of the directors were not in the country; with one **Mr. Sumir Soni** said to be deceased but is still part of the **Baileys Plant and Hire Ltd**.

43. In this case, one of the directors of the Defendant Mr. Mohamed was given an opportunity to represent the Company's records of income and expenditure. He was orally examined and he told the court that the Defendant did not have any assets and was not operational but failed to provide proof of the same as was ordered by the court. **Mr. Mohamed** did not produce any books of account as contemplated under **Order 22 rule 35** of the **Civil Procedure Rules, 2010**.

44. This court has further noted the mention of **Baileys Plant and Hire Ltd** which in cross-examination was shown to have the same Directors/ Shareholders as the Defendant but the same has not been shown to have a parent and subsidiary relationship or that any of it is being used illegally or fraudulently to cover the actions of the Defendant. The corporate veil of **Baileys Plant and Hire Ltd** cannot be lifted merely because it has similar directors and shareholders as the Defendant. Further, there was no such prayer that required the lifting of the corporate veil of **Baileys Plant and Hire Ltd**.

45. In conclusion, the lack of production of the books of accounts for the period of **January to June, 2015** by the Director who was summoned as was ordered by court is evidence that the corporate veil is being used to shield the Directors of the Defendant Company from execution of the decree. This clearly shows that the Defendants have acted in bad faith towards the Applicant and denied it the right to enjoy the fruits of its Judgment. This is coupled with the unsubstantiated absence of the other Directors of the Defendant Company.

46. In view of the above, I direct that the Directors of the Defendant; **Mr. Mohamed Hanif Shamshudin Noorani, Mr. John Forsyth, Mr. Dalbir Singh, Mr. Philip John Routlege and Mr. Sumir Soni** to personally pay the Applicant the decretal sum in this suit, being

Kshs.16,964,627/= plus accrued interests and costs.

47. The costs of this Application are awarded to the Applicant and to be settled by the Directors equally.

It is ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE