



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 745 OF 2009

PETER O. NGOGE T/A O.P. NGOGE & ASSOCIATES ADVOCATES.....APPLICANT/ADVOCATE

-VERSUS-

AMU INVESTMENT COMPANY LIMITED.....RESPONDENT/CLIENT

RULING

1. The applicant/advocate took out the Notice of Motion dated 15th January, 2019. The Motion is supported by the grounds set out on the body thereof and the facts deponed in the supporting affidavit sworn by the applicant. The orders being sought in the aforesaid Motion are as follows:

i. Spent.

ii. THAT this Honourable Court be pleased to order that the respondent's/client's directors: ALAN CLEOPHAS MULANGO SIMU (Architect) and ADAM SYNGIDURA MARJAN (Quantity Surveyor) be committed to civil jail for a period not exceeding six (6) months for deliberately disobeying and refusing to honour and satisfy the decree issued in favour of the applicant by the Honourable Lady Justice Khaminwa on 19th September, 2012.

iii. THAT the Chief Inspector of Police and OCS Central Police Station be ordered to effect the arrest of the abovementioned directors forthwith.

iv. THAT further and/or in the alternative, this Honourable Court be pleased to observed that by deliberately refusing to honour and satisfy the decree issued on 19th September, 2012, the respondent herein and its directors have subjected the applicant who is an advocate to cruel and degrading treatment apart from discriminating against him by subverting his socio-economic rights contrary to Articles 10, 27, 28, 29 and 40 of the Constitution and contrary to Article 16 of the United Nations Basic Principles on the Role of Lawyers.

v. THAT further and/or in the alternative, this Honourable Court be pleased to award the applicant general awards to redress the violation of his alleged fundamental Human Rights as against the respondent and its abovementioned directors.

vi. THAT the applicant be awarded the costs of his application.

2. In resistance thereto, the respondent filed Grounds of Opposition on 20th February, 2019.

3. The parties agreed to dispose of the Motion through written submissions, which were filed and exchanged between themselves.

4. I have considered the grounds stated on the face of the Motion, the facts deponed in the supporting affidavit and the Grounds of Opposition and the rival submissions together with the cited authorities.

5. The brief background of the matter is that the applicant had previously rendered legal services to the respondent at all material times in ELC NO. 252 OF 2008.

6. Thereafter, the applicant lodged a bill of costs dated 16th November, 2009 arising therefrom and which bill was subsequently taxed on 28th

October, 2011 by P. Gichohi (Deputy Registrar) at Kshs.788,569.50/= and later adopted as a judgment of the court by Honourable Lady Justice Khaminwa on 19th September, 2012 together with interest at 9% under the Advocates Act.

7. Having considered the submissions, I am of the view that the key issues requiring this court's determination are three-fold, namely:

- a. Whether this court has the jurisdiction to entertain the application;
- b. Whether service of the application was effected upon the directors of the respondent company; and
- c. Whether the respondent and/or its directors are in contempt of the order/decreed issued on 19th September, 2012.

8. However, before I delve into addressing the above issues, I deem it necessary to consider an argument raised by the respondent that the present application is premised on a similar application previously filed and that the same is not founded on a substantive suit.

9. There was no response to the above argument by the applicant.

However, I have perused the record which shows that the applicant had filed an earlier application dated 18th October, 2012 seeking to have the respondent's corporate veil lifted and warrants of arrest issued against ALAN CLEOPHA MULANGO.

10. In his ruling of 16th November, 2012 on the aforesaid application, the Honourable Mr. Justice G.V. Odunga held inter alia that the applicant had not established the proper circumstances to warrant a lifting of the corporate veil. The Honourable Judge went ahead to state that it would not be possible for the court to lift the corporate veil and find only one (1) director liable in a situation where there were other directors acting for the company. It would appear from the aforesaid ruling that the Honourable Judge left it open for the applicant to file a fresh application citing all the directors of the company for contempt upon lifting the corporate veil. I am convinced therefore that the application is not *res judicata*.

11. This court is of the view that the respondent's argument that the application is not premised on a substantive suit cannot stand because the taxation proceedings giving rise to the aforesaid application originated from ELC NO. 252 OF 2008. There was thus no reason for the applicant to file a separate substantive suit alongside the application.

12. Having settled the above issues I now turn to the first issue which was raised by the respondent vide its Grounds of Opposition that the applicant's attempts at canvassing his constitutional rights should have been directed at the appropriate court as opposed to this court. The respondent also contended that Order 40, Rule 8 of the Civil Procedure Rules cannot apply in this instance.

13. On his part, the applicant submits that this court has jurisdiction to not only entertain his Motion but to grant the orders sought, since the respondent's deliberate refusal to comply with the order/decreed issued on 19th September, 2012 resulted in a violation of the applicant's rights under Articles 10, 27, 28, 29, 40 and 43 of the Constitution inter alia. The applicant therefore prays for general damages amounting to Kshs.50,000,000/= arising from violations of his fundamental human rights.

14. The applicant also submits that Order 40, Rule 8 of the Civil Procedure Rules together with the Companies Act grant him the right to approach the court and seek to lift the corporate veil of the respondent and cite its directors for being in contempt of the relevant court orders.

15. In its opposing arguments, the respondent contended that whereas there is no dispute as to its representation, the firm of advocates on record do not represent its directors, hence it was improper for the applicant to neglect to serve the said directors personally.

16. I have taken into account the respective positions taken by the parties. There is no doubt that a company is separate legal entity from its directors as stated in the celebrated case of *Salomon & Co Ltd v Salomon (1897) AC, 22. HL*.

17. It is trite law that much as a company is a separate legal entity, it cannot perform its functions on its own but does so through its directors.

18. The general rule on service is that personal service should be effected. In the instance of a corporation, *Section 101 (1) of the Companies Act No. 17 of 2015* provides as follows:

“A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office.”

19. However, where a corporation is represented by an advocate or firm of advocates, the practice has been that such advocate or firm of advocates is entitled to receive documents on behalf of the corporation, just like in any other advocate-client relationship.

20. It is not controverted that the firm of Wanjama & Co. Advocates received the application on behalf of the respondent, therefore the respondent was properly served through its advocates on record.

21. In the circumstances of this case I am of the view that it was necessary to effect personal service upon the directors since the applicant is seeking to lift the corporate veil to enable him make the directors personally liable.

22. The final issue argued is that the respondent has refused or neglected to satisfy the decree issued by Lady Justice Khaminwa. The applicant further urged this court to take note that no appeal has been lodged against the aforesaid order therefore this court should grant an order citing the company and its directors for contempt having failed to satisfy the decree.

23. The respondent strenuously opposed the prayer seeking to have it and or its directors cited for contempt. The respondent argued that the applicant has neither demonstrated that the respondent's directors have thwarted his efforts in executing the decree nor has he shown whether or not the company has attachable assets.

24. It is clear from the material presented before this court that the respondent has not refuted that it was at all material times aware of the existence of the order/decreed. Equally, the respondent has not presented any argument or evidence to indicate that it has complied or attempted to satisfy the said decree.

25. Further to the above, there is nothing to indicate that the ruling on taxation or the order/decreed has been challenged by way of appeal. It is thus evident that the respondent has not satisfied the order/decreed even after being served with penal notices.

26. It is evident that the applicant had previously taken out warrants of attachment and sale, the outcome of the same has not clearly been explained, neither is there any indication that investigations regarding the assets, if any, of the respondent were carried out by Keysian Auctioneers.

27. From the foregoing, this court comes to the conclusion that no evidence has been adduced to indicate that the applicant has exhausted all the available modes of execution. It is also the view of this court that the directors of the respondent have not been shown to have thwarted the applicant's efforts in executing the decree to warrant the lifting of the corporate veil.

28. In the premises, I am unable to grant the orders sought for the above reasons.

29. Consequently, the Motion dated 15.1.2019 is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 3th day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant/Advocate

..... for the Respondent/Client