



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 555 OF 2012

ALFATECH CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

WEST WING INVESTMENTS LIMITED..... DEFENDANT

RULING

1. Alfatech Contractors Ltd, the plaintiff herein, took out the motion dated 7th December 2017, in which it sought for the following orders:

a) Isaac Wanyoike Githiri , Obadiah Waikwa Wambugu, Grant Ochieng', Ben Ochieng' Ogonji, Anthony Gregory Mwenda, Alex Kareso, Alex Mbogo, and Solomon Ngali the directors of West Wing Investments Limited be summoned to court on a date to be fixed by this hounourable court.

b) The said directors be ordered to produce any books and documents to show assets of West Wing Investments Limited.

c) The date of the oral examination be fixed.

d) The directors be orally examined on West Wing Investments Limited's assets and means of satisfying the decree herein.

e) In default of appearance the court do order that the decree herein together with the party to party costs be executed against the said directors personally.

f) The costs of this application be provided for.

2. The motion is supported by the affidavit of Robert Kamau Kinyanjui. When served with the application West Wing Investments Ltd, the defendant herein filed the replying affidavit of Isaac Wanyoike Githiri to oppose the motion. The defendant voluntarily furnished the plaintiff with books of accounts and documents including bank statements in its possession to show the assets of West Wing Investment Ltd, by a consent order that one Isaac Wanyoike Githiri, the defendant's Finance Director be summoned to be the only director to be examined on behalf of the other directors.

3. With respect, I agree with the submissions of the defendant that prayers (a), (b), (c), and (e) of the motion are spent hence the only outstanding prayer is the one seeking for the oral examination of the director. Upon the examination of Isaac Wanyoike Githiri (PW1), learned counsels were allowed to file written submissions.

4. I have considered the evidence tendered by Isaac Wanyoike Githiri while being examined. PW1 stated that he is a consultant in financial advisory services hence he is in a better position to testify on behalf of the other directors over the financial status of the defendant company.

5. He averred that the plaintiff did some works for the defendant and a sum of ksh.2,750,000/= was paid to settle part of the debt. He also stated that the plaintiff demanded to be paid ksh.9,460,922/= which amount the defendant disputed.

6. PW1 further stated that initially the defendant found it difficult to settle the amount due to the fact that the amount due was disputed. The witness also stated that he is aware that the plaintiff obtained a decree in its favour for kshs.7,346,436/= with no order as to costs.

7. PW1 also provided the defendant's statement of accounts for the year 2011 which did not factor in the debt claimed since it was disputed. The defendant's witness further stated that the company business went under due to several factors but it did not inform the plaintiff that it had ceased operations and had sold its assets. PW1 said that the defendant is still willing to settle the decree but it has no funds to do so.

8. The defendant's witness further told this court that upon the company ceasing operations, it disposed of the existing assets and used its proceeds to settle undisputed business liabilities. PW1 also pointed out that during the period of 5 years in operation the shareholders never took any dividends despite injecting over ksh.7,500,000/= into the company business. The defendant PW1 stated that the defendant's insolvency was due to factors beyond the directors' control.

9. It is the submission of the plaintiff the directors of the defendant company deliberately failed to disclose the statement of accounts for the year 2014 and nine (9) months of 2015 thus preventing the plaintiff from knowing where the assets of the defendant was.

10. The plaintiff pointed out that as of 31.12.2013, the defendant had assets and cash amounting to ksh.7,955,913/= and in the absence of audited accounts the defendant will never know what happened to those assets. The plaintiff further pointed out that PW1 gave the defendant's asset list with no valuation and a list of assets sales of ksh.607,100/=.

11. It is said that the defendant failed to tender any document to prove how the sale was conducted and whether the proceeds of sale were banked. The plaintiff further averred that as of 13.12.2013, the defendant had assets worth ksh.7,955,913/= but two years later the assets could only raise ksh.607,100/= after disposal. The plaintiff urged this court to find that the defendant's directors have acted fraudulently in the manner they disposed of the assets. This court was therefore urged to lift the corporate veil and issue an order to compel the directors to settle the decretal sum.

12. The defendant opposed the plaintiff's submission to have the corporate veil lifted. It was pointed out that PW1 gave a detailed explanation showing that the defendant's business was struggling to the extent that it had no resources to sanction any audit for the year 2014/2015 therefore there was no deliberate act of non-disclosure so as to prevent the plaintiff from knowing where the assets of the defendant were.

13. It is also the submission of the defendant that it explained every single asset in its possession and how every single shilling was realized from the sale of assets was accounted for. The defendant averred that PW1 demonstrated that the directors acted in a manner that was reasonable in disposing of the company's assets contrary to what the plaintiff alluded.

14. The defendant further submitted that its directors had no reason whatsoever to defeat the applicant's claim for they even paid an amount of ksh.2,750,000/= therefore the corporate veils should not be lifted.

15. It is not in dispute that the bar for piercing the corporate veil is very high and it is a power which the court exercises sparingly. In **Ultimate Laboratories vs Tasha Bioservice Ltd Nairobi H.C.C.C. no. 1287 of 2000** the court stated *inter alia*:

“However, that the fundamental principle of incorporation may be disregarded, lifted or pierced in exceptional circumstances both under express statutory provisions..... and under judicial interpretation or intervention. As regards the later, English authorities establish the broad principle that the corporate veil will be lifted by the courts if among other situations, corporate personality is being used as a mask for fraud or improper conduct.”

16. In the matter before me this court has been beseeched to lift the corporate veil on the basis that the defendant's directors have acted fraudulently in the manner they disposed of the company assets and by also failing to provide a statement of account for the financial years 2014/2015.

17. Having considered the evidence presented by the defendant's witness (PW1) plus the facts he deponed in the replying affidavit he swore on 14.3.2018, it is apparent that the defendant gave a comprehensive explanation as to what led to the collapse of the defendant's business. It is stated that two new restaurants were set up next to the defendant's establishment have due to competition made the defendant's business dwindle.

18. It is also said that there was disruption of the defendant's business due to the disruption of customer parking and lack of access to car wash area. The defendant also stated that the directors injected more funds to keep the business afloat. There is also evidence that the defendant managed to pay the plaintiff prior to the filing of this sum a sum of ksh.2,750,000/=.

19. I am also convinced by the defendants oral explanation that the defendant was not in a position to carry out the auditing of the financial status of the defendant company for the year 2014/2015 due to financial constraints.

20. In my humble view, I am not convinced that the plaintiff has shown that the defendant's directors committed fraud or any acts that would defeat the plaintiff's claim using the corporate as a mask.

21. In the end, I find that the plaintiff has failed to convince this court to exercise its discretion to lift the corporate veil. I decline to do so by dismissing the plaintiff's motion dated 7th December 2017 in the circumstances of this case. A fair order on costs is to direct which I hereby do, that each party meets its own costs.

Dated, signed and delivered at Nairobi this 13th day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent