



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 335 OF 2014

KEMBI-GITURA & COMPANY ADVOCATES..... ADVOCATE

VERSUS

METRA INVESTMENTS LIMITED CLIENT

RULING

1. The advocate, **Kembi Gitura**, obtained judgment against **Metra Investment Limited** (hereinafter the client) for the Ksh 899,761.80 plus interest. The judgment amount was for taxed costs against the client.
2. As it will be noted the client is a limited liability company. The advocate on being unable to execute, against the client, for that judgment amount applied by Notice of Motion application dated 20th September 2018 to cross examine **Rahab Mukiyama** (hereinafter Rahab) a director of the client and for an order for the lifting of the client's veil of incorporation and the holding of the said director personally liable for the judgment amount.
3. That application came up before court severally. On 23rd October 2018 the advocate's counsel informed the court, in the presence of Rahab, that Rahab had agreed to pay the decretal sum due from the client. The matter was mentioned on 18th February 2019 when it became apparent Rahab had not paid the decretal sum as agreed. Rahab was then ordered to produce the books of account of the client to facilitate her cross examination. The matter was mentioned a few time thereafter and the cross examination of Rahab was set to take place on 25th November 2019. On that day Rahab failed to attend court. The advocate prayed that the client's corporate veil be lifted and Rahab be ordered to settle the decretal sum. The ruling on that request was reserved to today.
4. I need to state that at this stage I am unable to order the corporate veil be lifted for two reasons.
5. The first is that later on after this matter had been mentioned in court and in the absence of the advocate's counsel, I did see Rahab enter the court. It does therefore seem that Rahab did not refuse to attend her cross examination but rather she was late to attend court.
6. The second reason is that I form the opinion there is no evidence before me to enable me lift the corporate veil. This is because I am unable to find that the client was formed for the purpose wrongful or unlawful act and I am unable to find that the client was used as a vehicle of fraud. See the Canadian workers' compensation Appeal Tribunal Decision No. 656/93, 1995

“Courts and Tribunals have been prepared to look behind the corporate entity or corporate veil to prevent a perceived injustice which might result from adhering to the general rule of a separate legal existence for incorporated entities.”

There are rare circumstances however, where the courts have lifted the corporate veil to find that a corporation is in reality a true ‘agent’ or ‘puppet’ of its shareholders or its parent corporation. As a result, the separate entity has been ignored, and the ‘agent’ and ‘principal’ have been treated as one. This has occurred rarely, and it would appear that there is no clear rule as to when the veil will be lifted by the courts. It would seem the courts have seen fit to go behind the corporate veil in cases where:

- ***The corporation is a sham or cloak;***
- ***The corporation is formed for the purpose of perpetrating a wrongful or unlawful act;***
- ***The corporation is a vehicle for fraud;***

- *The corporation is an agent for the controlling operator;*
- *affiliated corporations are used for tax avoidance.”*

7. It is because of the above finding that I will give **Rahab** one more chance to present herself for cross examine and failure to attend such cross examination this court will be left with no other alternative but to assume that the company (the client) was indeed formed for the purpose of perpetuating fraud.

8. I make the following orders:

a. Rahab Mukiama shall attend court to be cross examined as sought in the Notice of Motion dated 20th September 2018, on a date to be given at the reading of this Ruling.

b. If Rahab Mukiama fails to attend that cross examination the court will be at liberty to grant orders as sought in the Notice of Motion dated 20th September 2018.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of DECEMBER, 2019.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Advocate

.....for the Client