



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 2285 OF 1996

POST BANK CREDIT LIMITED (IN LIQUIDATION) PLAINTIFF

VERSUS

NYAMANGU HOLDINGS LIMITED DEFENDANT

RULING

1. This Ruling is in answer to a Request by Post Bank Credit (in liquidation) (hereafter The Decree Holder) that this Court be pleased to lift the veil of incorporation of Nyamangu Holdings Limited (The Judgment Debtor) and to find the Directors of The Judgment Debtor personally liable for the Decree herein. Peter Karingu is said to be one of the Directors.

2. After the presentation of this suit on 12th September 1996, the Decree holder obtained Judgement against the Company on 26th June 2003 for the sum of Khs.21,628,161.55 together with interest thereon at the rate of 18% per annum compounded on monthly balances with effect from 1st May 1996 until payment in full plus costs of the suit.

3. Unable to trace the Assets of the Company for purposes of Execution of the Decree, the Decree holder, through a Motion of 6th December 2013 sought that Peter Karingu be summoned to attend Court for an Examination on the Assets of the Company and to produce all its Books of Account including but not limited to the Company's Annual Financial Statements. That request was granted by Hon. Gikonyo J. on 24th February 2015. Mr. Karingu was examined on oath on 6th October 2017.

4. An issue now raised by Mr. Karingu is that there is no application before the Court for the piercing of the corporate veil. Whether or not the occasion has arisen for lifting of the veil is a preliminary question that calls for an early determination.

5. The basis upon which the Court ordered the examination of Mr. Karingu was the Company's Notice of Motion dated 6th December 2013 which had the following prayers:-

1. THAT Peter Karingu of St. Ellis House, City Hall Way, Nairobi, being one of the Directors of the Defendant (judgement debtor) herein be summoned to attend this Court for his examination on the Judgement debtor's assets, and to produce all its books of account including but not limited to the judgement debtor's Annual Financial Statements.

2. THAT the costs of this application be provided for.

6. To be observed is that neither in the main body of the Application nor in the Affidavit in support of the Application is there a prayer for the lifting of the veil upon conclusion of the examination of the Director. A question begs as to whether a Court should entertain and order for the lifting of the veil when there is no formal application for such orders.

7. Although not expressly stated, the Notice of Motion dated 6th December 2013 was brought under the auspices of Order 22 Rule 35 of the Civil Procedure Rules which provides:-

“Where a decree is for the 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”.

8. As correctly observed by Hon. Gikonyo J. when granting the permission for the Examination of Mr. Karingu,

“...information which may be provided in the Examination of a person summoned under Order 22 Rule 35 alone or together with other relevant evidence which the Judgment-holder may command, could be a basis for the lifting of the veil as long as it satisfies the threshold of the law”.

9. Yet the lifting of the veil is not a light matter because it opens up the Director or members of the Company to personal liability of the debts of the Company. This Court takes the view that if it is contemplated by a Decree holder that the Examination under order 22 Rule 35 should lead to the lifting of the veil then a formal request should be made simultaneously with the application for examination. If like here, no such formal application accompanied the request for examination, but the Decree holder wants to build on the information yielded at examination to lift the veil, then the Decree holder needs to bring a formal application for the order. The lifting of the veil will have drastic consequences on the Directors or members of a Company and it is only fair that they get a clear signal that they may be required to meet such dire consequences. That clear signal has to be by way of a Formal application.

10. I think that this is the correct approach because in the two of the cases (Masefield Trading (k) ltd vs. Rushmore Company Ltd & another [2008] eKLR and Corporate Insurance Co Ltd vs. Savemax Insurance Brokers Ltd [2002] EA 34(CAK) 41 cited to me by the Decree holder in support of their request, there were formal applications for the lifting of the veil.

11. The informal request for lifting of the veil is hereby declined. Let the Decree holder move Court by way of a Formal Application.

Dated, Signed and Delivered in Court at Nairobi this 6th day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Karagi h/b Chacha Odera for Applicant

Muturi for the Director

Nixon - Court Assistant