



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 509 OF 2013

VIMAL VELJI SHAH.....PLAINTIFF

VERSUS

CHEMAFRICA LTD.....1ST RESPONDENT

SRUNGARAPU RAJA SEKHAR.....2ND RESPONDENT

ABOTULA VENKATA

SATHYA NARAYANA VASU.....3RD RESPONDENT

SURYADEVARA

VENKAJEWAR RAO.....4TH RESPONDENT

SWATHIKA INVESTORS LIMITED.....5TH RESPONDENT

BABA ENTERPRISES LIMITED.....6TH RESPONDENT

RULING

1. In a ruling dated 25th November 2014, Judgment on admission of the sum of Kshs.17,000,000/= was entered in favour of the Plaintiff against the Defendant herein. About one year later, on 8th December 2015, the Plaintiff has sought the following Orders against the Defendant and five other Respondents:-

1. THAT this Honorable Court be pleased to lift the Corporate veil of the Respondent/Judgement Debtor Company herein for execution purposes by the Applicant/Decree Holder;

2. THAT additionally, the Honorable Court be pleased to order that the Directors including those of the shareholders of ChemAfrica Limited be held personally liable for the decretal sum of Kshs.27,834,786.00 which sum is inclusive of 12% interest per annum that has accrued up to the full recovery of the amount;

3. THAT in the alternative, the Honourable Court directs that the personal assets and properties of

the Respondent/Judgement Debtor's directors including those of the Shareholders be attached and /or auctioned in full recovery and settlement of the outstanding decretal sum;

4. THAT the Applicant be allowed to execute against the Directors including those of the Shareholders of the Respondent so as to enjoy the fruits of the Judgement.

5. THAT the costs of this Application be borne by the Respondents/Judgement Debtors.

6. THAT the Honorable Court grants any other remedy as it may deem fit to ensure that justice is served.

2. Of the five Respondents, three of them being Srungarapu Raja Sekhar, Abotula Venkata Sathya Narayana Vasu and Suryadevara Venkajewar Rao are said to be Directors of the 1st Respondent while Swasthika Investors Limited and Baba Enterprises Limited are its Shareholders.

3. In a Supporting Affidavit sworn on the same day as the Application, the Plaintiff avers that on 22nd June 2015 the Court issued a final Decree herein when it ordered that interest at 12% per annum was payable on the principal debt from the date it was advanced until payment in full. The Plaintiff further avers that on 28th September 2015, the Court issued a Warrant of Attachment to Express Agency Auctioneers in order to realize the sum of Ksh.27,834,286.60 which remained unsatisfied.

4. That on or before the said date, the Decree Holder learnt that the 1st Respondent/Judgement Debtor had closed the Company and moved to an unknown location to frustrate execution of the Decree. That the Directors of the 1st Respondent have hidden the Company assets and have been uncooperative in all ways.

5. In paragraph 12 of that Affidavit, the Plaintiff depones as follows:-

“THAT the 1st Respondent/Judgement Debtor's closure of the physical Company and relocation to an unknown destination was fraudulent and inconveniencing, hence realization of the decretal sum has been rendered futile and for that reason the Applicant/Decree Holder is seeking Court to lift the veil so that the Directors including those of the shareholders of the 1st Respondent can be held personally liable because the Company is still in existence”.

6. The 2nd, 4th, 5th and 6th Respondents resisted the Application by filing Grounds of Opposition on 30th March 2016 while the 1st Respondent filed Grounds of Opposition on 26th January 2016 and a Replying Affidavit sworn on 26th January 2016 by its Advocates Maureen Maitai. Taken together the Application is opposed on the following grounds:-

- The Application is premature and irregular as no Leave to execute the Decree without costs was sought by the Plaintiff contrary to Section 94 of the Civil Procedure Act.
- No evidence was exhibited to prove any relationship between the 2nd to 6th Respondents and the Defendant.
- No evidence had been given on attempts at execution.
- The Plaintiff had not given particulars of fraud and/or dishonesty on the part of any of the Respondents.

7. In a further Affidavit sworn on 21st April 2016 by Diana Nthiwa, Counsel for the Plaintiff, the Plaintiff sought to address some of the issues raised by the Respondents in their Reply. Counsel averred that the High Court has discretion to order for Execution of a Decree before Taxation of Costs. That an Application was made to the Registrar who issued the Decree and subsequent Warrants of Attachment having followed due process. That at any rate the Plaintiff was yet to execute the Warrants because upon the Plaintiff learning that the Defendant had closed shop, no execution could proceed since there was no property to be attached.

8. Counsel also displayed a Search from the Company Register showing the Shareholders and Directorship of the 1st Respondent as proof of the relation between the Company and the 2nd to 6th Respondents.

9. The Application was argued by way of Written Submissions filed by Counsel for the respective parties. The Court has read and understood those submissions.

10. This court has understood the Plaintiff to be seeking that, the corporate veil of the 1st Respondent be lifted because its Directors have committed a fraud and/or are guilty of improper conduct. It is said that the Directors have hidden assets of the Company so as to avoid execution of the Court process. It is also said that the Company has closed and moved to an unknown location. All this has been done while the Company continues to fail and refuses to settle the Decree herein.

11. As a broad Principle, a Court will lift the Corporate veil if, inter alia, the device of incorporation is being used as a cover for fraud or improper conduct. But it is not one to be done lightly or willynilly. It is a measure of last resort. For the current Application to succeed the Plaintiff needed to demonstrate, to the standard of proof required, by law, that the 2nd – 6th Respondents are guilty of fraud and/or improper conduct.

12. As correctly submitted by the Respondents' Counsel allegations of fraud must be proved to a standard above a balance of probabilities but below reasonable doubt. The Court of Appeal in the case of PAMBA ONG'WENO AMILA VS. JOHN JUMA KUTOLO[2015] eKLR cited by Counsel had this to say;-

'Fraud is a conclusion of law. The facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent....We also bear in mind that allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt''.

13. Is there sufficient evidence that the Respondents have committed fraud? The Plaintiff sought to prove that fraud by making the following averments in his Affidavit of 8th December, 2015:-

- THAT on or before the said dated, the Decree Holder learnt that the 1st Respondent/Judgement Debtor had closed the Company and moved to an unknown location to frustrate execution of the Judgement.
- THAT all efforts to contact and/or engage the 1st Respondent proved futile since the Directors have hidden their assets and have been uncooperative in all ways.
- THAT the hiding of the assets and closing shop is fraudulent and continues to occasion massive loss to the Applicant/Decree Holder.
- THAT the 1st Respondent/Judgement Debtor's closure of physical Company and relocation to an unknown destination was fraudulent and inconveniencing, hence realization of the decretal sum has been rendered futile and inconveniencing, hence realization of the decretal sum has been rendered futile and for that reason the Applicant/Decree Holder is seeking Court to lift the veil so that the Directors including those of the Shareholders of the 1st Respondent can be held personally liable because the Company is still in existence.

These were reiterated by the Plaintiff's Advocate in her Affidavit of 21st April, 2016.

14. Given the standard of proof required by law, this Court is of the view that the allegations made in the Plaintiff's Affidavit are too general. It would have been expected that the Plaintiff would furnish more cogent evidence, for instance;-

i. The date or about the date when the 1st Respondent moved its operations. Was this prior or after to the date of filing suit or date of judgment?.

ii. A description of the assets allegedly hidden.

iii. Efforts, if any, made by the Plaintiff or his agent to trace the current location of the Company and its assets.

iv. Details of efforts allegedly made to contact or engage the Defendant Company.

15. This Court finds the allegations made by the Applicant to be so unspecific that they cannot establish fraud or misconduct on the part of the Respondents even in the absence of a rejoinder by the Respondents. It follows that the plea for lifting of the Corporate veil must fail.

16. The Notice of Motion dated 8th December, 2015 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 13th day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Kahi for Ndhiwa for Plaintiff

Ngunju for Maitai for Respondent

Alex - Court Clerk