



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 806 OF 2003

CECILIA ODURO, suing as the administrator of the

Estate of the late MELCILLIUS ODURO...PLAINTIFF/APPLICANT

- VERSUS -

1. PRINCETON LAUREATE ACADEMY LIMITED.....DEFENDANT

2. KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

THE REGISTRAR OF COMPANIES.....1ST INTERESTED PARTY

KAMAL HARISH TOLLIA.....2ND INTERESTED PARTY

RULING

The Notice of Motion before the court is dated **29TH April 2015** filed under Section 339(6) of the Companies Act Cap 486; Section 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 51 Rule 1, Order 1 rule 3 and Order 5 rule 17 of the of the Civil Procedure Rules.

The Applicant seeks the following orders:-

1. That an order do issue directing the Registrar of Companies to restore the name of the 1st Defendant's Company to the Register of Companies.
2. That an order do issue directing the Registrar of Companies to cause a notice to be published in the Kenya Gazette notifying the public at large of the restoration of the 1st Defendant's name in the Register of Companies.
3. That in the alternative and without prejudice to the foregoing this Honourable Court be pleased to enjoin the 2nd Interested party **Kamal Harish Tollia**, the director of the 1st Defendant in this suit.

4. That this Honourable Court be pleased to order that 2nd Interested Party **Kamal Harish Tollia** be served by way of substituted mode of service or as the court may deem fit and appropriate in the circumstances.
5. That the court be pleased to issue any other order it deems fit to grant in the interest of justice.
6. That costs of this application be in the cause.

The application is premised on the grounds set out therein namely, that the Applicant has a legitimate claim against the 1st and 2nd Defendants as the substratum of the suit is general and special damages emanating from loss of expectation of life of their child occasioned by acts of both the 1st and 2nd Defendants, that the Applicant recently learnt that the 1st Defendant's name has been struck out from the Register of Companies of which she is aggrieved as the matter is still pending in this court, the applicant stands to suffer substantial loss and damage should the name of the 1st Defendant not be restored in the Register of Companies; that there is need to enjoin the interested parties to the suit as the same will assist the court to better determine the issues herein; that the physical address of the 2nd Interested party is unknown save for their last address; that it is only fair and in the interest of justice to allow the proposed application.

The application is supported by affidavit of **Elizabeth Gicheru** sworn on **29th April 2015** with annexures thereto. The said affidavit expands mainly the above said grounds.

The 2nd interested party has objected to the application through Grounds of Opposition which are to the effect that –

- i) The prayers sought by the Applicant against the 2nd Interested party clearly negates the doctrine of Separate legal entity;
- ii) The application is incurably defective in law and or otherwise futile
- iii) The application is an abused of the court process
- iv) The 2nd interested party stands to be highly prejudiced should the application be allowed.

I have carefully considered the application, affidavit in support thereof, grounds of opposition and the submissions filed by the Applicant and 2nd Interested party. It appears clearly that the de-registration by the Registrar of Companies of the 1st Defendant Company from the Register of Companies will be detrimental to the Applicant as her claim will not be fairly determined without such an important party in the suit. Since the Registrar was served with this application and has not found it necessary to appear to explain the reason behind the de-registration, the Registrar of Companies is hereby directed to restore the name of the 1st Defendant's Company to the Register of Companies.

The applicant has also sought orders that the 2nd Interested party be joined in the suit and that he be served by way of substituted mode of service primarily because as a Director the 1st Defendant, he might shed more light on the claim and also assume the liability in case the 1st Defendant fails to fulfil its obligations. Though the 2nd Interested Party has claimed that he is a separate legal entity from the 1st Defendant, it remains a mystery why the 1st Defendant was de-registered as the Registrar has neither entered appearance nor filed a reply to the application. It is not disputed that the 2nd Interested party was a Director of the 1st Defendant and has not claimed any prejudice he is likely to suffer if he is joined in these proceedings.

In **Nairobi HCCC No. 1287 of 2000 Ultimate Laboratories vs Tasha Bioservice Limited** (unreported) the court expressed itself as follows -

“However, that 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 latter, 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 conductI don’t agree that the court does not have the power in an application in execution which is grounded under the above provisions as well as the inherent power of the Court and all other provisions of the law to lift the corporate veil of the company and order the director to personally discharge the debts of the company.”

Therefore, in order for the issues to be fully and fairly determined, it is necessary for the 2nd interested party to be joined in these proceedings.

The application dated 29th April 2015 is allowed. Costs shall be in the cause.

Dated and delivered at Nairobi this 3rd Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE