



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 728 OF 2000

ELECTROWATTS LIMITED.....PLAINTIFF

VERSUS

COUNTRYSIDE SUPPLIERS LIMITED.....1ST DEFENDANT

JOHN MUTUTHO.....2ND DEFENDANT

R U L I N G

1. The Application before this Court is the Notice of Motion brought by the Plaintiff dated 4th April 2014. The same seeks the leave of the Court for the Plaintiff to execute the judgement debt as against the second Defendant and one **Daniel Mututho Njenga** as directors of the first Defendant jointly and/or severally. The Application is brought under the provisions of **Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as **section 3A** of the *Civil Procedure Act*.

The Grounds upon which the Application is based are as follows:

- “1. THAT the Plaintiff obtained judgement against the 1st Defendant herein on 27th September 2000 for breaching its contractual obligations against the Plaintiff.**
- 2. THAT subsequently, the Plaintiff obtained a Decree on 16th November 2009 for Kshs. 1,399,620 with interest at 21% p.a. from 19th April 2000 against the 1st Defendant.**
- 3. THAT since obtaining the decree, the Plaintiff has made numerous attempts to execute against the 1st Defendant but the same have been unsuccessful as the 1st Defendant has no attachable assets.**
- 4. THAT the said JOHN MICHAEL NJENGA MUTUTHO and DANIEL MUTUTHO NJENGA entered into contract as the 1st Defendant knowing fully well that the 1st Defendant could not fulfill its contractual obligations without liability befalling them as directors.**
- 5. THAT it is clear that the said JOHN MICHAEL NJENGA MUTUTHO and DANIEL MUTUTHO NJENGA as the directors of the 1st Defendant are using the company as a means of perpetrating fraud.**

6. THAT the Plaintiff ought to be allowed to execute against JOHN MICHAEL NJENGA MUTUTHO and DANIEL MUTUTHO NJENGA as the directors of the 1st Defendant so as to enjoy the fruits of judgment.

2. The Application was supported by the Affidavit of the Managing Director of the Plaintiff company one **Steven Elkington** sworn on even date. The deponent traced the history of this matter including the entering of summary judgement as against the first Defendant in the amount of Shs. 1,399,620/- on 27th September 2000 per **Hewitt J.** The Preliminary Decree was obtained on 16th November 2009 in the said amount plus interest at Shs. 2,799,087.80. However, Mr. Elkington detailed that once the auctioneers had been appointed to execute the Preliminary Decree, they were served with a Notice of Stay filed by 2 individuals who claim that the goods attached by the Auctioneers belonged to them. Thereafter, the auctioneers, Expeditious Auctioneers, were asked to establish other assets of the first Defendant but they were only able to determine assets owned by one of the first Defendant's directors – the second Defendant. The deponent maintained that the said directors were well aware that the first Defendant was a shell company with no attachable assets. They had proceeded to enter into contractual obligations with the Plaintiff through the first Defendant company, in order to defraud the former. As a result, Mr. Elkington requested the Court to lift the corporate veil of the first Defendant so that the Plaintiff could obtain the fruits of its judgement.

3. It is clear from the Affidavit of Service sworn by one **Samwel Kinyua Ndege** dated 17th April 2014 that the second Defendant herein was served with the Application before Court at his office at NACADA (National Control Against Drug Abuse Authority) on 15th May 2014. He has not chosen to respond to the Application. Before Court on 27th May 2014, Mrs. Koech, the learned counsel for the Plaintiff, took the Court through the Application and the Court process since the inception of the suit in the year 2000. Counsel noted the several attempts made to execute as against the first Defendant, which had not been successful. She maintained that the first Defendant company had been sustained by the second Defendant and his co-director one **Daniel Mutitho Njenga** to perpetuate the fraudulent activities of the first Defendant. The second Defendant was a well-known person and was in employment earning a salary. He had sought advice of counsel time and again to seek stay of execution. As a result, it was the Plaintiff's prayer that the Court do and allow the Plaintiff to go against the directors. Learned counsel for the Plaintiff then made the extraordinary remark that as the second Defendant was a party to the suit, the Plaintiff had the option to pursue judgement against him. Counsel noted that the second Defendant had raised a Counterclaim in which he resisted his enjoiner as a party to the suit. However the Plaintiff believed that it was still in order for it to seek prayers as per the Application and that the directors should bear the liability of the first Defendant. Finally, counsel referred this Court to the Plaintiff's list of authorities dated 27th May 2014 more particularly **Halsbury's Laws of England 4th Edition Vol 7 (1), Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd (2002) 1 EA 41, Pioneer Laundry and Dry Cleaners Ltd v Minister of National Revenue (1939) 4 All ER as well as Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor. (2014) eKLR.**

4. As regards the lifting of the corporate veil, **Paragraph 90 of Halsbury's Laws of England 4th Edition** (supra) details as follows:

“90. Piercing the corporate veil. Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.

5. That position has been visited on many occasions by the Courts in Kenya. Indeed the Plaintiff cited the

finding of **Ringera J.** in the **Corporate Insurance** case (supra) which this Court quoted in its Ruling in **China Wu Yi Company Ltd v Edermann Property Ltd & 2 Ors (2013) eKLR** as follows:

“Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman v Saloman & Co Ltd (1897) A C 22 HL* the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court’s attention was drawn to the finding of Ringera J (as he then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor. HCCC No. 125 of 2002 (unreported)* when he stated:

“The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.”

Later in that suit this Court detailed:

“13. The Plaintiff submitted that this case is very much along the lines of *Jones & Another v Lipman & Another (1962) 1WLR 832* where Russell J. had held:

‘... if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company’.

It had also referred to the local case of **National Social Security Fund Board of Trustees v. Ankhan Holding Ltd & Ors. (2006) eKLR** as per Ochieng J. quoting from the decision of Lord Hoffman in **Standard Chartered Bank v. Pakistan National Shipping Corporation (2002) UKHL 43** as follows:

‘and just as an agent can contract on behalf of another without incurring personal liability, as an agent can assume responsibility on behalf of another for the purpose of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying ‘I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable’.”

6. In 2013 my learned brother **Mabeya J.** expressed his view on the topic in the case of **Multichoice Kenya Ltd v Mainkam Ltd & Anor. (2013) eKLR** wherein he detailed:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon (1897) A.C. 22* Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

Perhaps the most recent decision of the High Court as cited by the Plaintiff in this connection is the finding of my learned brother, **Gikonyo J.** in the **Kolaba Enterprises** case (supra). The Judge detailed as follows:

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *SALOMON & CO LTD v SALOMON [1897]*

A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. ”

7. The Plaintiff referred to the Ruling of **Hewett J.** delivered on 27th September 2000 when the learned Judge allowed summary judgement for the Plaintiff against the first Defendant for Shs. 1,299,620/-with interest thereon at 21% per annum from filing to the date of payment and costs. He then gave the first Defendant unconditional leave to defend in respect of the balance of the Plaintiff's claim being Shs. 275,250/-. The Judge then went on to say:

“that brings me to the question of the 2nd Defendant and whether he was correctly joined. That I think is a matter for the trial. I think there is a triable issue as to whether he is liable at all for the amount claimed and I give him unconditional leave to defend.”

The Judge's finding must be read alongside the Plaintiff's claim in the simple Plaint herein a copy of which was annexed to the Affidavit in support of the Application by the said Steven Elkington. Paragraph 4 thereof simply reads:

“The plaintiff's claim against the defendants jointly and severally is for the sum of Kshs. 1,674,620 together with interest thereon at the rate of 21% per annum being monies due and owing on account of goods ordered and supplied to the 1st defendant at the request of the 2nd defendant particulars whereof are within their knowledge and information.”

8. There is absolutely no mention of impropriety, fraud or dishonourable conduct on the part of the 2nd Defendant which is why **Hewett J.** gave him unconditional leave to defend. This case is now 14 years old and no attempt has been made by the Plaintiff to pursue its case against the second Defendant. The Court file contains a history of attachments and attempted execution as against the first Defendant. Finally frustrated, the Plaintiff comes before this Court to ask it to lift the veil of incorporation as regards the first Defendant. Why has the Plaintiff chosen this route rather than put down the case for hearing as against the second Defendant? Presumably only time will provide the answer to that question as the second Defendant has been given unconditional leave to defend very nearly 14 years ago.

9. As a result, I see no good reason for this Court to lift the veil of incorporation and allow execution as against the directors of the first Defendant Company. That position may have been different if there had been any allegations of fraud and dishonesty as against those directors. However, it is only in the present Application before Court that this suggestion would seem to have arisen. I cannot accept the same. Accordingly, the Plaintiff's Notice of Motion dated 4th April 2014 is dismissed with costs to the Defendants.

DATED and delivered at Nairobi this 16th day of July, 2014.

J. B. HAVELOCK

JUDGE