



**Okoyo v Whitty Wash Limited (Miscellaneous Application
E026 of 2022) [2024] KEELRC 1804 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1804 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E026 OF 2022**

**AK NZEI, J
JULY 11, 2024**

BETWEEN

MORRIS OTIENO OKOYO APPLICANT

AND

WHITTY WASH LIMITED RESPONDENT

RULING

1. On 11th May 2023, this Court delivered a Ruling pursuant to the Applicant’s Amended Notice of Motion dated 30th September 2022 and ordered:-
 9. That the Respondent’s directors namely, Mehul Suryakant Govind Vaja, Victor Arara Were And Yogesh Suryakant Govind Vaja, do attend Court personally and be examined on the Respondent’s property and means of satisfying the decree in Mombasa CM ELR No 106 of 2018, failing which the Court shall make further and/or other orders which may include piercing and/or lifting the corporate veil and allowing execution of the decree in issue against the Directors personally.
 10. A date for such examination shall be fixed at the Court’s Registry, and the Deputy Registrar shall issue summons for service on the Respondent’s Directors named in this Ruling.
 11. In the meantime, the Applicant shall, within 14 days of this Ruling, file certified copies of the Court’s Judgment and decree in Mombasa CM ELR Case No 106 of 2018.”
2. Certified copies of the aforesaid Court’s judgment and decree have since been placed on this Court’s record herein.
3. The cause herein was subsequently fixed for examination of the Respondent’s Directors. On 9/11/2023, Yogesh Suryakant Govind Vaja, one of the Respondent’s directors, appeared for examination in open Court. He told the Court that he is a director of the Respondent company



holding 500 ordinary shares and that his brother, Mehul Suryakant Govind Vaja, was the other shareholder/director. He told the Court, on oath, that the Respondent company is not currently in business, has no assets or debtors; and that he had the company's audited financial statement for the year ended 31/12/2017. That the audited financial statement had been prepared by Fuad Rashid & Company Certified Public Accountants, and that the said director had signed it. He identified the statement, which the Court marked as MFI-1.

4. The director further told the Court:-
 - a. that the Respondent company was a boiler operator (company) which generated steam for the director's (dry cleaning) machines.
 - b. that the machines were leased from the owners of the property/premises where the company business operated, and that as the owners of the premises wanted to sell their property, the said director left his old machines there and got financial assistance from his brother and bought smaller/domestic machines (at Kshs 340,000) which could not be used for commercial purposes. That those machines went down due to the salty water in Mombasa.
 - c. that the director again got financial assistance from his brother and bought two used commercial machines from Nairobi at Kshs 600,000. That at this time, the director was not doing the Respondent's business, as he had switched to Zero Zero Launderers Limited, which had been incorporated in 2019. That the Respondent's business had collapsed at that time.
5. Cross-examined by Counsel for the Applicant, the said director told the Court that he was aware of the Court's decree in issue, that the Respondent company had not been dissolved, that he (the director) had not shown the Respondent company's bank statements and that he had not shown the Respondent's audited accounts for the years that it had been in business, other than the year 2017. That he did not have a resolution of the Respondent company adopting the 2017 audited financial statement. That the new company incorporated by the director in 2019, Zero Zero Launderers Limited, had paid the auditor's fees.
6. The Court further heard from the said director, Yogesh Suryakant Govind Vaja, that his brother, from whom he alleged to have gotten financial assistance to buy new business machines, was a co-director of the Respondent company, and that he did not have evidence of the alleged financial assistance.
7. The said director further stated that the domestic and second hand commercial machines that he bought from Nairobi were being run by the Respondent company. That those machines are being operated by the new company, Zero Zero Launderers Limited.
8. The Respondent's aforesaid audited financial statement was produced in Court by Rashad Ramadhan from Faud Rashid & Company (CPA). Cross-examined, the said person, who told the Court that he was not a registered auditor himself, told the Court that the audited financial statement was prepared in 2018, in a month that he could not remember.
9. One of the documents annexed to the Applicant's amended Notice of Motion dated 30/9/2022 is a CR12 on the Respondent company, shown to have been issued on 24/2/2022. According to the information contained in the said document, the Respondent company was registered on 19/10/2000. The Respondent's directors did not say anything regarding the company's operations between the said date of registration and 2019, and particularly its financial status and business operations during that period. The Court was not told whether the company acquired any assets during that period and if so, what became of such assets and when.



10. The director (Yogesh Suryakant Govind Vaja) did not demonstrate the existence of any demarcation line between the Respondent's directors' personal business/financial affairs and those of the Respondent company. The source of the money allegedly used by the directors to acquire machines (tools of trade) for a new company (Zero Zero Launderers Ltd) was not disclosed. All that the director told the Court was that he got financial assistance from his brother, who is a co-director of the Respondent company. Was this money from the Respondent company's business." The Court was not told, and the said co-director did not appear in Court for examination as summoned. It is evident from matters stated on oath in Court by the Respondent's said director that the Respondent company is a shell company used by its directors as a vehicle for various financial manoeuvres.
11. I have also noted from the said director's evidence in Court and from documents filed by the Applicant that the new company, of which Yogesh is the sole director, Zero Zero Launderers Limited, was incorporated in the year 2019, the same year that the Court's decree in Mombasa CM ELR Case No 106 of 2018 was passed. Was this incorporation meant to defeat the decree that would flow from the aforesaid case."
12. It was stated as follows in the case of *Jian Nan Xing v Cok Fast-st Company Limited* [2018] eKLR:-

"...the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are, inter alia, where there is no real formal legal separation between the company and its shareholders' personal financial affairs and/or that the company is just a sham or the company's actions were wrongful and fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the company and/or design a scheme to perpetrate financial fraud, and/or if the company's creditors suffer unjust cost, that is, they did business with the company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or directors personally liable."
13. In *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR, the Court stated as follows:-

"The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for ends of justice. Thus, jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues."
14. As stated in *Lucy Mukembura Kimani v Nzuri Feeds Suppliers Limited* [2021] eKLR, Courts in Kenya will only allow for the piercing of the Corporate veil when the following two requirements are met:
 - a. where the company is a mere instrumentality or alter ego for the shareholders or directors in question such that there is such unity of interest and ownership that one is inseparable from the other, and,
 - b. the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote an injustice.
15. In view of all the foregoing, and taking into account the fact that piercing of a corporate veil is an equitable remedy, it is my finding that the case herein is an appropriate one where the corporate veil must be pierced and/or lifted. Consequently, and having considered the submissions filed, the Respondent's corporate veil is hereby lifted, and personal liability is hereby imposed on the Respondent's directors, Mehul Suryakant Govind Vaja, and Yogesh Suryakant Govind Vaja, regarding



the sum of Kshs 1,023,741 decreed in Mombasa Chief Magistrate’s Court ELR Case No 106 of 2018. Warrants of attachment and sale of their property in execution of the said Court’s decree, or any other form of lawful execution of the said Court’s decree, shall issue against the said persons/directors.

16. Each party shall bear its own costs of the proceedings herein.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH JULY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Applicant

.....Respondent

