



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 175 OF 2015

ASTER HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

THE CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

CAROGET INVESTMENTS LIMITED..5TH DEFENDANT/RESPONDENT

RULING

1. The Decree Holder/Applicant filed a Notice of Motion dated 5th March, 2018 in which it sought among other orders that the Directors of the 5th Judgement Debtor/Respondent be orally examined on oath as to the assets and means of satisfying the decree herein. Among the other orders sought was an order for lifting of the corporate veil of the Respondent.

2. On 31st October, 2017 this Court entered Judgement in favour of the Applicant which was to the effect that the Applicant was the lawful owner of the property which was the subject matter of the suit before the Court. The Court also awarded general damages of Kshs.100,000,000/= to the Applicant.

3. The Applicant has tried to locate the assets of the Respondent with a view to executing but has been unable to do so as neither the registered office of the Respondent nor its assets can be traced. The Applicant contends that it has discovered that the Directors of the Respondent are Esther Njeri Gitau and Acres and Homes Limited. The Applicant further discovered that the Directors of Acres and Homes Limited are Kamau Kabogo, Patrick Gichure Kamau, Esther Njeri Gitau and William Kabogo Gitau.

4. The Applicant contends that during the hearing which culminated in the decree herein, William Kabogo Gitau who is a Director of Acres and Homes Limited testified on oath that he was a Director of the Respondent which was not the case. The Applicant therefore argues that this was a deliberate move to mask the true identity of the Respondent and that there is need to pierce the corporate veil of the Respondent and deal with the Directors behind the Respondent.

5. The Respondent opposed the Applicant's application through grounds of opposition filed on 11th June, 2018. The Respondent contends that the Applicant's application is premature in that costs have not been taxed or leave to execute before taxation has been obtained; that the Applicant has not demonstrated any fraud on the part of the Respondent; that the decree for Kshs.100,000,000/= does not arise from a contractual relationship between the Respondent and the Applicant; that there is no demonstration that the Respondent is unable to satisfy the decree; that the Applicant has not exhausted avenues for execution; that Acres and Homes Limited cannot be held liable for the liabilities of the Respondent; that Kamau Kabogo, Patrick Gichure Kamau and William Kabogo Gitau are not directors of the Respondent who can be summoned to be cross-examined as to the financial statements of the Respondent and that the Applicant's application is an abuse of the process of the Court.

6. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The main issue which emerges for determination is whether the corporate veil of the Respondent should be

lifted and the orders related to the lifting granted as prayed by the Applicant.

7. There is no doubt that a company is at law a separate legal entity which is different from its shareholders and subscribers. However in some instances, the corporate veil of a company can be pierced. The circumstances under which the corporate veil of company may be pierced were well set out in paragraph 90 of Halsbury's Laws of England 4th Edition Vol 7 (1) which states as follows:-

“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.”

8. In ***Githunguri Dairy Farmers Co-operative Society vs Ernie Campel & Company Limited and another [2018] eKLR*** Waki JA held that the law is that Courts will disregard the veil of incorporation where it is apparent that the device of incorporation is used for some illegal, fraudulent or improper purpose.

9. In ***De Ruiters Roses East Africa Limited Vs Alora Flowers Limited [2006]eKLR*** Justice Azangalala as he then was held as follows;-

“The veil may however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or a device for enabling the Directors to hide themselves from the eyes of equity.”

10. In determining whether to pierce the corporate veil or not it is important to note the background of this application. This Court entered Judgement in favour of the Applicant. In its bid to execute the Judgement, the Applicant can neither trace the assets of the Respondent nor its offices. In the Judgement which was rendered, the Court found that the Respondent had illegally obtained title to part of the Applicant's property. During the evidence on part of Respondent, William Kabogo Gitau testified on oath that he was a Director of the Respondent. This is not true as the Directors of the Respondent are Esther Njeri Gitau and Acres and Homes Limited. This is confirmed by CR 12 annexed to the Applicant's application and marked as “NP3”.

11. By claiming that he was a Director of the Respondent which he was not, William Kabogo Gitau was being dishonest and was out to cover the Respondent from the eyes of equity. It has now turned out that William Kabogo Gitau is a Director in Acres and Homes Limited which is one of the Directors of the Respondent. The Respondent was found to have engaged in fraudulent activities in as far as registration of the suit property in its name was concerned. It is therefore clear that where issues of fraud and dishonesty are raised, the Court can pierce the corporate veil so as to see who the Directors are.

12. Lifting of corporate veil has nothing to do with whether costs have been taxed or not. Lifting of the corporate veil is concerned with unmasking the veil to see who are the true persons behind the company. The Applicant has raised concerns that it cannot trace the assets of the Respondent. These concerns are raised in an affidavit. The Respondent has not countered the same in a Replying Affidavit. The Respondent has only filed grounds of opposition which cannot answer issues of facts. In as much as I agree with the holding in ***Electrowatts Limited Vs Countryside Suppliers Limited & Another [2014]eKLR*** which quoted the case of Corporate Insurance Brokers Ltd & Another where it was held that the veil of Incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts is thus insolvent, the Court went further to state that a corporate veil can be lifted where there are allegations of fraud or dishonesty against the Directors. In the instant case, the Applicant has annexed the Court Judgement where it was found that the Respondent had acted fraudulently in the registration of the title in its name. One of the Directors of the Respondent is Acres and Homes Limited. It is necessary to lift the corporate veil to see who are the Directors of Acres and Homes Limited which committed the fraud. The CR 12 in respect of Acres and Homes Limited show that one of its Directors is William Kabogo Gitau who came to Court to testify that he was a Director of the Respondent which was not the case. It is therefore clear that the Respondent's corporate veil should be lifted on grounds of fraud and dishonesty. I therefore find that the Applicant's application is well grounded. I allow the Notice of Motion dated 5th March, 2018 in terms of prayers 6,7,8,9, 10 and 11.

Dated, Signed and delivered at Nairobi on this 3rd day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Cohen for Applicant

M/s Gichoya for Mr. Havi for 5th Respondent and M/s Omesa for 1st Respondent.

E.O.OBAGA

JUDGE

3.4.2019