

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO 2079 OF 2016

STANLEY GITHENDE NGIGI.....
CLAIMANT

VERSUS

DIRECT SPECIALIST COMPANY LIMITED.....
.....RESPONDENT

RULING

Background

1. The application before the court is dated 17th February 2025. It is filed pursuant to various provisions of law including Order 22 rule 22, Order 45 rule 1 and Order 51 of *the Civil Procedure Rules*.
2. Through it (the application), the Applicants, Dipak Shantilal Galaya and Hassan Nooral Chatur Bhai Popat, seek for various orders to wit the following:-
 - a) Spent.
 - b) Spent.
 - c) That the court be pleased to lift the warrants of arrest issued against the Applicants.
 - d) That the court be pleased to review, vary and or set aside the orders issued on 28th January 2025 lifting the Respondent's corporate veil and directing Dipak Shantilal Galaya and Hassan Nooral Chatur Bhai Popat to show cause.

- e) That the court be pleased to issue any other orders as it may deem fit and necessary to grant in the interest of justice and fairness.
 - f) That the Applicants be granted costs of the application.
3. The Applicants contend that at the time the suit was heard and judgment delivered, they were no longer directors and shareholders of the Respondent. They contend that the directorship and shareholding of the Respondent had been transferred to one Farouk Riyaz Jamal at the time. As such, they aver that the court should not have lifted the corporate veil of the Respondent with the intent of compelling them to account for its (the Respondent's) affairs.
 4. The Applicants contend that the 1st and 2nd Applicants resigned from the directorship of the Respondent on 4th August 2015 and 13th March 2017 respectively. They aver that the Respondent accepted their resignations through a resolution that was passed on 13th March 2017.
 5. The Applicants aver that after they handed over management of the Respondent to Farouk Riyaz Jamal, he continued to run the company for close to four years before it was allegedly deregistered. They deny that they were either involved or played a role in the dissolution of the Respondent. As such, they contend that they ought not to be asked to account for the affairs of the Respondent as has been done in the cause.

6. The Claimant has opposed the application. He filed a replying affidavit dated 17th March 2025.
7. The Claimant contends that the Applicants were directors of the Respondent during the term of his employment with it (the Respondent). As such, he avers that their contention that they ceased being the Respondent's directors before he quit employment is meant to assist them to evade responsibility for the decree that is due for enforcement.
8. The Claimant contends that the 1st Applicant continued to serve the Respondent up to early August 2015 whilst the 2nd Applicant remained in the Respondent's service until 2017. He contends that since his employment with the Respondent commenced in 2014, the Applicants were in service of the Respondent when his contract of service commenced and when the cause of action that gave rise to the case arose.
9. The Claimant avers that directors of a company have a duty to manage it (the company) soundly. He contends that the directors have a duty to ensure that the company's employees are remunerated and their benefits settled.
10. The Claimant avers that the Applicants abdicated this responsibility whilst serving as the Respondent's directors. He contends that the Applicants did not settle his due leading to the instant claim against the Respondent.
11. The Claimant contends that as directors of the Respondent at the time, the Applicants cannot evade responsibility for the Respondent's missteps. It is his case that the transfer of

their directorship and shareholding in the Respondent to Farouk Riyaz Jamal was fraudulent. As such, he avers that they should not be permitted to evade responsibility for the decree in the cause.

Analysis

12. The law on corporate personality as I understand it is that a body corporate is legally distinct from its shareholders and directors. As such, shareholders and directors of a corporation do not ordinarily bear personal responsibility for its liabilities (see ***Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22***).
13. However, there are instances when the corporate veil of a corporation may be overlooked in order to hold its members and managers personally responsible for its liabilities. This is done through lifting or piercing the corporate veil of the corporation (see ***Joel Ndemo Ong'au & another v Loyce Mukunya [2015] KEHC 6500 (KLR)***).
14. The circumstances which may necessitate lifting of a company's corporate veil are varied. They include fraud or improper conduct by those who control the company. A company's corporate veil may also be lifted in any case where its (the company's) character or the character of the persons who are behind the company has come into question.

15. Speaking to this issue, the court in the case of **Joel Ndemo Ong'au & another v Loyce Mukunya** (supra) stated 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. 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”.

16. From the above excerpt, it is apparent that a company’s corporate veil is only lifted in order to examine the activities of its (the company’s) shareholders and or directors. The device cannot be deployed to pursue former directors and shareholders of the corporation. It is meant to enable the

court to examine the conduct of individuals who are in actual control of the corporation at the time that is relevant to the matter that is before it (the court), usually enforcement of decrees and court orders.

17. The above position is fortified by the wording of Order 22 rule 35 of *the Civil Procedure Rules* which states as follows:-

“Where a decree is for the payment of money, the decree- holder may apply to the court for an order that:

a) the judgment-debtor;

b) in the case of a corporation, any officer thereof; or

c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.”

18. From the foregoing, it is apparent that when the aforesaid proceedings relate to a company, any officer of the company may be summoned for examination. The term “officer thereof” in sub-rule (b) of the rule denotes a “serving” and not “past” or “former” officer.

19. The term “officer thereof” in Order 22 rule 35(b) of *the Civil Procedure Rules* must, in the court’s view, be understood to be in reference to a person who is in control of the affairs of

the corporation. A past or former officer cannot be said to be in control of the corporation's affairs. He cannot, for instance, be reasonably expected to have control of the corporation's books of accounts since he presumably lost control of its (the corporation's records) when he ceased to be its member or official. As such, it will be onerous to compel him to produce and present to court such records.

20. In the instant case, the Applicants have presented to court a CR 12 for the Respondent which was generated on 7th September 2017. According to the document, the Respondent's director and shareholder as at that date was one Farouk Riyaz Jamal. The Applicants had ceased being shareholders and directors of the Respondent at the time.
21. According to the court record, the Claimant's case was heard on 29th November 2022 and judgment delivered thereafter. At this time, the directorship and shareholding of the Respondent had already changed from the Applicants to Farouk Riyaz Jamal.
22. Information on a company's directorship and shareholding is, in law, considered to be in public domain. All that one needs to do to access it (the information) is to apply and pay for an official search from the Registrar of Companies. As such, the court is of the view that the Claimant was in a position to ascertain the Respondent's directorship and shareholding as at the time his case proceeded to trial.

23. From the evidence before the court, the Respondent's directorship and shareholding was transferred from the Applicants to Farouk Riyaz Jamal before trial and delivery of judgment in the suit. As such, the responsibility to settle the decree in the suit fell on the Respondent when it was no longer under the stewardship and shareholding of the Applicants. At the time, management and shareholding of the Respondent had been transferred to Farouk Riyaz Jamal.
24. There is no evidence that the Applicants transferred an empty shell to Farouk Riyaz Jamal. The Respondent was transferred as a going concern.
25. The evidence presented by the parties show that an application to strike out the Respondent's name from the register of companies was presented to the Registrar of Companies in August 2021. This was approximately four (4) years after Farouk Riyaz Jamal had taken over the Respondent from the Applicants. The fact that the Respondent continued in existence for four years under the stewardship of Farouk Riyaz Jamal after the Applicants had exited the scene is consistent with the Applicants' contention that they handed over the Respondent as a going concern. As such and unless there is cogent evidence to the contrary, the court is obligated to presume that the Respondent was a sound going concern when it was taken over by Farouk Riyaz Jamal.

26. As mentioned earlier in the ruling, a corporate body bears distinct legal existence from its directors and shareholders. As such, if it is sold off, it goes with its liabilities unless there is evidence to the contrary.
27. Having regard to the foregoing, the Claimant cannot blame the Applicants for the Respondent's failure to satisfy the decree in his favour when the Respondent's inaction in respect of the decree occurred when it (the Respondent) was under the management and shareholding of Farouk Riyaz Jamal. The Claimant can only pursue Farouk Riyaz Jamal (subject to lifting of the corporate veil of the Respondent) who was the Respondent's manager and shareholder at the time.
28. The Claimant relies on the case of ***Republic v Capital Markets Authority Ex parte: James R. Murigu and Barth Ragalo [2018] KEHC 8897 (KLR)*** to contend that the court may be called upon to lift a corporation's corporate veil in order to pursue its former directors. In that case, the learned Judge was of the view that the term "director" under *the Companies Act* includes "former director".
29. As correctly pointed out by the learned Judge, the term "director" under *the Companies Act* means any person who is occupying the position of a director of the corporation by whatever name the person is called. However, this does not include former occupants of the office of director. In my view, the terms only applies to a person who is in office and

purporting to act as director irrespective of how he describes himself.

30. For the above reason, I am not persuaded by the contention in the aforesaid decision that the term “director” includes former directors of a company. Since the decision was by a court of equal status as this court, it is not binding on the court. It can only be persuasive.
31. The court notes that when the Claimant filed the application dated 12th March 2024, he did not make full disclosure of material facts to the court. A reading of the aforesaid application gives the impression that at the time the application to strike out the name of the Respondent from the register of companies was lodged, the Applicants were its (the Respondent’s) directors. The application also gives the impression that it is the Applicants who lodged the application to deregister the Respondent in order to evade responsibility for the decree in favour of the Claimant.
32. The Claimant selected the information to share with the court and the information to withhold from it. For instance, whilst he disclosed data which gave the impression that the Applicants were directors of the Respondent at the time the application to strike out the Respondent from the register of companies was lodged, he withheld information which would have demonstrated that both Applicants had resigned from the directorship and shareholding of the Respondent as at 1st April 2017 and that the Respondent’s shareholding and

directorship was transferred to Farouk Riyaz Jamal on or before 7th September 2017.

33. If the Claimant had volunteered to the court all information on the changes which had taken place with respect to the Respondent's shareholding and management since August 2015, it is probable that it (the court) would have arrived at a different conclusion on the application dated 12th March 2024. The court cannot emphasize more the importance of making full disclosure during litigation.
34. Although in the application dated 12th March 2024, the Claimant did not premise his accusations of fraud against the Applicants on the impugned transfer of shares and directorship to Farouk Riyaz Jamal, he has now raised this as a ground of fraud against them in his response to the application for review dated 17th February 2025. He asserts in his response to the application for review that the transfer by the Applicants of their shares and directorship in the Respondent to Farouk Riyaz Jamal was fraudulent because Farouk Riyaz Jamal is a foreign national.
35. However, this new accusation of fraud against the Applicants is without cogent basis. The mere fact that the person who took over the shareholding and management of the Respondent is a foreigner is not *per se* evidence of fraud.

Determination

36. Having regard to the foregoing, the court finds merit in the application dated 17th February 2025.

37. The court finds that the Applicants have demonstrated that there are sufficient reasons to warrant the request for review of the orders which were issued on 28th January 2025.
38. The orders were issued on account of nondisclosure of material facts to the application by the Claimant.
39. Consequently, it is ordered that the impugned orders through which the Respondent's corporate veil was lifted and a Notice to Show cause issued against the Applicants to appear in court to show cause why they should not be committed to civil jail for failure to pay the decretal sum, accrued interest and costs of the suit are hereby reviewed and set aside.
40. The Claimant is at liberty to institute fresh proceedings to lift the corporate veil of the Respondent in order to get to its (the Respondent's) proper shareholder(s) and director(s).
41. Each party to bear own costs for the application.

Dated, signed and delivered on the 28th day of November, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

.....for the Applicants

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI