



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 152 OF 2016

VIHIGA FARMERS CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

NATHAN INDOMBELO.....DEFENDANT/APPLICANT

RULING

This Notice of Motion is dated 13th January, 2016 seeking inter alia the following orders;

1. That this honourable court be pleased to lift the corporate veil against the plaintiff herein VIHIGA FARMERS CO. LTD.
2. That thereafter this honourable court be pleased to allow the 8th defendant/applicant to execute the decree together with the certificate of costs issued on 8th August, 2011 respectively to recover the costs payable by the directors of the plaintiff herein in their individual capacity.
3. That the costs of this application be provided for.

The applicant submitted that, the court herein granted the Defendant/Applicant costs of Kshs.144,955/= on 26th July 2011 which sum the plaintiff/respondent has never settled. The defendant applicant efforts to execute the said decree have been rendered impossible. The defendant/applicant once arrested the directors of the plaintiff company to show cause why they should not be committed to civil jail for not settling the said amount. The said notice to show cause was opposed and the Deputy Registrar in his ruling on 24th September 2013 made a finding that the judgment debtor is a limited liability company and different legal person from its directors and shareholders. The court in its ruling of 24th September 2013 directed and advised the decree holder now the applicant herein to lift the corporate veil of the plaintiff/respondent company in order to execute against its directors. This is what prompted the defendant /applicant herein to file this application.

It is trite law as established under the jurisprudence case of Salomon & Co Ltd vs Salomon (1897) AC, 22. HL that a company is a separate legal entity. However from time to time the court have moved away from this position and in the case of Selle Vs Associated Motor Board Company (1968) E.A paragraph 10 of Halsbury's law of England 4th edition

“90 piercing 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 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 cases the court will go behind the mere status of the company is 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”

The applicant submits that, the circumstance that prompts lifting of co-operate veil in the case herein is abuse of the law on the following arguments. The plaintiff brought the suit herein knowing that the orders obtained from court whether for or against them could be executable. The plaintiff has gone ahead to make the court orders herein impossible to execute. The plaintiff moved the court knowing very well that they did not have any tangible asset possible of being executed yet went ahead to file the suit herein. It is definite that the beneficiaries would have been the directors or the shareholders. The shareholders of this company can only have been pointed out by the directors. This can only be possible if the corporate veil is lifted and directors summoned and pointed out. It is the applicant's submission that a company, moving the court knowing well that it has no assets is using the law improperly. That the agenda and management of any company is done by directors. On 23rd June 1997 the defendant counsel made request for particulars seeking among others the list of directors of the plaintiff's company and minutes of meeting at which it was resolved that the defendants be sued. The plaintiff through its advocate filed the said particulars on 14th November 1997. The meetings were chaired by the Chairman who was one of the directors Zacharia Monyo as per the list of directors supplied then by Plaintiff's Company now annexed on the applicant's application. In addition the said minutes were

never signed and seconded by any shareholder hence a conclusion that the move by the plaintiff to sue the defendants was not by resolution of shareholders but the directors' move for self-interest. For that reason they submit that the court here lifts the corporate veil to establish those who are abusing the law using the corporate name the directors to.

Further several applications and responses have been made in the suit herein and all along any document requiring execution of the company the same was done by the directors commonly being Jim Matia Bandi and Zacharia Monyo. All the two persons are listed as the directors of the company as per annexure 3 of the applicant's application. The sole objective of the plaintiff's company was to buy a piece of land and distribute the same among its members. The said objective was achieved and the company was deemed dissolved as per defendant/applicant's defence filed in court on 11th January 1992 which the plaintiff never replied to contest the same. The company had no asset to attach and the decision to sue was made by few individuals who were doing it in their own interest. They invite the court to lift the corporate veil and establish who are using the company name to satisfy their selfish interest.

The respondent submitted that, the known circumstances when the Court may lift the corporate veil are 10 which are:-

1. Where companies are in the relationship of holding and subsidiary companies.
2. Where a shareholder has lost the privilege of Limited Liability and has become directly liable to certain creditors on the ground that business continued after the Membership had dropped below the legal minimum, to the knowledge of the shareholder;
3. In certain matter relating to Taxation;
4. In the law relating to Exchange Control;
5. In the law relating to trading with the enemy;
6. In the law of merger control in the united kingdom;
7. In competition of the European economic community;
8. In abuse of law in certain circumstances;
9. Where the device of incorporation is used for some illegal or improper purposes.
10. Where the private company is founded on personal relationship between the members.

They submit that, the applicant has not shown any of these circumstances that he is relying upon for the court to grant the orders sought. The only reason given by the applicant is that the Deputy Registrar in ruling made on 24th September 2013, which ruling has not been attached ordered the applicant to apply to lift corporate veil against the plaintiff in order to execute against the directors.

That this ruling was given after the 8th defendant had filed a notice to show cause and was prosecuting the same and the court in declining to issue arrest warrant against the plaintiff's directors ruled that the orders can only be granted once corporate veil is lifted. The reason given that the Deputy Registrar ruled for corporate veil to be lifted is not a circumstance known by law when court can actually assess and decide to lift corporate veil. The plaintiff is a Company Limited duly registered and as such, as determined in the Landmark Jurisprudence of *Salmons vs Salmon* is a separate entity from the directors. The costs are awarded to the 8th Defendant against the plaintiff which is a separate legal entity which can sue and be sued on its own capacity. The actions of the company cannot be burdened upon its members as the company is not an agent of its members.

They submit that there is no reason given in the application good or sound enough to have the corporate veil lifted and this prayer having failed the rest of the prayers cannot be granted. They relied on the case of *Ephantus M. Kagomo & 6 Others vs Industrial Commercial Development Corporation (2012) eKLR* where a court of similar Jurisdiction explains circumstances persuasive similar to matters in this instant application.

This court has carefully considered the application and both the applicant and the respondents submissions herein. The application is based on the grounds that, the suit against the 8th defendant/applicant was dismissed on 14th April 2014 with costs for want of prosecution. The 8th defendant/applicant was awarded costs in the sum of Ksh. 144,955/= on 26th July 2011. The plaintiff has failed to settle the said costs since the same was taxed. The 8th defendant/applicant was in the process of execution to recover the said costs when the Deputy Registrar in a ruling delivered on 24th September 2013 ordered that the 8th defendant/applicant do apply to lift the corporate veil against the plaintiff in order to execute against the directors of the plaintiff's company directly and in their individual capacity. It is only fair and just that the said application be allowed to enable the 8th defendant/applicant reap the fruits of the judgment.

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”.

The case of *Mugenyi & Company Advocates vs. The Attorney General* [1999] 2 EA 199 following *Palmer's Company Law Vol. 1* (22 ed) gave a list of 10 instances in which the veil of corporate personality may be lifted and these are:-

1. Where companies are in the relationship of holding and subsidiary companies’
2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;
3. In certain matters relating to taxation;
4. In the law relating to exchange control;
5. In the law relating to trading with the enemy;
6. In the law of merger control in the United Kingdom;
7. In competition of the European Economic Community;
8. In abuse of law in certain circumstances;
9. Where the device of incorporation is used for some illegal or improper purpose; and
10. Where the private company is founded on personal relationship between the members.

In the case of **Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano (2014) eKLR** the court held that;

“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 or 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”

In the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor. (2013) eKLR* the Judge held that;

“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.”

Ringera, J (as he then was) in *Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000*, stated on lifting of the corporate veil that;

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) 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 conduct (See the cases of GILFORD MOTOR CO. VS. HORNE [1933] Ch. 935 and JONES VS. HIPMAN [1962] 1W.L.R. 832).”

I see no evidence of the circumstances mentioned above on the part of the respondents. For instance there is no evidence that the *corporate personality in this case is being used as a mask for fraud or improper conduct*. The main reason given by the applicant is that the Deputy Registrar in ruling made on 24th September 2013, which ruling has not been attached ordered the applicant to apply to lift corporate veil against the plaintiff in order to execute against the directors. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE