IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 123 OF 2011

GITHUNGURI DAIRY FARMERS

CO-OPERATIVE SOCIETY.....APPELLANT

AND

ERNIE CAMPBELL & CO. LTD.....1ST RESPONDENT

GITHUNGURI DAIRY PLANT COMPANY LTD.....2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Kimaru, J**.) delivered on 31st December, 2015*

in

H.C. Misc. Application No. 79 of 2003 (O.S)

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JUDGMENT OF THE COURT

The facts that form the basis of the dispute between the parties herein are undisputed and are succinctly captured in the ruling the subject of this appeal. **Ernie Campbell & Co. Ltd** "*the 1st respondent*" sued **Githunguri Dairy Plant Company Ltd** "*the 2nd respondent*" on account of outstanding sums of money owed to it by the latter arising from a construction contract for a milk processing plant, an office building and associated civil engineering services in Githunguri Township, Kiambu County. Following the filing of the suit in the High Court, the parties agreed to refer the dispute to arbitration. Following the arbitral proceedings, the arbitrator rendered his award on 29th April 2003, and found in favour of the 1st respondent in the sum of Kshs. 13,677,440.80/- with interest thereon at the rate of 12% per annum from 23rd July 2003 till payment in full plus costs of the arbitration.

Subsequently, the 1st respondent applied to the High Court, pursuant to section **36** of the Arbitration Act, for the award to be entered as the judgment of the court for purposes of execution. On 22nd July 2005, the High Court allowed the application and the 1st respondent thereafter commenced execution proceedings as against the 2nd respondent. It however found itself in conundrum in the sense that the 2nd respondent had no attachable assets and though the milk processing plant was constructed for the 1st respondent, the same was developed on properties registered in the name of **Githunguri Dairy Farmers Co-operative Society** "*the appellant*". Attempts to attach the movable assets of the appellant were thwarted through objections based on such grounds as the appellant being the legal and beneficial owner of the proclaimed goods. Undeterred however, the 1st respondent applied to court to have the directors of the 2nd respondent appear in person before court for purposes of examination to establish whether the 2nd respondent owned any assets capable of being attached in satisfaction of the decree. Mr. **Peter Njoroge Baiya** appeared as a director of the 2nd respondent and upon examination, revealed that the appellant held 100,000 shares in the 2nd respondent. Three other individuals held a share each in the 2nd respondent. With a total share capital of 100,003 shares, it became apparent that the appellant was the majority shareholder in the 2nd respondent.

Armed with that information, the 1st respondent filed a motion on notice dated 25th November 2008, which culminated in the ruling dated 18th February 2009 from which this appeal emanates. The application was brought pursuant to sections **3A, 34, 44 (1),** of the Civil Procedure Act and **order 50 rule 1** of the Civil Procedure Rules. The 1st respondent sought that the corporate veil of the 2nd respondent be lifted; a declaration be made to declare that the appellant held **LR No. Githunguri/Kianjai/1206** and **Githunguri/Kianjai 1440** "*the suit properties*" together with the milk processing plant constructed thereon for and on behalf of the 2nd respondent; that the suit properties were subject to attachment and sale in execution of the decree; that all assets owned by the appellant were held by it for and on behalf of the 2nd respondent;

a prohibitory order prohibiting the appellant from transferring or charging the suit properties and a declaration that the appellant was liable to pay the balance of the decretal sum together with interest thereon and costs.

The application was premised on the grounds that the two entities, the appellant and the 2nd respondent were owned by the same persons hiding behind the cloak of incorporation to defeat or avoid paying the decretal amount. Mr. Baiya who also doubled as the chair of the 2nd respondent claimed during his examination that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent's account. However, according to the 1st respondent, that was a ruse by the 2nd respondent to hide behind the cloak of incorporation to escape its liabilities. The 1st respondent's argument was that since the appellant had acquired the milk processing plant, whose costs of construction remained unpaid, it was just and mete that the appellant be held liable.

The response in opposition to the application was through an affidavit sworn by one, **Charles Ndichu Mukora** in his capacity as the chair of the appellant's management committee. The opposition was centered on the fact that the appellant was not a party to the suit since the underlying contract leading to the dispute was between the respondents. That the 1st respondent, having obtained a decree in its favour, could not sue any other person for the same cause of action nor could the judgment obtained be enforced against a party who had not been enjoined to the suit. According to the appellant, its assets were not the assets of the 2nd respondent and so execution of the judgment could not be enforced against it.

In his ruling, **Kimaru, J**. agreed with the 1st respondent and held that on a balance of probabilities, it had established a case for lifting of the veil of incorporation against the appellant. The learned Judge concluded that though the appellant and the 2nd respondent were two separate legal entities, they were essentially the same with the appellant as the holding entity of its subsidiary, the 2nd respondent. Further, that although the 2nd respondent had been incorporated to manage the plant constructed on the suit properties, the appellant retained the possession and ownership of the suit properties and the developments thereon. The Judge found that the 2nd respondent was a mere shell with no assets and its incorporation was intended to benefit the appellant and its shareholders. The Judge therefore held that the appellant could not hide behind the veil of incorporation yet it remained a beneficiary of the developments constructed by the 1strespondent on the suit properties.

Dissatisfied with those findings, the appellant lodged the present appeal. The appellant's main complaint is that the learned Judge erred in lifting its veil of incorporation yet it was not a party to the arbitration proceedings between the respondents. That in so doing, the Judge contravened section **77 (9)** of the former Constitution and the rules of natural justice. That by lifting the veil, the Judge allowed the 1st respondent to execute the decree against it, a shareholder in the 2nd respondent, for a judgment entered against the 2nd respondent and treating its assets as though they were assets of the 2nd respondent. The appellant also accuses the judge of ignoring the doctrine of finality of litigation; the doctrine of *functus officio* and for failing to find that execution against it was barred by the doctrine of *res judicata*.

Upon being served with the appeal, the 1st respondent raised a preliminary objection disputing this Court's jurisdiction to hear the appeal as according to it, there is no automatic right of appeal arising from proceedings for enforcement of an arbitral award under sections **36** and **37** of the Arbitration Act, 1995. Further, that no leave to appeal was sought or granted by either the High Court or this Court pursuant to the provisions of section **39** of that Act. Another objection was that this appeal offends the doctrine of finality and speedy resolution of arbitral proceedings as required under sections **10** and **32A** of the same Act.

However, we do not think that we should determine this appeal on the basis of the preliminary objection aforesaid. If the 1st respondent felt so strongly about the preliminary objection, it should have applied to strike out the appeal on those grounds. Rather, we will determine the appeal on its own merits.

On 9th June 2015, counsel for the appellant appeared and informed the Court that the 2nd respondent was not interested in proceeding with the appeal. The remaining parties agreed to proceed or canvass the appeal by way of written submissions.

In canvassing the appeal, the appellant divided or chose to argue its grounds of appeal in three (3) clusters. The first cluster was with regard to the procedure which was used by the 1st respondent to lift the veil of incorporation of the 2nd respondent. The 2nd category was concerned with the circumstances under which the veil of incorporation of a company will or ought to be lifted. The third category pertained to the doctrine of finality of which *functus officio* is a component in the 1st respondent's view.

The appellant opined that the High Court had no jurisdiction to determine the application giving rise to this appeal. In this regard, its argument was that upon the High Court adopting the arbitrator's award and issuing a decree, it became *functus officio*. Such that, in entertaining the 1st respondent's application, the court acted outside its jurisdiction resulting in a ruling that was a nullity. Secondly, that in lifting the veil of incorporation, the court infringed upon its constitutional right to a fair hearing as per section **77(9)** of the former constitution based on the fact that it was not a party to the suit. Thirdly, that since the facts of this case did not envisage an agency or trustee relationship, whether then in the circumstances it warranted a departure from the well-known principle espoused in the famous case of **Salomon v Salomon & Co. Ltd. [1897] AC 22.** The principle from the case is very simple – a company is a separate legal entity and thus a juristic "**person**" in the eyes of the law**.** The appellant maintained it was a legal person pursuant to section **12** of the Co-operative Societies Act and in essence a different person altogether from its subscribers, shareholders and even the 2nd respondent. The appellant pointed out that the award to be enforced arose from a contract between the respondents and it was therefore not privy to it.

Though the appellant admitted that the learned Judge was right in taking into account who benefitted from the contract or from the works carried out by the 1st respondent, it contended that there were other factors to consider, such as whether the two entities were operating as one or as separate entities. The appellant remained categorical that it and the 2nd respondent were separate entities and that the 1st respondent had not led evidence to warrant departure from the principle in Salomon v Salomon aforesaid. It accused the High Court of having relied on tenuous evidence and convenient legal fiction to imply an agency or trusteeship and thus enable itself to give decisions which it thought just.

It also accused the 1st respondent of having abandoned execution proceedings against the 2nd respondent when it ran into problems. That the 1st respondent was obliged to make it a party to the arbitral proceedings and then apply for the veil of incorporation to be lifted.

According to the appellant, whether or not it held the immovable properties and assets, vehicles, plant machinery, furniture, fixtures, trademarks and stock on trust and on behalf of the 2nd respondent was a question to be tried and the procedure adopted by the 1st respondent did not permit any trial of those facts. It was contended that the High Court was bound by section 77 (9) of the former constitution to afford the appellant a fair hearing on the question whether there was any civil right or obligation on its part. In addition, it submitted that the civil procedure provides for procedures of initiating a claim by way of a plaint or originating summons. It cited the authority of **Bhari v Khan (1965) EA 94** in which it was held that rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice to the parties. The appellant submitted that when the application was filed, it was intended to have its properties attached despite the fact that up to that stage it had not been made a party to the proceedings. It argued that the 1st respondent had concluded proceedings against the 2nd respondent through an unknown procedure. In addition, it was submitted that the execution undertaken against it needed to have an originating process where the question whether the appellant was the 2nd respondent's trustee or not ought to have been determined. Its view was that since it was not a party to the arbitral proceedings, a decision emanating there-from could not be enforced against it as that would offend the principles of natural justice and section 77 (9) of the then Constitution.

In the appellant's view, the application was unconstitutional in so far as it sought to have its properties attached without being given a chance to be heard. The appellant cited the case of **James Ndungu Wa Wambu v R& Ors (1995) eKLR** where the Court of Appeal allowed an appeal on account that the High Court had granted judicial review orders which affected parties that had not been enjoined to the suit.

The appellant also submitted that the High Court lacked jurisdiction to hear the 1st respondent's application since it stood *functus officio* after it adopted the arbitral award. It cited the case of **Raila Odinga v IEBC Petition No. 5 of 2013** where the Supreme Court held that a person vested with adjudicative or decision making powers, could as a general rule exercise, those powers only once in relation to the same. That from the record, the 1strespondent abandoned execution proceedings it had commenced against it upon its objections. It termed the 1st respondent's application an afterthought and opined that the 1st respondent could not turn around to look for a party to enforce its judgment, after it failed to enforce the same against the 2nd respondent.

In canvassing its appeal, the 1st respondent stated that the issues for determination in this appeal were whether the High Court had jurisdiction to entertain its notice of motion application; whether the procedure invoked by the 1st respondent was unconstitutional and whether the High Court's departure from the **Salomon v Salomon** rule was proper in the circumstances.

In reply to the appellant's contention that the High Court stood *functus officio* once it adopted the award and therefore had no jurisdiction to delve into the matter thereafter, the 1st respondent submitted that it did not seek to re-engage the court on the merits of the decision of the arbitration or on the merits of the application to enforce the arbitral award. Having established that the appellant was the 2nd respondent's majority shareholder, its application to have its assets satisfy the decree in its favour became necessary. The application was hinged on section **34** of the Civil Procedure Act which provide that all questions arising between the parties to the suit in which the decree was passed or relating to the decree has to be determined by the court executing the decree and not by a separate suit.

It was also the 1st respondent's contention that an arbitral award is only satisfied on payment of the decretal sum to the judgment creditor and the execution proceedings before the High Court were therefore ancillary to the issues before the arbitration. It cited the authority of **Raila Odinga & 2 Others v IEBC & 3 Ors (2013) eKLR** for the proposition that courts had a legal and constitutional obligation to uphold the integrity of the judicial process even after delivery of judgment. That a court's jurisdiction in safeguarding the scheme of rendering justice and upholding the dignity of the judicial process is not exhausted or compromised until the court is satisfied and declares as such. To counter the appellant's contention that it's rights to fair hearing and natural justice were violated by virtue of the fact that it was not a party to the arbitral proceedings; the 1st respondent submitted that as the majority shareholder in the 2nd respondent, the appellant could not feign ignorance of the arbitral and enforcement proceedings. This is more so since the High Court had found that the shareholders of the appellant and the 2nd respondent are one and the same. It therefore denied that the appellant's right to a fair hearing was violated as it did file its response to the application dated 25th November 2008 and was heard before the court delivered its ruling.

The 1st respondent cited the English case of **VTB Capital PLC v Nutritek International Corp & Another & 3 Others (2012) EWCA Civ 808** for the proposition that in exceptional cases courts will regard it appropriate to pierce the corporate veil and thereby identify the company with those in control of it. According to the 1st respondent therefore, the circumstances of this case met the requirements for lifting the veil of incorporation. It maintained that the procedure it adopted or followed in lifting the veil of incorporation was lawful, pursuant to section **44 (1)** of the Civil Procedure Act.

During the oral hearing of the appeal, Senior Counsel **Dr. Kamau Kuria** appeared for the appellant whereas **Mr. Issa Mansour**, learned counsel appeared for the respondent. Both counsel reiterated their written submissions already captured elsewhere in this judgment. Counsel for the 1st respondent however pointed out that only Kshs. 2 million had been recovered from the 2nd respondent so far, and it could not be left without a remedy to recover the outstanding balance. In reply to the issue that it could have enjoined the appellant in the suit, counsel submitted that lifting of the veil could only be tenable at the execution stage and not earlier.

In our view this appeal can be determined on the following broad issues; whether or not the High Court had jurisdiction to determine the application for the lifting of the veil; whether the appellant's right to a fair trial as guaranteed under section **77 (9)** of the former Constitution was infringed and lastly whether in the circumstances of this appeal, it was lawful or proper to allow for the lifting of the appellant's veil of incorporation.

The appellant in this appeal has challenged the jurisdiction of the High Court in determining the application dated 25th November 2008. The appellant specifically submits that the court lacked jurisdiction to entertain the application on the basis that having entered judgment on the

basis of the award, it stood *functus officio* and therefore lacked jurisdiction to entertain further proceedings in regard to the matter. Therefore and according to the appellant, in determining the 1st respondent's application, the High Court, in essence, was re-opening the suit for determination a second time and in the process offended the principle of finality and *res judicata*. To buttress that argument, it cited the case of **Raila Odinga v IEBC** (supra) where the Supreme Court held that, as a general rule, once a court or any person with adjudicative powers had exercised those powers then it could not have another bite of the same cherry. The court stated that once a decision was given, it became subject only to any right of appeal to a superior court. The appellant further cited this Court's decision in **Rai v Rai, Civil Application No. 307 of 2003** to advance the argument that litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.

In its response, the 1st respondent submitted that in the mounting and prosecuting its application, it did not seek to re-engage the court on the merit or demerits of the decision of the arbitration but sought rather to enforce the arbitral award. It explained how it came to lodge the application. The 1st respondent was awarded Kshs. 13, 677,440.80/- with interests and costs by the arbitrator. Attempts to execute the decree against the 2nd respondent proved futile as the same was objected to and thwarted by the appellant on the basis that the assets the 1st respondent wished to attach to satisfy the decree were not owned or registered in the names of the 2nd respondent but rather that of the appellant and that the appellant had both legal and beneficial interest in the same. It is then that the 1st respondent applied to court to have the directors of the 2nd respondent summoned before it in a bid to establish whether it possessed any assets capable of being attached in satisfaction of the decree. It is during the examination of the directors that it became apparent that the 2nd respondent did not have assets capable of being attached as even the milk processing plant had been built on properties owned by the appellant. Further, it became clear that the officials of the appellant and the 2nd respondent were the same and actually owned the majority shares in the appellant. That in essence the 2nd respondent was held by the appellant as a subsidiary for its benefit and that of its members.

Faced with that scenario and with the decree in its favour still unsatisfied, the appellant again approached court and through the application the subject of this appeal asked court to lift the veil of incorporation and find the assets of the appellant as capable of being attached towards the satisfaction of the decree. The 1st respondent invoked section **34** of the Civil Procedure Act which provides *inter alia*;

> ***"1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.[Emphasis put]***
>
> ***2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.***
>
> ***3. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. "***

The 1st respondent further invoked section **44(1)** of the Civil Procedure Act which provides that;

> ***"all property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in the execution of a decree."***

Read together with section 3A of the Civil Procedure Act, those provisions allowed the 1st respondent to approach the High Court, which passed the decree to determine questions arising or ancillary to the suit. We agree with the 1st respondent's submission that the proceedings before **Kimaru J.** arose out of execution proceedings initiated by it for purposes of satisfying the arbitral award and subsequent judgment of court and did not seek to reopen for determination the merits and or demerits of the suit between the parties which had already been settled. Indeed such an attempt would offend the principle of finality as the court stood *functus officio*. Nor can it be said that in proceeding as it did, the High Court violated the doctrine of *res judicata*. The 1st respondent cited the authority of **Telkom Kenya Ltd v John Ochanda (Suing on his own behalf and on behalf of 996 Former employees of Telkom Kenya Ltd) (2014) eKLR** where this court in discussing the principle of *functus officio* stated that the principle was meant to prevent the re-opening of a matter before a court that rendered the final decision thereon. The court went further to state as follows;

> *"**The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.**"*

The appellant's submissions that the High Court lacked jurisdiction to hear and determine this application on the above propositions must therefore be rejected.

The issues raised in this appeal go towards the execution process which is ancillary or pursuant to the findings of the arbitrator. As was stated in **Raila Odinga & 2 Others v IEBC & 3 Ors (2013) eKLR** courts have a legal and constitutional obligation to uphold the integrity of the judicial process even after delivery of judgment. That a court's jurisdiction in safeguarding the scheme of rendering justice and upholding the dignity of the judicial process is not exhausted or compromised until the court is satisfied and declares as such.

The appellant has in this appeal further alleged that its rights to a fair trial as guaranteed under section **77 (9)** of the repealed Constitution were infringed or violated. The said section provided as follows;

> ***"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or***

obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

According to the appellant therefore, since it was not a party to the original suit which determined the parties' rights and obligations, and only became a party in the 1st respondent's application, it argued that it had been denied its right to be heard and in the process the principles of natural justice violated. The appellant contended that the 1st respondent was obliged to make it a party to the arbitral proceedings in which it would then have applied for the veil of incorporation to be lifted. It must be remembered that the contract was between the respondents and upon breach the doctrine of privity of contract behooved either party to pursue the other party to the contract for relief and not a third party. At that point the 1st respondent had no legal reason or basis for enjoining the appellant, a third party, to the suit. It is only after it faced objection to execution and upon further interrogation, realized that the 2nd respondent had no assets that could satisfy the decree obtained. It is at that point that it became necessary to apply to court, under the relevant provisions of the law, for the lifting of the 2nd respondent's veil of incorporation. The appellant duly appeared, mounted a defence and exercised its right to be heard. In fact, the gist of its response was that it was not a party to the suit but which the Judge deemed as not absolving it from liability. In essence, it had due notice of the issues before the court, to which it duly responded to and the court as the adjudicative tribunal delivered itself on them. The appellant cannot in the circumstances, therefore, claim denial of its right to a fair hearing and or violation of the principles of natural justice. We hasten to add that the application was in the nature of a motion on notice. It is not necessary that a matter in court must only be initiated by way of plaint or originating summons, so that a party can claim to have been heard fairly as submitted by the appellant.

The appellant has further argued that the circumstances of this case did not warrant a departure from the principle in **Salomon v A Salomon**. Having stated that the appellant and the 2nd respondent were different legal entities, it argued that the court ought to have refused or denied the piercing of the corporate veil of the 2nd respondent. However, the circumstances under which a court ought to disregard the veil of incorporation are as stated in paragraph **90** of **Halsbury's Laws of England 4th Edition Volume 7 (1)** as:

"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".

In its deliberation, the High Court found that the faces behind the two legal entities were the same which necessitated the piercing of the veil of incorporation. In **VTB Capital PLC v Nutritek International Corp & Another & 3 Others** (supra), Court of Appeal (UK) observed that;

"….if the corporate veil is to be pierced, "the true facts" must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be)."

Then that being so, the appellant being the majority shareholder in the 2nd respondent and its chairman, Mr. Baiya were the relevant actors behind the veil of incorporation for the two entities. The learned judge came to the conclusion of facts and this Court does not have the luxury to interfere with those findings as they are based on evidence. It is trite law that the appellate court would not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court acts on a wrong principle in reaching its findings. See **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd (1985) EA 89; Selle & Another v Associated Motor Board Co Ltd & Others (1968) EA 123.** The learned Judge in coming to the conclusion delivered himself as follows;

"In the present application, it is clear that the plant, as a wholly owned subsidiary of the society, has no assets of its own. The plant, having no assets of its own, purported to enter into an agreement with the applicant for the construction of the dairy plant. It was evident that the dairy plant was constructed with finances from the society. The dairy plant was constructed by the applicant. The plant paid part of the construction costs. The society took possession and management of the dairy plant. The plant failed to pay the balance of the cost of construction of the dairy plant to the applicant as it had no assets to settle the decree issued in favour of the applicant. The society, the overwhelming majority shareholder of the plant, does not wish to settle the said decree because it claims that it is a separate legal entity from the plant.

I think the applicant has established a case for lifting of the veil of incorporation. As a beneficiary of the dairy plant that was put up by the applicant, the society cannot hide behind its corporate veil to escape liability of satisfying the decree that was issued in favour of the applicant. The applicant established that the officers of the plant and the society was not a party to the arbitral proceedings and the proceedings before this court. I think the court in the circumstances will be entitled to hold that the plant for all purposes and intents, is another name of the society."

In our view, the learned Judge was right to lift or pierce the veil of incorporation to ensure justice and equity to all parties prevails. Further, 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. See **Mugenyi & Company Advocate v The Attorney General (1999) 2 EA 199.** In the present instance, Mr. Baiya claimed that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent's account. Why would Mr. Baiya, a director in the 2nd respondent and who definitely had full knowledge of its affairs (that it

had no attachable assets or financial means to satisfy the decree) insist that the decree be settled by it? We draw the same inference as the 1st respondent that the same was meant to defeat the satisfaction of the decree, an improper purpose warranting the court to go behind the veil of incorporation. This is especially since the benefit of the works carried on by the **1st** respondent was realized and continues to be enjoyed by the appellant. Surely in the circumstances of this case, the appellant did not expect a court of equity to shut its eyes to the 1st respondent's plight and leave it without a remedy. The appellant incorporated the 2nd respondent and then had it enter into an agreement with the 1st respondent knowing well that it had no financial means or assets to meet the obligations related with the contract. In the absence of any reasonable excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2nd respondent's veil of incorporation for purposes of ensuring justice to both parties.

The upshot of all the above assessment and reasoning is that the appeal is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 16th day of March, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR