



**Saenger v Afrikon Limited (Cause 677 “A” of 2014)
[2024] KEELRC 332 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 332 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 677 “A” OF 2014
MA ONYANGO, J
FEBRUARY 14, 2024**

BETWEEN

FRANK SAENGER CLAIMANT

AND

AFRIKON LIMITED DEFENDANT

RULING

1. Judgment in this suit was delivered on 27th September, 2019 in favour of Frank Saenger, the Claimant herein, against the Respondent Africon Limited in the sum of 68000 Euros plus costs and interest.
2. The Claimant, unable to execute the Judgment, filed the instant application by way of a Notice of Motion dated 16th February 2021 wherein he seeks the following orders:
 - i. Spent
 - ii. That leave be granted to the Applicant to effect service of the Application upon the Respondent both through counsel on record and by email to the Respondent’s known email address-mike.jung@africon.net
 - iii. That summons do issue compelling Mike Jung Woonsun the known Director of the Judgment Debtor’s company to attend court on such date as may be ordered to be orally examined on oath as the Judgment Debtor’s means and assets.
 - iv. That taking into account the fact that the Director of the Respondent is a foreign National, to ensure and facilitate the appearance of the said Director and further to ensure that this Application is not rendered nugatory this Court do order and direct that the Passport of the said Director, Mike Jung Woonsun be deposited with the Deputy Registrar of this court pending the hearing and determination of the present application.



- v. That consequent to the grant of Prayer (2) above, the said Director Mike Jung Woonsun be ordered to produce the Judgment Debtor's books, papers, documents and/or evidence showing the affairs of the Company.
 - vi. That in default of such attendance and/or providing suitable means and assets for the satisfaction of court, the said Director Mike Jung Woonsun be held personally liable to satisfy the decree of the court in full including, without limitation, the taking out of Warrants of Arrest against the said Director and subsequent incarceration.
 - vii. That costs of this Application be borne by the Respondent Judgment Debtor and its said Directors in any event.
3. The application was disposed of by way of written submissions and the court delivered its ruling on 11th February 2022.
 4. In its ruling on the application the court ordered that summons do issue to Mike Jung Woonsun And Sammy Maina Kamau to appear in court on 25th April 2022 to be orally examined as to the assets of the Judgment Debtor and that they bring with them the company's books of accounts among other documents necessary to ascertain the liquidity of the Judgment Debtor.

a. The Cross examination

5. When the matter came up on 25th April 2022 for cross examination of the Directors, Counsel Orinda holding brief for the Respondent's counsel informed the Court that the firm had filed an application to cease acting. The said application was unopposed and on 11th May 2022, the Court allowed the firm of McKay & Company Advocates to cease acting for the Respondent.
6. On 4th July 2022, Sammy Maina Kamau was brought to court in satisfaction of warrant of arrest orders issued by the court on 11th May 2022 after the Directors failed to appear in court to be orally examined.
7. At cross examination, Sammy Maina Kamau informed the court that he was not the Judgment debtor's Director as evidenced by CR12 extracted on 1st July 2022. He told the court that he became aware that he was required to appear before court when the warrant of arrest was delivered at his gate. During cross examination he informed the Court that Mike Jung Woonsun was the owner of the company. That the directorship of the company had changed. He told the court that he was a director of the company for only 2 or 3 months in 2021. It was his testimony that when he left the company, he did not access the assets and did not look at the assets register. He informed the court that there were returns made when he was a Director and that he did not know if the company is able to pay the decretal sum.
8. On being cross-examined by Learned Counsel Olieti, Sammy Maina Kamau told the court that the name of the other director in Form CR12 is James Githinji Maina. He told the court that at the time he was not aware of the suit herein until he was served.
9. The parties were directed to file submissions after the cross examination of Sammy Maina Kamau. The Claimant filed his submissions dated 12th July 2021 while Sammy Maina Kamau's submissions are dated 21st July 2022.
10. The Claimant in his submissions has maintained that Mr. Sammy Maina Kamau had all the opportunity to present documents showing what assets the Company had but failed to do so. It was also submitted that the said Sammy Maina Kamau deliberately intended to defeat the decree by failing to give further and better particulars of the alleged new Director Mr. James Githinji.



11. The Claimant urged the court to lift the Corporate Veil and have the Company's Directors including Mr. Sammy Maina Kamau held personally liable to settle the Decree.
12. Mr. Sammy Maina Kamau in his submissions stated that he was only a director of the Respondent for 3 months and that he transferred the company back to Mr. Mike Jung Woonsun after he realized that he had been duped into a raw deal.
13. He submitted that he was never aware of the case before court and the court award to the Claimant. That Mr. Jung Woonsun on the other hand knew of the suit as he was represented up to the point when the orders for examination of the directors was sought.
14. Sammy Maina Kamau maintained that he is not a current director and that the CR 12 indicates that the current director is Mr. James Githinji Maina.
15. In response to the Claimant's submissions that the corporate veil be lifted and the directors including himself be ordered to meet the decretal sum, Sammy Maina Kamau submitted that the lifting of the corporate veil is only limited to the current directors of the Respondent and that to hold otherwise would mean every director of a company from its inception regardless of the current prevailing circumstances is to be liable for whatever happens to a company long after leaving the said company.

Determination

16. The only issue that falls for my determination is whether the corporate veil in the instant suit should be lifted.
17. As stated above, the court in its ruling delivered on 11th February 2022 directed that Mike Jung Woonsun attends court to be orally examined as to the status of the Respondent and to produce books of accounts or documents for purposes of satisfying the decree herein.
18. The court also directed that summons be issued to Mr. Sammy Maina Kamau whose name appeared in the CR12 of the Respondent as at 7th April 2021 to attend Court to assist the Court in ascertaining the Respondent's ability to satisfy the decree herein.
19. It is worth noting that Mike Jung Woonsun never appeared in court for cross examination.
20. The Claimant in his submissions urged this court to lift the Respondent's corporate veil and find the directors including Mr. Sammy Maina Kamau should be held personally liable to settle the decree herein. Mr. Sammy Maina Kamau on his part maintained that he was only a director of the Respondent for 3 months and that he transferred it back to Mike Jung Woonsun. The CR 12 as at the time Sammy Maina Kamau was being orally cross examined indicated the Director of the Respondent as James Githinji Maina.
21. Lifting of the corporate veil is concerned with unmasking the veil to see who are the true persons behind the company. Halsbury's Laws of England (4th Ed) at para 90 summarizes the principles governing the lifting of the corporate veil 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."

22. In the instant case, it is evident that the company as of now is not under the directorship of Mr. Sammy Maina Kamau. He is therefore not liable to pay the Respondent's debts including settling the decree herein in favour of the Claimant.
23. The application dated 21st February 2021 was specific. The orders sought were against Mr. Mike Jung Woonsun.
24. From the record, Mr. Mike Jung Woonsun was represented by counsel and participated in the proceedings herein until the point where the court ordered for cross examination of the Directors.
25. In an unfortunate turn of events, it appears that Mr. Mike Jung Woodsun, a foreign national and the person who procured the services of the Claimant and failed to pay him his dues, is not within the jurisdiction of this court.
26. The prayers sought by the Applicant in the instant application were that the Director Mike Jung Woonsun be ordered to produce the Judgment Debtor's books, papers, documents and/or evidence showing the affairs of the Company and in default of such attendance and/or providing suitable means and assets for the satisfaction of court, the said Director Mike Jung Woonsun be held personally liable to satisfy the decree of the court in full.
27. The said Director Mike Jung Woonsun having not been produced in Court, the prayers of the Applicant have not been proved. The Application dated 21st February 2021 is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

