



**Kenya Hotels and Allied Workers Union v Praying Mantis Limited (Octopus Club)
(Cause 129 of 2013) [2024] KEELRC 2786 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2786 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 129 OF 2013
JK GAKERI, J
NOVEMBER 14, 2024**

**BETWEEN
KENYA HOTELS AND ALLIED WORKERS UNION CLAIMANT
AND
PRAYING MANTIS LIMITED (OCTOPUS CLUB) RESPONDENT**

RULING

1. Before the Court for determination is the Applicant's Chamber Summons dated 12th August, 2024 seeking orders that:
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to issue an order absolute directed at the Garnishees attaching the monies in the aforementioned accounts to be deposited in the decree holders account No. 1139424505 at the Kenya Commercial Bank at Kisumu.
 4. Spent.
 5. The costs of this Application be paid out of the aforesaid accounts held by the Garnishees.
2. The chamber summons filed under Certificate of Urgency is expressed under Order 23 Rule (1)(1)(2) (3). Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and is premised on the Supporting Affidavit sworn by Chadwick Oloto Ng'ono on 12th August, 2024 who deposes that judgment was entered in favour of the Judgment Creditor/Applicant on 28th January, 2021 in the sum of Kshs.1,950,790.00 with costs of Kshs.50,000.00 and the sum has accrued interest in the sum of Kshs.2,593,704.75.



3. The affiant further deposes that although the Judgment Debtor paid the sum of Kshs.300,000.00 on 21st July, 2021, no other payments have been made and the sum of Kshs.2,593,704.75 remains outstanding.
4. That the Garnishee are bankers of the Judgment Debtor with sufficient credit to settle the judgment debt, and the Garnishee order will enforce the judgment made on 28th January, 2021 and the interests of the Garnishee will not be prejudiced.

Response

5. By a Replying Affidavit sworn by Toyah Chalingo on 24th September, 2024 which is silent on what the Garnishee relates to, the affiant states that the account sought to be Garnished Number 06588270004 alleged to belong to the Judgment Debtor (Octopus Club) belongs to an individual named William Roman Mctough and no orders have been made to avail the individuals bank account or other details.
6. The affiant also deposes that the bank does not have any other account in the name of the Judgment Debtor and prays for discharge from the proceedings with costs.
7. In its response to the Replying Affidavit, the Judgment Creditor (Applicant) deposes that Mr. William Roman Mctough, the holder of Account Number 06588270004 is a principal director of the Judgment Debtor who's actively engaged in this matter and the judgment debtor wind up its operations by falsely obtaining orders to stifle the decree holder members rights to enjoy the fruits of their judgment granted on 28th January, 2021.
8. The affiant deposes that on 21st July, 2021 Mr. William Roman Mctough paid Kshs.300,000.00 from account No. 06588270004 at the 2nd Garnishee bank in Kisumu.
9. That Mr. William Roman Mctough had not deposited any security in court for plot No. Kisumu/Kogony/193 and the Company had wound up its operations.
10. That having identified himself as the Managing Director of the Company and having engaged in an improper design to deny the Decree holders their terminal dues, the corporate veil ought to be pierced for enforcement purposes.

Applicant's submissions

11. The union submitted that the Court has jurisdiction to enforce its judgments and the Applicant had provided sufficient facts to warrant the orders sought.
12. Reliance was made on the sentiments of the Court in Lesinko Njoroge & Gathogo Advocates V Invesco Assurance Co-operative Bank of Kenya (Garnishee).
13. The union further submits that the 1st and 3rd Garnishees are not opposed to the instant application.
14. As to whether Mr. William Roman Mctough's account can be attached, reliance was made on the sentiments of the Court in Stacy Jepkemoi V Zaburi Enterprises Co. Ltd & 2 Others to urge that this is a case where the veil of incorporation may be pierced as Mr. William Roman Mctough used his account to discharge part of the decretal sum and obtained stay of execution orders by purporting to deposit security.
15. Sentiments of the Court in Multichoice Kenya Ltd V MainKam Ltd & Another [2013] eKLR were also cited to reinforce the submissions and urge the Court to grant the application.



2nd Garnishees Submissions

16. As to whether the 2nd Garnishee has an account in the name of the Judgment Debtor, Counsel submits that it does not as applicant confirms as Account No. 06588270004 belongs to Mr. William Roman Mctough, his position as Managing Director of the Judgment Debtor, if true, notwithstanding.
17. Reliance was made on the decisions in *Salomon V Salomon & Co. Ltd* [1897] AC 22 and *Mohamed Adan Molly V Linksoft (K) Ltd & Another* [2013] eKLR to urge that the Judgment Debtor and Mr. William Roman Mctough are different person and the instant application amounts to piercing of the corporate shell or veil of incorporation which cannot be done automatically as held in *Ukwala Supermarket V Jaidep Shali & Another* [2022] eKLR, that for the veil to be lifted or pierced, it must be proved that the company is an *alter ego* of the member or director and there exists unity of interest and ownership or that insisting on the principle of legal personality would occasion fraud or promote injustice.
18. According to Counsel, since the Corporate veil has not been pierced, the Judgment Creditor cannot pursue Mr. William Roman Mctough.
19. The 2nd Garnishee prays for costs.

Analysis and determination

20. It is common ground that the grievants were employees of the Judgment Debtor and their employment was terminated between 1st May, 2012 in the case of the 4th grievant and 16th July, 2012 in the case of the 5th grievant. The 1st, 2nd and 3rd grievants were dismissed from employment on 13th June, 2012.
21. The Court found their termination from employment unfair and awarded the sum of Kshs.1,950,790.00 and Kshs.50,000 as costs.
22. Contrary to the applicant's averments and assertions that the judgment was delivered on 28th January, 2021, it was in fact delivered on 13th November, 2020. It is unclear to the Court where the Applicant obtained the date it is using.
23. Documents on record reveal that an attempt by the Judgment Debtor to stay execution failed on 30th June, 2024 when the Court delivered its ruling on the application.
24. The Court found that the Respondent was not entirely truthful on its bank accounts.
25. It is also clear that the Respondent obtained interim stay orders from the Court of Appeal but the application was ultimately dismissed as an abuse of the process of the Court.
26. In its application dated 9th July, 2021, the respondent had intimated that it would appeal the Ruling of this Court delivered on 30th June, 2021. It is unclear if the same was filed as no evidence has been availed.
27. Evidently, Mr. William Roman Mctough who swore the affidavit dated 9th July, 2021 did not provide security as ordered by the court as the offer to provide Title for land parcel Kisumu/Kogony/193 was not actualized.
28. On 26th August, 2024, the Court granted Garnishee Order *Nisi* on account No. 0070151538110, A/C No. 007011520211810, A/C NO. 00701515992910, all at the Investment & Mortgages Bank Kisumu, A/C No. 1260282135533 at Equity Bank Kisumu and A/C No. 1139424505 at Kenya Commercial Bank, Kisumu held by the Garnishees to wholly satisfy the decree and accrued interest of Kshs.2,593,704.75.



29. During the hearing on 7th October, 2024 Mr. Ngame informed the Court that only the 2nd Garnishee was opposed to the application and had filed a Replying Affidavit and both the applicant and the 2nd Garnishee filed submissions.
30. The 2nd Garnishee's case is simply that the account it holds No. 06588270004 belongs to Mr. William Roman Mctough not the Judgment Debtor which is the position as Judgment was entered against the Respondent as opposed to Mr. William Roman Mctough.
31. The applicant on the other hand argues that since Mr. William Roman Mctough paid the sum of Kshs.300,000.00 in July 2021 as part payment and identified himself as the Managing Director of the Judgment Debtor and involved himself in improper designs, his personal account should be attached.
32. The question to be answered is whether Mr. William Roman Mctough is liable for debts and other liabilities of the Judgment Debtor.
33. It is trite law that a registered company is legal person, a body corporate distinct and separable from its members and directors with rights and subject to obligations in its own right as aptly articulated by Lord MaC Naghten in the House of Lords decision in Salomon V Salomon & Co. Ltd (Supra).
34. When a company is incorporated or registered, its members and directors or employees are all subsumed under the company's name. Incorporation creates a veil around the members and mangers of the company, the so called veil of incorporation or corporate shell.
35. The rule Salomons Case (Supra) is clear that the company has its own legal existence as it is a legal abstraction and liable for its debts or other obligations and the company has capacity to sue or be sued as was the case in this matter.
36. The Claimant sued the Judgment Debtor and obtained a Judgment against it and did not sue Mr. William Roman Mctough, who appears to have been the sole director of the Company.
37. Applying the decision in Salomon V Salomon & Co. Ltd (Supra), Mr. William Roman Mctough is not liable to any of the grievants as the company was the employer and the Judgment Debtor.
38. However, the rule in Salomons Case (Supra) is subject to various statutory and Judicial qualifications or modifications, circumstances in which the veil of incorporation is lifted or the corporate shell pierced and regard had to the members or directors of the Company. In such case liability attaches on members or directors of the Company.
39. Examples include agency relationships, to prevent evasion of legal obligations, determination of residence of a company for purposes of taxation, fraud or improper conduct among others.
40. In the instant case, Mr. William Roman Mctough entered appearance for the Judgment Debtor and gave his address of service as P.O. Box 1239 Kisumu and he identified himself as the Managing Director of the company.
41. In its Notice of Motion dated 19th March, 2021, the Respondent/Judgment Debtor sought review of the court's order to deposit the decretal sum of Kshs.2,019,068.00 and in its place Mr. William Roman Mctough volunteered his Title Deed of Kisumu/Kogony/193 worth Kshs3,100,000.00 registered in his name and swore an affidavit to that effect but application was declined and no security was provided as the decretal sum was not deposited as directed by the Court.
42. From the documents filed by the Judgment Debtor the Court gets the impression that Praying Mantis Ltd (Octopus Club) was a shell company with no assets capable of being attached and had only one



- director, its Managing Director, Mr William Roman Mctough who may be said to have been the alter ego of the company under the corporate law principle of organic theory.
43. Since the 1st and 3rd Garnishees have not contested the orders sought, it is unclear to the Court whether the accounts they hold belong to the Judgment Debtor or Mr. William Roman Mctough.
 44. However, the fact that Mr. William Roman Mctough paid Kshs.300,000.00 from his personal account in part payment of the decretal sum, would appear to suggest Mr. William Roman Mctough's personal account and the Judgment Debtor's account were indistinguishable or the funds were commingled and thus inseparable. Otherwise why would Mr. William Roman Mctough pay the company's liability from his personal account?
 45. Equally, Mr. William Roman Mctough has not alleged that the company had other directors or that its accounts had money to satisfy the decretal sum. Similarly, he has by default or design remained reticent on the status of the company.
 46. One of the common law exceptions to the rule in *Salomon V Salomon & Co. Ltd (Supra)* is the veil of incorporation may be pierced if it shown that a member or director of the company intends to use or was using the company to avoid existing legal obligations.
 47. Since 2021 Mr. William Roman Mctough has fought vociferously to avoid execution and the Claimant opted to change tact and proceeded against bank accounts hoping that there may be some monies to salvage the decretal sum as the company appears to have ceased to carry on business.
 48. It is unclear to this Court why the Claimant did not follow up to ensure that the decretal sum was deposited as directed by the Court on 30th June, 2021 and the last time the file was in Court was on 5th March, 2022 and no follow up until the instant application was filed more than 2 years later.
 49. Although the Claimant alleges that Mr. William Roman Mctough involved himself in "improper design to deny decree holders just terminal dues" he provided no supportive evidence of the improper design which ought to have been demonstrated evidentiary to show that Mr. William Roman Mctough's intention was to ensure that the company evaded its obligations or defraud the Judgment Creditor.
 50. Be that as it may, having found that Mr. William Roman Mctough may be regarded as the alter ego of Praying Mantis Ltd (Octopus Club) as explained in *H. L. Bolton Engineering Co. Ltd V T. J. Graham & Sons Ltd [1956] ALLER*, he manifested the thoughts and deeds of the company. In other words, the company thought and acted through him.
 51. Relying on the sentiments of R. Nyakundi J. in *Ukwala Supermarket V. Jaideep Shah & Another [2022] eKLR*, the Court is satisfied that Praying Mantis Ltd (Octopus club) was a mere instrumentality or alter ego of Mr. William Roman Mctough and there was unity of interest and ownership to the extent that the two were inseparable in that Mr. William R. Mctough entered appearance for the Judgment Debtor, filed a response, gave his title in the Company and postal address, offered to substitute deposit of the decretal sum with his personal Title Deed of Kisumu/Kogony/193, but failed, and did not deposit the decretal sum as directed by the Court.
 52. Simply put, Mr. William Roman Mctough was the face and hands of the Company and never alleged that it had other members or directors or that it had bank accounts of its own.
 53. In the Court's view, there is overwhelming evidence to show that Mr. William Roman Mctough and Praying Mantis Ltd interests and ownership were inseparable.



54. The Managing Director of Praying Mantis Ltd was the alter ego of the company and more importantly, as held in Ukwala Supermarkets case upholding the rule in Salomons case (Supra) will promote injustice by leaving the grievants without a remedy, as the Court held that termination of their employment by the Respondent was unfair.
55. In the upshot, the Court is satisfied that this is one of those cases where the rule in Salomon's case (Supra) may be qualified or excepted as its strict application is likely to promote injustice.
56. In conclusion, the Judgment-Creditor's application dated 12th August, 2024 is granted in the following terms:

That the Garnishee Order Nisi granted on 26th August, 2024 be and is hereby decreed as absolute and monies held in the accounts identified by the Garnishee Order Nisi at the Investment & Mortgages (I&M) Bank Kisumu, Bank of Africa Kisumu, Equity Bank Kisumu and Kenya Commercial Bank Kisumu to satisfy the decree and accrued interest of Kshs.2,593,704.5 and be deposited in the decree holders account No.1139424505 at the Kenya Commercial Bank Kisumu.

Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 14TH DAY OF NOVEMBER, 2024.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

