



**Makae v Habo Group of Companies (Cause 179 of 2016)
[2023] KEELRC 1359 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 179 OF 2016**

**AK NZEI, J
MAY 31, 2023**

BETWEEN

JONATHAN MULEWA MAKAE CLAIMANT

AND

HABO GROUP OF COMPANIES RESPONDENT

RULING

1. Judgment in the suit herein is shown to have been delivered on July 30, 2020, upon which party and party costs are shown to have been taxed and certified.
2. On February 2, 2023, the Claimant/Decree holder filed an evenly dated Notice of Motion seeking orders:-
 - a. that the Court do issue summons directed at Mr Augustine Omondi Awiti, Mr Hezron Awiti Bollo, Ms Monica Anyango Awiti, Mamba Village Centre Limited, Silver Dust Limited and Habo Agencies Limited, who are directors and shareholders of the Respondent/Judgment Debtor; Managers and any other officers of the Respondent/Judgment Debtor be compelled to attend Court on an appointed day to be orally examined as to the business and affairs of the Respondent/Judgment Debtor and/ or the property or properties of the Respondent/Judgment Debtor, and the Respondent/Judgment Debtor's means of satisfying the decretal sum.
 - b. that the Court be pleased to issue an order directed at Mr Augustine Omondi Awiti, Mr Hezron Omondi Bollo, Ms Monica Anyango Awiti, Mamba Village Limited, Silver Dust Limited and Habo Agencies Limited in their capacity as directors of the Judgment Debtor and any other officers of the Respondent/Judgment Debtor to produce before the Court books of accounts, audited financial statements, annual returns, bank statements, cheque books and other statutory documents relating to the operations and transactions of the Judgment Debtor



for the last five (5) years as well as their personal bank statements as stated above, and the said directors be examined on oath on the said documents.

- c. that in default of appearance and/or in failure to such reasonable circumstances as may be deemed fit, the said directors named herein above be deemed personally liable to settle the claim herein, and warrants of attachment do issue against them personally, or to be imprisoned and committed to civil jail for a period not less than six (6) months.
 - d. that the Court be pleased to make such further orders in the interest of justice upon examination of Mr Augustine Omondi Awiti, Mr Hezron Awiti Bollo, Ms Monica Anyango Awiti, Mamba Village Centre Limited, Silver Dust Limited and Habo Agencies Limited.
 - e. that costs of the application and cross-examination proceedings be awarded to the decree holders.
3. The application is based on the Claimant/Decree holder's affidavit sworn on January 28, 2023. It is deponed in the said affidavit, *inter-alia*:-
- a. that Judgment was delivered in favour of the Claimant/decree holder in June 2017 whereby the Respondent was ordered to pay the Claimant ksh 459,600, costs and interest.
 - b. that the Respondent did not settle the decretal sum despite demand, leading to issuance of execution proceedings against the Respondent.
 - c. that attachment by the auctioneers was objected to by AWANAD Enterprises Limited, and that the objection was determined vide a Ruling delivered on July 30, 2020.
 - d. that on May 27, 2021, the Claimant/decree holder was informed by Makini Auctioneers that the Respondent company is dissolved and that the said auctioneers were unable to trace any assets belonging to the Respondent company.
 - e. that dissolution of a company does not extinguish accrued liabilities such as the decretal sum herein.
 - f. that directors of the Respondent at the time of dissolution were Mr Augustine Omondi Awiti, Mr Hezron Awiti Bollo, Ms Monica Anyango Awiti, Mamba Village Centre Limited, Silver Dust Limited and Habo Agencies Limited.
 - g. that the directors of the Respondent company have acted in a fraudulent manner in that they commenced the process to dissolve the Respondent company and disposed of its assets during the pendency of the suit herein and that this was done with a clear intention of frustrating the Claimant/decree holder from realizing the fruits of the Judgment.
4. The application came up for hearing on March 8, 2023, and there being no appearance on the part of the Respondent, the Court ordered that summons be issued and be served on the Respondent/Judgment Debtor's directors for oral examination in Court on April 17, 2023. The directors did not attend Court on April 17, 2023, though shown to have been served with summons.
5. Documents annexed to the Claimant/decree holders supporting affidavit filed herein include this Court's Judgment delivered on June 9, 2017, a Ruling delivered on July 30, 2020, a letter dated February 1, 2021 by the Registrar of Companies to the Respondent company acknowledging receipt of the Respondent's letter requesting the Registrar of Companies to dissolve the Respondent company and a confirmation that the company had been dissolved, and a notice in that regard published via Kenya Gazette Notice 666 of January 29, 2021. Also annexed to the application is a company search



dated May 28, 2019 indicating the Respondent's directors to have been Augustine Omondi Awiti, Hezron Awiti Bollo and Monica Anyango Awiti; and the shareholders as Mamba Village Centre Limited, Silver Dust Limited and Habo Agencies Limited.

6. It is clear from the record herein that dissolution of the Respondent Company was sought and achieved after delivery of this Court's Judgment and at a time when execution proceedings herein had issued to recover the decretal sum from the Respondent/Judgment Debtor. The Claimant/decreed holder's averment that dissolution of the Respondent/Judgment Debtor company was fraudulently commenced with an intention to frustrate realization of the decretal sum by the Claimant/Applicant is not, in my view, far fetched.
7. Under such circumstances, this Court will not hesitate to pierce, and to lift the Respondent/Judgment Debtor's incorporation veil and to reach out for the directors with a view to holding them personally liable regarding the decretal sum herein. A company operates through its officers, chief of whom are the directors, who together with the company's shareholders are (also) the company's top decision makers.
8. It was stated as follows as follows in *Jian Nanxing -Vs- Cok Fast Company Limited* [2018] eKLR:-

“...the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are, inter alia, where there is no real formal legal separation between the company and its shareholders' personal financial affairs and/or that the company is just a sham or the company's actions were wrongful and fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the company and/or design a scheme, to perpetrate financial fraud, and/or if the company's creditors suffer unjust cost, that is, they did business with the company and they are left with unpaid bills or unpaid Court Judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or directors personally liable.”
9. It is my finding that the present case is an appropriate one where the Respondent company's veil of incorporation must be pierced and lifted. Consequently, I lift the Respondent's veil of incorporation and impose personal liability on Mr Augustine Omondi Awiti, Mr Hezron Awiti Bollo, Ms Monica Anyango Awiti, Mamba Village Centre Limited, Silver Dust Limited and Habo Agencies Limited regarding the decretal sum herein. Warrants of attachment and sale of their property in execution of this Court's decree herein, or any other form of lawful execution of this Court's decree, shall issue against the said directors and/or shareholders.
10. Costs of this application are awarded to the Claimant/applicant.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



..... for Claimant

..... for Respondent

