



**Kenya Union of Commercial Food & Allied Workers Union v Fish & Chicken Bar Limited
(Cause E326 of 2022) [2023] KEELRC 3029 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3029 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E326 OF 2022
SC RUTTO, J
NOVEMBER 24, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS
UNION APPLICANT**

AND

FISH & CHICKEN BAR LIMITED RESPONDENT

RULING

1. On 15th July 2022, this Court allowed the Claimant/Applicant's Application dated 18th May 2022, thereby issuing orders that the Respondent pays the grievants half of their severance pay.
2. Thereafter, the Claimant brought the instant Notice of Motion dated 9th June 2023, seeking the following orders:
 - a. Pending hearing and determination of the Main Claim, this Honourable Court do and/ hereby issues Summons to appear against Mr. Ghalib Mohamed, the Respondent's Director to personally attend open Court on a date and time as the Court finds convenience to Show Cause why he should not be punished and or committed to civil jail for willful disobedience of the orders of the Court issued and on dated 15th July, 2022.
 - b. In the event of default to honour the Summons issued by this Honourable Court, this Honourable Court do and hereby issues orders directing the OCS Kileleshwa Police Station to arrest and produce the said Mr. Ghalib Mohamed in Court on a date and time as may be convenient to the Court.
 - c. This Honourable do fine and jail the said Mr. Ghalib Mohamed for disobedience of the orders of the Court.



- d. The said Mr. Ghalib Mohamed be also directed to deposit in Court deposit Account Kshs.3,079,168.50 being half of the total benefits arising out of termination of employment on account to redundancy and in honouring the Ruling and orders of 15th July, 2022.
 - e. Pending hearing and determination of the Main Claim, the said Mr. Ghalib Mohamed be ordered to deposit his passport and any other travel document(s) with this Court until after full and final settlement of Redundancy benefits owing and due to the nine grievants.
3. The Motion is expressed to be brought under Section 12 of the *Employment & Labour Relations Court Act*, the *Judicature Act* and is supported by the Affidavit sworn on 9th June 2023 by Mr. Caleb Nyamwaro who describes himself as the Claimant's Branch Secretary at Ongata Rongai. Mr. Nyamwaro deposes that the Claimant addressed the Respondent on 1st August 2022, 2nd November 2022, 27th February 2023 and on 28th April 2023 but its Director chose to ignore the letters asking him to make payments as ordered by the Court.
 4. Mr. Nyamwaro further avers that the Respondent's Director Mr. Ghalib Mohamed intends not to pay the benefits thus subjecting his former employees to economic difficulties, poverty and suffering. He further avers that the law requires the Respondent to settle redundancy benefits before terminating employment on account of redundancy hence it acted in violation of the law.
 5. Opposing the Application, the Respondent filed a Replying Affidavit sworn on 11th July 2023 by Mr. Ghalib Mohamed who deposes that he has been advised by the Respondent's advocates on record which advise he verily believes to be correct, that it is only if circumstances warranting the lifting of the corporate veil of the Respondent exist, that he can be held liable for its obligations.
 6. Mr. Ghalib further avers that in this respect, there are no circumstances warranting the lifting of the corporate veil of the Respondent such as fraud or improper conduct of its affairs.
 7. He further stated that even prior to the commencement of these proceedings the Respondent was facing serious liquidity issues which were exacerbated by the COVID-19 pandemic that necessitated the closure of its business and the termination of employments as the Respondent explained to the grievants in its letter to them dated 16th March 2022.
 8. According to Mr. Ghalib, the Respondent was totally unable to meet its said obligations as it had no money as shown in its bank statement for its only bank account for the year 2022.

Submissions

9. The Application was canvassed by way of written submissions which I have considered. On its part, the Claimant submitted that to the best of its knowledge, the Respondent company has not been declared insolvent. It was its contention that the Respondent is equally not facing any winding up or Insolvency Petition. That the Respondent is therefore not in financial distress to be unable to pay its debts and the reason for its closure is therefore only known to its Director, Mr. Ghalib Mohamed.
10. The Claimant further submitted that Mr. Ghalib's Replying Affidavit does not indicate what he has done to ensure that the receiver of his estate would take care of the interests of the grievants employed by the Respondent. That he had equally not shown any of his assets which workers can have a chance to lay their hands on for payment on his assets available for liquidation.
11. The Claimant contended that it has not been demonstrated that the Respondent has been wound up by an order of the Court or that it is under administration order or that a resolution for voluntary winding up has been passed.



12. In further submission, the Claimant stated that in employment matters, it is not necessary to lift the veil in order to hold the director liable to honour the decision of the Court.
13. On the Respondent's part, it was submitted that it has a separate and distinct legal personality from Mr. Ghalib Mohamed as its director and he cannot be held personally liable for its debts and other obligations. While referencing the case of *Ukwala Supermarket v Jaideep Shah & another* (2022) eKLR, the Respondent maintained that a company at law is a different person altogether from its subscribers and in this case, from its directors and they cannot be in any shape or form be held liable.
14. The Respondent further argued that while there are circumstances under which the veil of incorporation may be lifted, this can only be done with the leave of court and the same has to be specifically pleaded and sought. That a point that is not pleaded even if canvassed at the hearing, cannot be a basis of a determination. In this regard, the Respondent posited that in the current Application, no orders for the lifting of the corporate veil have been sought.
15. The Respondent maintained that the Claimant has not cited Mr. Ghalib for contempt nor sought to lift the corporation veil of the Respondent and should not therefore be allowed to cite him for contempt of Court as a Director of the Respondent. In support of the Respondent's arguments, the Court was invited to consider the determination in the case of *Daniel Ogare v Herne Limited; Gopal Dhanji Patel (Applicant)* (2021) eKLR.
16. Placing reliance on the case of *Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd* (2021) eKLR, the Respondent further posited that the mere fact that a company has become insolvent or no longer has assets as is in the current case, is not proof of fraud or intention to defraud creditors.

Analysis And Determination

17. Upon evaluating the Application, the Response thereto and the rival submissions, it is evident that the singular issue for determination is whether the Court should allow the Application and grant the orders sought by the Claimant.
18. As can be discerned from the face of the Application, the Claimant is seeking to have the Respondent's Director Mr. Ghalib Mohamed punished for contempt of the Court's orders issued on 15th July 2022. Essentially, the Claimant seeks to have Mr. Ghalib answer for the legal obligations of the Respondent.
19. It is not in doubt that the Respondent is a Limited Liability Company and hence is a legal person separate from its Directors and shareholders.
20. This brings to the fore the principle of corporate personality as espoused in the celebrated case of *Salomon v Salomon & Co Ltd*. [1897] AC. Flowing from that decision, it is trite that a company is a separate legal entity and thus a juristic "person" in the eyes of the law.
21. This position was amplified in the case of *Victor Mabachi & Anor v Nurtorn Bates Ltd* NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR, where the Court of Appeal reiterated the principles set out in the Salomon case as follows, "A company as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."
22. And further, in the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor* (2013) eKLR the Court 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.”

23. However, there are instances when the veil of incorporation may be lifted. In such instances, the Court disregards a company’s separate legal entity and holds its directors or shareholders personally liable for the company’s legal obligations. As was held in the case of *Multichoice Kenya Ltd vs Mainkam Ltd & Anor* (Supra), the exceptions to the principle of corporate personality have been made when a fraudulent and improper design by scheming directors or shareholders is imputed. That 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.
24. Further, in the case of *Jayden Limited v Bradley Limited* (Miscellaneous Application E202 of 2019) [2021] KEHC 127 (KLR) (Commercial and Tax) (30 September 2021) (Ruling), the Court in addressing the principle of the lifting of the corporate veil, cited with approval the *Halsbury’s Laws of England*, thus:

“...I note that the law is settled on the circumstances under which such an order can be issued. 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.”
25. In the instant Application, the orders sought by the Claimant will effectively lift the corporate veil. Be that as it may, it is notable that the Claimant has not sought leave to lift the veil of incorporation.
26. In essence, the Court has not been asked to make a determination for the lifting of the corporate veil of the Respondent. Therefore, in absence of such a determination, the Court cannot issue orders effectively lifting the corporate veil of the Respondent. Indeed, what the Claimant has done in this case, is put the cart before the horse.
27. What’s more, and as highlighted above, it is clear that the lifting of the corporate veil is only done in exceptional cases for instance, where fraud or improper conduct is imputed or where the character of the company, or the nature of the persons who control it, is a relevant feature. In this case, the Claimant has not indicated let alone suggest that there is fraud or improper conduct to warrant the lifting of the corporate veil of the Respondent.
28. What is clearly evident is that the Respondent has failed to settle the grievants’ dues as ordered by the Court on 15th July 2022. Does that warrant the lifting of the corporate veil?



29. In *Carey Ngini v Dennis O. Ogolla & another* (2010) eKLR, the Court quoted with approval, the determination in *Corporate Insurance Company Limited v Savemax Insurance Brokers Limited and another* HCCC No. 125/2002, where it was held that the veil of incorporation is not to be lifted merely because the company has no assets or is unable to pay its debts and thus insolvent. The Court further held that in such a situation, the law provides a remedy other than the director of the company being saddled with the debts of the company.
30. As I have stated, there is no indication that the Director of the Respondent has acted in any fraudulent manner or is culpable of any other improper in order to avoid paying the grievants their dues.
31. The Court is also alive to the expansive definition of the term “employer” in the *Employment Act* to include agent, foreman, manager or factor of such person. However, it is notable that in this case, the issue in dispute is with regards to the execution of the Court’s orders hence pursuant to Rule 32(2) of the *Employment and Labour Relations Court Rules*, it is the *Civil Procedure Rules* that are applicable.
32. In any event, the Claimant was at liberty to apply for orders under Order 22 Rule 35 of the *Civil Procedure Rules* prior to moving the Court through the instant Application.
33. I therefore find this Application is not merited and I dismiss it accordingly with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant/Applicant Mr. Nyumba

For the Respondent Mr. Wanjohi

