



REPUBLIC OF KENYA



KENYA LAW
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**Kangethe v Ziwa Garments and Apparels Limited (Cause 947 of 2015)
[2023] KEELRC 2921 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 947 OF 2015
MA ONYANGO, J
NOVEMBER 16, 2023**

BETWEEN

GEORGE K KANGETHE CLAIMANT

AND

ZIWA GARMENTS AND APPARELS LIMITED RESPONDENT

RULING

1. The application before me for determination is dated 1st December 2020 and has been filed by the Decree Holder seeking the following orders –
 - (i) That summons do issue compelling one Michael Oddenyo and Ambrose Anguka the Directors of the Judgement Debtor's Company to attend Court on such date as may be ordered or allocated, to be orally examined as to the Judgement Debtor's means and assets in satisfying the decretal sums and costs herein in the sum of Kshs.382,524/=.
 - (ii) That the court makes an order for the attendance in court and examination of Michael Oddenyo and Ambrose Anguka the Directors of the Judgement Debtor's Company, for production of any books of accounts, documents and or evidence showing the affairs of the company for purposes of satisfying the decretal sums and costs herein in the sum of Kshs.382,524/=.
 - (iii) That in default of the said directors complying with the above orders, this Honourable Court be pleased to order that the said directors be held personally liable to pay the Decree Holder the decretal sums and costs in the sum of Kshs.382,524/=.
 - (iv) That costs of this Application be borne by the Judgement Debtor and/or its said Directors in any event.



2. The application was heard and, in a ruling, delivered on 1st February 2022 this court ordered as follows:

“.....18. I accordingly order that Michael Oddenyo and Ambrose Anguka do attend Court on 24th February 2022 to be orally examined, as to the judgment debtors means and assets in satisfying the decretal sum and costs herein in the sum of Kshs.382,524/-. They will be required to produce any books of accounts, documents and other documentary evidence relating to the judgment debtor’s finances or accounts.”
3. From the record, Mr. Michael Oddenyo and Ambrose Anguka were cross examined on 20th July 2022. It is the said cross examination that is the subject of this ruling.
4. Mr. Michael Oddenyo in cross examination admitted that he was one of the two directors of the Respondent each holding a share in the ratio of 50:50. He informed the court that the company was registered in 2013 and that the company was closed in March 2016.
5. He further stated that the last returns were filed in 2014. He stated that the company is still legally in existence but does not have the resources to pay the Claimant the decretal sum. Mr. Oddenyo stated that he is not willing to personally take up the debts of the company as the company was to generate funds to pay its debts.
6. Upon being referred to the letter dated 15th February 2016 signed by the Directors, Mr. Oddenyo stated that at that time they had some outstanding funds which they were to collect and pay the Company’s debtors including the Claimant herein.
7. The other director, Mr. Ambrose Anguka on cross examination testified that the company ceased operating way back in March 2016. He maintained that the company died legally and as of now, it does not have means or assets to satisfy the decree herein. He denied the allegation that he had fraudulently closed the company to avoid paying the Claimant.
8. After the two directors had been cross examined, the parties filed written submissions on the issues that arose during the cross examination. The Claimant’s submissions dated 25th August 2022 and the Respondent’s submissions dated 6th September 2022 are on record.

Claimant’s Submissions

9. The Claimant in his submissions identified the issue for determination to be whether the Respondent’s Directors should be held personally liable for the decretal sum owed to the Claimant as prayed in the application dated 1st December 2020.
10. Counsel for the Claimant submitted that the Respondent’s Directors gave conflicting information regarding the status of the company. That they have no intention of making good of the court decree. The court was urged to hold the two directors personally liable by lifting the corporate veil. The case of *Multichoice Kenya Ltd v Mainkam Ltd & Another* was cited to buttress this position.

Respondent’s Submissions

11. The counsel of the Respondents counsel submitted that the primary purpose of cross examination of Directors or any person under order 22 rule 35 of the *Civil Procedure Rules* is to provide information by discovery of what assets, property or means are available to satisfy the decree.
12. It was the Respondents’ submission that the Directors produced the company financial statements and documents relating to the operations of the company during cross examination. It was submitted that



the decree holder was bound to use such information that came out of cross examination to ascertain what assets, property or means were available to complete the execution process.

13. The Respondents submitted that order 22 rule 35 of the *Civil Procedure Rules* has no provision for personal liability. According to the Respondent, the prayer for personal liability by the Applicant was sought only in case of default of attendance, and that as such, the corporate veil cannot be lifted and the Directors held liable for the company debts as sought by the Claimant.
14. It was further submitted that the equitable exception to limited liability can arise in exceptional circumstances where the Directors are shown to have used the company as a vehicle for fraud, improper misconduct or deceit to defeat claims or court decrees. That no such illegality was imputed upon the directors during cross examination
15. It was the Respondents' submission that no fraud, illegality or whatsoever misconduct can be imputed upon the Directors to warrant the lifting of the corporate veil and finding them personally liable for the debts of the company.

Determination

16. The issue arising from the submissions of the parties is whether the court should lift the corporate veil herein and hold the directors of the Respondent personally liable for the decree herein.
17. As pointed out in the Respondent's submissions, the issue of lifting the corporate veil to hold the Directors of the Respondent personally liable was not raised in the application. It has only come up in the submissions filed by the Applicant.
18. Nevertheless, it is imperative that I determine the issue as it will have an impact on the final disposition of this matter.
19. It is trite law as was held in the case of *Salomon & Co Ltd v Salomon* (1897) AC, 22. HL, that a Company is a separate legal entity from its Directors. However, there are circumstances when the courts will hold the Directors and members of a Company personally liable for a Company's actions and debts.
20. The circumstances when the corporate veil may be pierced are discussed in paragraph 90 of The Halsbury's Laws of England 4th Edition Volume 7(1) as follows:

“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”.

21. In summary, a court can only pierce the corporate veil in the following circumstances:



- a) First, where the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
 - b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.
22. In *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Another* (2014) eKLR the court observed:
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L that a company is a different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”.
23. In the instant case, the two directors testified and stated that the Respondent company has not been operational since March 2016 and further that the company does not have assets or money to settle the decree herein.
24. The Applicant has averred that the Respondents’ Directors closed down the company to evade satisfying the decree in his favor. However, no evidence has been tendered to demonstrate the alleged fraudulent intent by the Directors of the Respondent.
25. In addition, the application before the court did not seek orders for lifting of the veil. The prayer by the Applicant is that the directors be held personally liable should they fail to comply with the court’s orders to appear for cross examination which they complied with.
26. The upshot, is that the prayers sought by the Applicant in the application dated 1st December, 2020 to hold the directors personally liable for satisfaction of the decree herein fails. The same is accordingly dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 16TH DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

