



**Gachoka v Protocol Solutions Limited (Cause 1516 of 2014)  
[2022] KEELRC 12713 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12713 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1516 OF 2014**

**M MBARŪ, J**

**MAY 12, 2022**

**BETWEEN**

**PETER MUCHA GACHOKA ..... CLAIMANT**

**AND**

**PROTOCOL SOLUTIONS LIMITED ..... RESPONDENT**

**RULING**

1. The applicants, Job Maxwell Ochieng Ndege filed application dated March 4, 2022 seeking for orders that the notice of motion dated December 22, 2021 be struck out with costs on the grounds that the same is fatally defective because it is filed against the directors of the company instead of the respondent company and offends the concept of corporate legal personality as held in *Salomon v Salomon* and adopted in the case of *Macaura v Northern Assurance Company Ltd [1925] AC*.
2. The application is supported by the affidavit of the applicant, Job Maxwell Ochieng and on the grounds that the judgement and decree herein were entered against the respondent company and not against its directors and the respondent being a legal entity, a notice to show cause cannot issue against the directors seeking to attach their personal property. A party can only execute against the party whom they obtained judgement against and seeking to attach the personal assets of the directors is a misapprehension of the concept of corporate legal personality where a company is distinct and separate entity from the shareholders and directors. The corporate legal status creates a protective veil insulating directors, shareholders and other company officers from individual personal liability for actions attributable only to the company unless certain conditions exits.
3. Mr Ochieng avers in his affidavit that the only exception to lifting the corporate veil on a company is meant to allow certain actions to be directed against its directors and officers but cannot operate in a vacuum so that parties choose to pierce the veil as a matter of preference but requires proof the the company has engaged in wrongful trading or contracting someone despite being disallowed by the law or the company's articles, there is fraud and or evasion of legal duty.



4. The cause of action herein does not create any exception to justify the piercing of the company veil and there is no application seeking to lift the corporate veil. The application seeking to show cause is made in abuse of court process.
5. Where a company has no assets to satisfy its liabilities, an applicant ought to file application seeking to examine the company directors pursuant to order 22 rule 35 of the *Civil Procedure Rules*. The cross-examination must be done first before any show cause notice can issue. It must be established whether the company has any assets to be attached to satisfy its liability.
6. Under section 384 of the *Insolvency Act* enables a company is required to pay its debts if a creditor to who it is indebted for Ksh 100,000 or more has served at the company office notice and demand or execution of a judgement or decree has issued and remains unsatisfied. The claimant has not met this condition.
7. The claimant has failed to use ordinary means of execution the decree herein pursuant to section 38 of the *Civil Procedure Act* and order 22. No matter is demonstrated that the claimant has taken any steps to execute the decree herein.
8. In reply, the claimant filed his replying affidavit and avers that judgement herein was entered in his favour against the respondent in the year 2016 for the sum of Ksh 5, 100,000 together with costs and interests and for the last 6 years the respondent has not paid a single cent. The respondent has no attachable assets to sell to recover the decretal sum and he made application dated April 3, 2017 and amended on December 4, 2017 seeking to summon and cross-examine the respondent directors, Tony Ketter and Job Maxwell Ochieng Ndege which application was allowed on February 22, 2018 and one director Job Maxwell Ochieng Ndege appointed the firm of Jacob Oloo & Co Advocates to represent him during the cross-examination and which was done on May 20, 2019 and the court delivered ruling on June 19, 2019 and held that he had committed fraud in changing the directorship of the respondent company to defeat the execution process and the court deemed it appropriate to lift the corporate veil of the respondent company to hold both the directors personally liable to pay the decretal sum.
9. There is no appeal against the judgement and orders of the court and the instant application is only meant to delay justice and should be dismissed with costs.
10. Both parties attended on March 22, 2022 and agreed to address the application by way of written submissions. Only the claimant filed his written submissions.
11. The claimant submitted that upon judgement herein, the respondent failed to pay the award leading to his application seeking to examine the directors which was allowed and the court held that the respondent directors were personally liable to pay the judgement sum together with costs and interest. They have not paid since. The claimant has filed application seeking that the respondent directors be summoned to attend court and show cause why they should not pay the judgement sum personally and leading to the instant application seeking to have the same struck out.
12. In the case of *Stephen Njoroge Gikera & another v Econite Mining Co Ltd & 7 others [2018] eKLR* the court held that instances where the veil of incorporation may be lifted must be based on the circumstances of each case to allow the persons behind the company to take responsibility to the entity. The applicant herein, Maxwell Ochieng Ndege has been found by this court to have committed fraud so as to evade justice and payment of the decretal sum herein and should not enjoy equity. The application herein is meant to delay justice and should be dismissed with costs.



## Determination

13. The sole issue for determination following application dated March 4, 2022 is whether the court should strike out the claimant's notice to show cause dated December 22, 2021 with costs.
14. Should the court strike out notice of motion dated December 22, 2021?
15. It is trite that that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process. However, such action should only be taken upon the court being satisfied that sufficient and good cause to show that the pleadings sought to be struck out are indeed frivolous, vexatious or likely to be prejudicial to the other party.
16. In the case of *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa (Civil Appeal No 54 of 1999)* the Court of Appeal held that;

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.
17. And in *Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)* the same court held that;

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.
18. Therefore, such an order should issue in the exception rather than as a matter of course.
19. This matter has had a long history. On January 30, 2017 court entered judgement in favour of the claimant in the sum of Ksh 5, 100,000 together with costs and interests. The respondent did not pay.
20. The claimant made application seeking to summon and examine the respondent's directors and which was allowed on February 22, 2018 and indeed Job Maxwell Ochieng Ndege attended and was cross-examined and in ruling delivered on May 20, 2019 the court found the respondent's directors, Job Maxwell Ochieng Ndege and Tony Ketter personally liable to pay the decretal sum. The two have not complied.
21. The claimant has moved the court with his application seeking the respondent's directors to attend and show cause why they should not personally pay the decretal sum.
22. The application dated December 22, 2021 is yet to be heard and at this stage, for the court to be called to make a finding that the application is without merit would be a draconian move and one meant to gag the claimant before he is able to urge his matter.



- 23. Save to urge the court that the claimant has not filed application of lift the corporate veil pursuant to section 38 of the Civil Procedure Act and that he has not utilised the ordinary means of execution, the applicant herein has not set out any matter that the application is frivolous or vexatious and if addressed, there shall be no merit.
- 24. The court shall hear the application by the claimant and one dated December 22, 2021 on the merits.
- 25. Accordingly, application dated March 4, 2022 is found without merit and is hereby dismissed with costs to the claimant.

**DELIVERED IN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

**\*\*M. MBARU\***

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....

