



Kenya Engineering Workers Union v Rolmil Kenya Limited (Cause 41 of 2006) [2022] KEELRC 12805 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12805 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 41 OF 2006
MA ONYANGO, J
OCTOBER 5, 2022

BETWEEN
KENYA ENGINEERING WORKERS UNION APPLICANT
AND
ROLMIL KENYA LTD RESPONDENT

RULING

1. Before me, for determination is the claimant/applicant's notice of motion application dated October 14, 2021. It seeks the following orders: -
 - a. Spent.
 - b. That this court be pleased to order the directors of the respondent/judgment debtor, listed as Diamond Hasham Lalji, Mahendradhai Patel, Shahid Diamond Lalju and Sureshchandra Nagjibhai Patel, to appear in court, to explain how they intend to pay the outstanding debts to their ex- employees.
 - c. That the court be pleased to order the directors of the respondent/judgment debtor, listed as Diamond Hasham Lalji, Mahendradhai Patel, Shahid Diamond Lalju and Sureshchandra Nagjibhai Patel to show cause why they should not be put in the civil jail for six months for disobeying the court orders of paying its ex-employees their decretal dues amounting to Kshs 363,065,128/- plus interest and costs.
 - d. That the court be pleased to order te directors of the respondent/judgment debtor to immediately deposit their travel documents in court to prevent them from leaving this country, before this application is heard and determined.
 - e. Costs of the application be provided for in favour of the applicant.



2. The application is further supported by the affidavit of Jason N Namasake, counsel on record for the applicant herein, sworn on October 14, 2021 in which he reiterates the grounds as set out on the face of the notice of motion application.
3. In response to the Application, the respondent/judgment debtor filed a replying affidavit deponed by Diamond Hasham Lalji, its Managing Director, on February 4, 2022 in which he avers that the applicant had already commenced execution proceedings against by serving him with a notice to show cause.
4. The affiant maintains that the notice to show cause was erroneously served upon him individually yet execution was to be effected against the Respondent.
5. He contended that the respondent/judgment debtor is a legal and separate entity pursuant to the provisions of sections 5 and 6(1) of the Companies Act capable of satisfying its own debts and therefore he cannot be held personally liable for its actions.
6. Mr Lalji contends that the Notice to show cause and/or committal to civil jail of individual directors over a debt of a Limited Liability Company is unfair and vindictive in nature especially noting that he holds no shares in the respondent.
7. He maintains that the claimant/decreed holder is using the notice to show cause and the judicial process to settle personal scores in complete disregard of the court processes.
8. The affiant further states that his committal to civil jail will not redress the wrong but will act as a way to punish him. He argues that the committal will not enforce the orders alleged to have been disobeyed by the respondent/judgment debtor.
9. It is further contended that unless the options outlined in section 38 of the Civil Procedure Act are exhausted, enforcement of the orders through committal to civil jail will be extreme and tantamount to a miscarriage of justice.
10. He further argues that his committal to civil jail will be a serious breach to his constitutional rights as he will be condemned unheard.
11. The deponent maintains that the execution process initiated is illegal. He this court to find the application dated October 14, 2021 devoid of merit and to dismiss it with costs to the respondent.

Claimant submissions

12. In its submissions the claimant maintains that its application is merited as it seeks to question disobedience of court orders by the respondent's directors on behalf of the respondent, which is an artificial person and thus cannot be summoned in court. For emphasis the claimant relied on the decision in the Court of Appeal in the case of Shimmers Plaza Limited v National Bank of Kenya Limited (2015) eKLR on obedience of court orders.
13. The claimant further submits that there are deliberate attempts by the directors of the respondent to evade the implementation of this court's award despite voluntarily signing the collective bargaining agreement with the claimant on December 19, 2002 and their subsequent failure to implement the same leading to the institution of this claim before this court.
14. The claimant/applicant further submits that the respondent's directors have not only failed to implement court orders but through their acts and omissions have hampered implementation of this court's orders. The claimant accuses the directors for hiding assets belonging to the respondent and failure to pay debts owed by the company which is something within its powers to do.



15. It is on this basis that the claimant/applicant argues that the said directors ought to be summoned to court to explain why they should not be committed to civil jail for the omissions as highlighted above.
16. In conclusion the claimant/applicant urged this court to find its application with merit and to allow it in terms of the reliefs sought therein.
17. The court takes note that at the time of writing its ruling there were no submissions on record filed on behalf of the respondent/judgment debtor.

Analysis and determination

18. I have considered the application dated October 14, 2021, the affidavits, the claimant/applicant's submissions and authorities cited therein. The only issue for determination is whether the application is merited or not.
19. In its application, the claimant seeks to have the individual directors called to account for the actions and inactions of the respondent/judgment debtor.
20. The claimant/applicant maintains that given the history of this matter and continuous failure by the respondent/judgment debtor to comply with the judgment, this court is called upon to summon the individual directors of the respondent to show cause why they should not be committed to civil jail for continued failure to comply with court orders.
21. This suit was filed in 2006 and judgment delivered on August 9, 2008. Since then there have been two rulings, with the instant ruling being the third, all on execution of the judgment.
22. It is a cardinal principle of the rule of law that court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the proper thing to do is to come back to court and explain the difficulties faced by the party in complying with the order. Once a court order is made in a suit the same is valid unless set aside on review or on appeal. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

23. This position was reiterated by the Court of Appeal in *Refrigerator & Kitchen Utensils Ltd v Gulabchand Popatlal Shah & others* Civil Application No. Nai. 39 of 1990. In *Wildlife Lodges Ltd vs. County Council of Narok and another* [2005] 2 EA 344 (HCK) the court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A



party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...”

24. The respondent filed a review application, which application was dismissed by this court. That then means the respondent/judgment debtor was bound at that juncture to comply with the court orders in place.
25. The respondent has not come to court to explain why it as not been able to comply with the judgment. Since the respondent is an inanimate person who acts through its directors. It is only logical that the directors be called upon to explain to the court how they intend to liquidate the decretal sum.

Lifting of the Corporate Veil

26. Lifting of the corporate veil means disregarding the corporate personality and looking behind the real person who is in control of the company. Where a fraudulent or dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. In *United States v Milwaukee Refrigerator Company* (2004) 122 Comp. Case 4681) the court said:-

“A corporation will be looked upon as a legal entity as a general rule... but when the notion of legal entity is used to defeat public convenience justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons.”

27. In *Littlewood Mail Stores Ltd v Inland Revenue Commissions* (IWL 1969 IWL 1214) Lord Denning observed: -

“The doctrine laid down in *Salmon vs Salmon & Co. Ltd* has to be watched carefully. It has often been supposed to cast a veil over the personality of a limited liability company through which courts cannot see. But that is not true. The courts can and often draw aside the veil. They can and often do pull off the mask. They look to see what lies behind.”

28. In *Halsbury's Laws of England* 4th Edition vol 7 paragraph 90, the conditions for lifting the corporate view are indicated as follows: -

“90. Piecing the corporate veil notwithstanding the effect of a company's incorporation. In some cases the court will piece the corporate veil in order to enable it to do justice by treating a particular company for purposes of 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 person who control it is a relevant feature. In such a case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even agents directors 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.”

29. The grounds upon which the corporate veil can be pierced and/or lifted are set out both in the *Companies Act* and in judicial decisions. The issue of whether the conditions for lifting the veil have been established is a question dependent on the facts of each case.



30. Reference is made to the finding of Ringera J. (as he then was) in *Corporate Insurance Co Ltd v Savemax Insurance Brokers Ltd & another* (2002) 1 EA 41 when he stated:

“The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company”.

31. In the instant case the applicant has cited the failure by the directors to obey numerous court orders as well derailing execution process by the directors hiding and/or disposing of the respondent’s properties.

32. The court orders relate to implementation of the collective bargaining agreement signed on December 19, 2002, which was later on registered in court on February 5, 2003.

33. I am satisfied that the applicant has satisfied the conditions for lifting of the corporate veil as it is the directors who have failed to either comply with the court orders or frustrated execution of the decree.

34. In the case of *George Williams Omondi & another v Co-operative Bank of Kenya Ltd & 2 others* (2016) eKLR, the court cited the case of *H M B Kayondo v Somani Amirali, Kampala* HCCS No 183 of 1994, where it was held that;

“There is no doubt that a company duly registered is a legal entity distinct from the subscribers or those who formed it. Once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities, appropriate to itself. The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the company is not, in law, the agent of the subscribers or trustees for them. Nor are the subscribers as members like any shape or form except to the extent and the incidence of incorporated is the same whether the shares in the company are in the hands of one man or many... Courts are in general precluded from treating a company as the alias, agent, trustee or nominee of its members, but they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct and this is what is meant by lifting the veil of incorporation... Since the defendant was the sole proprietor of his company, he knew or ought to have known that the company did not have funds to meet the cheques on due dates. To permit the defendant to hide behind corporate personality will amount to allowing him to escape the consequences of his breach of fiduciary trust placed in him by the plaintiffs... Accordingly, the corporate veil is lifted and the defendant held personally liable.”

[Emphasis mine]

35. Ringera, J (as he then was) in *Ultimate Laboratories v Tasha Bioservice Limited Nairobi* HCCC No 1287 of 2000, stated on lifting of the corporate veil that:

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which section 323 of the *Companies Act* is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principles that the



corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct.

36. For these reasons, I find merit in the claimant's application dated October 14, 2021 and direct that the directors of the respondent appear in person to explain how they intend to pay the decretal sum. Should they fail to do so the applicant will be at liberty to apply for the committal of the directors to civil jail for failure to comply with the court's orders.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

