



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 293 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EDWARD ODOYO OWITI.....CLAIMANT

VERSUS

SALAMA HOTEL LIMITED.....RESPONDENT

RULING

1. Before me, for determination is the Notice of Motion Application dated 8th November, 2019. It seeks the following orders **THAT**:

a) Spent.

b) Spent

c) **THAT** the execution of judgment and decree of this court be directed to the following entities and personalities jointly and severally **Salama Hotel Limited, Hotel Salama Limited, Salama Hotel, New Hotel Salama Annex, Ezekiel Karanja Ndune, Alfred Njau Karanja and Susan Ann Karanja.**

d) **THAT** costs be provided for.

2. This Application is premised on the grounds **THAT**:

i.) **THAT** the Claimant was employed by the Defendant and its affiliates controlled by the same personalities which on drone dates has been known and metaphorized as follows;

a. *Salama Hotel Limited*

b. *Hotel Salama Limited*

c. *New Hotel Salama Annex*

d. *Hotel Salama Annex*

e. *Ezekiah Karanja Ndune*

f. *Alfred Njau Karanja and*

g. *Susan Ann Karanja*

ii.) **That** judgment, decree and certificate of costs has been issued against the defendant and who sought about objection proceedings and refused to pay the Claimant despite all evidence that it was its employer.

iii.) **That** it is in the interest of justice that orders be issued against the aforementioned personalities and entities who are evading execution of court process.

3. The Application is further supported by the Affidavit of **EDWARD ODOYO OWITI**, Claimant sworn on 8th November, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.
4. The affiant states that the Respondent, its directors and entities listed herein jointly and severally had been his employer since 1998 until May 2013 when he was terminated from employment.
5. The affiant avers that he has attached the certificate of registration showing the said personalities.
6. He further states that the Respondent through its representative has previously sworn an affidavit before the court and acknowledged that the Respondent was also trading as New Hotel Salama.
7. The affiant seeks that this Court do order execution against the said personalities and the entities which relate to the Respondent herein.
8. He further avers that the Respondent did not provide him with a contract as stipulated in Section 10 of the Employment Act.

Respondent's Case

9. In response to the application the Respondents filed grounds of opposition dated 27th November 2019 in which it states that the application is fatally defective as it does not state under what provisions of law the Claimant is moving the court for the orders sought.
10. The Respondent further states that the Claimant has not shown any nexus between the Respondent, Salama Hotel Limited and New Hotel Salama Annex.
11. The Respondent avers that the Claimant is attempting to lift the veil of incorporation to execute the decree against individuals and entities who are neither shareholders nor directors of the Respondent.
12. It further maintains that the Claimant has failed to prove the existence of any such entity known as Salama Hotel Limited the Respondent herein, capable of suing or being sued in a court of law.
13. It maintains that the application lacks merit, is bad in law, misconceived and an abuse of the due process.

Rejoinder

14. The Claimant in rejoinder filed a further affidavit in which he averred that he conducted a search and has attached a search for Hotel Salama Limited which stated the directors as Salama Hotel Limited and prays that the court directs the said directors be issued with a Notice to show cause.

Submissions by the Parties

15. The Claimant submits it filed CR12 as directed by the court and the same evidenced the directorship of the Respondent as James Ndune Karanja, Teresiah Wanjiru Karanja, Susan Anne Karanja, Teresiah Wanjiru Karanja and Ezekiel Ndunge Karanja.
16. The Claimant submits that the Respondent swore in the annexed supporting affidavit that he is the managing partner of New Salama Annex sued herein as Salama Hotel and further states that Salama Hotel Limited.
17. On the issue that a company has a separate legal entity, the Claimant submits that the principle in **Salomon v A Salomon & Co Ltd** is not absolute. He submits that the **High Court in Mradula Suresh Kantaria v Suresh Nanalal Kantaria [2007] eKLR** held that:-

“... the Judgment debtor comfortably seated inside the corporate entity with a sneer on his face, saying, “you cannot touch me, I am protected by statute”. And this Court in response to tell him “We know who you are and you cannot be allowed by equity to fraudulently continue avoiding your genuine financial obligations using statute or law.”

18. The Claimant also relied in the Section 20(4) and Section 66 of the Companies Act.
19. It relies in the case of **Jackson Mugolio Musunji & 3 Others v Dambusters East Africa Limited [2019] eKLR** held;

“The Employment Act has given liberal definition of “employer” to mean –

“employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes die agent, foreman, manager or factor of such person, public body, firm, corporation or company;

.... When an employee is working in the same premises for the same employer, it is not affected by change of name unless this has been brought to his attention and the entity taking over has cleared the issue of employment benefits and or continuity of service. It would otherwise be unfair labour practice as the employer would be treating employees as other inanimate assets thus subjecting them to unfair labour practice.”

20. The Claimant also relied on the case of **Kenya Scientific Research International Technical and allied institutions Workers Union v Flame Tree Brands Limited and 2 Others (2013) eKLR** Rika J. expounded on the question of change of business name as follows.

“...Change in business name does not mean the business has ceased to exist... The Respondents continued to own the business, manufacture and sell cosmetics from the same business premises, under the same management. There were no roles phased out or diminished by the employer; there were no new roles introduced at the workplace ...”

21. The Claimant prays that the application be allowed.

Respondent’s Submissions

22. The Respondent submit that the claim was filed against one Respondent being Salama Hotel Limited which is a distinct legal entity from New Hotel Salama Annex which is just a registered business name and a separate business from the Respondent.

23. The Respondent submits that the Claimant did not adduce any evidence showing the relations between the Respondent, other personalities and entities neither did they annexe any search from the company registry showing whether Ezekiel Karanja Ndune, Alfred Njau Karanja and Susan Ann Karanja are in any way associated with Salama Hotel Limited the Respondent.

24. It also contends that no evidence has been adduced showing the relationship between the two entities nor proved the existence of an agency relationship between Ezekiel Karanja Ndune, Alfred Njau karanja and Susan Ann Karanja with the Respondent Salama Hotel Limited.

25. The Respondents submit that between Ezekiel Karanja Ndune and Alfred Njau karanja are both deceased as such the Claimant should not seek to execute against deceased persons.

26. The Respondent submits that New Hotel Salama Annex has been in existence since 2003 which is way before the claim was filed in 2015 and the Claimant never joined New Hotel Salama Annex as a party to the suit if there was the existence of an employment relationship. It submits there is no privity of contract as the employment agreement subject of the proceedings existed only between the Claimant and the Respondent’s Salama Hotel Limited. He submits that New Hotel Salama Annex a third party cannot benefit nor incur obligations from employment contract between the Claimant and the Respondent as held in **Provisional Construction Company Limited v Attorney General, Civil Case No. 165 of 1991**.

27. The Respondent submits that the allegations of an existing employment relationship between the Claimant and New Hotel Salama annex never came up during trial and that the same is an afterthought meant to cure fatal defect in a claim.

28. He submits that the application lacks merit as no relationship has been outlined between the Respondent and New Hotel Salama Annex or the individuals listed he therefore urges the court to dismiss the application with costs.

Analysis and Determination

29. After considering the parties’ arguments and the evidence adduced, the issue for determination is whether the instant Application is merited or not.

30. The Claimant herein filed a suit against the Respondent Salama Hotel Limited and a judgment was entered against them on 10th February 2017, a decree extracted against the defendant on 3rd August 2018.

31. The Claimant seeks to have an order directing execution of the judgment and decree jointly and severally against –

(i) Salama Hotel Limited

(ii) Hotel Salama Limited

(iii) New Hotel Salama Annex

(iv) Hotel Salama Annex

(v) Ezekiah Karanja Ndune

(vi) Alfred Njau Karanja

(vii) Susan Ann Karanja

32. The Claimant has attached the company search CR12 of Hotel Salama Limited which indicates its shareholders and directors as –

i.) James Ndune Karanja

ii.) Susan Ann Karanja

iii.) Teresia Wanjiru Karanja

iv.) Ezekiel Karanja Ndune

33. On record is a certificate of Business Registration for New Hotel Salama Annex, Hotel llama Annex. It is marked as Exhibit EK1 in the affidavit of Ezekiel Karanja Ndune sworn on 23rd February 2017. According to the Certificate of Registration, the proprietors of New Hotel Salama are Ezekiel Karanja Ndune, Susan Ann Karanja w/o Ezekiel Karanja and Alfred Njau Karanja.

34. In the affidavit, Mr. Ezekiel Karanja states that he is the Managing Partner of New Hotel Salama Annex sued as Salama Hotel limited. In the application dated 23rd February 2017 Salama Hotel Limited was seeking stay of execution pending appeal against the judgment herein. He specifically deposes as follows at paragraphs 1 to 6 of the affidavit –

1. That I am the Managing Partner of New Hotel Salama Annex sued herein as Salama Hotel Limited and fully conversant with the facts of this case thus competent to swear this Affidavit.

2. That I am advised by my advocates on record that this Honourable Court delivered judgment herein on the 10th February 2017 in favour of the Claimant.

3. That in its judgment, this Honourable Court awarded the Claimant a sum of Kshs.217,000/= plus costs for unlawful dismissal from employment.

4. That the Applicant is aggrieved by the said judgment and has lodged an Appeal against the said judgment and Decree.

5. That the said Appeal is arguable and has high chances of success.

6. That one of the pertinent issues raised in the appeal is that the Claimant during trial did not provide any documentary evidence to prove his case as against the Respondent. This Honourable Court had no document upon which to find that there existed an employer/employee relationship nor was there a basis for the award.

35. From the foregoing, it is clear that there is a nexus between Salama Hotel Limited and New Hotel Salama Annex. It is clear that Ezekiel Karanja Ndune was the major shareholder in Hotel Salama Limited.

36. The Claimant herein is seeking to lift the corporate veil for purposes of executing the decree against the directors of the company.

37. In **Post Bank Credit Limited (in liquidation) v Nyamangu Holding Limited (2015) eKLR** at paragraph 12, page 7/9 in which the Court listed circumstances under which the corporate veil can be lifted as follows:-

a) Where companies are in the relationship of holding and subsidiary companies;

b) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors because the business continued after the membership had dropped below the legal minimum;

c) In matters relating to taxation;

d) In matters relating to exchange control;

e) In the law relating to trading with the enemy of the state;

f) Where the law has been abused in certain circumstances;

g) Where the company is being used for some illegal or improper purpose;

h) Where the company is founded on personal relationship between the members.

38. In the present case, the company is founded on personal relationships between the shareholders and/or proprietors. It is clear from the search that both Salama Hotel Limited and New Hotel Salama Annex are family owned businesses. I also find that the Respondent and named parties abused the law by failing to issue a letter of appointment to the Applicant to enable him know which of them was his employer.

39. As stated by the Applicant in his affidavit, because he was never issued with a letter of appointment, he cannot tell which of the many entities bearing the names listed by him as his specific employer.

40. The Respondent submitted that Ezekiel Karanja and Alfred Njau Karanja are deceased. However, no evidence was adduced to prove this as the Respondent only filed grounds of opposition which in any event did not mention the issue of the deaths. Submissions cannot take the

place of evidence and facts must be supported by evidence. Counsel further does not state who engaged him to represent a deceased person?

41. The Respondent further submitted that the New Hotel Salama Annex has been in existence since 11th August 2003 as shown on the Certificate of Registration yet the Claimant never enjoined it as a party to the suit.

42. As the Applicant has submitted, he was never issued with a letter of employment and did not know the distinctions between the very many entities that he has sought to execute against. Indeed, the names are so deceptively similar and confusing, it would be almost impossible for an employee without a letter of appointment specifying one of them as his employer, to pinpoint which one of them was his employer.

43. I find that the Applicant is entitled to an order lifting the veil and to execute against the Directors and or Proprietors or Directors of the named entities in the circumstances of this case. I thus order that the Claimant be and is hereby allowed to execute the decree herein against the following personalities and entities jointly and severally namely:-

(1) Salama Hotel Limited;

(2) Hotel Salama Limited;

(3) Salama Hotel;

(4) New Hotel Salama Annex;

(5) Ezekiel Karanja Ndune;

(6) Alfred Njau Karanja and

(7) Susan Ann Karanja.

44. The costs of this application to be included in the decretal sum herein.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

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 had 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