



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 781 OF 2015**

**MCDONALD CHARO & 36 OTHERS.....CLAIMANTS**

**VS**

**BOFA MAWENI LIMITED.....RESPONDENT**

**RULING**

1. Pursuant to the Claimants' Notice of Motion, dated 30<sup>th</sup> August 2018, I allowed the Claimants' plea for summoning of Shahbaz Khan, for the purpose of examination under Order 22 Rule 35 of the Civil Procedure Rules.

2. When the parties appeared before me on 24<sup>th</sup> May 2021, it turned out that Shahbaz Khan did not have any documents relating to the Respondent. Counsel for the Claimants therefore chose not to examine him and instead filed a further Motion dated 10<sup>th</sup> June 2021, seeking the following:

- a) That the corporate veil of the Respondent Company be lifted;
- b) That the decree herein be executed personally against Shahbaz Khan.

3. The Motion is supported by an affidavit sworn by the 1<sup>st</sup> Claimant, McDonald Charo and is based on the following grounds:

- a) The Claimants have obtained judgment against the Respondent;
- b) The Claimants have extracted the decree and taxation of costs has been finalised;
- c) The Claimants have not been able to trace any known assets of the Respondent;
- d) Shahbaz Khan was ordered to appear in court and produce books of accounts;
- e) Shahbaz Khan, without filing a formal application, to vary or set aside the order of the Court, and without giving any reasons under oath, deliberately failed to produce the books of accounts as ordered by the Court;
- f) In the absence of the Respondent's attachable assets, and for disobeying a court order, execution should issue against Shahbaz Khan personally;
- g) The Court has jurisdiction to lift the veil of incorporation and hold Shahbaz Khan liable to settle the decretal sum decreed against the Company;
- h) The Claimants should enjoy the fruits of their judgment;
- i) It is in the interest of justice that the orders sought herein be granted.

4. Shahbaz Khan filed a replying affidavit on 13<sup>th</sup> July 2021. He depones that he is not a director of the Respondent Company and states that he had resigned from being such director one year prior to institution of the suit.

5. Khan challenges the authenticity of CR 12 dated 19<sup>th</sup> January 2017 produced by the Claimants, showing that he is still a director of the Respondent, on the following grounds:

- a) The CR12 indicates that Khan is a Kenyan Citizen, while he is a Pakistani Citizen holding Passport Number Zxxxxxxx;
- b) The aforesaid CR12 is not accompanied by an official receipt confirming that it was issued by the Registrar of Companies;
- c) In the absence of such a receipt from the Registrar of Companies showing that the CR12 was paid for, it is doubtful that the CR 12 emanated from the Registrar of Companies.

6. Khan further depones that the records from the Companies Registry clearly indicate that the current directors of the Respondent are Malik Rafaqat Ali and Mohamed Faisal.

7. Khan maintains that once he ceased being a director of the Respondent Company, he could not have access to the records of the Company. He adds that the Respondent had ceased operations.

8. Regarding the Claimants' plea that he be held personally liable for the decretal sum herein, Khan states that such an order can only apply to directors of the Company after it has been proved that the Company had acted fraudulently.

9. Khan concludes that a company is a separate juristic person and an order for lifting of the corporate veil should be granted sparingly, only in the presence of special circumstances such as misconduct, which have not been demonstrated by the Claimants.

10. The Motion proceeded by way of written submissions. In his submissions filed in court on 13<sup>th</sup> July 2021, Shahbaz Khan submits that no special circumstances have been demonstrated to warrant lifting of the Respondent's corporate veil, to his detriment.

11. Khan further submits that at the time the suit leading to the unsatisfied decretal sum was filed, he was no longer a director of the Respondent.

12. Khan adds that an application for lifting of the corporate veil must be preceded by an application for oral examination in respect of a decree as provided under Order 22 Rule 35 of the Civil Procedure Rules.

13. The single issue for determination in this application is whether the Claimants have made out a case for lifting of the Respondent's corporate veil and for pursuit of Shahbaz Khan to settle the decretal sum herein.

14. The law on lifting of the corporate veil was settled by the venerable decision in *Salomon v Salomon & Co Ltd (1897) AC 22 HL* to the effect that the veil of incorporation will only be lifted in the face of fraud or some other misconduct of equal gravity. Lifting of the corporate veil is thus not a common place practice.

15. In *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & another (HCCC No. 125 of 2002) Ringeral J* (as he then was) stated the following:

***“The veil of incorporation is not to be lifted merely because the company has not 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 directors of the company being saddled with the debts of the company.*”**

16. More recently in *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & another [2014] eKLR Gikonyo J* rendered himself thus:

***“...[the] separate legal personality of a company can never be departed from except in instances where the statute of 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.”***

17. In *Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & another [2016] eKLR Odunga J* restated this principle in the following terms:

***“...the decision to lift the corporate veil will not be lightly undertaken. In the present case there is no allegation that the applicant has attempted to execute against the defendant company and such attempts have failed. The only allegation made is that the applicant is not aware of the assets of the respondent. Whereas that may be a ground for invoking Order 22 rule 35.....that does not necessarily satisfy the conditions stipulated for the lifting of the corporate veil of corporation.”***

18. The Claimants chose not to examine Shahbaz Khan because in his affidavits in response to the application for examination under Order 22 Rule 35, he stated that he had no access to the Respondent's records. Although the Court appreciates the Claimants' frustrations, this is not sufficient ground to make the fundamental decision to lift the corporate veil, leave alone to pass on the Respondent's debts to Shahbaz Khan.

19. That being the case, the only decision to make is that the Claimants have failed to establish grounds for lifting of the corporate veil and the Motion dated 10<sup>th</sup> June 2021 cannot succeed.

20. Each party will bear their own costs.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyange for the Claimants

Mr. Gakuo for the Respondent