



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**ELRC CAUSE NO. 35 OF 2017**

**DANIEL OGARE.....CLAIMANT**

**-VERSUS-**

**HERNE LIMITED.....RESPONDENT**

**AND**

**GOPAL DHANJI PATEL..APPLICANT/DIRECTOR HERNE LIMITED**

**RULING**

1. This matter is in a series of other related files being Kericho Elrc Cause Nos. 36 of 2017, 37 of 2017, 38 of 2017, 39 of 2017, 40 of 2017, 41 of 2017 and 42 of 2017 all relating to the same parties and arising from the same cause of action so the orders in this file will apply to all the aforementioned files *mutatis mutandis*.

2. The Application before Court is a Notice of Motion dated 8.8.2019 filed by the Applicant herein seeking the following orders:

- 1) That the matter be certified urgent, service be dispensed with and the same be heard ex- parte in the first instance.**
- 2) That there be stay of execution of the warrant of Arrest issued on the 29.05.2019 against the Applicant herein, Gopal Dhanji Patel, pending the hearing and determination of this Application.**
- 3) That an order do issue suspending and or lifting the warrants of arrest issued on 29.05.2019 against the Applicant**
- 4) That the proceedings of this Honourable Court conducted on the 29.05.2019 and all consequential orders be set aside.**
- 5) That the costs of this Application be in the cause.**

3. The Application is supported by the affidavit of Gopal Dhanji Patel, the Applicant, who is the director of the Respondent deposed upon on 8<sup>th</sup> August 2019.

4. The Application is also premised on the following grounds:

- a) That sometimes in the month of June, 2019 the Applicant learned of an alleged warrants of arrest that had been issue against him.
- b) That the cause of the warrants was unknown to him, and he therefore instructed an advocate to follow up on the matter and unearth the cause of the warrants of arrest.
- c) He then was informed by his advocate, who perused the Court file, that there are series of matters that had been filed against the company which judgment had been issue against it and execution proceedings were live.
- d) On further perusal of the Court file, the Applicant's advocate learnt that, the Notice to show cause was issued against the company, which notice was addressed directly to the Applicant, who was a director, a natural person separates from the company.
- e) That the Notice to show cause addressed to the company and the one addressed to him never reached them, rather that he learnt of these notice upon perusing the Court file.

f) The Applicant contends that the Court issued warrant against him in person for wrongs allegedly done by the company without first lifting the corporate veil.

g) The Applicant therefore avers that the Notice to Show Cause and the subsequent warrants of arrest were irregular since no Order of lifting corporate veil was sought first.

h) The Applicant hence wants the warrants of arrest lifted.

5. The application above was opposed by the Respondents/Claimants herein who mounted a joint replying affidavit deposed upon by **Daniel Ogare**, the claimant in this cause on his behalf and on behalf of all other claimants in cause number 36 to 42 herein

6. The Respondents stated that the application herein is a defeatist, an afterthought which ought to be dismissed by this Court.

7. The Respondents stated that they knew the Applicant as the face of the company together with the manager of the Respondent one Mr. Harris Patel. That they worked for Mara River Lodge that was owned by the Respondent and managed by the Applicant.

8. That the Respondent offices are situated in Micasa Suite, along Cedar Road off Lenana Street in Westland's a building that houses the Applicant too. Therefore, service effected upon the respondent was also received by the Applicant.

9. The Respondents stated that service to the company is not in dispute the only issue the Applicant has is the fact that procedure was not followed in seeking leave of Court to execute the decrees.

10. They contended that the doctrine of corporate separation is not inviolable in labour law, since labour law seeks to protect the weaker party and also unmask employers who hide under multiple layers of business organization to avoid liability.

11. They contended that execution proceedings were properly undertaken and the warrants were only issue after the Notice to show cause failed to elicit some response from the company which was managed by the Applicant herein.

12. It was also stated that the Applicants application is without basis and the same ought to be dismissed.

13. This Application was disposed of by way of written submissions.

#### **Respondents Submissions.**

14. The claimants/ respondents submitted on Three issues; whether the decree can be enforced as against a company director, whether proper service of the Notice to show cause was effected and whether the present application is an abuse of Court process.

15. On the first issue it was submitted that officers/agents of a company are not shielded from legal obligation by the corporate veil in context of Employment law. In this they cited the case of **Justine Nyambu v Jaspa Logistics [2017] eKLR**.

16. It was argued that the Applicant is the human face of the Company and the Employment and Labour relations Court does not bar the claimant from joining the directors of a company in one claim. They reinforced their Argument by citing the case of **Daniel Mutisya Masesi v Romy Madan & Another [2013] eKLR**, where Justice Rika held that;

**“The Employment Act 2007 does not bar directors and their companies from being joined in the same claim, filed by their employees. This Court has in the past suggested that the doctrine of corporate separateness is not inviolable, particularly in labour law. Employers organize their businesses around multiple layers of insulating personalities- corporate and individual in the attempt to avoid regulatory burdens. The law aims to assist the lesser of the parties in the bargaining equation, by making it possible for the weaker party, to proceed and apportion liability to any of the decision making component in the economic enterprise. The Employment Act defines the term ‘employer’**

**Ochola Kamili Holdings Limited v Guardian Bank Limited [2018] eKLR.**

21. The Respondent then submitted that the Application herein is an abuse of Court process and prayed that the same be dismissed with costs to them.

**Applicant's submissions.**

22. The Applicant on the other hand submitted only on one issue that is whether the Warrants of Arrest issued against the Applicant/ Director- Herne Limited were proper, procedural and legal.

23. It was then submitted that the Applicant learnt of the ex- parte judgment together with the Notice to Show cause after the warrants were issue and he only learnt of the same after instructing his advocate to peruse Court file and affirm the cause of the warrants. The Applicant also took issue with the way the Notice to show cause was addressed to him instead of the Respondent who had employed the Claimants. According to the Applicant, if the Notice to show cause was properly served then execution proceedings ought to have been commenced against the Respondent and not himself.

24. The Applicant maintained that the warrants of arrest were improperly procured, and that the proper procedure would have been to first lift the corporate veil or at the very list seek his court attendance in accordance with Order 22 Rule 35 of the Civil Procedure Rules 2010 and cited the case of **Kolaba Enterprises Limited v Shamshudin Hussein Varvani & Another [2014] eKLR.**

25. It was also submitted that the Respondent had not exhausted all other means of execution before seeking for the warrants of Arrest which according to the Applicant ought to have been used as a last resort. They relied on the case of **Jayne Wangui Gachoka v Kenya Commercial Bank Limited [2013] eKLR.**

26. They then submitted that before warrants of arrest are issued the court need to satisfy itself that the person seeking the warrants of arrest has adhered to section 38 of the Civil Procedure Act and Order 22 Rule 31(1) of the Civil Procedure Rules 2010. They then cited the case of **Solomon Muriithi Gitandu & Another v Jared Maingi Mburu [2017] eKLR.** They further cited Article 11 of the International Convention on Civil and Political Rights (ICCPR) which stated that no one should be imprisoned merely on the ground of inability to fulfil a contractual obligation.

27. The Applicant then urged this Court to lift the warrants of arrest issued by this Court on the 29.05.2019 and in essence allow the Application herein.

28. I have examined the averments of the parties herein. The main argument by the appellant is that a warrant of arrest has been issued against him in person – as Copal Dhanji Patel who is the Director of the respondent.

29. He contends that he is a different entity from the respondent and no proceedings to lift the veil of the respondent were conducted to uncover him and thus the warrant of arrest were illegally issued.

30. He contends that a Notice to Show Cause has been issued against the company, the respondent herein but were not received by the company.

31. The respondents argued against the application insisting that the principal of corporate separation is foreign in Labour Law.

32. The respondents also cited **Philip Ateng Oguk & 28 others vs E.A. Power Management (supra)** where the court held that principles of legal separation does not apply in Labour Relations cases.

33. Whereas this court agrees in principle that in employment matter there is sometimes a very thin line between an employer and director of the company, the separation between the 2 can only be conclusively discerned upon lifting of the corporate veil.

34. In the instant case, the respondents proceeded to seek to levy execution against the applicant herein without seeking court's direction upon lifting of the corporate veil.

35. This in my view was irregular because the status of the applicant vis a vis the respondent and his dealings with the employers must be first demonstrated before court before execution is allowed to proceed against him in person.

36. I find the application is therefore merited and I allow stay of execution and lift the warrant of arrest issued against the applicant on 29/5/2019 pending further direction of this court.

37. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Wachira for respondents – present

Oumo for the claimant – present

Court Assistant - Fred