



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 19 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 29<sup>th</sup> January, 2020)

**ANCENT MUMO KALANI.....CLAIMANT**

**-VERSUS-**

**NAIROBI BUSINESS VENTURES LIMITED.....RESPONDENT**

**RULING**

1. The Claimant/Applicant, Ancent Mumo Kalani filed a Notice of Motion application dated 9<sup>th</sup> July 2019 brought under Rule 32 of the Employment & Labour Relations Court (Procedure) Rules, 2016 as read together with Order 22 rule 35 of the Civil Procedure Rules and the relevant provisions of the Companies Act No.17 of 2015 against the Respondent, Nairobi Business Ventures Ltd. He seeks to be heard for orders that:-

**1. The Honourable Court do order that ALFRED NZOMO NGULO TITHUSI, KOTHA PANDURANGA VITTAL, DAVID ODEGA NYABOGA, SAWASTHIKA INVESTORS LTD, SIMON SAILI MALONZA, RAJA SEK HAR SRNGARAPU, VENKATA SATHYA NARAYANA VASU ABUTOLA and NAGRECHA JAYESH HIMATAL being the Shareholders/ Directors of Nairobi Business Ventures Ltd, the judgment debtor herein, to attend Court and be orally examined on oath as to the assets and means of the Judgment Debtor and produce books of accounts and other documentary evidence showing the same.**

**2. ALFRED NZOMO NGULO TITHUSI, KOTHA PANDURANGA VITTAL, DAVID ODEGA NYABOGA, SAWASTHIKA INVESTORS LTD, SIMON SAILI MALONZA, RAJA SEK HAR SRNGARAPU, VENKATA SATHYA NARAYANA VASU ABUTOLA and NAGRECHA JAYESH HIMATAL being the Shareholders/Directors of Nairobi Business Ventures Ltd, the judgment debtor herein, to personally satisfy the decree given on 20<sup>th</sup> August 2018 together with costs plus interest accrued to date.**

**3. The warrants of arrest and committal to civil jail be issued against the Shareholders/ Directors of Nairobi Business Ventures Ltd namely, ALFRED NZOMO NGULO TITHUSI, KOTHA PANDURANGA VITTAL, DAVID ODEGA NYABOGA, SAWASTHIKA INVESTORS LTD, SIMON SAILI MALONZA, RAJA SEK HAR SRNGARAPU, VENKATA SATHYA NARAYANA VASU ABUTOLA and NAGRECHA JAYESH HIMATAL.**

**4. Costs of this application be provided for.**

2. The Application is grounded on the following reasons: The judgment debtor has resorted to concealing its property so as to delay or defeat execution by the decree holder and that *Alfred Nzomo Ngulo Tithusi, Kotha Panduranga Vittal, David Odega Nyaboga, Sawasthika Investors Ltd, Simon Saili Malonza, Raja Sekhar Srngarapu, Venkata Sathya Narayana Vasu Abutola* and *Nagrecha Jayesh Himatal* personally transacted the business of the Respondent Company. That the Applicant is sure to suffer irreparable loss due to the Respondent's action and that its agents have failed to locate attachable assets of the judgment debtor.

3. The Applicant avers in his Affidavit that on 05/04/2019 he obtained a decree for Kshs. 305,910/= together with interest pursuant to a judgment delivered on 20/12/2018 but has unsuccessfully attempted to execute against the Respondent.

4. He believes the judgment debtor's directors fraudulently disposed of or transferred its assets to defeat this claim and defraud him and that they have further been involved in fraudulent/wrongful trading.

5. That the directors are abusing the corporate personality of the judgment debtor and should be held personally liable so as to satisfy the

decree and that they are also using the corporate veil as a means of fraud.

6. That he has conducted a search of the ownership of the Respondent Company which has revealed that *Alfred Nzomo Ngulo Tithusi, Kotha Panduranga Vittal, David Odega Nyaboga, Sawasthika Investors Ltd, Simon Saili Malonza, Raja Sekhar Srngarapu, Venkata Sathya Narayana Vasu Abutola and Nagrecha Jayesh Himatal* are the Shareholders/ Directors of the company.

7. He believes that cross-examination of these Shareholders/ Directors will reveal that the judgment debtor has paid other creditors to the exclusion of the judgment debtor's claim.

8. The Respondent filed a replying affidavit dated 11<sup>th</sup> October 2018 sworn by its Director, Abotula Venkata Satyanarayana Vasu who avers that the Respondent ceased operations and closed shop sometime in January 2019 due to a reduction in business and which is well within the Applicant's knowledge.

9. That that the company currently has no assets capable of satisfying the Claimant's decree and that the Claimant's allegation that it is concealing its assets to delay and defeat execution of the decree is unfounded as he has not given details of the same.

10. That the audited accounts confirm the Respondent is further riddled with debts owing to creditors including the Claimant and that the few assets it had upon closing shop were confiscated by the landlords over non-payment of rent arrears.

11. That the Respondent has two accounts with Bank of Baroda namely Account No. 95870200000824 and Account No. 95870400000201 and another account with Diamond Trust Bank namely Account No. 0605610002.

12. That a look at the said accounts' statements confirms they have credit balances and that the Respondent Company has not transacted any business since January 2019. That the Respondent's directors have therefore not acted fraudulently and/or improperly and so the application should be dismissed.

#### **Claimant/ Applicant's Submissions**

13. The Applicant submits that the Respondent not explaining where the goods the Claimant had attached at its headquarters were taken to, committed an offence under **Rule 14 of the Auctioneers Rules, 1997** which provides as follows:-

**“14. Non-removal or alteration of attached goods A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.”**

14. That the Respondent's actions call for penal sanctions being a fine of Kshs. 50,000/= and imprisonment up to one year.

15. He submits that lifting of the veil occurs if there is abuse of the legal process or improper conduct as in the present case where attachment was done but the items attached were moved to an undisclosed location. He cites the case of **Peter O. Ngoge T/A O P Ngoge & Associates -v- Ammu Investment Company Limited [2012] eKLR** where in regard to reasons for lifting of the corporate veil, the Court observed:-

**“It is however my view that the lifting of a corporate veil is not the same thing as an application under Order 22 rule 35 of the Civil Procedure Rules. In the latter an officer is examined as an agent of the Company while in lifting the corporate veil, the mask of incorporation is lifted with the result that the shareholders are no longer agents of the company but are treated in their own rights and liability attaches to them not in their capacity as agents of the company but in their personal capacity. The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. In other words the corporation's brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. The day to day management of the company may, however, be handled by specific officers tasked to do so on behalf of the Board. However, the ultimate responsibility rests with the directors. It therefore follows that the management of the corporation must be deemed to be carried by or on behalf of the Board save in cases where the ultra vires principle applies. The legal position as regards incorporated entities is well settled. In Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183, the Court of Appeal citing Salomon vs. A. Salomon & Company Ltd [1897] AC 22 and Adams vs. Cape Industries Plc [1990] 1 Ch 433 held that it is a principle of company law of long antiquity that a limited company has a legal existence independent of its members and that a company is not an agent of its members. The Court further said that the principle of alter ego attributes the mental state of company's directors or other officers to the company itself in order to fix the company with either criminal or civil liability.**

It follows that the mere fact that one is a director or shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of **Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199** following **Palmers Company Law Vol. 1 (22 ed)** lists 10 instances under which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a legal persona and these are:-

1. Where companies are in the relationship of holding and subsidiary companies;

2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;
3. In certain matters relating to taxation;
4. In the law relating to exchange control;
5. In the law relating to trading with the enemy;
6. In the law of merger control in the United Kingdom;
7. In competition of the European Economic Community;
8. In abuse of law in certain circumstances;
9. Where the device of incorporation is used for some illegal or improper purpose; and
10. Where the private company is founded on personal relationship between the members.”

16. That the Court of Appeal in Githunguri Dairy Farmers Co-operative Society –v- Ernie Campbell & Co. Ltd and another [2018] eKLR observed that:-

“...It must be remembered that the contract was between the respondents and upon breach the doctrine of privity of contract behoved either party to pursue the other party to the contract for relief and not a third party. At that point the 1st respondent had no legal reason or basis for enjoining the appellant, a third party, to the suit. It is only after it faced objection to execution and upon further interrogation, realized that the 2nd respondent had no assets that could satisfy the decree obtained. It is at that point that it became necessary to apply to court, under the relevant provisions of the law, for the lifting of the 2nd respondent’s veil of incorporation. The appellant duly appeared, mounted a defence and exercised its right to be heard. In fact, the gist of its response was that it was not a party to the suit but which the Judge deemed as not absolving it from liability. In essence, it had due notice of the issues before the court, to which it duly responded to and the court as the adjudicative tribunal delivered itself on them. The appellant cannot in the circumstances, therefore, claim denial of its right to a fair hearing and or violation of the principles of natural justice. We hasten to add that the application was in the nature of a motion on notice. It is not necessary that a matter in court must only be initiated by way of plaint or originating summons, so that a party can claim to have been heard fairly as submitted by the appellant...”

In its deliberation, the High Court found that the faces behind the two legal entities were the same which necessitated the piercing of the veil of incorporation. In VTB Capital PLC v Nutritek International Corp & Another & 3 Others (supra), Court of Appeal (UK) observed that;

“...if the corporate veil is to be pierced, “the true facts” must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be).”

Then that being so, the appellant being the majority shareholder in the 2nd respondent and its chairman, Mr. Baiya were the relevant actors behind the veil of incorporation for the two entities. The learned judge came to the conclusion of facts and this Court does not have the luxury to interfere with those findings as they are based on evidence...

*In our view, the learned Judge was right to lift or pierce the veil of incorporation to ensure justice and equity to all parties prevails. Further, the law is that courts will disregard the veil of incorporation where it is apparent that the device of incorporation is used for some illegal, fraudulent or improper purpose... In the present instance, Mr. Baiya claimed that the liabilities accrued by the 2nd respondent including the decretal sum and the costs of suit, were to be paid from the 2nd respondent’s account. Why would Mr. Baiya, a director in the 2nd respondent and who definitely had full knowledge of its affairs (that it had no attachable assets or financial means to satisfy the decree) insist that the decree be settled by it? We draw the same inference as the 1st respondent that the same was meant to defeat the satisfaction of the decree, an improper purpose warranting the court to go behind the veil of incorporation...In the absence of any reasonable excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2nd respondent’s veil of incorporation for purposes of ensuring justice to both parties.”*

17. The Applicant submits that one particular director Abotula V. S. Vasu has testified in this case and answered the application for lifting the corporate veil and that he has also commissioned the audit of the Respondent. That Mr. Abotula’s name could be replaced mutatis mutandis in the arguments made in the case of Kenya Hotels & Allied Workers Union –v- Sheshe Beach Resort T/A Tabora Enterprises Ltd & 2 others [2015] eKLR where Rika J noted:-

“19. Section 2 of the Employment Act 2007, as well as the Interpretive Sections of the other Labour Statutes, describe an Employer to include: any person, public body, firm, corporation, or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation or company.

20. Mr. Buffa retained his position as a minority shareholder, but also remained as an Employer. He was the person in his own evidence, who was asked by the absent Directors to inquire about the Respondent's debts, including debts owing to Employees; he was the person who commissioned Auditors for the Respondents; he communicated with Mr. Hussein from Italy about the Respondents' debts; he was sent money by Respondents through the Bank to pay Employees their salaries; he oversaw the Respondent's business; and although coming in these proceedings as an Interested Party, has basically made the Response for the Respondents, the Respondents having stayed away from the proceedings. The Interested Party was an Employer within the definition of the law. It is irrelevant whether he was a Director or Shareholder of the Company."

18. The Applicant submits that in this case, the Respondent's goods were proclaimed by the auctioneers but when they went to attach the same, the goods had been moved. That the Court has had the occasion to lift the corporate veil where the judgment debtor conceals its property after proclamation, such as in the case of Joseph Isagi Nyando –v- Imagine IMC Ltd [2018] eKLR where the Court noted:-

22. In the instant case, I note that judgement was entered against the Respondents on 19.2.2015. After taxation of costs, warrants of attachment of movable property were issued on 7/12/2017 and the Respondent's goods proclaimed on 8/12/2017 by Eshikoni Agency Auctioneers. The proclamation indicates that the Respondent had attachable property. It is not possible to ascertain how the proclaimed goods disappeared if not but for the reasons that the Respondent disposed them off after they got interim reliefs of stay of execution.

23. This act by the Respondent is an act of evasion of liability. The Respondent never proceeded to prosecute the stay application. In my view, they purposely proceeded to dispose of their property to evade execution.

24. The affidavit opposing this application is deponed to by the Respondent's Chief Executive Officer who averred that the Respondent ceased to exist. I find it difficult to understand why a non-existent entity should be having a Chief Executive Officer. In the circumstances, it is my finding that the Applicant have established valid reasons to warrant the piercing of the Respondent's corporate veil, which I now allow, and order that execution of the decree herein be effected against the Respondent's Directors herein as prayed."

#### Respondent's Submissions

19. The Respondent submits that it and its Directors/ Shareholders are distinct and separate legal persons and that the debts incurred by the company should not therefore be satisfied by its directors. That the corporate veil cannot be lifted unless and/or until the following are proved:-

1. There must be fraud or improper conduct on the part of the company and directors/shareholders.
2. The company must be basically intended to evade tax obligations.
3. The company was being used to conduct criminal activities.
4. There was discovery of fraudulent and improper design by the directors/shareholders of the company.

20. That it is trite law that inability to satisfy a debt is not a basis for lifting corporate veil and it relies on the case of Corporate Insurance Co. Ltd –v- Savamax Insurance Brokers Ltd & anor, HCCC No. 125 of 2002 quoted with approval in Carey Ngini –v- Dennis O. Ogolla & another [2010] eKLR where Ringera J stated:-

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

21. It submits that the Claimant has failed to substantiate his allegations that the Respondent concealed its assets and that the claim the Claimant proclaimed its goods is unfounded as he has not produced a copy of the proclamation notice as proof of the same.

22. That what is produced is a sworn affidavit, which does not even show the premises at which the good were proclaimed and that only a proclamation notice can ascertain the value and description of the goods attached. Further, that **Rule 12 (1)(a) of the Auctioneers Rules, 1997** requires the auctioneers to inter alia prepare a proclamation notice upon proclamation of goods.

23. The Respondent further submits that the Applicant has not produced any evidence pointing to the fraud or misbehaviour by its directors and that he has made vague and very general allegations of fraud against it. That the Claimant's prayer for lifting of the corporate veil should fail and it urges this Court to find so.

24. That it is trite law that the standard of proof for fraud allegations is higher than a mere balance of probabilities as was held in the case of Pamba Ong'weno Amila v John Juma Kutola [2015] eKLR. It also relies on the case of Vimal Velji Shah –v- Chemafrika Ltd & 5 others [2016] eKLR where the court in refusing to lift the corporate veil held:-

**"Given the standard of proof required by law, this Court is of the view that the allegations made in the Plaintiff's Affidavit are too general. It would have been expected that the Plaintiff would furnish more cogent evidence, for instance;-**

- i. The date or about the date when the 1stRespondent moved its operations. Was this prior or after to the date of

filing suit or date of judgment?

ii. A description of the assets allegedly hidden.

iii. Efforts, if any, made by the Plaintiff or his agent to trace the current location of the Company and its assets.

iv. Details of efforts allegedly made to contact or engage the Defendant Company.”

25. It is submitted by the Respondent that it is committed to satisfying the decretal sum but has been unable to and should not be subjected to punitive measures and that it relies on **Section 38 of the Civil Procedure Act** and further on the case of **Solomon Muriithi Gitandu & another –v- Jared Maingi Mburu [2017] eKLR** where the Court stated that:-

**“I am of the view that though the Respondent was entitled to execute the decree, the procedure was flawed. The trial magistrate erred by not complying with the provisions of Section 38 of the Civil Procedure Act and committed the appellants to prison merely on account of inability to pay and denying them a chance to show cause why they should not be committed to civil jail. As pointed out in the case of Rosana Pluda -V- Phillip Kipchirchir Moi Nairobi Divorce Cause 154/2008 (unreported), no one should be sent to jail for inability to pay a debt. It would be morally wrong to do so. And it would make no sense to send to civil jail a person who is unable to pay. That would be malicious. Civil jail is for those who refuse to part with their money to pay debts...”**

26. The Respondent also submits that the Applicant has clearly not discharged his burden of proof that the Respondent has refused and/or neglected to satisfy the decree or that it has assets capable of satisfying the decree. It concludes that the Claimant’s application is not merited and urges the court to dismiss the same with costs.

27. I have considered the averments and submissions of the Parties herein. The Applicants want this Court to lift the veil of the Respondent and find the Directors liable to pay the decretal sum.

28. The Respondents contend that the corporate veil of the Respondent cannot be lifted because the directors have not done any act or omission that would warrant this step.

29. The Claimant have not indicated any act or omission the directors have committed against the law to warrant piercing of the corporate veil.

30. In **Corporate Insurance Company Limited vs Savemax Insurance Brokers Limited and Another HCCC No. 125/2002**, quoted with approval by Ringera J. in **Carey Ngini v Dennis O. Ogolla & Another (2010) eKLR** (supra), the veil of incorporation is not to be lifted merely because the company has no assets or is unable to pay its debts and thus insolvent.

31. The law is that the corporate veil can only be lifted where the directors use the notion of a legal entity to defeat public convenience, justify wrong, protect fraud or defend crime.

32. There is no indication that the directors of the Respondent have acted in any fraudulent manner or have transferred their property to another entity in order to avoid paying the Claimant. I therefore find this application is not merited and I dismiss it accordingly.

**Dated and delivered in open Court this 29<sup>th</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wabuko holding brief Enonda for Claimant/Applicant

Anduno holding brief Mutai for Respondent