



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

CAUSE NO.170 OF 2018

NDERITU KAGUU GITHAE & 8 OTHERS.....CLAIMANTS

VERSUS

LLOITA HILLS SPRING LIMITED.....1ST RESPONDENT

LEDAMA OLE MEITEKINI MESOPIR2ND RESPONDENT

LETAN LIMITED..... 3RD RESPONDENT

RULING

The ruling herein is with regard to two (2) applications dated 16th July, 2019 and 26th August, 2019.

The 2nd respondent, Ledama Ole Meitekini Mesopir by application dated 16th July, 2019 is seeking for orders that;

1. ...

2. *The 2nd respondent herein be substituted by IOVANNA MESOPIR in her capacity as the personal representative of the estate of the late LEDAMA OLE MEITEKINI MESOPIR and the memorandum of reply be amended accordingly;*

3. ...

4. *Pending hearing and determination of this application, the decree dated 22nd November, 2018 and subsequent orders be stayed;*

5. *The court deems it fair to set aside the ex parte judgement entered on 22nd November, 2018.*

6. *Costs of the application be provided for.*

The application is supported by the affidavit of Iovanna Mesopir and on the grounds that the 2nd respondent was the managing director of the 1st and 3rd respondents and in charge of the day to day affairs and died on 27th July, 2018. That Iovanna Mesopir and other family members to the 2nd respondent were not aware of the judgment entered on 22nd November, 2018 in this matter because the 2nd respondent was personally issuing instructions.

The applicant, Iovanna Mesopir obtained Limited Letters of Administration for purposes of dealing with this case on behalf of the estate of the 2nd respondent and only fair that the judgement entered on 22nd November, 2018 and subsequent orders be set aside and the matter be heard on the merits.

The claimants replied through the Replying Affidavit of David Githinji and who avers that he is one of the claimants herein and that in his affidavit of 18th April, 2019 his assertions that the applicant is a director of the 1st and 2nd respondents is not challenged. A copy from the records of the Registrar of Companies indicate the 1st and 2nd respondents confirm the same.

The CR12 for the 1st respondent show that the applicant is a director thereof.

The CR12 for the 3rd respondent is yet to be obtained as this is an old file of 1994 which has been misplaced at the Companies Registry.

Mr Githinji also avers in reply that on 22nd July, 2019 the court ordered the respondents to deposit the decretal sum in court by 22nd July, 2019 and in default they would have no right of audience. There was no compliance. Whereas the respondents are seized of their corporate personalities, they can only operate through their officers and therefore it follows that all officers are bound by the orders of the court issued on 22nd July, 2019.

As a director of the respondents, the applicant is deemed an employer under the meaning of the law and thus already a party herein. The respondents should be held personally liable for the satisfaction of the judgement debt.

The respondents have no audience with the court until there is compliance with the orders of 22nd July, 2019 and the current application should be dismissed with costs.

With regard to the substitution of the 2nd respondent by his personal representative, Mr Githinji avers that, without prejudice, the judgement herein is against all the respondents jointly and severally. The 2nd applicant being a director of the respondents and in view of the application to lift the corporate veil, the applicant becomes a necessary party in this claim and no particular purpose shall be served by the substitution save to delay these proceedings.

By Notice of Preliminary Objections dated 14th September, 2017 the 3rd respondent had challenged its enjoinderment herein but now wishes to be a party. The respondents being companies run by its directors and housed in the family residence, all family members were directors thereof. The substitution will not serve any useful purpose.

Mr Githinji also avers that on the application seeking stay of judgement dated 22nd November, 2018, the respondents entered appearance on 14th December, 2017 and therefore judgement was not ex parte as alleged.

The respondents filed their defences on 1st February 2019 and which is addressed at paragraph 18 of the judgement. The judgement was not in default of defence. There was sufficient notice to the respondents who failed to attend. The failure to attend hearing cannot be grounds for seeking stay of judgement alleged to be in default of defence.

No reasons have been given for setting aside a valid judgement. The respondents have not demonstrated that there is a reasonable defence which ought to be considered by the court. The filed defence has since been factored in the judgement.

The applicant in her affidavit confirmed that only the 2nd respondent was conversant with the day to day affairs of the respondents and therefore by being substituted herein will only be allowing speculation on matters she is not conversant with.

To allow the respondents to amend the defence at this stage would be prejudicial to the claimants and a waste of judicial time. By their conducts and the failure to abide court orders issued on 22nd July, 2019 the respondents are not deserving of the orders sought.

The applicant being partly Russian is alienating the respondents properties with a view of taking off before the claimants can realise the fruits of their judgement and the application should be dismissed with costs.

The claimants filed application dated 26th August, 2019 seeking for orders that;

- 1. The court be pleased to make an order for the attendance of IOVANNA MESOPIR and one TATYANNA IVANOVNA MESOPIR being director/shareholders of the 1st and 3rd respondents for purposes of being examined as to whether the respondent/judgement debtor has any property or means of satisfying the decree herein and to produce the respondents books of accounts.*
- 2. In default to 2 above, the court be pleased to lift the respondent's corporate veil, and order the said IOVANNA MESOPIR and TATYANNA IVANOVNA MESOPIR to personally satisfy the judgement debt.*
- 3. The said IOVANNA MESOPIR and TATYANNA IVANOVNA MESOPIR be ordered to deposit Ksh.1, 722,765.00 in court pending the hearing and determination of the Bill of Costs herein dated 28th November, 2018.*
- 4. The said IOVANNA MESOPIR and TATYANNA IVANOVNA MESOPIR as director/shareholders of the respondents herein be denied audience before the court except only for the purpose of prayer 1 above, until they jointly and or severally comply with the orders of the court issued on 8th July, 2018 and 22nd July, 2019 respectively.*
- 5. Costs of this application be provided for.*

The application is supported by the Affidavit of Nderitu Gagu Githae, the claimant and on the grounds that the respondents are in breach of the court orders issued on 8th and 22nd July, 2019 and should not be allowed audience until compliance. One IOVANNA MESOPIR and TATYANNA IVANOVNA MESOPIR are directors/shareholders of the respondents and it is only through the said directors that the orders of 8th and 22nd July, 2019 the costs and claim can be enforced.

Other grounds in support of the application are that the respondent is no longer in operation and has a skeleton staff at the office and in the

process of closing down business.

In his Affidavit Mr Githae avers that the respondents are in breach of the orders of the court issued on 8th and 22nd July, 2019 where the respondents were directed to deposit the judgement amount in court and there is no compliance hence have any right of audience with the court.

One Iovanna Mesopir and one Tatyanna Ivanovna Mesopir are the only common directors/ and shareholders of the respondents as shown in records from the Registrar of Companies and CR12 dated 23rd July, 2019 and 26th August, 2019.

Ledama Ole Meitekini Mesopir who doubles up as the 3rd respondent is deceased.

Mr Githae also avers that he has been the employee of the respondents and is aware the respondents were family companies wherein Tatyanna Ivanovna Mesopir was wife to the deceased and Iovanna Mesopir is the daughter of the deceased. The two Iovonna Mesopir and one Tatyanna Ivanovna Mesopir are busy selling the family companies and properties and trying to compromise some claimants and also plan to send Iovonna Mesopir out of the court jurisdiction.

There is real apprehension that the respondents shall frustrate the process of the court hiding behind the corporate veil of the respondents which are family companies run by them. Seek the court to intervene to prevent abuse of the process and hold Iovonna Mesopir and one Tatyanna Ivanovna Mesopir liable to satisfy the decretal sum and costs.

The claimants have been unable to prosecute the bill of costs which was arrested by the intervening applications herein.

In reply to the claimants' application dated 26th August, 2019 the respondents filed Grounds of Opposition on the basis that there is no sufficient cause to warrant the summons to the respondent directors to attend court for cross-examination or for the lifting of the corporate veil and the application is meant to deny Iovanna Mesopir the right to be heard herein.

On these applications, the claimants conceded to prayer (2) on the application dated 16th July, 2019 allowing the substitution of the deceased Ledama Ole Mesopir with Iovanna Mesopir. The court allowed prayer (1) in the application dated 26th August, 2019 by the claimants for the examination of the respondent company's directors.

The court was only able to hear one director, Ms Iovanna Mesopir as the other director, Tatyanna Ivanovna Mesopir though in court is aged and unwell.

Both parties also filed written submissions.

The claimants submitted that the 3rd respondent, Iovanna Mesopir has been enjoined herein not in her personal capacity but as the director and shareholder in the 1st and 2nd respondent companies who are defined under section 2 of the Employment and Labour Relations Court Act, 2011 as employer that;

“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 the agent, foreman, manager or factor of such person, public body, firm, corporation or company

in this regard the court in **Justine Nyambu versus Japsa Logistics [2017] eKLR** held that directors of a company are fused together and thus removed the need to lift the corporate veil and the directors are liable for the satisfaction of the debts of the employing company.

In this regard, the court while addressing the preliminary objections field by the respondents on 14th September, 2017 and in its ruling on 14th May, 2018 dismissed respondent's objections. The 3rd respondent thus assumes all the rights and liabilities of the deceased father and fellow director and shareholder of the 1st and 2nd respondent companies.

The claimants also submitted that the judgement of 22nd November, 2018 should not be set aside as no reasons are given for non-attendance noting that Ledama Ole Meitekini Mesopir died on 27th July, 2018 and left other directors and shareholders. The prayer to set as aside the judgement of the court is left bare as no other request is made as to what action(s) the respondents propose on taking. Each remedy given by the court should have a purpose as held in **Civil Appeal No.129 of 2013 Blues Sea Shopping Mall Limited versus City Council of Nairobi & 3 others [2015] eKLR**.

The court can only vary or set aside its judgement and orders on terms that are just. There is discretion based on the circumstances of each case but not relating to an inexcusable error or deliberate evasion of justice.

The claimants also submitted that when the matter came up for hearing directions on 11th June, 2018, the deceased 3rd respondent was alive, no whiteness statement had been filed when hearing dates were allocated by consent. It cannot suffice to seek to amend the defence at this stage as such would be prejudicial to the claimants. There is no material placed before the court to justify the setting aside of its judgement as held in **Evergreen Marine (Singapore) & Another versus Petra Developers Service Limited [2016] eKLR** that;

In dismissing the application, we conclude, the learned Judge properly exercised her discretion as the appellants had placed no

material before her to warrant the setting aside of the ex parte orders of 3rd June 2014. She correctly stated the principles that guide the courts in an application for setting aside ex parte orders and took into account relevant factors, including the appellants' conduct.

The claimants also submitted that there are existing orders herein issue don 8th and 22nd July, 2019 and the respondents have not complied. Companies are run through directors and Ivonna Mesopir and one Tatyanna Ivanovna Mesopir cannot wear a different legal persona to avoid liability under the 1st and 2nd respondent companies. There is judgement against the respondents jointly and severally and they should abide.

As agents of the respondents, the directors owe a duty to the respondent to ensure there is no breach of court orders as held in **Civil Appeal No.213 of 2013 Nyandarua Progressive Agencies Limited versus Cyrus Wahome Nduhiu & another [2017] eKLR.**

There is a stay of hearing of the bill of costs taxation due to the pending applications and subsisting interim orders. The claimants cannot proceed for taxations of their costs. There is evidence that the respondents are closing the companies and disposing off its properties and the averments in the affidavit of Mr Githae has not been challenged.

In reply the respondent, Ivonna Mesopir submitted that by consent of the parties she was allowed substitution of the deceased and the claimants allowed cross-examining her on the affairs of the respondent companies.

As a respondent she has a right to a hearing. Hearing concluded and judgement entered on 22nd November, 2018 when the 3rd respondent Ledama Ole Meitekini Mesopir had already died and who was in charge of the affairs of the companies. The substituted respondent only learnt of the judgement upon being served with application dated 18th April, 2019 and only fair that she be allowed a fair and just hearing, the judgement be set aside and the matter be heard on the merits.

The 2nd respondent, Ivonna Mesopir also submitted that the claimant are seeking for the lifting of the veil on the respondent companies but the court should not entertain such application without a formal application as held in **Post Bank Credit Limited versus Nyamunga Holdings Limited [2018] eKLR.** where there is fraud or improper conduct the corporate veil may be lifted and such being a question of fact, an applicant must address.

The claimant's application seeking the lifting of the corporate veil is pegged on the named directors declining to be examined by the court. the respondents have attended court and produced documents and there is no need to lift the corporate veil.

Based on matters above, the issues for determination can be summarised as follows;

Whether the judgement and decree of the court delivered on 22nd November, 2018 should be set aside;

Whether the court should set aside the *ex -parte* judgement entered on 22nd November, 2018;

Whether the court should lift the corporate veil of the respondent companies and order Ivonna Mesopir and one Tatyanna Ivanovna Mesopir to personally satisfy the judgement debt;

Whether Ivonna Mesopir and one Tatyanna Ivanovna Mesopir should be ordered to deposit Ksh.1, 722,765 in court pending the taxation of the Bill of costs;

Whether Ivonna Mesopir and one Tatyanna Ivanovna Mesopir should be denied audience until they comply with the orders of 8th and 22nd July, 2019; and

Who should pay costs.

As noted above, Ivonna Mesopir was substituted in place and instead of her deceased father Ledama Ole Meitekini Mesopir who died on 27th July, 2018 and was one of the respondents herein. In these proceedings she stands as the 2nd respondent.

It is also common cause that judgement was delivered herein on 22nd November, 2018.

Both parties conceded and allowed for the examination of Ivonna Mesopir on the 9th December, 2019.

From the examination of the substituted respondent it was apparent to the court that Ivonna Mesopir is a director of the 1st and 3rd respondent companies – Lloita Springs Limited and Letan Limited. Her late father Ledama Ole Meitekini Mesopir was the managing director and was involved in the running of the companies. The companies were audited with unqualified results as key audit documents were not supplied and the auditors could not make an opinion on the status of these companies.

It was also apparent to the court that the respondent was not directly involved in the running of the companies. Despite being a director and shareholder she was where the claimants were employees of the respondent and were owed employment dues. the deceased admitted owing the claimants employment due son 23rd March, 2017. The respondent is equally aware that the claimants are owed employment dues.

The respondent also confirmed that there are key assets of the respondents comprising Land Rover KAJ 835E; there is Motor vehicle KYD 839 owned by Letan Limited, the 3rd respondent;

There was an angle grinder since sold to the 1st claimant;

Concrete mixer since sold to a Mr orina;

A generator since sold to the 1st claimant;

A sewing/sawing machine sold to Simon Masago; and

Welding generator sold to the 1st claimant.

The respondent also noted that the operations of the companies have since closed down and she is in the process of determining the future of the companies and she is aware of the court judgement delivered on 22nd November, 2018 and the respondents are able to pay the debt of up to Ksh.6 million. She is also aware of the court orders of 8th and 22nd July, 2019 to make a deposit of the judgement sum and has entered into a sale agreement but there is a caveat.

The respondent is thus well conversant and acquitted with matters herein and the operations of the subject companies. By offering to be examined and admission that she is a director and shareholder of the respondent companies – Lloita Springs Limited and Letan Limited – the lifting of the company veil is addressed. As submitted by the claimant in the case of **Justine Nyambu versus Jaspa Logistic [2017] eKLR** the lifting of the corporate veil should arise where there is apparent fraud, dishonesty and improper conduct.

With the 2nd respondent examination and admission that she is a director and shareholder and conversant with the running of the respondent companies and has knowledge of its current assets and the judgement of the court and the employment dues owing to the claimants, that addresses the lifting of the corporate veil. It is opened.

The rationale is to be found under section 2 of the Employment Act defines employer as follows:

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 the agent, foreman, manager or factor of such person, public body, firm, corporation or company

Unlike other forms of dispute resolutions, in employment and labour relations dispute, an ‘employer’ well defined, Managers or Directors of the company are liable to pay to the employees the sum decreed by the court, on behalf of employing company/companies.

Most fundamentally, the matters now addressed by the respondents with regard to the standing of the 2nd respondent in these proceedings were addressed by the court in its ruling delivered on 14th may, 2018. Found as a proper party herein, upon the substitution of the respondent with Iovanna Mesopir, she is a proper party herein.

That addressed, should the court set aside its judgement delivered on 22nd November, 2018?

On 11th June, 2018 both parties attended court and a hearing date was allocated for the 31st of October, 2018. On the due date the respondent was absent. There was no attendance by counsel or the witness from the respondents combined.

Hearing proceeded as scheduled and closed and judgement delivered on 22nd November, 2018.

It is apparent the 2nd respondent died 22nd July, 2018 whereas hearing proceeded on 11th June, 2018 where there was no attendance by the respondents. The sole reason given by Iovanna Mesopir in her affidavit of 16th July, 2019 and seeking to stay the execution of the judgement herein is that judgement was delivered on 22nd November, 2018 when her father, the then 2nd respondent had since died.

There is no explanation as to why there was no attendance at the hearing as scheduled.

Upon the court judgement, the respondent’s advocates *Kiptui Kipkemei & Company Advocates* made application dated 25th January, 2019 seeking to cease acting for the respondents. This application has not been prosecuted.

The respondents remained represented herein at all material times by a firm of advocates.

The 2nd respondent, Iovanna Mesopir singled out herself and appointed new advocates seeking to be substituted in place and instead of the deceased, Ledama Ole Meitekini Mesopir which has since been addressed and allowed.

The respondents thus well represented, the judgement herein is regular, lawful and legitimate.

Subsequent to the court judgement on 22nd November, 2018 the claimant moved to secure the same with a deposit of the judgement amount

in court by the respondent and which was addressed by the court on 8th and 22nd July, 2019. These orders requiring the respondents to deposit with the court the judgement amount stands and remains to be complied with.

The substituted 2nd respondent now conversant and well acquainted with matters herein, with the knowledge of the court judgement delivered on 22nd November, 2018 and aware the claimants are owed employment dues by the respondents, pending the taxation of the bill of costs herein and in accordance with section 94 of the Civil Procedure Act, the respondents are given 21 days to deposit with the court the judgement amount.

Taking the above into account, costs due shall in in the cause.

Accordingly, as set out above, the following orders issue;

- (a) Iovanna Mesopir is hereby substituted as a respondent in place and instead of Ledama Ole Meitekini Mesopir, herein the 2nd respondent;**
- (b) The respondents shall deposit the judgement sum with the court within 21 days;**
- (c) Parties shall proceed with the taxation of the party and party bill of costs;**
- (d) Where there is no compliance as (b) above, the claimants shall move the court as appropriate.**
- (e) Costs in the cause.**

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of: