



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 538 OF 2016

MATHEW WANDERA AKWIRI.....CLAIMANT/DECREE HOLDER

VS

HABO GROUP OF COMPANIES LTD.....RESPONDENT/JUDGMENT DEBTOR

RULING

1. By a Notice of Motion dated and filed in court on 18th June 2019, the Claimant/Decree Holder seeks the following orders:

- a) That the directors of the Respondent/Judgment Debtor namely; Augustine Omondi Awiti, Hezron Awiti Bolo and Monica Anyango Awiti be summoned for purposes of examination on oath as to the Judgment Debtor's means and assets and to produce an account and other documentary evidence showing the same and an undertaking on how to settle the decretal sum of Kshs. 680,042;
- b) That in default of the said directors complying with the above order, the Court be pleased to order that the said directors be held personally liable to pay the Claimant/Decree Holder the decretal sum, taxed costs plus interest at court rates.

2. The application is supported by the Claimant/Decree Holder's affidavit and further affidavit and is based on the following grounds:

- a) The Claimant obtained judgment against the Respondent on 8th March 2018;
- b) The Claimant issued notice of entry of judgment upon the Respondent's Advocates but the same has not been settled;
- c) The Claimant taxed the bill of costs and started execution process;
- d) The Claimant has been unsuccessful in attempts to attach assets of the Respondent;
- e) The directors have thwarted all attempts by the Claimant to execute the decree and do not wish to have the Judgment Debtor fulfil its legal obligation hence liability falls on them as directors;
- f) It is obvious that the said directors are using the Company to evade compliance with the judgment herein;
- g) The Claimant ought to be allowed to execute against the said Augustine Omondi Awiti, Hezron Awiti Bolo and Monica Anyango Awiti as directors of the Respondent;
- h) It is true that justice delayed is justice denied;
- i) It is in the interest of justice that the orders sought herein do issue.

3. The Respondent/Judgment Debtor's response to the application is by way of a replying affidavit sworn by its Administrator, Anderson Muturi Mugambi on 23rd September 2019.

4. Mugambi states that there is no evidence connoting any fraud in the dealings of the company by directors to necessitate the Court to summon the directors for purposes of cross examination.

5. He adds that the directors have not in any way whatsoever acted fraudulently and/or improperly and have in fact, committed to liquidate the decretal sum in monthly instalments as per letter annexed to the Claimant's supporting affidavit to which the Claimant did not respond.

6. Mugambi depones that the Claimant was issued with post-dated cheques through the auctioneer, which cheques have been banked and cashed and none of them has been accounted for, thus the application is malicious and is made in bad faith.

7. The Respondent/Judgment Debtor maintains that it has acted in good faith to liquidate the decretal sum by requesting the Claimant to accept payment by monthly instalments and issuing post-dated cheques, hence the filing of the application by the Claimant was unnecessary.

8. Mugambi states that the Claimant has failed to demonstrate that he has exhausted other means of execution of the decree.

9. He further states that the Claimant's allegation that the Respondent/Judgment Debtor has hidden its assets is untrue and unwarranted.

10. The Respondent/Judgment Debtor concludes that the Claimant has not satisfied the principles for lifting of the corporate veil.

11. In addition, the Respondent filed Grounds of Opposition and a Replying Affidavit sworn by its Counsel, William O. Wameyo stating that the Claimant's application is ill advised and bad in law in that:

a) The application is directed at the directors of the Respondent Company instead of the Respondent;

b) The application fails to appreciate the fact that the Respondent is a distinct legal entity separate from its directors;

c) The application is premised on the flawed assumption that the corporate veil of the Respondent has been pierced and the directors have assumed liability;

d) No application has been made and no grounds have been advanced for the piercing of the corporate veil and the application lacks any legal leg to stand on.

12. In his affidavit, William O. Wameyo, Advocate reiterates that there is no legal basis or justification for summoning of the named directors for purposes of cross examination on the means and assets of the Respondent.

13. Counsel makes reference to a special audit report on the financial status of the Respondent dated 27th August 2019 attached to his affidavit.

14. By his application, the Claimant seeks two orders; first, an order for examination of the Respondent/Judgment Debtor's directors and second, an order for piercing of the corporate veil so as to make the said directors liable for settlement of the judgment entered against the Respondent.

15. The Respondent objects to both prayers on the grounds that the Respondent Company and the named directors are separate and distinct and further, that there is no evidence of any attempt by the directors to use the corporate veil to defeat justice.

16. The basic principle in corporate law stated in the well tested decision in *Salomon v Salomon & Co Ltd [1897] AC 22* to the effect that a limited liability company is a separate legal entity from its shareholders and directors remains good law.

17. It follows therefore that the piercing of the corporate veil, in order to attach liability on shareholders and directors must be supported by solid grounds. In the present application, the Claimant states that he has been unable to execute his judgment against the Respondent Company but does not put forth any evidence of fraud or other improper conduct by the Respondent's directors. That being the case, I find no basis for lifting of the corporate veil at this stage.

18. However, the Claimant's judgment remains unsatisfied and the Respondent has not demonstrated any serious efforts to do so. In its response to the application, the Respondent makes general statements on its willingness to settle the decretal sum.

However, no concrete settlement plans were presented to the Court.

19. Moreover, the Respondent itself does not guarantee full settlement of the decretal sum and even alludes to poor financial health.

20. In the result, I find and hold that this is a proper case for summoning of the named directors for examination under Order 22 Rule 35 of the Civil Procedure Rules.

21. I therefore direct that Augustine Omondi Awiti, Hezron Awiti Bolo and Monica Anyango Awiti being directors of the Respondent/Judgment Debtor, shall appear before this Court on **15th October 2020** for examination on oath as to the Respondent's means and assets and to produce an account and all other relevant documents, including an undertaking for settlement of the decretal sum herein.

22. The costs of this application will be borne by the Respondent.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2020

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. Anaya for the Claimant

Mr. Bosire for the Respondent

Mr. Wameyo for the Director