



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1516 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 19th June, 2019)

PETER MUCHA GACHOKA.....CLAIMANT

VERSUS

PROTOCOL SOLUTIONS LIMITED.....RESPONDENT

RULING

1. The Claimant/Decree-Holder, Peter Mucha Gachoka filed a Notice of Motion application dated 05/11/2018 brought under *Order 5 Rule 17 of the Civil Procedure Rules* against the Respondent/Judgment Debtor, Protocol Solutions seeking leave to serve summons for examination of directors by way of substituted service through publication in any of the widely circulated daily newspapers.
2. The Application is based on the grounds that while this Honourable Court allowed his application to examine the Respondent's directors, his process server was able to trace and serve one of them being Job Maxwell Ochieng Ndege; that it has been unable to trace the whereabouts of the other Director Tony Ketter whom it believes is avoiding service to defeat the Claimant's claim; and that by an order issued on 24/10/2018, Job Ndege was to be subjected to an oral examination on the status and affairs of the Respondent company.
3. This Honourable Court allowed the Application in terms of prayer No. 2 on 05/12/2018 and the Deputy Registrar later directed on 08/04/2019 that examination of the director would be conducted on 20/05/2019.
4. The Director of the Respondent company Job Maxwell Ochieng Ndege appeared in Court on the said 20/05/2019 for cross-examination where he stated that he was aware the Court had entered judgment against the Respondent and that he ceased being an employee and director of the Respondent effective 30/10/2016.
5. The director also avers that at 02/07/2017, the records from the Registrar of Societies show he was a director of the Respondent and that on 19/06/2018, he tried to change directorship of the company which was after judgment had been entered against the Respondent. That he had already resigned from the company and that he testified in this case as Managing Director of the company.
6. The director also stated that he filed documents for change of Director in 2018 and that the Respondent dealt with another company in Mauritius. He stated that in Kenya, they did not have control of accounts of Protocol Solutions and that every month they raised an invoice and the company in Mauritius paid them. That his role as a Managing Director was ensuring they did all services they had signed for and that employees got their pay from the company in Mauritius.
7. He indicated that he does not know if the company notified the company in Mauritius of the judgment entered in this case and that as at 07/05/2019, he was not a director of the company. He also stated that Tony Ketter is out of the country.
8. In re-examination, he testified that he became director of the Respondent in 2015 and that he is even owed 15 months' salary and that he joined the company in 2014 in the same month when the Claimant left the company.
9. The purpose of examining Job Maxwell as indicated above was to confirm his relationship with the Respondents. From the examination, it is apparent that Job Maxwell Ochieng was one of the Directors of the Respondent Company as at 2/7/2017.
10. As late as 2018, the said Job Ndege also tried to change the directorship of the Respondent Company as it is only as at 7/5/2019 that the records from the Company Registry show he is no longer a Director.

11. Judgement in this case was entered against the Respondent on 30/1/2017 when Job Ndege was one of the Directors of the Respondent. He cannot therefore run away from liability of the Respondent Company having been such a Director.

12. This principle has been applied severally in the Courts in Kenya where the Court in **China Wu Yi Company Limited vs Edermann Property Limited and 2 Others (2013) eKLR**, cited Riger J in **Corporate Insurance Company Limited vs Savemax Insurance Brokers Limited (2002) IEA 41**, where the Court opined as follows:-

“Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of Saloman v Saloman & Co Ltd (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court’s attention was drawn to the finding of Riger J (as he then was) in Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor. HCCC No. 125 of 2002 (unreported) when he stated:

‘The veil of incorporation is not to be lifted merely because the company has no 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 director of the company being saddled with the debts of the company.’”

13. The same principle was reiterated by my brother Mabeya J in **Multichoice Kenya Limited vs Mainkam Limited and Another (2013) eKLR** where he opined thus:-

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

14. From the above arguments, it is evident that the above principle has exceptions and this includes situation where there is fraud and improper design by the share holder is imputed.

15. In the current case, the Director examined herein, gave evidence before this Court as RW1.

16. In his evidence in Court, he indicated that he was an employee of the Respondent but omitted to indicate he is also a Director.

17. The said witness has been practically trying to change the directorship of the Respondent Company even after judgement had been entered against the Respondent and in this case, this Court can impute improper motive on his part with a view of evading liability.

18. In the circumstances, it is my finding that the piercing of the corporate veil is a solution to the issue of execution in this case in order to do justice and therefore treat the witness Job Maxwell Ochieng Ndege and the current Directors Tonny Ketter as identical to the Respondent herein and order they be ordered to pay the Claimant decretal sum herein jointly.

Dated and delivered in open Court this 19th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondego holding brief Oloo for Respondent – Present

Nzuki holding brief Gachoka for Applicant – Present