



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**Cause No. 2555 Of 2012**

**(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> July, 2018)**

**JOSEPH ISAGI NYANDO.....CLAIMANT**

**-VERSUS-**

**IMAGINE IMC LIMITED.....RESPONDENT**

**RULING**

1. The Application before Court is the one dated 27/4/2018. This Application was filed through a Notice of Motion brought under Section 12 and 13 of the Employment and Labour Relations Court Act, Order 51 rule 1 of the Civil Procedure Rules, 2010 as well as Section 3A of the Civil Procedure Act and all enabling provisions of the law.
2. The Applicants seeks orders that they be allowed to proceed to execute the decree herein against Salome Njeri Kamau and Edward Ndegwa Wachira who are Directors of the Respondent herein.
3. The Application is based on the following grounds:-
  - a) *The Honourable Court did deliver its judgment on 19<sup>th</sup> February 2015 awarding the Claimant a total of Kshs.355,000/= plus costs taxed at Kshs.81,456/= and a certificate of service.*
  - b) *A ruling on the Claimants' party and party bill of costs was done on 15/4/2015 and a certificate of taxation issued on 6/6/2015.*
  - c) *Warrants of sale of movable property were issued on 7/12/2017.*
  - d) *On 8/12/2017, auctioneers proclaimed the Respondent's properties but have been unable to attach the said assets as the Respondent disposed them off.*
  - e) *The Respondent then got interim reliefs halting execution pending hearing of the stay applications.*
  - f) *The Claimant/Applicants have since then tried to execute the decree but with no success since the Respondents impishly disposed off all its assets during the pendency of the stay applications.*
  - g) *That it will be reasonable and in the interest of justice to allow this application.*
4. The Application is also supported by the Supporting Affidavit of Francis Amisi Shijendi Ndalekwa, the Administrator of the Claimant's estate herein who has deponed of matters raised in the above grounds attaching all the supporting documents therein.
5. The Respondents opposed this Application. They filed a Replying Affidavit on 17/5/2018 which affidavit was deponed to by one Edward Ndegwa the Chief Executive Officer of the Respondent.
6. He deponed that the Notice of Motion is incurably defective for want of jurisdiction pursuant to the Companies Act. He also depones that he had filed a Notice of Motion Application seeking stay, which is still pending in Court. That in the affidavit in the said Application dated 19.11.2015, he had deponed that the Respondents underwent a decline in its business operations owing to difficult economic times and made substantive losses, which necessitated its closure.

7. He therefore denies that the Respondent impishly disposed of all its assets during the pendency of the stay of execution as averred in paragraph 9 of the supporting affidavit.

8. They have averred that the Respondent is a legal juristic person with a corporate seal and exists independently of its directors. That also since the directors are not parties to this suit, they cannot be enjoined through an interlocutory Application.

9. The Respondents therefore oppose this Application.

10. The parties agreed to dispose of this Application through written submissions. The Applicant filed his submissions on 29/5/2018 and the Respondent filed their submissions on 6/6/2018.

11. I have considered submissions of both parties. The Applicant has submitted that lifting of the Respondent's corporate veil is allowable as paragraph 90 of Halsbury's Laws of England 4<sup>th</sup> Edition which states as follows:-

*“Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company.*

*And the instances when corporate veil will be lifted are not limited to fraud or improper conduct of the directors but also include all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. See again paragraph 90 of Halsbury's of England 4<sup>th</sup> Edition that:-*

*This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature” (Emphasis is mine).*

12. The Respondent submitted that this Court has no jurisdiction to handle this Application because there are limited cases under which a company's corporate veil can be lifted as stated in **Post Bank Credit Limited (in liquidation) vs Nyamangu Holding Limited (2015) eKLR** at paragraph 12, page 7/9 in which the Court listed circumstances under which the corporate veil can be lifted as follows:-

*a) Where companies are in the relationship of holding and subsidiary companies;*

*b) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors because the business continued after the membership had dropped below the legal minimum;*

*c) In matters relating to taxation;*

*d) In matters relating to exchange control;*

*e) In the law relating to trading with the enemy of the state;*

*f) Where the law has been abused in certain circumstances;*

*g) Where the company is being used for some illegal or improper purpose;*

*h) Where the company is founded on personal relationship between the members.*

13. I will first address the issue of this Court's jurisdiction in relationship to the Application before me. The Claimant filed this claim before this Court as an Employment and Labour Relations Court (ELRC) matter.

14. The Respondents submitted to the Court's jurisdiction without questions and the entire claim was heard and determined. The Court indeed has jurisdiction to entertain claims arising out of an employment or labour relations situation as provided under Section 12 of the Employment and Labour Relations Court Act and Article 162(2) of the Constitution of Kenya 2010.

15. The Court cannot separate its role in hearing a labour dispute from the execution process which is the current position of the case.

16. The submissions by the Respondent that this Court lacks jurisdiction to entertain the application is therefore in my view mischievous and an attempt to have side shows at the expense of proper and prompt resolution of this dispute.

17. On the substantive issue raised, I note that a corporate veil of a company can be lifted in various circumstances.

18. Ringera J (as he then was) in **Ultimate Laboratories vs Tasha Bioservice Limited Nairobi – HCCC No. 1281/2000**, stated as follows in relation to the lifting of a Company's corporate veil:-

*“[12] In light of above discussion, although it is an undisputed principle of law since Solomon's case that a company is an independent and legal personality distinct from the individuals who are its members, it has also been firmly established that the corporate veil may be lifted, and the individual members recognized for who they are in certain exceptional circumstances.*

**Generally, and broadly speaking the corporate veil may be lifted where the statute itself contemplates lifting the veil or fraud, or improper conduct is intended to be prevented. It is neither necessary nor desirable to enumerate classes of cases where lifting the veil is permissible, since that must necessarily depend on relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of element of public interest, the effect on parties who may be effected, etc. In the case before me, even if the request for piercing the veil was made it ought to have met the high threshold of the law. 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 *Palmer's Company Law Vol. 1 (22 ed)* gave a list of 10 instances in 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:-**

- a. Where companies are in the relationship of holding and subsidiary companies'**
- b. 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;**
- c. In certain matters relating to taxation;**
- d. In the law relating to exchange control;**
- e. In the law relating to trading with the enemy;**
- f. In the law of merger control in the United Kingdom;**
- g. In competition of the European Economic Community;**
- h. In abuse of law in certain circumstances;**
- i. Where the device of incorporation is used for some illegal or improper purpose; and**
- j. Where the private company is founded on personal relationship between the members".**

**19.** As stated by Ringera J (as he then was) supra, there are many instances when the company's corporate veil can be lifted. These instances range from instances where the Company's corporate entity is used for tax evasion, where membership falls below the statutory minimum. (Section 33 of the Company's Act), no publication of the Company's name (Section 109(4) of Company's Act) where an Inspector is appointed under Section 169 by the Court to investigate the Companies affairs and where there is fraudulent trading among other areas.

**20.** Section 323 of the Companies Act states as follows:-

**a) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.**

**b) On the hearing of an application under this subsection the official receiver or the liquidator, as the case may be, may himself give evidence or call witnesses.**

**21.** Case law has shown that the corporate veil of a company can be lifted if among other situations corporate personality is being used as a mast for fraud or improper conduct (Ringera J. supra).

**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.

**25.** Costs of this application be borne by the Respondents.

**Dated and delivered in open Court this 11<sup>th</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyabena for Claimant/Degree Holder – Present

Isa for Respondent