



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 201 OF 2013
JUSTINE NYAMBU.....CLAIMANT
VERSUS
JASPA LOGISTIC..... RESPONDENT
RULING

Introduction

1. On 28.2.2014, I entered judgement for the claimant in the sum of Kshs. 573,741 for being employment benefits plus compensation for unfair termination of his contract. The respondent paid only Kshs.100.000 on 30.4.2015 and defaulted.
2. The claimant then brought the Notice of Motion dated 10.8.2016 seeking the following orders:
 - (a) That SAMMY KITAVI and ESTHER MUTHUE MUENI being the Shareholders and Directors of the Respondent do attend court and be examined as to whether the respondent/judgement debtor has any property or means of satisfying the decree herein and to produce the respondent's books of accounts and other documentary evidence showing the same before the court.
 - (b) That in default of the said Directors complying with the above court order, they be ordered to personally pay the decretal amount due to the claimant or to be imprisoned and committed to civil jail for a period not less than six (6) months.
 - (c) Costs of the application.
3. The motion is brought under order 22 rule 35 of the civil procedure rules and is supported by the affidavit sworn on 10.8.2016 by the claimant. The gist of the affidavit is that the decree of this court has not been fully paid and the claimant's effort to execute for the same by attachment has not yielded any fruit because the respondent has no known attachable assets. In addition the claimant has deponed that the respondent has either changed the company's name or closed down the offices. He has therefore prayed for action against the said Directors/shareholders of the respondent. The respondent never filed replying affidavit but she opposed it on points of law when the motion came up for hearing on 15.12.2016.
4. The issues for determination are:
 - (a) **Whether the said Directors/Shareholders of the respondent should be examined on the assets and the means by which the respondent intends to satisfy the decree herein.**

(b) Whether corporate veil can be pierced to allow an employee to execute court decree for employment dues against the directors of the company which formerly employed him.

Claimants Argument

5. M/s Katu, learned counsel for the claimant/applicant urged that the shareholder who are also the respondent's directors should be examined to ascertain whether the respondent has any means of satisfying the decree. In the alternative the counsel prayed for the committal of the said Directors/Shareholders to civil jail for six months. According to the counsel the respondent has not signed any agreement with the claimant on the mode of paying the outstanding balance. That on 31.8.2016 the respondent gave a cheque for Kshs.50,000 but it was dishonoured upon presentation to the bank. That the said cheque was never compensated by the respondent despite notice that it bounced. She submitted that giving bouncing cheque was a breach of the law and cited **HCCA416 of 2012, Director of O'Jays investment V Loise Mukunya(2015) ECLR** where the court upheld the piercing of the corporate Veil on account of dishonesty (improper conduct and frauds). The counsel further submitted that the attempt to execute by attachment of assets have also failed because the claimant has changed name and relocated after the decree was passed.

Respondents Case

6. Mr. Wachenje, counsel for the respondent opposed the motion because it seeks to lift the corporate veil of the judgement debtor. He submitted that the respondent and her Directors/Shareholders are distinct and separate legal persons. He further submitted that for the corporate veil to be lifted several things should be proved. First, there must be fraud or improper conduct on the part of the company and Directors/Shareholders. Second, the company must be basically intended to evade tax obligations. Third, the company was being used to conduct criminal activities. Fourth, there was discovery of fraudulent and improper design by the Directors/Shareholders of the company. The defence counsel submitted that the said ingredients have not been demonstrated by the applicant and urged that the motion should be dismissed. He relied on **HCCA No 728 OF 2000 Electrowatts Limited Vs Countryside Suppliers Limited and Another (2014 e KLR** where the court declined to lift the corporate veil merely because the company had no assets capable of satisfying a court decree.

Analysis and Determination

Examination of Directors

7. There is no dispute that the judgment of this court for employment benefits is still outstanding against the respondent and in favour of the applicant. There is also no dispute that the respondent has given a cheque towards the court decree and it was dishonoured. There is further no dispute that the respondent has not given any undertaking to the claimant on how and by what means, she intends to satisfy the outstanding amount of the court decree. In addition the respondent has not sworn any affidavit of reply to deny the foregoing factual allegations by the applicant. Even in his submissions on the law, the defence counsel only opposed the order for lifting of the corporate veil and said nothing about the request for the cross examination of the said officers of the respondent.

8. I have perused Order 22 rule 35 of the Civil Procedure Rules under which the motion is brought and confirmed that where the decree of the court is for money, like in this case, the decree holder can apply to the court for oral examination of any officer of a corporation regarding any assets or debts owing to the judgement debtor, or other means of satisfying the court decree and for production of books or documents. In view of my observation above, that this request has not been opposed by the respondent, I grant the same as prayed because it is well anchored on the said provision of the law.

Lifting of Corporate Veil

9. The claimant has prayed for the respondent's directors/members to pay the decree personally or be committed to civil jail for six months because they have acted dishonestly by giving bouncing cheque and

by hiding from creditors by relocating offices to an unknown address. The respondent has however submitted that such default does not constitute enough ground for piercing the respondent's corporate veil.

10. I agree with the defence submissions and the judicial precedents cited that since the decision in **Salmon and Salmon and Co. Ltd (1897)A.C. 22HL**, courts have upheld the doctrine of the corporate veil and limited liability of a company. However, I agree with the applicant the same courts have also pierced the corporate veil to see what is happening behind it if there is evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the company.

11. In this case there is no mention of fraud on the part of the respondent and her directors or shareholders. There is however unrebutted allegations that the respondent has deliberately given a cheque which was dishonoured by their bank and that the company has relocated her offices to unknown place to evade creditors. In my view that is an act of dishonesty and also breach of the law for the respondent to deliberately issue a cheque which she knew it will bounce. It is also an act of dishonest to close office or change location by the respondent in order to evade creditors after a decree is passed against her.

12. The respondent being an artificial person, is committing such acts of dishonesty through her officers or shareholders who are physically around but shielding themselves from their legal obligation to pay debts using corporate veil. Are there assets or debts owing from third parties behind the veil which can satisfy the decree of the court? The claimant is curious to know and that is why he wants to examine the said officers and to have them held liable personally.

13. For the court to make appropriate decision on the request to lift the corporate veil, one has to consider it in the context of employment law in Kenya. In Kenya, it appears that officers or agents of an employer are not shielded from legal obligations by the corporate veil. 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”

14. Despite the foregoing provisions, I will not pierce the respondent's corporate veil and I hold that the said Managers or Directors of the respondent are liable to pay to the claimant the sum decreed by the court, on behalf of employing company until a later date as indicated below.

Disposition

15. For the reason that the law allows for examination of officers of a corporation on credit worthiness of a judgment debtors, I make the order that SAMMY KITAVI and ESTHER MUTHUE MUENI do attend court and be examined on respondent/judgment debtor's property and/or means of satisfying the decree herein and to produce the respondent's books of accounts and other documentary evidence showing the same before the court. In default to comply, the court shall make further or other orders as may be appropriate including lifting the respondent's Corporate Veil and pursuing the individual Directors/Shareholders. Costs shall be to the claimant/applicant.

Signed, Dated and Delivered at Mombasa this 27th day of January 2017.

ONESMUS MAKAU

JUDGE