



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 113 of 2010

ELSEPHAN INGALULA SHISOKA.....CLAIMANT

VS

MASTERS BAKERS (1987) LIMITED.....RESPONDENT

RULING

1. On 12th February 2010, the Claimant filed a Memorandum of Claim vide which he sued the Respondent and its named Directors for unfair termination of employment. The Respondent and its named Directors filed their Memorandum of Response on 14th May 2010 in which the named Directors took issue with their joinder as Respondents on the ground that as Directors of Masters Bakers (1987) Limited they were merely agents and that they were not party to the employment relationship between the Claimant and the Company. On 8th September 2010, the named Directors were struck out from the suit and hearing proceeded against the Company.

2. On 13th February 2012, Kosgey J (as he then was) delivered an Award in favour of the Claimant as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 35,000
- b) Unpaid half salary from October 2008 to December 2009.....227,500
- c) Service pay at the rate of 15 days' salary
for every completed year of service.....367,500
- d) 12 months' salary damages for
unlawful termination of employment.....420,000

Total.....1,050,000

3. Pursuant to this Award, a decree was issued by the Court on 10th April 2012, whose execution stalled as the Respondent's physical address and assets are unknown. The Claimant therefore came back to Court by way of Notice of Motion dated 8th May 2012 seeking orders that:

- a) The Respondent's Directors-Bhupendra Somchand Shah, Cornelius Muthuri and Sanju Lalchand Shah be summoned in Court to show

cause why they should not be held personally liable to pay the judgment/decretal amount;

b) The Respondent's Directors- Bupendra Somchand Shah, Cornelius

Muthuri and Sanju Lalchand Shah be ordered to:

(i) Individually and jointly pay the judgment amount ordered herein to the Claimant;

(ii) Warrants of attachment and sale be issued against the said Directors' personal assets;

(iii) The Respondent's aforesaid Directors be ordered to meet the costs of this application.

4. The Claimant's application was based on the grounds that:

a) The Judgment debtor's assets were unknown after the business whereat the Claimant was employed was sold while the case was ongoing;

b) The aforesaid Directors sold the business with a clear intention to defeat the outcome of the case.

5. In a replying affidavit sworn by Cornelius Muthuri on 18th July 2012, it was deponed that at the commencement of the case, the named Directors who had been enjoined as co Respondents were upon their application struck off from the case. Muthuri further deponed that the Claimant was employed by Masters Bakers (1987) Ltd to manage two of its businesses namely Tausi Cafe and Candy Shop and Masters Cafe which were closed in 2009 and the fixtures, furniture and equipment sold to one Simon Gatembu Mugaa on 31st July 2009 before commencement of this case.

6. In the written submissions filed on behalf of the Respondent's Directors, Counsel submitted that since the suit had been heard and concluded without the participation of the Directors, they could not be held accountable for the judgment entered against the Company.

7. On the Claimant's averment that the Company's assets could not be traced, Counsel for the Respondent's Directors stated that the Claimant had made no effort to trace the Judgment Debtor's assets. The Claimant's allegation that the assets of the Judgment Debtor were sold while the case was going on in order to defeat justice was rebutted in the replying affidavit sworn by Cornelius Muthuri on 18th July 2012. Muthuri deponed that the Company's businesses were closed down and the fixtures, furniture and equipment of the said businesses sold vide an agreement dated 31st July 2009 before filing of the case on 12th February 2010.

8. Counsel cited the well known case of **Salomon Vs Salomon & Co. [1897] AC 22. H.L.** in which Lord Mccnaghten stated that:

The company is at law a different person altogether from the

subscribers.... and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act.

9. Counsel also cited the case of **Corporate Insurance Co Ltd Vs Savemax Insurance Brokers Ltd East Africa Law Reports [2002] 1EA** in which the Court held that:

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.

10. The basic principle of incorporation is that a body corporate is distinctly separate from the natural persons behind it and the courts will generally respect this demarcation, all things being equal. However, courts must discourage parties from using incorporation to defeat justice. In the case of **Aviation and Allied Workers Union Vs Kenya Aerotech Limited & Another (Industrial Court Cause No 1494 of 2011)** this Court affirmed this principle and stated that:

Only in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice, would the Court allow lifting of the veil.

11. In this case the Directors maintain that the Claimant can only proceed against the Company. They however admit that the Company's businesses in which the Claimant worked were closed down and the assets sold before commencement of this case. The Court has taken note that the cause of action in this case arose before the Company assets were sold. It seems to me therefore that there may be some connection between this case and the sale of the assets of the Company. For this reason, the Court finds the Claimant's application to have the Directors examined to have merit and direct the said Directors that is to say; Bupendra Somchand Shah, Cornelius Muthuri and Sanju Lalchand Shah to present themselves before this Court on 11th April, 2013 at 9.00 a.m for examination under Order 22 Rule 35 of the Civil Procedure Rules, 2010

DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF MARCH 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....Claimant/Applicant

.....Respondents