



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 145 OF 2010

KENYA PETROLEUM OIL WORKERS UNION CLAIMANT

VERSUS

DELTA PETROLEUM TRADING COMPANY RESPONDENT

RULING

This is an application by the claimant Kenya Petroleum Workers Union dated 11th March 2013 brought by Notice of Motion under Rule 22 and 35 of the Civil Procedure Rule, Section 1, 2, and 3 of the Civil Procedure Act and the provisions of the Companies Act. The application is seeking for production and examination orders as outlined in the application and same being supported by the annexed affidavit of Gerishon Mmbadi, a former employee of the respondent and a member of the claimant. The respondent filed their Replying Affidavit sworn by Bagwanji Bachu Parmar and dated 6th May 2013 in opposition to the application.

The application is seeking for orders that;

The directors of the respondent company namely

Pravin Kumar Kantilal,

Karim Sandrudin Gulamhussein Mohamed Nath,

Bagwanji Bachu Parmar, and

Savitri Bagwanji Parmar

Do attend court and be orally examined as to whether any or what debts are owing to the respondent/judgement debtor and where the respondent/judgement debtor has any and what property or means of satisfying the decree herein and to produce all the respondent/judgment debtor's books of account, bank statements, sales and purchases journal, V.A.T. and Income Tax returns and all other financial records and documents of the respondent/judgment debtor company for the last 9 years.

Upon failure to attend and/or give satisfactory reasons why the respondent cannot satisfy the decree herein, the court to order that the respondents company is acting in breach of the law and fraudulently and consequently lift its veil an order that the said directors being Pravin Kumar Kantilal,

Karim Sandrudin Gulamhussein Mohamed Nath,

Bagwanji Bachu Parmar, and

Savitri Bagwanji Parmar

To pay and satisfy the decree herein personally and in default execution to issue against them jointly and severally.

This application is made on the grounds that there is a judgement against the respondent company to pay the claimants kshs.4, 625,823/= together with costs and interest but they have deliberately and with a view of abusing the law to defeat the decree herein fraudulently closed operations and that the directors of the respondent being

Pravin Kumar Kantilal,

Karim Sandrudin Gulamhussein Mohamed Nath,

Bagwanji Bachu Parmar, and

Savitri Bagwanji Parmar

Have failed and or refused to satisfy the decree. That in this eventuality the directors are acting fraudulently in breach of the law and hence the company veil should be lifted for the directors to be held personally liable and in default execution to issue. That if the application is not granted the claimants will suffer substantial and irreparable loss and the decree herein shall be rendered nugatory.

In reply the 1st respondent Bagwanji Bachu Parmar, state that by an award of this court dated 18th June 2011, the court dismissed the claim against him but the claimants proceeded to extract the decree against him and when this error was noted and brought to the attention of the court, the same was amended. That the applicant then filed an application for review dated 9th December 2011 which application is still pending. That prior, the claimant had instituted criminal proceedings against the 1st respondent in criminal case No. 3275 of 2007 where he was acquitted.

The 1st respondent's further state that he is not a director of the 2nd respondent and was only a manager and that Savitri Bagwanji Parmar, his wife who was a co-accused in the criminal case was also acquitted and is not a director of the 2nd respondent or a party to the proceedings in this matter. That the claimants are only abusing the court process to frustrate him and that the application herein is fatally defective and cannot stand as the court lacks jurisdiction and the same should be dismissed.

The 1st respondents further noted that the orders sought cannot be granted against Bagwanji Bachu Parmar, and

Savitri Bagwanji Parmar

As they are not directors of the 2nd respondent company which facts are well within the knowledge of the claimant as in the search attached to the affidavit of Gerishon Mmbadi, the two are not listed as directors of the 2nd respondent. Also that the orders sought regarding execution relate to a decree dated 23rd July 2011 which decree was recalled and amended and the same re-issued on 9th September 2011.

The claim was found by the court to be against the 2nd respondent and the claimants are still following up on Bagwanji Bachu Parmar and that has been already decided upon by the court. That on the basis of the application for review, this court has not made a decision in that regard and thus the claimants cannot ask the court to lift the veil of an individual who was sued and already confirmed not to be a director of the 2nd respondent.

I have gone through the entire file and note that the award of this court as issued and dated 15th June 2011 was for a claim against the two respondents herein but judgement was confirmed as against the 2nd respondent only. This was confirmed as per the decree herein dated 9th September 2011. These are crucial records as the judgement that was against the 2nd respondents is the one to be executed.

The procedure where a litigant is seeking to lift a corporate veil for purposes of execution of a decree, the court must be satisfied that indeed there were efforts in executing the decree as issued by the court and on that confirmation, this court as empowered by the Labour Institutions Act and the industrial Court Act, can direct as prayed herein.

The application as filed is fundamentally flawed with regard to meeting this procedure of extracting the decree as issued and dated 9th September 2011 for purposes of the claimants realising the judgment made in their favour. This must be met before the court can entertain the current application.

I note the claimant union has since 2011 when the award was issued herein struggled through the system of justice for purposes of achieving the fruits of that award; I will not sanction them herein. This is an old matter and this court in meeting its objectives as set out under section 3 of the Industrial Court Act will allow the claimant time to file an appropriate application or move the court as appropriate. I will therefore stick out this application and direct each party to bear their own costs.

Delivered in open court this 19th day of July 2013.

M. Mbaru

Judge

In the presence of

Jacob Kipkirui: Court Clerk

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