



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 113 OF 2010

ELSEPHAN INGALULA SHISOKA.....CLAIMANT

VS

MASTER BAKERS (1987) LIMITED.....RESPONDENT

RULING

Introduction

1. On 13th February 2012, Kosgey J (as he then was) made an award in favour of the Claimant for the sum of Kshs. 1,050,000. Pursuant to this award, a decree was issued by the Court on 10th April 2012 but the Claimant's attempts at execution failed because the Respondent's physical address and assets were unknown.
2. The Claimant therefore came to Court on 8th May 2012 by way of Notice of Motion 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 individually and jointly pay the judgment amount to the Claimant and warrants of attachment and sale be issued against the said Directors'personal assets;
 - c) The Respondent's aforesaid Directors be ordered to meet the costs of the application.
3. Upon hearing the Claimant's application, I directed the Respondent's Directors; Bupendra Somchand Shah, Cornelius Muthuri and Sanju Lalchand Shah to appear before the Court for examination under Order 22 of the Civil Procedure Rules, 2010.

The Examination

4. The Directors elected to be represented by Sanju Lalchand Shah who was examined on 8th May and 30th July 2013. Sanju Lalchand Shah told the Court that the Claimant was employed by Master Bakers (1987) Limited, of which he was a co-director, at inception in 1990 in the position of waiter and rose through the ranks to the position of Manager.

5. At some point the Company started making losses and the Directors decided to cease operations in July 2009. They sold the business to one Simon Mugaa at Kshs. 3.2 Million. According to Sanju Shah, the sale price included goodwill, furniture and equipment. The sale proceeds were used to pay the Company's creditors, including employees. Sanju Shah told the Court that the Company had no other assets and that its funds were exhausted in 2010.

Findings and Ruling

6. The single issue for determination is whether the Claimant has made out a case for lifting of the corporate veil and holding the named Directors of the Respondent personally liable to settle the decretal amount.

7. Counsel for the Directors, Mr. S.N Ng'ang'a referred the Court to case law on the principle of the veil of incorporation. In the well known case of *Salomon Vs Salomon &Co. [1897] AC 22. H.L* it was held that at law the company is a separate legal entity separate from its subscribers and the liability of the company cannot therefore be assigned to the subscribers except as provided by law. This remains good law and courts have over the years protected the sanctity of the corporate veil as far as it not employed to defeat justice.

8. In the case of *Aviation and Allied Workers Union Vs Kenya Aerotech Limited & Another (Industrial Court Cause No 1494 of 2011)* this Court held 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.”

9. Sanju Shah told the Court that all the funds of the Company were applied towards settling debts owed by the Company. He also testified that the Claimant was the only employee who was not paid because he had pending issues with another establishment by the name *Tausi Cafe* in which the Directors had an interest. The Court was notified that there was a separate case concerning *Tausi Cafe*.

10. It was the Directors' case that the Company's goodwill, furniture and equipment was sold for Kshs. 3.2 Million and a bank statement issued by Barclays Bank of Kenya, Westlands Branch, with a debit entry for this amount was produced in support of the Directors' contention. Mr. Namada, Counsel for the Claimant however disputed this figure and submitted that the Company's funds were held in several other accounts either in the name of the Company or its Directors.

11. Counsel drew the Court's attention to a cheque payment of Kshs. 100,000 made on 8th June 2009 by one of the Directors, Cornelius Muthuri into the Company's bank account as an indication that the Directors were personally involved in financial transactions of the Company. Sanju Shah told the Court that this was a cash injection for payment of rent.

12. The sale agreement submitted to the Court did not disclose the purchase price of the Company's goodwill, furniture and equipment because the figure was blocked. It was the Directors' contention that the original sale agreement could not be traced either by themselves or by the purchaser. The Directors were however unable to explain to the Court why the purchase price figure was blocked from the copy of sale agreement supplied to the Court. In fact, Sanju Shah told the Court that he did not know who had blocked it.

13. The issue of the actual figure of the sale price therefore remained a mystery and the Court found it hard to believe that the Directors could not trace the original of such an important

document. Moreover, apart from a general statement that efforts to trace it had been unsuccessful, there was no detail as to how far the Directors had gone to trace this document that was at the centre of the dispute before this Court. The reason for blocking the sale price figure and the hand that did the blocking also remained a mystery. In the absence of any explanation on this issue by the Directors, I have arrived at the conclusion that the reason for blocking the purchase price figure on the copy of sale agreement submitted to the Court was to defeat justice.

14. Even assuming that the sale price of the Company's goodwill, furniture and equipment was Kshs. 3.2 Million as submitted by the Directors, the Court found that the Directors failed to make any provision for settlement of an award arising from the Claimant's claim. It is instructive that at the time the Company's assets were sold, the Claimant was on an indefinite suspension and part of the award made by the Trial Judge was for unpaid salary and service pay which would be payable even in cases where a termination of employment is justifiable. Any prudent director would make provision for such a liability and the Court finds that in failing to make any provision for the Claimant's final dues, the Directors failed to exercise due care and diligence.

15. An examination of the payments made by the Directors on behalf of the Company shows a payment for Kshs. 566,720 to Kuster Bakers, in which two of the Directors; Bupendra Somchand Shah and Sanju Lalchand Shah had an interest. Even in cases of insolvency, a debt owed to a former employee ranks higher in priority to a debt owed to a director or to an enterprise in which a director has an interest.

16. It was the Claimant's case that the Respondent Company and its Directors operated several accounts into which proceeds from the operations of the Company were banked.

17. The Directors produced the Company's Annual Accounts for year ended 31st December 2007 as well as Profit and Loss Account for the year 2008 to show that the Company was making losses.

18. Sanju Shah told the Court in cross examination, that the average monthly sales of the Company was Kshs. 2 Million but that he did not have details of bankings for period between 2nd May and 31st December 2009 when the Company ceased operations. Sanju Shah sought to clarify in re-examination that towards the end of the Company's operations, it was Cornelius Muthuri who was actively involved in the affairs of the Company. Since the Court had summoned all the three Directors and they elected to send Sanju Shah to represent them, they must take responsibility for any gaps in the information provided to the Court.

19. It was the Claimant's position that the purchase price of the business was in excess of Kshs. 10 Million, an allegation that was denied by the Directors. The Directors were however unable to explain to the Court why the purchase price figure was blocked from the sale agreement. Additionally, details of the funds collected on behalf of the Company for period between 2nd May and 31st December 2009 were not provided to the Court. This, coupled with the testimony of Sanju Shah that the Claimant would have been paid but for the pending case touching on *Tausi Cafe* leads the Court to the conclusion that the Directors declined to settle the award amount for reasons other than lack of funds.

20. For the foregoing reasons, I find that this is an appropriate case for lifting of the corporate veil. Consequently, I impose personal liability on the named Directors Bupendra Somchand Shah, Cornelius Muthuri and Sanju Lalchand Shah jointly and severally with regard to the decretal amount awarded to the Claimant in this case, plus the costs of this application. Warrants of attachment and sale may therefore be issued against the said Directors' personal assets towards satisfaction of the decretal amount and costs of the application.

Orders accordingly.

DATED SIGNED DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF

NOVEMBER 2013

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JUDGE

In the Presence of:

.....**Claimant/Applicant**

.....**Respondents**