



Mzuri Sweets Limited v Rameshwar Distributors Limited (Civil Suit 18 of 2019) [2024] KEHC 2207 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 18 OF 2019
DKN MAGARE, J
FEBRUARY 22, 2024**

BETWEEN

MZURI SWEETS LIMITED APPLICANT

AND

RAMESHWAR DISTRIBUTORS LIMITED RESPONDENT

RULING

1. This is a relatively straightforward Application dated 19/7/2023. There is a decree of this court adjudging the Applicant as liable to pay the Respondent the decretal sum. I had earlier allowed the first part of the Application and ordered the
2. The Applicant obtained a decree of court on 18th November 2018. The Decretal sum with costs and interest is Ksh. 49,894,575.03. It is conceded that out of the adjudged amount above, the Applicant executed and the Respondent paid Ksh. 1,653,786.00 leaving a balance of Ksh. 4,773,480.00 which is due and owing.
3. After futile attempts to execute, the Applicant made an Application for issuance of summons to the three directors
 - a. Rohit Zaverchand Shah
 - b. Bhavin Rogit Shah
 - c. Pradipkumar Bhagwanji Shah; and
 - d. Atul Bhagwanji Shah
4. These were directors listed in CR 12 dated 18/7/2023. There are 4 directors and a secretary.
5. The parties argued the application before me, wherein I summoned the Directors as listed above. Atul Bhagwanji Shah was said to be out of the country and the rest were equally not available to attend court.



6. However, it was submitted by the Advocate for the Directors that the company had no assets and it was futile to lift the corporate veil. They stated that they have filed several cases for recovery of huge amounts and as such the Applicant should await their determination.

7. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N vs. N* [1991] KLR 685. The Learned Judge lamented as follows:

“Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N vs. N* [1991] KLR 685 when he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

8. I leave the submissions at that.

9. A Company is a judicial person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In *Salomon v Salomon & Co* (1897) AC 22, Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words: -

“the company is at law a different person altogether from its 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 trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

10. In the case of *Protus Opwora Wabwoto v Ken Manda & 2 others* [2020] eKLR, justice S N Riechi stated as follows:

“Lifting the corporate veil means disregarding the corporate personality and looking behind the real persons who are in the control of the company. In other words, where a fraudulent or dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality in *United States Vs Milwaukee Refrigerator Company* (2004) 122 Comp. Case 4681) the court said:-

“A corporation will be looked upon as a legal entity as a general rule... but when the notion of legal entity is sued to defeat public convenience justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons.”

In *Littlewood Mail Stores ltd Vs Inland Revenue Commissions* (IWLR 1969 IWLR 1214) Lord Denning observed: -

“The doctrine laid down in *Salmon Vs Salmon & Co. Ltd* has to be watched carefully. It has often been supposed to cast a veil over the personality of a limited liability company through which courts cannot see. But that is not true. The courts can and often draw aside the veil. They can and often do pull off the mask. They look to see what lies behind.”



In Halsbury's Laws of England 4th Edition Vol. 7 paragraph 9, the conditions for lifting the corporate veil are indicated as follows: -

“90. Piecing the corporate veil notwithstanding the effect of a company's incorporation. In some cases the court will piece the corporate veil in order to enable it to do justice by treating a particular company for purposes of litigation before it as identical with the person or persons who control that company. 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 person who control it is a relevant feature. In such a case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even agents directors and controlling the activities of the company. However, where this is not the position even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny the corporate veil will not be pierced.”

11. In company law, once the registration of a company has been completed a legal person separate from its Members is created. With the formation of the company, the new entity acquires a veil of incorporation that completely separates the members from being held responsible for the liabilities of the company to which they have subscribed to.
12. This veil of incorporation blocks the members from being held liable for acts of the company. This principle was set out in the old English case of *Salmon and Salmon & Co. Ltd (1897) AC 22*. The effect of this is that there is a fictional veil between the company and its members, protecting them from being personally liable for the company's debts and obligations.”
13. There are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance.
14. The company and directors did not provide documents to show that the judgment debtor is not a shell. There are no known assets in the name of the company. It is not shown what business it does and there is nothing but a shell meant to defraud members of the public and creditors. In the circumstances, I find that the company is a front for the directors fraud and not a true company.
16. In the circumstances of this case, I determine that this is a proper case to pierce the veil of incorporation to view the persons and faces represented by the company. After piercing the corporate veil, I find behind the true debtors as the directors/shareholders of Rameshwar Distributors Limited. The persons liable is: -
 - a. Rohit Zaverchand Shah
 - b. Bhavin Rogit Shah
 - c. Pradipkumar Bhagwanji Shah; and
 - d. Atul Bhagwanji Shah
16. The Directors above should bear the burden of the Judgment herein.



16. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

16. In the circumstances, the judgment debtor shall bear the costs of the Application.

Determination

16. In the upshot I allow the balance of the Application dated 19th July 2023 and make the following Orders:

- a. The corporate veil of the Rameshwar Distributors Limited be and is hereby lifted.
 - i. The Directors of Rameshwar Distributors Limited namely; Rohit Zaverchand Shah, Bhavin Rogit Shah, Pradipkumar Bhagwanji Shah and Atul Bhagwanji Shah be and are hereby held personally liable to pay to pay the Plaintiff the decretal sum and costs of Ksh. 48,773,480.00 and interest thereon
 - ii. Costs of this Application be paid by the Respondent company.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian

