THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 8 OF 2020

BETWEEN

1. **BEATRICE ODONGO**
2. **NOAH OCHOLA .... APPELLANTS**

AND

TAMP ENGINEERING CONSULTANTS LIMITED .... RESPONDENT

(Appeal from the Ruling of the High Court Execution Division (Anglin, J) in Miscellaneous Application No. 2803 of 2016)

Nuty.

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Tamp Engineering Consultants Limited ('the Respondent') was sub-contracted by Macdowell Limited ('the Company') vide a contract dated 15th August 2008 to construct a 100 km road in the Republic of South Sudan at a cost of Ushs. 1,600,000,000/=. The Company had made two payments towards the contractual amount before taking over the construction site and subsequently terminating the contract.

2. Following failed negotiations between the contracting parties, the Respondent instituted **Civil Suit No. 224 of 2010** in the High Court of Uganda (Commercial Division) *inter alia* seeking to recover the outstanding contractual payment in the sum of Ushs. 372,452,331/=, as well as the return of vehicles and equipment retained for the construction project by the Company or payment of their monetary value in lieu thereof. Judgment in that suit was entered in favour of the Respondent, pursuant to which the value of the vehicles and equipment that was due to the Respondent was quantified by M/s East African Consulting Surveyors & Valuers.

3. Upon failure to trace any of the Company's assets in Uganda, the Respondent filed **Miscellaneous Application No. 2803 of 2016** in the High Court Executions and Bailiffs Division, seeking to have the Company's corporate veil lifted under section 20 of the Companies Act of Uganda, Act No. 1 of 2012. The Application was filed against the Company and its directors, Ms. Beatrice Odongo and Mr. Noah Ochola ('the First and Second Appellants respectively'), the said directors being accused of using the Company's '*veil of corporate personality as a mask for fraud*'.

4. In a Ruling dated 22nd May 2018, the trial court allowed the Application; lifted the corporate veil, and directed the Appellants to make good the Company's legal obligations towards the Respondent (judgment creditor) in accordance with section 98 of the Civil Procedure Act (CPA), Cap. 71 and section 33 of the Judicature Act, Cap. 13.

B. **The Appeal**

5. Dissatisfied with the trial court's decision, the Appellants lodged this Appeal before this Court, preferring the following grounds of appeal:

I. The learned Trial Judge erred in law and in fact when she held that the corporate veil of Macdowell Ltd be lifted and the appellants being the directors of the said company be ordered to pay the judgment debt of Macdowell without any evidence of fraud being specifically pleaded and/or proved against the appellants thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

II. The learned Trial Judge erred in law when she disregarded the statutory provisions and binding case law relating to lifting of corporate veil thereby arriving at wrong conclusion and thus occasioning a miscarriage of justice to the appellants.

III. The learned Trial Judge erred in law and in fact when she held that the appellants were hiding behind the corporate veil of Macdowell Limited in the absence of any evidence on record and thereby arriving at a wrong decision and thereby occasioning a miscarriage of justice to the appellants.

IV. The learned Trial Judge erred in law and in fact when she held that the official place of business for Macdowell Limited was unknown thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

V. The learned Trial Judge erred in law and in fact when she held that the appellants refused and/or failed to disclose the necessary information to enable the respondent enforce the judgment thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

VI. The learned Trial Judge erred in law and in fact when she held that the matter had been before court since 2010 and it showed that the appellants were using the corporate veil of Macdowell Limited as a mask to avoid the recognition of equity thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

VII. The learned Trial Judge erred in law when she held that failure to fulfil contractual obligations amounts to an injustice justifying the lifting of the corporate veil thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

VIII. The learned Trial Judge erred in law and in fact when she held that Macdowell Limited had failed to pay its debt when there was no evidence to that effect thereby arriving at a wrong decision and occasioning a miscarriage of justice to the appellants.

6. At the hearing of the Appeal, the Appellants were represented by Mr. Nelson Nerima, while Mr. Andrew Ankunda and Ms. Eva Nabitaka appeared for the Respondent. The Parties solely relied upon written submissions filed in the matter.

C. **Determination**

7. This being a first Appeal, this Court is enjoined to reappraise the evidence and draw its own inferences of fact therefrom. *See Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10.* The duty upon a first appellate court in that regard is succinctly stated in **Henry Kifamunte v Uganda, Criminal Appeal No. 10 of 1997** (Supreme Court) and, for present purposes, may be summed up as follows:

   I. The appellate court is required to subject the evidence and any other materials that were before the trial court to fresh judicial scrutiny then draw its own conclusions therefrom, with appropriate regard for the *bona fides* of the judgment appealed from.

   II. Even where the court unearths errors by the trial court, it should only interfere with the lower court's judgment where the errors have occasioned a miscarriage of justice.

   III. Where the demeaner of witnesses does not arise other factors may be considered to determine the credibility of the evidence and warrant a departure from the trial judge's position.

8. In **Banco Arab Espanol v Bank of Uganda, Civil Appeal No. 8 of 1998** (Supreme Court), the foregoing principles were held to be applicable to the re-appraisal of both oral and affidavit evidence. I do respectfully abide that position for purposes of the affidavit evidence under scrutiny in this case. It will suffice to observe that the Appellants (quite correctly in my view) subsumed all eight grounds of appeal

into the single issue: ***whether the grounds for lifting the corporate veil were properly pleaded and proved***. This being the Appellants' case, I would defer to that approach in determination of the Appeal. It is therefore to the sole issue in contention in this Appeal that I now turn.

9. The Appellants fault the Respondent for citing fraud as the basis for its application for the lifting of the corporate veil but neither pleading it as provided in Order 6 rule 3 of the Civil Procedure Rules (CPR), not proving it to the required standard of proof. It is the contention that in the absence of particulars of fraud either in the Notice of Motion or the affidavit in support thereof, the trial court unsurprisingly made no finding of fraud. The court did, nonetheless, make findings that are contested for having been unsupported by evidence and/ or were plainly wrong. These include the finding that the Appellants hid behind the Company to avoid the legal consequences of breach of contract, using it as a mask to avoid the eye of equity; they refused or failed to disclose information as would have enabled the Respondent enforce the judgment in **Civil Suit No. 224 of 2010**, and their failure to fulfil their contractual obligations was unjust and provided sufficient justification for the lifting of the corporate veil.

10. Learned Counsel argues that not only was there no evidence of the Appellants' refusal to disclose information necessary for the enforcement of the judgment, no application had been made under Order 22 of the CPR to examine them about the Company's assets. In his view, the reasoning of the trial court is tantamount to the abolition of the statutory concept of limited liability as encapsulated in section 4(1) of the Companies Act, rendering limited liability companies useless as vehicles for investment. He further contends that whereas issues of enforcement of judgment awards should be handled by execution proceedings, a judge has no power to order directors to pay a judgment debt simply because a company has neglected to do so, save where fraud has been pleaded and proved as stipulated in section 20 of the Companies Act. Learned Counsel referred the Court to the case of **Salim Jamal & Others v Uganda Oxygen Limited & Others, Civil Appeal No. 64 of 1995** on the question of corporate personality.

11. On its part, the Respondent restricted itself to *Grounds 1, 2, 4* and *5* of the Appeal on the questions of proof of fraud; the law on lifting of the corporate veil; unknown Company business premises, and failure to facilitate the enforcement of a judgment decree. It is the contention that section 20 of the Companies Act does not require a pleading of fraud in the main suit but, in any case, manifestation of fraud is to be found in the case pleadings. To begin with, paragraph 2 of the Written Statement of Defence is opined to prove fraud in so far as it denies the Company's incorporation in Uganda yet proof thereof was furnished in the Reply to the Written Statement of Defence by way of a certificate of incorporation No. 44073. Secondly, although the First Appellant purportedly was the known sole signatory of the Company's account in Stanbic Bank A/c No. 0113376601, she denied that the Company had operations in Uganda. Reference was made to *Black's Law Dictionary's*[1] definition of fraud in support of the proposition that fraud has in fact been established in this matter.

12. It is opined that applicable case law mandates courts to look beyond the corporate personality in the interest of justice and, on grounds of fraud, lift the corporate veil. I understood learned Counsel for the Respondent to propose that it would be a mockery of justice for a party to a contract to claim that the contract was executed with another party in another jurisdiction, to the extent of the contracting party's directors denying the existence of a company they manage, yet pointing to the supposedly non-existent entity to make good a judgment debt arising from the contract. Counsel supported the trial court's finding that statutory provisions in respect of the lifting of the corporate veil give cognisance to the fraudulent conduct of business, which consideration was (in his view) applicable to the present circumstances where the Company took over the Respondent's construction site with intention to defraud it.

13. In addition, learned Respondent Counsel supports the trial court's finding that the Company's official place of business was unknown on the premise that the Company's own conduct would entrench this view. In that regard, the construction contract had been signed in a hotel in Kampala; meetings between the contracting

[1] 6th Edition, p. 660.

Muy.

parties were held at the Appellants' residence; the Company's own pleadings in the substantive suit challenged its presence in Uganda, and its letter head displayed no physical address. Learned Counsel were of the view that the Company's conduct was intended to deny the Respondent the proceeds of the judgment decree. A rhetorical question was posed, to wit, if the facts adduced in the lower court were that the Company did not exist in Uganda yet it signed a contract through the Appellants, who then should be liable?

14. The foregoing rival positions bring into purview the principle of corporate personality as espoused in the famous case of **Salomon v Salomon & Co. (1897) AC 22**. In general terms, that principle portends that a company is a legal entity that is separate and distinct from its members, shareholders and/ or directors. It is re-echoed in the leading American case on the subject, **United States v Milwaukee Refrigerator Transit Co., 145 F. 1007 (1906)**, as follows:

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

15. Indeed, in exceptional cases the courts will pierce through the protection that is accorded by the principle of corporate personality. Thus, in the case of **Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners (1969) 1 WLR 1241** it was held (per Lord Denning):

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

16. The courts in Uganda have indeed weighed in and lifted the corporate veil when the circumstances of a case do warrant that course of action. The circumstances that would justify the lifting of the corporate veil were most aptly articulated in the

case of **Salim Jamal & Others v Uganda Oxygen Limited & Others** (supra), arguably the *locus classicus* on the subject in Uganda. It was held (per Oder, JSC):

> **To my mind, there is no doubt that ever since the famous case of Salomon v Salomon & co. (1897) AC 22, courts have rigidly applied the principle of corporate personality. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience or in the interest of revenue collection. In such exceptional cases, the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by holding and subsidiary companies.**

17. Tracing the development of the exceptions to the corporate personality principle, the Supreme Court cited with approval the case of **Gilford Motor Company v Horne (1933) Ch 935**, where a defendant incorporated a new company in order to avoid liability for breach of covenants he owed to his employer. It was held (per Lawrence, LJ, agreeing with Lord Hanworth, MR):

> **The company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation ... In these circumstances, I agree with the finding of the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain advantage of customers of the plaintiff company and that therefore the defendant company ought to be restrained as well as the defendant Horne.**

18. The decision in that case was approbated by the Supreme Court to the extent that it '**ignored the corporate personality of the defendant company in order to stop EB Horne** (the defendant) **using it to continue in breach of his covenants, and secondly it held the defendant company bound by a covenant to which it was not a party, a covenant previously binding the promoter of the new company**.'

19. The court did also defer to its earlier position in the case of **National Enterprises Corporation & Others v Nile Bank Ltd, Civil Appeal No. 17 of 1994**, where the following holding in the Canadian case of **Manley Inc et al v Fallis (1977) 38 CPR (2nd) 74 at 76, 77** was cited with approval:

> **This is a case where the court is not precluded from lifting the corporate veil, and in effect, regarding the closely related respondent companies as essentially one trading enterprise, in the interests of the affiliated companies, in circumstances where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust.**

20. The Supreme Court concluded that '**where fraud or improper conduct can be shown then it may be possible to disregard the corporate personality**.' Thus, the court in **Salim Jamal & Others v Uganda Oxygen Limited & Others** (supra) essentially found flagrant injustice, fraud or improper conduct to justify the lifting of the corporate veil. See also **Pioneer Laundry and Dry Cleaners Ltd v Minister of National Revenue (1939) 4 All ER 254**. Fraud, as justification for the lifting of the corporate veil in Uganda, has since been embodied into statutory law in terms of section 20 of the Companies Act, 2012. It reads:

> **The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single-member company, the membership of a company falls below the statutory minimum, lift the corporate veil.**

21. In the instant case, the lifting of the corporate veil was not in issue in the substantive suit between the Respondent and the Company, **Civil Suit No. 224 of 2010**, only arising at the time of execution of the judgment decree. The ensuing application for the lifting of the corporate veil was brought by notice of motion and supporting affidavit. In clause (h) of the grounds of the application, the Respondent did plead fraud in the following terms: '*the 2nd and 3rd Respondents as directors in the 1st Respondent are using the veil of corporate personality of the 1st Respondent company as a mask for fraud.*'

22. The requirement in Order 6 rule 3 of the CPR for particulars of fraud to be pleaded pertains to pleadings as defined in section 2 of the CPA. The list of items that should accompany pleadings as outlined in Order 6 rule 2 would negate the inclusion of applications by notice of motion as pleadings in the strict interpretation of that term. The items include a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities. By contrast, Order 52 rule 3 of the CPR specifically addresses what an application by notice of motion

should entail, namely, '**state in general terms the grounds of the application**' and a copy of the supporting affidavit, where the application is founded in evidence. It neither requires particulars of fraud nor the list of items referred to above but, rather, places emphasis on the grounds of the application being stated in a notice of motion *in general terms*. To that extent, with respect, I would not construe Order 6 rule 3 of the CPR to impose an obligation upon litigants to provide particulars of fraud in applications by notice of motion.

23. A related situation arose in the case of **Hajji Numani Mubiakulamusa v Friends Estate Ltd, Civil Appeal No. 209 of 2013** (Court of Appeal). In that case, the trial judge had made a finding of fraud on the basis of affidavit evidence attached to an application that sought to have immovable property released from attachment under Order 22 rules 55, 56 and 57 of the CPR. On Appeal, learned counsel for the appellant successfully argued that issues of fraud could only be determined in a regular suit arising from regular pleadings after the framing of issues. It was held:

> **We agree with Mr. Kateeba, Counsel for the appellant, that the issues raised in the affidavit of reply could not have been properly resolved in an application of this nature. That they were serious issues of law and of fact that required proper pleadings upon which evidence would have been adduced.**

24. Be that as it may, as quite rightly opined by learned Counsel for the Appellants, the trial court's decision to lift the corporate veil was not premised on proof of fraud but rather on the Appellants' 'hiding' behind the corporate veil to avoid responsibility for breach of contract, which conduct was deemed to be an injustice warranting the lifting of the corporate veil. In that regard, the trial court rendered itself as follows:

> *In the present case, as rightly pointed out by Counsel for the Applicant, the 2nd and 3rd Respondents who are directors of the Company are hiding behind the 1st Respondent Company to avoid the legal obligations arising out of breach of contract. There is a judgment against the 1st Respondent where there are directors. The judgment has not been appealed against. The assets of the company or its official place of business are not known and yet the 2nd and 3rd Respondents have refused and or failed to disclose the necessary information to enable the Applicant enforce its judgment. It is trite law that* **'where the use of an incorporated company is being made to avoid legal obligations, the court**

may disregard the legal personality of the company and proceed on the assumption as if no company existed.' *In the circumstances of this case the matter has been before the court since 2010 and the 2nd and 3rd Respondents are using the 1st Respondent Company as* '**a mask which they hold before their faces in an attempt to avoid recognition by the eye of equity**.' *The interests of justice demand that the application be allowed the corporate veil be lifted so that the 2nd and 3rd Applicants make good the legal obligations imposed on the 1st Respondent by the judgment. Failure to fulfil contractual obligations amounts to an injustice justifying the lifting of the corporate veil.*

25. It would appear that the trial court impugned the Appellants' conduct with regard to the judgment debt in **Civil Suit No. 224 of 2010**, adjudging them to have hidden behind the corporate personality of a company in which they were directors to defeat the enforcement of the decree in favour of the Respondent. The trial judge thus considered the directors' failure to fulfill the Company's contractual obligations to constitute an injustice that warranted the lifting of the corporate veil. The Appellants fault this approach for rendering redundant the concept of limited liability companies in section 4(1) of the Companies Act, and having directors pay a judgment debt simply because a company has neglected to do so contrary to section 20 of the Companies Act. Conversely, it is the Respondent's case that the material on record sufficiently established both fraud and injustice and thus justified the lifting of the corporate veil. Although the trial court did not explicitly rely on fraud in arriving at its decision to lift the corporate veil, this being a first appellate court it is incumbent on it to subject the material on record to fresh scrutiny with a view to arriving at its own conclusions in the matter.

26. As earlier observed in this judgment, the Respondent did plead fraud in clause (h) of the notice of motion and sought to support it with an affidavit in support of the application that was deposed by Mr. Daniel Twinomugisha. In addition to a claim in paragraph 4 of that affidavit that the Respondent was unable to locate the Company premises for purposes of service of court process, the only other averments that might perhaps allude to fraud are to be found in paragraphs 8, 9 and 10 of the affidavit in support of the application. For ease of reference, they are reproduced below.

(8) *THAT the location of the 1st Respondent in Uganda cannot be traced and there is no known property owned by the 1st Respondent in the Republic of Uganda;*

(9) *THAT the 2nd and 3rd Respondents as directors in the 1st Respondent are using the veil of corporate personality of the 1st Respondent company as a mask for fraud.*

(10) *THAT the 2nd Respondent is the sole signatory to account number 0113376601 held with Stanbic Bank Uganda Limited under the name "Macdowel Limited";*

27. It is trite law that fraud must be proved strictly, the burden of proof being higher than the balance of probabilities generally applied in civil matters. See **Kampala Bottlers Ltd v Damanico (U) Ltd, Civil Appeal No. 22 of 1992** (Supreme Court). It is similarly well established law that he who alleges bears the burden of proof of the allegation made. See also section 103 of the Evidence Act, Cap. 6. The evidence of fraud that was raised in the application under review is found in averments as to the unknown location and property of the Company; a flat statement about the Appellants using corporate personality as a mask for fraud, and the Second Appellant having been the sole signatory of the Company's bank account in Stanbic Bank. Although the affidavit in reply does not directly controvert them, the averments on their own without elaboration on what is dishonest or amounts to sharp practice about them, are not sufficient to establish fraud to the required standard of proof. To my mind, inability to trace a company's physical address or property, or a director being the sole signatory of its bank accounts are not indicative of fraud *per se*.

28. In submissions, the Respondent sought to rely on averments in the Written Statement of Defence and Reply to the Written Statement of Defence, both in respect of **Civil Suit No. 224 of 2010** to suggest that fraud had been established. Those pleadings cannot constitute evidence in the application without having been annexed to an affidavit in support thereof. Reference thereto would thus be misconceived and tantamount to evidence from the Bar. I therefore find no proof that the Appellants were involved in acts of fraud as warranted the lifting of the corporate veil under section 20 of the Companies Act.

29. However, section 20 does not restrict the legal premise for lifting the corporate veil in Uganda to fraud. On the contrary, that statutory provision makes provision for ***acts*** that include, but are not necessarily limited to, tax evasion, fraud or membership below the statutory minimum. A literal interpretation of the provision would be that acts of fraud or tax evasion are only some of the acts that would warrant the lifting of the corporate veil. Thus, the decision in **Salim Jamal & Others v Uganda Oxygen Limited & Others** (supra) is instructive on other acts that may legally justify the lifting of the corporate veil. In addition to fraud, that case found flagrant injustice and improper conduct to justify the lifting of the corporate veil. Although these additional acts were not specifically mentioned in the notice of motion, the fact that the said application was lodged under section 20 of the Companies Act that makes provision for them would mandate this Court to address them *suo moto*.

30. *Halsbury's Laws of England*,[2] posits that '**the doctrine of piercing the corporate veil should only be invoked where a person is under an existing obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control**.' This principle is well illustrated in the case of **Prest v Petrodel Resources Ltd (2013) All ER 90** where the UK (United Kingdom) Supreme Court was faced with an issue as to whether it had power to order the transfer of properties to a wife, given that they legally belonged not to the husband but to his companies. It was held:

> **It was settled law that the court might be justified in piercing the corporate veil if a company's separate legal personality was being abused for the purpose of some relevant wrongdoing. The recognition of a limited power to pierce the corporate veil in carefully defined circumstances was necessary if the law was not to be disarmed in the face of abuse. There was a limited principle of English law which applied when a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or whose enforcement he deliberately frustrated by interposing a company under his control. The court might then pierce the**

[2] Companies, Vol. 14 (2016), para. 116.

corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

31. It is further opined in *Halsbury's Laws of England* (supra) that the court's piercing or lifting of the corporate veil will be justified where '**the device of a corporate structure will often have been used to evade limitations imposed on conduct by law[3] and rights of relief which third parties already possess against a defendant**.' Courts would thus go behind a company's distinct corporate personality and consider the persons directing and controlling the activities of the company (including as agents). Where, however, the foregoing circumstances do not exist, although an individual's connection with a company may cause a transaction to be subjected to strict scrutiny, the corporate veil would not be pierced. Nor are courts entitled to lift the veil as against a company which is a member of a corporate group merely because the group corporate structure has been used to ensure that the legal liability, if any, in respect of particular activities of the company will fall on another member of the group rather than the defendant company. See **Adams v Cape Industries plc (1991) 1 All ER 929 at 1026**.

32. That was not the scenario before this Court. The uncontroverted facts of this case as garnered from the affidavit evidence on record are that at the hearing of a suit for the recovery of an outstanding contractual sum owed to the Respondent by a company in which the Appellants are directors, the Company's lawyers stepped down from the conduct of the case immediately upon closure of the Respondent's case on the premise that they had lost contact with the Company. Subsequent efforts by the Respondent to locate the Company's business premises for purposes of service of court process proved futile. Judgment was subsequently secured against the Company under Order 17 rule 4 of the CPR. However, the Respondents have been unable to execute the judgment decree on account of inability to trace either the company's location or known assets. Meanwhile, the

[3] As in **Gilford Motor Company v Horne (1933) Ch. 935** where a company was deliberately used as a vehicle for activities that were outlawed.

Second Appellant is the sole signatory of a bank account attributed to the Company.

33. In an affidavit in reply that opposed the application for the lifting of the corporate veil, the thrust of the First Appellant's deposition was that she and the Second Appellant were not party to the suit in respect of which the Respondent secured a judgment decree; fraud was not pleaded in that suit, and the action by the Respondent to lift the corporate veil and find the Appellants liable in fraud was misconceived, and similarly misconceived was the application by the Respondent to validate a valuation report that had not been adduced in evidence at trial.

34. No evidence was adduced by the Appellants as would establish that either the Company was part of a corporate group or conglomerate, the corporate structure of which apportioned its legal liabilities on another company in the corporate group. On the contrary, in an affidavit in rejoinder deposed by Ms. Eva Nabitaka, two pertinent averments were made. First, that the failure of a company operating business in Uganda to have a physical office and ascertainable assets that establish its solvency would render such a company a sham that the directors are using as a mask to defraud its creditors. Secondly, that the Respondent's application had not sought to have the Appellants found liable in fraud but rather a finding that the Company's corporate veil was being used to defraud a judgment creditor.

35. By virtue of its name (Macdowell Company Limited), the company whose corporate personality was pierced is a limited liability company within the ambit of section 7(1)(a) of the Companies Act. Section 7(1)(b) of the same Act requires that the Memorandum of Association reflect a registered office of the company situated in Uganda. Indeed, the place of business is one of the items required in the registration form referred to in section 18 of the Act that, alongside the Memorandum and Articles of Association, form the basis of a company's registration. Meanwhile, a certificate of incorporation is conclusive evidence that all the requirements of the Act in respect of registration have been complied with. *See section 22 of the Act.*

36. In this case, I do take judicial notice of the judicial decision in **Civil Suit No. 224 of 2010** that the Company was incorporated in Uganda under Certificate of Incorporation No. 44073 dated 11th April 2000, with its principal place of business at Kampala and Kitgum. That decision was never appealed therefore the findings of fact therein are deemed to be factual. That being so, it would appear to me that at the time of its incorporation the company did indicate a registered office and place of business in Uganda as satisfied the requirements for its registration. Upon the institution of legal proceedings against it for breach of contract, the same Company sought to impeach the trial court's jurisdiction to hear the case, arguing that it was registered in South Sudan and did not have offices in Uganda. That argument was rejected by the trial court but more importantly for present purposes, it depicts a party that sought to evade legal responsibility. In addition, it begs the question, what did happen to the Company's registered office and place of business in Uganda?

37. The answer to that rhetorical question is quite instructive to the matters before me. Either the Company did in fact have no registered office or place of business in Uganda, only having filled them in on paper for purposes of its incorporation, in which case it would be a sham company; or it did have the said office and place of business at the time of incorporation but they were subsequently closed: certainly, following closure of the Respondent's case in the suit the Company could no longer be traced even by its lawyers. It could not have closed its offices itself therefore some person(s) controlled it enough to have closed the registered office and relocated from its business premises or at the very least, taken the decision to do so. The timing of the same disappearance – after closure of the Respondent's case at trial – would suggest that the suit was a material consideration in that decision or action.

38. It seems to me that in this case the Company's separate legal personality was being abused for the purpose of evading legal responsibility for breach of contract. This in itself would, on the authority of **Prest v Petrodel Resources Ltd** (supra), justify the lifting of the corporate veil. Upon the Respondent securing a judgment decree against it, the Company's separate corporate personality continued to be used as a buffer against the execution of the judgment. *See paragraph 5 of the*

First Appellant's affidavit in rejoinder. In those circumstances, the UK Supreme Court did in **Prest v Petrodel Resources Ltd** (supra) hold that '**the court might then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality**.' It will suffice to observe here that in the case of **HL Bolton Co. v TJ Graham & Sons (1956) 3 All ER 624 at 630**, directors of a company were equated to controllers thereof in the following terms (per Lord Denning):

> **A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do.** *(my emphasis)*

39. Closer to home, in **Yusuf Manji versus Edward Masanja and Abdallah Juma [2005] TZCA 83** the Court of Appeal of Tanzania considered the interests of justice in lifting the corporate veil in respect of a corporate judgment debtor. It was held:

> **In the circumstances, it is our view that the respondents would be left with an empty decree as it were, against the company, Metro Investments Ltd. Furthermore, it is apparent that the company's managing director was at the time the appellant, who, as said before was alleged to be involved in concealing the assets of the company. For this reason, we think it will not serve the interests of justice in this case to shield the appellant behind the veil of incorporation.**

40. The Uganda Supreme Court did similarly give due regard to the interests of justice in **Salim Jamal & Others v Uganda Oxygen Limited & Others** (supra). It approbated the decision in **Gilford Motor Company v Horne** (supra) that held the defendant company bound by a covenant to which it was not a party, a covenant previously binding the promoter of a company, in order to stop the defendant from using the company to continue in breach of his obligations to the detriment of customers of the plaintiff company.

41. In my judgment, the present scenario where a company registered as physically present in Uganda subsequently disappears into thin air mid-way the hearing of a claim against it smirks of a situation where the company's controllers, like the defendant in the **Gilford Motor Company** case, sought to obtain undue advantage over their business partners and ought to be restrained. In that case, the corporate veil of the co-defendant company was lifted to refrain its controller, the defendant. Similarly, in the instant case I cannot fault the trial court for lifting the corporate veil to restrain the Appellants (as directors of Macdowell Company Limited) from obtaining undue advantage over the Respondent, the Company's business partner turned judgment creditor and making a blatant mockery of justice. I would therefore disallow this Appeal.

D. **Conclusion**

42. The Appellants having emerged unsuccessful on the sole issue for determination, the Appeal would fail. It is trite law that costs should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the CPA*. Therefore, as the successful party in this Appeal, the Respondent is entitled to the costs thereof. The upshot of this judgment is that the Appeal is hereby dismissed with costs in this Court and the trial court to the Respondent.

It is so ordered.

Dated and delivered at Kampala this ....7th.... day of ....Jan...................., 2022.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 171 OF 2015

1. BEATRICE OFONGO}
2. NOAH OCHOLA} .... APPELLANTS

VERSUS

TAMP ENGINEERING CONSULTANTS LTD} ....RESPONDENT

(Appeal from the Ruling of the High Court Execution Division (Anglin, J) In Miscellaneous Application No. 2803 of 2016 dated 22nd May 2018)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JA.

I agree with her that the appeal ought to fail for the reasons she set out in the judgment and I have nothing useful to add. Since Hon. Lady Justice Irene Mulyagonja, JA also agrees, this appeal stands dismissed with costs in this court and in the trial court to the Respondent.

Dated at Kampala the 7th day of Jan 2022

Christopher Madrama Izama

Justice of Appeal

THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Madrama, Mulyagonja & Mugenyi, JJA

CIVIL APPEAL NO. 8 OF 2020

BETWEEN

1. BEATRICE ODONGO

2. NOAH OCHOLA ::APPELLANTS

AND

TAMP ENGINEERING

CONSULTANTS LIMITED ::: RESPONDENT

(Appeal from the Ruling of the High Court Execution Division (Anglin, J) in Miscellaneous Application No. 2803 of 2016)

JUDGMENT OF IRENE ESTHER MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned sister, Monica K. Mugenyi, JA. I agree with her findings and the conclusion that this appeal should be dismissed with costs in this court and in the court below.

Dated at Kampala this ___4th___ day of ___Jan___ 2022.

Irene Esther Mulyagonja

JUSTICE OF APPEAL