THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO 232 OF 2007

JIMMY MUKASA}……..…… PLAINTIFF

VS.

1. **TROPICAL INVESTMENTS LTD}**
2. **JOHN MARY MPAGI }**
3. **JOSEPH MULINDWA }**
4. **EQUATOR TECHNICAL AGENCIES LIMITED}…….DEFENDANTS**

BEFORE HONORABLE MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The plaintiff filed a suit against the defendants jointly and severally for recovery of a judgment debt of **Uganda shillings 145,321,300/=** accruing to him as the successful party under arbitration cause No. 34 of 2002 as well as a share of profits of **Uganda shillings 47,753,047/=** being 10% of the accumulated profits and altogether **Uganda shillings 193,074,347/=** and general damages and costs of the suit.

At the hearing Kiyemba Mutaale appeared for the plaintiff while Steven Musisi represented the defendants.

Before the hearing commenced, counsel for the defendants Mr. Steven Musisi objected to the suit against the first defendant contending that it is barred by the doctrine of *res judicata.* He submitted that there is an existing decree against the first defendant. The suit seeks to recover an amount the plaintiff has a decree for. He invited court to examine paragraph 6 of the plaint which gives the plaintiffs cause of action in the suit as a claim to recover a judgment debt arising from

arbitration cause No. 34 of 2002. Paragraph 7 of the plaint avers that the arbitral award was confirmed by court in MA 45 of 2004. The plaint attaches a decree issued by court is annexed. The plain also avers that there was partial execution and a sum of **shillings 11,089,500** was recovered. This was by sale of the first defendant's land at Nalukulongo as averred in paragraphs 7 (e) and 7 (f) of the plaint. Counsel further made reference to the amended written statement of defence of the 3rd defendant and specifically paragraph 6 (a) thereof and copies of stock list annexure exhibit "A".

He asserted that this court issued a decree in favour of the plaintiff against the first defendant and action has been taken to realize the judgment debt. The matter is therefore *res judicata* under the provisions of section 7 of the Civil Procedure Act cap 71 Laws of Uganda. This section bars actions such as the current one where court has adjudicated the matter in controversy. The judgment of the court arose out of the arbitration award. He pointed out that paragraph 6 of the plaint shows that the suit arises from a judgment debt. He contended that parties cannot have two decrees from the same court and two different suits arising out of the same facts and between the same parties. The plaintiff's suit is accordingly barred under section 7 cited above. Counsel cited **Semakula vs. Susan Magala and 2 others [1979] HCB page 90** for the proposition of law that *res judicata* is a fundamental legal doctrine that bars a suit and that there must be an end to litigation. The test is whether the plaintiff is trying to bring into court in the form on a new cause of action the same transaction which has been adjudicated upon. Counsel further submitted that order 22 of the Civil Procedure Rules provides for execution of decrees and the plaintiffs remedy against the first defendant is to pursue execution proceedings, which he started and then abandoned.

Kiyemba Mutaale counsel for the plaintiff opposed the preliminary objection. He however agreed that the background of the suit stated by his learned colleague was correct in so far as the amount claimed in paragraph 6 of the plaint is an outstanding amount against the first defendant which has not been fully satisfied. He submitted that reference to the first defendant in the whole of the plaint is limited to paragraph 6 as far as the decreed sum is concerned. He submitted that the gist of the suit is captured in the prayers pleaded namely paragraph (a) for "lifting veil of incorporation of the 1st and 4th defendants; (b) that the defendants be made jointly and severally liable; (c) the defendants are made jointly and severally liable for the accumulated commercial

interest at the rate 25% per annum and costs of the suit." He referred me to the joint scheduling memorandum of the parties at page 3 which give the agreed issues for trial.

He submitted that reference to the first defendant in the pleadings was to provide a background to the claim. And the recital of past events was not to bring back a fresh claim against the first defendant as it had been settled in arbitration. He submitted that what is sought is that all the 4 defendants be made liable for the sum of money claimed in paragraph 6 of the amended plaint. However, if the court is inclined to dismiss the suit as prayed by his learned friend, he prayed that the suit proceeds against the remaining defendants. To the question as to why the suit was not brought under section 34 of the Civil Procedure Act or as an enforcement matter, he contended that to bring the action as an enforcement action would not bring out all the facts. See section 34 CPA. In case the court is inclined to dismiss the suit, he prayed that the plaintiff should not be penalized in costs as the first defendant still owes him money which has not been satisfied.

In rejoinder counsel Steven Musisi referred court to paragraph 14 A – E and contended that the grounds mentioned in the suit were canvassed in the arbitration matter and formed the basis of the award. He submitted that the plaintiff should be penalized because he already has a decree. As far as costs are concerned, filing of suit has occasioned costs to the first defendant who has filed a defence and costs should be awarded.

I have considered the submissions of the parties and the pleadings in the suit. The basis of the suit or its background is the arbitral award attached to the plaint as annexure "A". This was pursuant to a dispute between the plaintiff as the claimant and the first defendant. The arbitral award was made on the 22nd of December, 2003 at Kampala. The arbitrator's award at pages 46 to 48 of annexure "A" is as follows:

1. That the Claimant holds 10 shares of the Respondent Company.
2. That the Respondent pay to the Claimant his shillings 903,500 in respect of his unpaid leave pay.

3. That is the company's articles until amended nullified the attempt to alter the nominal value of the share capital to match the increase in capital, reckoning of the value of the company's shares shall be based on net worth the company.

4. That upon receipt of the Claimant's written request the Respondent declare dividends and pay the claimant a proportion commensurate to his 10% shareholding in the company.

5. That the Claimant is entitled to receipt/enjoyment of all his Directorial entitlements.

6. That the Respondent pay to the Claimant his Director's remuneration from 1990 to 2003 in the sum of Uganda shillings 32,812,000/= as found above.

7. That the respondent shall pay to the Claimant in respect of Directors' remuneration, accumulated commercial interest on the individual sums claimed, at the rate of 22% per annum from the respective dates with individual, monthly or annually payable sums fell due and payable till payment in full. Interest at 22% per annum shall be due on all the rest of the sums payable by either party from the date of this award till payment in full.

8. That the Claimant pay to the Respondent the sum of shillings 1,662,000 being the shillings 518,000 and shillings 1,082,000 due from the Claimant to the Respondent.

9. That Messrs. Sage Associates, Certified Public Accountants, 3rd floor, UCA Building Nkrumah Road, Kampala are hereby appointed to execute valuation or/re-evaluation, or any exercise they shall deem necessary to establish the true net worth of the Respondent Company. The parties are ordered to provide the company's annual audited accounts and all annual financial reports and all other required information to the said firm and their professional fees of shillings 2,000,000/= shall be borne in equal proportion by the parties.

10. That within 30 days of receipt hereof Messrs Sage Associates submit their report.

11. That the Respondent discharge payment to the Claimant of the Exit Price of his shares as 10% of the company's net worth as per undertaking upon receipt of the report from Messrs. Sage Associates.

12. That the parties shall each bear their own Arbitral and Advocates costs of these proceedings save that the full costs of one day – shillings 600,000 shall be paid by the Respondent solely. The costs being as follows: …

13. That save for the monies payable under No. 10 above, the obligation on the respective parties to pay all other monies payable under this Award falls due immediately. …"

Pursuant to the award the first defendant filed Miscellaneous Application No. 45 of 2004 in the High Court Commercial Division challenging the award. On the 30th of June, 2005 the application was denied with costs.

In the plaint paragraph 18 thereof the plaintiff is seeking an order lifting the veil of incorporation of the first and fourth defendants. That the defendants be made jointly and severally liable for the judgment debt accruing to the plaintiff under arbitration cause No. 34 of 2002 amounting to Uganda shillings 145,321,300/= and a share of accumulated profits of Uganda shillings 47,453,047 shillings. The plaintiff also prays that the defendants be made jointly/severally liable for the accumulated commercial interest at the rate of 25% per annum from the date of the award till payment in full and for costs of the suit.

In my judgment there are two fundamental points to be considered in this suit. The first being whether the suit as against the 1st defendant is barred by the doctrine of *res judicata*. The second issue is bound up with the first but addresses a more central issue as to whether a separate suit could be brought against the defendants on the basis of an arbitral award which had been affirmed by the High Court.

The status of an award as a decree of the court is very clear. Section 36 of the Arbitration and Conciliation Act cap 4 Laws of Uganda provides that where an application to set aside the award has been refused by the court, the award shall be enforced in the same manner as if it were a decree of the court. The ruling of the High Court Hon. Mr. Justice James Ogoola PJ in H.C.M.C. 45 of 2004 arising from arbitration cause No. 34 of 2002 was delivered on the 10th of June 2005. It is attached as annexure "B" to the plaint. The ruling concludes and I quote: "In light of all the above, this application is denied with costs to the Respondent." BY the ruling of the court the arbitral award remained intact and could be enforced as a decree of the court under section 36 of the Arbitration and Conciliation Act cited above.

There is no dispute that the suit is founded on the arbitral award referred to above. The intention of the plaintiff is to make the other defendants in addition to the first defendant liable for the money debt awarded by the arbitrator. The foundation of the plaintiffs claim against the rest of the defendants is founded on the pleadings in paragraphs 8 and 9 of the plaint which are reproduced for ease of reference:

8. That at the time of the judgment and extraction of the decree, the first defendant company had the capacity to pay the said debt. (A copy of the audit report is attached hereto and marked annexure "D").

9. However in an effort to defeat the course of justice, the second and 3rd defendants have dissipated the first defendant's property and have invested and/or wasted its property within the personal property and/or that of the 4th defendant in which both of them are shareholders in fact or by proxy. (A copy of the memorandum and articles of association of the 4th defendant and other supporting evidence relating to the second and 3rd defendants to the 4th defendant are attached hereto and marked Annexure "E", "F" and "G". "

The test under section 7 of the Civil Procedure Act cap 71 Laws of Uganda as to whether a suit was res judicata was enunciated in the case of **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263**. LAW, Ag. V.-P. with the concurrence of Spry Ag. P. and Mustafa J.A. held that page 265 paragraphs F – G that:

> The test whether or not a suit is barred by *res judicata* seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (**Greenhalgh v. Mallard, [1947] 2 ALL E.R. 255.)** The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply (**Jadva Karsan v. Harnam Singh Bhogul (1953), 20 E.A.C.A. 74)**

The Court of Appeal of Uganda agreed with this test in Kamunye in the case of **SEMAKULA VS. MAGALA & OTHERS [1979] HCB 90** holding numbers 2 and 3.

Following the provision of section 36 of the Arbitration and Conciliation Act, it can be concluded that there was a judgment debt or decree in arbitration cause No. 34 of 2002 which award had been affirmed by the High Court in Miscellaneous Application NO 45 of 2004 between Jimmy Mukasa the plaintiff herein and Tropical Investments Limited, the first defendant herein. The matter had been litigated upon between the same parties and on the same subject matter and consequently the current suit against the first defendant is barred by the doctrine of *res judicata*.

This may have been the end of the matter. However a second question arises from the submission of the counsel and from the pleadings of the parties to the effect that the background to the claim in this suit is an arbitral award. Can this award be enforced by further proceedings against the 2nd, 3rd and 4th defendants? It is not disputed that the 2nd and 3rd defendants are directors in the first defendant and it is alleged in the plaint that they dissipated the property of the first defendant with a view to concealing and defeating the judgment creditor/plaintiff. It is specifically averred that at the time of the award, there was sufficient property to answer the award made in favour of the plaintiff. The plaintiff has further attached the memorandum and articles of association of the 4th defendant as annexure "E" to the plaint.

The company namely the 4th defendant was incorporated in 2004 after the arbitral award. Only Joseph Mulindwa, the 3rd defendant is a shareholder therein though it is averred that the directors could be owners by proxy. It is a general principle of law that a judgment may only be enforced between parties to the suit. Once a final order has been made there is no need to file a second suit. A second suit to implement a judgment occurs in specific circumstances such as when there is a declaration of rights of a party but no consequential relief has been sought. In such cases consequential relief is obtained through a suit to prove the consequential reliefs arising from the judgment. This is not the situation here.

The way the plaint has been pleaded, it amounts to an action to prove the award afresh against third parties. Secondly it is specifically pleaded that the directors dissipated the goods with a view to defeat the judgment creditor/plaintiff. The plaintiff goes ahead to plead that the directors conveyed the property of the judgment debtor to a third party (Namely the 4th defendant).

Directors are not immune from being followed in execution of a decree against their company. Why was the action not brought as an interlocutory proceeding for enforcement? Execution proceedings arise from the suit in which the decree sought to be enforced was decided. In this case it was in arbitration cause No. 34 of 2002 and MA NO. 45 of 2004 between the plaintiff and the first defendant. Directors are not immune from enforcement proceedings and lifting the veil where it is alleged that they concealed or misappropriated the company's assets with a view to defrauding creditors. In one case, it has been held that a company only thinks and does things through the directors.

In the case of **HL BOLTON CO V TJ GRAHAM AND SONS [1956] 3 ALL ER 624,** Lord Denning said at page 630:

> 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. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd ([1915] AC 705 at pp 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by R v I C R Haulage Ltd ([1944] 1 All ER 691) to which we were referred this morning. The court said (ibid., at p 695):
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> > "Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company … must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

So here the intention of the landlord company can be derived from the intention of their officers and agents."

Paragraph 6 of the plaint is explicit and provides that: "The plaintiff sues the defendants jointly and severally and his claim against all is for recovery of a judgment debt of Ug. Shs. 145,321,300/- accruing from arbitration cause no. 34 of 2002 as well as a share of profits. In support of the cause of action the plaintiff attaches the arbitral award as annexure "A". In paragraph 8 of the plaint it is averred that at the time of the award the company had capacity to pay the judgment debt. The crux of the plaintiff's grievance against the 2nd and 3rd defendants is contained in paragraph 9 of the plaint where he avers that the 2nd and 3rd defendants vested or wasted the property of the first defendant with their personal property and/or into the 4th defendant in which both of them are shareholders in fact or by proxy. Fraud of the directors is alleged in paragraph 10 and particulars thereof are given in paragraph 14. In paragraph 14 of the plaint it is the 2nd and 3rd defendants who are alleged to have fraudulently dealt with the first defendant's property upon delivery of judgment in favour of the plaintiff to defeat the plaintiffs claim. Last but not least the plaintiff avers and I quote paragraph 15: "The plaintiff contends and avers that in order to defeat the fraudulent manipulations of the defendants, the 2nd and 3rd defendants should bear liability in their individual capacity but in the alternative with the 1st and 4th defendants.

All in all it is the directors of the first defendant/judgment debtor who are alleged to have spirited away the first defendant's property with a view to defeat the creditors. Whereas the plaint discloses a cause of action for lifting the veil as sought in the prayers, the issue before me is whether an independent suit should be filed. In practice the veil of incorporation can be lifted within the original suit. From the case of **HL Bolton** (supra) I agree that the acts of the first defendant as a company are done through the 2nd and 3rd defendants as directors. In East Africa the veil of incorporation has been lifted in the main suit against the company.

In Civil Appeal No. 78 of 2002, **Yusuf Manji versus Edward Masanja and Abdallah Juma** [2005] TZCA 83 the court of Appeal of Tanzania in Dar es Salaam agreed that the corporate veil had been properly lifted and execution proceedings directed at the directors of a company in a case brought against the company. They said between pages 6 and 7 of their judgment:

> “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. Therefore, having regard to the fact that the appellant was the managing director of the company, we do not accept Mr. Kamara’s contention that evidence was required to prove the appellant's relationship with the company or that he had shares in the company. The principle enunciated in **Solomon** (supra) would apply to the contrary once special and exceptional circumstance shown. Here, as just shown such circumstance is premised upon the fact that the appellant was the managing director of the company. The appellant was also alleged to be involved in concealing the identity and assets of the company. In that capacity, and that's held by the learned judge, we agreed that the appellant was in a better position to know the trend of affairs regarding the alleged concealment of the company's assets.
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> In summary therefore, having regard to the relationship of the company at the time with the appellant as the managing director, the alleged concealing of the assets of the company by the appellant which was not denied by way of counter - affidavit, we are satisfied that this was a proper case in which to apply the principle of lifting the veil of incorporation. The learned judge cannot, in our view, be faulted in his decision to apply the principle.

Some important principles in the case are that the director who is alleged to be involved in concealing the assets of the company may be asked to account. This may be averred in an affidavit in support of an application to determine any question arising out of the execution under section 34 of the Civil Procedure Act. A recent case in Kenya is persuasive for this position. In **Corporate Insurance Company Limited versus Savemax Insurance Brokers Ltd [2002] 1 EA 41**. The Milimani Commercial Court Of Kenya at Nairobi Kingera J held at page 46.

> “The issue of the lifting of the corporate veil was not canvassed before Mwera J and he did not make any findings or ruling thereon. It is not therefore res judicata as contended by counsel for the Respondents. And it is a well known principle of company law that the

> veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts may well be disclosed in the examination of the directors or in affidavits filed. *Counsel for the Respondents submitted that the veil of incorporation could not be lifted during execution proceedings and that a separate suit for the purpose had to be filed. He was unable to cite any authority for his proposition. And I know of none. On principle I see no reason why the veil of incorporation cannot be lifted at the execution stage. I would have no difficulties in doing so in an appropriate case*. Be that as it may I should sound a note of caution. 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. In such a situation the law provides for remedies other than the director of the company being saddled with the debts of the company. (Emphasis added)

The High Court of Kenya was of the view that the veil of incorporation can be listed against the directors at the execution stage in appropriate cases. As far as this case is concerned, section 34 bars the filing of a separate suit for enforcement of a decree.

Section 34 Civil Procedure Act which is in *pari materia* with a provision interpreted by Mulla in Mulla the Code of Civil Procedure 17th Edition volume 1 page 707 provides that:

> It's a well settled that no suit shall lie on an executable judgment. The only remedy to enforce such a judgment is by way of execution. The section prohibits any relief being granted in a separate suit which will interfere with the conduct of proceedings by the court executing the Decree. This section lays down the general principle that matters relating to execution, discharge or satisfaction of a Decree arising between the parties including the purchaser of the sale in execution should be determined in execution proceedings and not by a separate suit. It matters not whether such a question arises before or after the Decree has been executed. The object of the section is to provide a cheap and expeditious procedure for the trial of such questions without recourse to a separate suit and to take needlessly litigation. … The questions must relate to the

execution, discharge, or satisfaction of the Decree. The parties must be the parties to the suit or their representatives. If both of these conditions are fulfilled, the question must be determined in execution proceedings and a separate suit will be barred.

It is my humble view that the directors not only act on their own behalf but also on behalf of the company. They are representatives of the company.

In conclusion execution proceedings can rightly be brought against the directors who are alleged to have concealed the assets of the first defendant. There is no need to proceed to prove the judgment debt against the directors of the first defendant company. Such proceedings are brought within the original action not to prove the debt but for enforcement. Secondly the plaint only avers that the property might be hidden in the 4th defendant. It does not show how the 4th defendant is guilty. It is the 2nd and 3rd defendants as directors who are alleged to have concealed the property of the company. It is my conclusion that this present action being in its nature a suit to enforce a judgment cannot proceed against the 4th defendant. For the reasons stated above the following orders are issued;

1. The suit against the first defendant is barred by the doctrine of res judicata and stands dismissed.

2. The suit against the 4th defendant is dismissed for disclosing no cause of action.

3. The actions against the 2nd and 3rd defendant are inappropriate in an original suit. They should be brought by way of an application for enforcement and determination of questions arising out of the execution which questions are alleged to have arisen after the award/decree in the arbitration case no. 34 of 2002 and MA 45 of 2004. The suit is discontinued and the plaintiff should instead file an application under section 34 of the Civil Procedure Act.

4. In the premises the suit against the first defendant is dismissed with costs to be offset against the plaintiffs claim

5. As far as the 2nd, 3rd and 4th defendants are concerned each party shall bear his/its own costs

Ruling delivered on the 15th of April 2011 in open court.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of

Hon. Mr. Justice Christopher Madrama