

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 48 OF 2015

WAVENETS COMMUNICATION LTD}.....PLAINTIFF

VERSUS

- 1. ZIMWE ENTERPRISE HARDWARE & CONSTRUCTION LTD}**
- 2. PAUL KASAGGA}**
- 3. JOSEPHINE KASAGGA}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff which is a limited liability company filed this suit against the first Defendant which is also a limited liability company incorporated under the laws of Uganda and against the second and third Defendants who are natural persons jointly and severally for lifting of the first Defendants corporate veil in view of recovery of a liquidated amount of Uganda shillings 139,547,362/= being the decreed special damages, commercial interest from the date of default until full payment, general damages and costs of the suit.

The matter initially proceeded by way of a default judgment. A default judgment had been entered for Uganda shillings 139,547,362/=. In High Court Miscellaneous Application Number 588 of 2015, the Defendants moved the court and the decree as against the second and third Defendants was set aside and subsequently the Defendant filed a defence denying liability. The Defendants denied any fraud as alleged by the Plaintiff and averred that they used all the proceeds of the company in the day-to-day running of the company's activities and in the best interest of the company. The second Defendant claimed that he never committed himself to pay any debt of the company in his personal capacity. Whatever he did was done in his official

capacity as a director on behalf of the company and he is not personally liable. It is averred that the Plaintiff does not have any claim against the Defendants at all and is not entitled to the reliefs sought. Finally the Defendants aver that the suit is frivolous and vexatious and does not disclose a cause of action and as such the Defendant intended to raise an objection to the suit for it to be struck out with costs. The suit however proceeded and the parties filed a joint scheduling memorandum and raised the following issues for consideration namely:

1. Whether the Defendants are indebted to the Plaintiff?
2. Whether the first Defendant's corporate veil should be lifted?
3. What are the remedies available to the parties?

The Plaintiff was represented in these proceedings by Counsel Kiiza Lillian and Counsel Ronald Mugisha while the Defendant is represented by Counsel Kavuma Kabenge appearing jointly with Counsel Golooba Muhammad. At the close of the Plaintiff's case and Defendant's defence, the court was addressed in written submissions.

Written submissions of Counsel

The Plaintiff's Counsel submitted that the Plaintiff supplied the 1st Defendant 200 drums of Bitumen at Uganda shillings 92,000,000/ (Uganda Shillings Ninety Two Million Only) on the 20th day of May 2011. The 1st Defendant deposited Uganda shillings 26,900,000/- (Uganda Shillings Twenty Six Million Nine Hundred Thousand Only) for taxes leaving an outstanding balance of Uganda shillings 65,100,000/= (Uganda Shillings Sixty Five Million One Hundred Thousand Only). The 1st Defendant issued post-dated cheques dated the 16th day of June 2011 for Uganda shillings 65,100,000/- (Uganda Shillings Sixty Five Million One Hundred Thousand Only) and they were dishonoured upon presentment to the bank. The 1st Defendant was notified about the dishonour upon which it committed to pay 10% as interest on its monthly default beginning the 29th day of June. The timelines for the payment were never met and this prompted the Plaintiff to sue for recovery of the outstanding money. A decree against the 1st Defendant was obtained vide High Court Civil Suit No. 071 of 2012 for a sum of Uganda shillings 139,547,362/- (Uganda Shillings One Hundred Thirty Nine Million Five Hundred Forty Seven Thousand Three Hundred Sixty Two Only). This included the 10% per month which was

promised and continues to accrue to-date. The 1st Defendant has no known properties to satisfy the decree, the 2nd and 3rd Defendants are in charge of running the affairs of the 1st Defendant and they were not party to the Civil Suit No. 71 of 2012. The 1st Defendant has been receiving payments but the same has been diverted by the 2nd and 3rd Defendants in their capacity as directors without clearing the Plaintiff's arrears after making various commitments to pay.

In reply the Defendant's Counsel gave a brief background and submitted that the Plaintiff filed this suit against the Defendants seeking for lifting of the veil of incorporation, damages, costs and interest. The court entered an ex parte judgment and decree against the Defendants which was later set aside and court allowed the matter to proceed inter partes.

The issues for determination are:

1. Whether the 2nd and 3rd Defendants committed any fraud against the Plaintiff.
2. Whether there are any other grounds for lifting the corporate veil.
3. What are the remedies available to the parties?

Issue 1

Whether the 2nd and 3rd Defendants committed any fraud against the Plaintiff?

The Plaintiff's Counsel relied on **Section 20 of the Companies' Act 2012** which empowers the high court to lift the corporate veil where the company or its directors are involved in fraud. This was discussed in the case of **D.K Construction Co Ltd and Anor vs. Barclays Bank Uganda Ltd Civil Suit No. 644 of 2000**; where it was held that to ascertain whether the company is used as a mask, the court is entitled to look at the reality of the situations, the motive for the transaction and other relevant facts must be considered before coming to the conclusion that the company is a mere facade concealing the true facts.

According to **Gower's Principles of Company Law 6th edition at page 173** there are three instances where the court can pierce the veil of incorporation and they include:

a) When court is construing a statute, a contract or other documents;

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

- b) When the court is satisfied that the company is a mere facade concealing the true facts;
- c) When it is established that the company is an authorized agent of its members/controllers.

It followed that the veil of incorporation can be lifted under certain circumstances such as when the veil of incorporation is used as an instrument of fraud. In **Jones and Another v Lipman and Another [1962] 1 All ER 442 at 445 RUSSELL J** described the company as: "The Defendant company is the creature of the first Defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. "

The Plaintiff's Counsel submitted that it is an undisputed fact that the 2nd and 3rd Defendants are directors of the 1st Defendant. It is also undisputed that the 1st Defendant's company obtained Bitumen and issued cheques for the outstanding balance of Uganda shillings 65,100,000/- (Sixty Five Million One Hundred Thousand Shillings Only). It is a fact that the said cheques were dishonoured upon presentment and the 1st Defendant was notified through the 2nd Defendant (the Managing Director) but for over five years; the same has not been paid up and the Defendants continue to trade and promise to pay.

The Plaintiff's Counsel further submitted that due to the delayed payment, the Plaintiff filed High Court Civil Suit No. 071 of 2012 and obtained a decree against the 1st Defendant for Uganda shillings 139,547,362/- (One Hundred Thirty Nine Million five Hundred Forty Seven Thousand Three Hundred Sixty Two Shillings Only). The amount remains unpaid and the debt is not in dispute as per evidence of the Plaintiff and the 2nd Defendant occasioned with promises to pay as per D. EX. 2 dated 13th day of July 2011 and P.E. X 11. The Defendant continued to receive payments from other contracts like the one with KCCA in which the Plaintiff's products were used. They are also selling off Company Property. In the case of **Re Williams Bros Ltd (1932) 2 CH 71** cited with approval in **John Lubega Matovu vs. Mukwano Investment Ltd Misc. Application No. 156 of 2012**, the High Court (Commercial Division) held that where a company is insolvent but its directors continue to carry on business and purchase goods on credit and incurs debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payments for the debts, the proper inference is the company is carrying on business with intent to fraud. In **R vs. Graham (1984) QB 675 (see R v Grantham**

[1984] 3 All ER 166) in which it was held that a person is guilty of fraudulent trading if he has no reason to believe that the company will be able to pay its creditor in full by the dates when the respective debts become due or within a short time thereafter.

The Plaintiff's Counsel submitted that the 1st Defendant issued cheques to the Plaintiff in 2011 well knowing there were no funds on the account. The cheques were dishonoured upon presentment; and a notification about the same was made; but for over five years; the 1st Defendant through its directors have not honoured the payment obligations. This is amidst the undisputed evidence of the 2nd Defendant who intimated to court that the company was still trading to date and that the Plaintiff is ranked as number 5 on the list of creditors. In lieu of recovery of the outstanding amount, the Plaintiff commenced execution but there was no known properties belonging to the 1st Defendant. By and large, the first Defendant had even shifted from its last known address without informing the Plaintiff. Perhaps this was an attempt to keep house and avoid its creditors. DW2 informed court in cross examination that he was using the 3rd Defendant as "an elder and to gain a sympathy vote" to get the payments from KCCA. Indeed the payment was made to the 1st Defendant and the same was used by the 2nd and 3rd Defendant to run other activities. It ought to be noted that the Plaintiff's payment was slated to be offset from KCCA payments because the Bitumen had been supplied to work on the KCCA projects. The 2nd and 3rd Defendants did not find it prudent to pay off the Plaintiff but rather had the 2nd Defendant stating that they attempted to do so; yet they had no evidence showing any attempt. The Defendants acts were contrary to Section 198 of the Companies Act 2012 which mandates the directors to inter alia; exercise a degree of skill and care as a reasonable person would do looking after their own business.

Counsel submitted that the fraudulent acts of the 2nd and 3rd Defendant were further exposed during cross examination when their testimonies were marred with controversy in that Form 7 of the Companies Act (E.X P.I) was not contested by their Counsel and his only query was why the Plaintiff had chosen to sue only two directors instead of all (an affirmation of directorship)". A few minutes later during the cross examination of the 3rd witness, she disclaimed being a director and knowing anything about the Company. However, this evidence was contradicted by the 2nd Defendant- the Managing Director and son to the 3rd Defendant who testified that he always used

his mum/3rd Defendant as a consultant and she was kept aware of all transactions relating to company business including the KCCA Payment and the matter before this Honourable Court. The contradicting evidence of the witnesses should be treated with caution at the risk of being expunged if perjury is so glaring.

The Plaintiff's Counsel further submitted that courts have lifted corporate veils where it's proved that a company is being misused by its directors to perpetrate fraud or for a dishonest or improper purpose. In **Salim Jamal & 2 others vs. Uganda Oxygen Ltd and 2 others (1997) 11 KALR 38** cited with approval in **John Lubega Matovu vs. Mukwano Investments Ltd (Supra)** the Supreme Court held that corporate personality cannot be used as a cloak or mask for fraud. Where this is shown to be the case the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud.

The Plaintiff's Counsel submitted that the 2nd and 3rd Defendants committed acts of fraud (being directors through which the Company carries out its obligations) against the Plaintiff in as far as the 1st Defendant being used as a means to further the interests of the 2nd and 3rd Defendants to wit:

- a. Doing business while knowing that the 1st Defendant is insolvent.
- b. Diverting payments from KCCA from 2011 yet the 1st Defendant has been promising to pay the debt and no payment was made.
- c. Excluding the 3rd Defendant as a director/shareholder yet form 7 shows her as a director and there is no resolution effecting such alleged changes.
- d. Shifting the location/ offices without notice to the Plaintiff.
- e. Non-disclosure of available properties belonging to the 1st Defendant, albeit the instruction to the Plaintiff to look for buyers

The Plaintiff's Counsel submitted that the standard of proof required in cases of fraud was considered by this court in the case of **Malcau Nairuba Mabel vs. Crane Bank Ltd Civil Suit No. 380 of 2009** and cited with approval in the case of **John Lubega Matovu vs. Mukwano Investments Ltd**, in which this court referred to a passage in **Bullen & Leake & Jacob's**

Precedents of Pleadings 4th Edition Vol. 2 page 809 specifically the decision of Lord Denning to the **Bater vs. Bater (1951) P 35** which stated that,

“...A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence was established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.”

The Plaintiff’s Counsel stated that from the above, it is very clear that the 2nd and 3rd Defendants were trading fraudulently and the 1st Defendant was being used as a mere cloak or sham for the purpose of enabling them to commit a breach of covenant. See the case of **Gilford Motor Co vs. Horne (1938) Ch. 935**. He prayed that the first Issue be assessed in the affirmative and the corporate veil of incorporation for the 1st Defendant be lifted.

In reply the Defendant’s Counsel also addressed the first issue as to whether the 2nd and 3rd Defendants committed any fraud against the Plaintiff?

The Defendant’s Counsel addressed court on **Section 20 of the Companies Act 2012** and submitted that it empowers this court to lift the veil of incorporation against the directors where there is any involvement in fraud by the directors. It follows that by using the word involvement in fraud it is apparent that it should be established to the satisfaction of the court by proving fraud to the required standard. Sections **101, 102, 103, and 106 of the Evidence Act (Cap. 6)** impose the burden of proof on the Plaintiff as a person who alleged facts to exist to prove their existence (See **Sebuliba vs. Cooperative Bank Ltd [1987] HCB 130**). In addition, the standard of proof in cases of fraud is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt required in criminal cases (See **Ratilal Gordhanbhai Patel vs. Lalji Makanji [1957] 1 EA 314** Katureebe JSC, in **F.J.K. Zaabwe vs. Orient Bank & 5 Ors, S.C.C.A. No. 4 of 2006**, definition of "fraud" in **Black's Law Dictionary, (6th Ed) at page 660**).

The Defendant's Counsel also cited the case of **Kampala Bottlers Ltd v. Daminico Ltd, S.C.C.A No. 22 of 1992**, where Wambuzi, CJ for the definition of fraud to mean actual fraud or some act of dishonesty. The court followed with approval the decision in **Waimiha Saw Milling Co. Ltd v. Waione Timber Co. Ltd (1926) A.C 101 at page 106**, per Lord Buckmaster that fraud implies some act of dishonesty. Counsel submitted that in the instant case, the Plaintiff alleges that the 2nd and 3rd Defendants committed acts of fraud. This is also proved in the testimony of PW1 paragraph 6 of the plaint reproduced under paragraph 18 of the PW1's witness statement as constitution the acts below:

- Diverting payments from KCCA meant to clear the company arrears to other use.
- Concealing the 1st Defendant's properties for their own use and by transferring the unencumbered properties to other legal entities.
- Failure to satisfy the decree and breach of written undertakings.

The Defendant's Counsel submitted that the Plaintiff has not proved any of the above grounds. During cross examination, PW1 admitted that he did not have any evidence to prove that actually the 1st Defendant obtained money from KCCA, he just provided the bank account and left court to investigate whether their money was credited to the Defendants account by KCCA and therefore did not help court. Contrary to that DW2 testified during cross-examination that actually KCCA has not yet paid the contract money to the 1st Defendant and it's because of that the 1st Defendant has not cleared the Plaintiff's debts.

Furthermore, PW1 admitted during cross examination that he did not have any evidence to prove how the money paid to the 1st Defendant was or is expended and therefore cannot allege that the 2nd and 3rd Defendant used the 1st Defendant's money for own personal use. PW1 also conceded during cross examination that he does not know of any property belonging to the 1st Defendant and did not have any proof of transfer of any of the 1st Defendant's property to other entities or to the 2nd and 3rd Defendants as alleged by him on behalf of the Plaintiff. PW1 also admitted that he has never dealt with the 3rd Defendant in the suit transactions neither did the 3rd Defendant

ever make any promise to pay the Plaintiff. On the other hand the 3rd Defendant contended that she became aware of the existence of the main suit after bailiffs accosted them. The entire 1st Defendant's day to day running of the business was by the 2nd Defendant. Therefore the 3rd Defendant cannot commit fraud in the company she cannot run. On the other hand the 2nd Defendant proved that he never promised to pay the Plaintiff in his personal capacity and whatever he did was done in his official capacity for and on behalf of the 1st Defendant for which he cannot be held personally liable.

The Defendant's Counsel submitted that the Plaintiff departed from pleadings, and raised new other grounds of fraud in submissions allegedly committed by the Defendants. These include doing business while knowing that the 1st Defendant is insolvent, shifting the location of the 1st Defendant without notice to the Plaintiff, non-disclosure of available properties belonging to the 1st Defendant albeit on the instructions to the Plaintiff to look for buyers. The above grounds were not stated by the Plaintiff either in the plaint or the Plaintiff's witness statement to be put to strict proof by the Defendants. This was evidence from the bar which should be disregarded by court.

Counsel relied on **Order 6 rule 7 of CPR** which provides that parties are bound by their pleadings and cannot depart from them without amendment. The Plaintiff failed to prove any act of fraud against the 2nd and 3rd Defendants as required by law. The Defendant's Counsel invited the court to answer that issue in the negative.

Issue 2

Whether there are any other grounds for lifting the corporate veil.

The Plaintiff's Counsel relied on **Gower's Principles of Company Law 6th edition at page 173**, for three instances where the corporate veil can be lifted. These include: When the court is satisfied the company is a mere facade concealing the true facts". He submitted that it was evident that the 2nd and 3rd Defendants concealed the true facts relating to the status of the 1st Defendant Company in as far as its directorship is concerned. Form 7 (P .EX P.1) shows the 3rd Defendant is one of the directors. However, the 2nd and 3rd Defendants testified that the 2nd Defendant is not a director but P.EX P1 was never challenged and no other evidence was

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

adduced to show the current status of the 1st Defendant. Therefore the court should pierce the corporate veil and satisfy itself that the 2nd and 3rd Defendants are using the 1st Defendants Company as a mere facade concealing the true fact in terms of:

- a) Directorship
- b) The properties belong to the 1st Defendant
- c) Payments made to the 1st Defendant
- d) Relationship between the 1st Defendant and the 3rd Defendant
- e) The role of the 3rd Defendant in the affairs of the 1st Defendant

In reply on the issue of whether there are other grounds for lifting the corporate veil, the Defendant's Counsel relied on section **20 of the Companies Act 2012** which empowers this court to lift the veil of incorporation against the directors only where the directors of the company are involved in acts of tax evasion, fraud or where the membership of the company falls below the minimum membership. He further submitted that the Plaintiff has not proved any of the statutory grounds under section 20. Instead the Plaintiff contended that concealment of facts by the 2nd and 3rd Defendants is a sufficient ground to lift the veil of incorporation. DW1 clearly testified that she has never participated in any activity of the company but rather it was the 2nd Defendant who had been carrying out the day to day management of the company. Even PW1 conceded during cross examination that he has been in touch with the 2nd Defendant throughout the transaction in question and not with the 3rd Defendant. There was no concealment by the Defendants as alleged by the Plaintiff. He invited court to answer this issue in the negative.

On the issue of remedies:

The Plaintiff's Counsel prayed for general damages assessed on the principles in **Strom vs. Hutchinson (1905) AC 515**. In that case Lord Macnaghten held that general damages are such as the law will presume to be the direct, natural and probable consequence of the act complained of. They are ordinarily meant to compensate the Plaintiff. The Plaintiff testified that since 2011, the Defendant's have failed to pay its money leading to the closure of the business as the direct

result of the Defendants causing the Plaintiff financial loss despite constant reminders and promises to pay. He proposed a sum of Uganda shillings 80,000,000/ - (Uganda Eighty Million Only) as general damages.

The Plaintiff's Counsel also prayed for Exemplary damages and relied on **Rookes vs. Bernard (1964) All ER 367**, where it was held that exemplary damages should not be used to enrich the Plaintiff but to punish the Defendant and deter him/her from repeating his/her conduct. He also relied on **London vs. Ryder (1953) All ER 741**, where the court awarded exemplary damages to teach a Defendant who had acted with a cynical disregard of the Plaintiff's rights. He submitted that it was proper to award exemplary damages on top of general damages in the circumstances. From the evidence on record, the 1st Defendant through the 2nd and 3rd Defendants continued receiving payments from KCCA for the works that they executed using the Plaintiff's products and sale of some of the properties but they never remitted any money to the Plaintiff which was an act of denial of the right to a living. The Plaintiff's debt had accumulated to Uganda shillings 139, 547,362/ - (Uganda Shillings One Hundred Thirty Nine Million Five Hundred Forty Seven Thousand Three Hundred Sixty Two Shillings Only) in addition to a 10% interest from the date of default until payment. He proposed Uganda shillings 30,000,000/ (Uganda Shillings Thirty Million Shillings Only) as exemplary damages to act as deterrence. The Plaintiff also prayed for interest at commercial rate on both the decretal sum, general and exemplary damages and also prayed for costs of the suit under section **27 (2) of the Civil Procedure Act Cap. 71**. The court has wide discretion to award costs. In the premises, he prayed that costs should follow the event (See **SDV Transami (u) Ltd Vs Nsibambi Enterprises (2008) HCB 94** that the costs are a direct consequence of the Plaintiff's expenditure on the case).

In reply the Defendant's Counsel submitted that when the Plaintiff was asked by court what it wants and PW1 answered that it wants to recover a judgment debt against the Defendants. In other wards he wanted to lift the veil of incorporation to make the Defendants liable for payment of the judgment debt. This can only be done upon the Plaintiff proving to the satisfaction of court the grounds for lifting the veil under **section 20 of the Companies Act**. Counsel submitted that the Plaintiff has failed to prove its

case as required by law and prayed that this court be pleased to dismiss the suit with costs to the Defendants.

In rejoinder the Plaintiff reiterated earlier submissions and added that the Plaintiff's ground upon which the company's veil should be lifted is its directors' involvement in fraud as an exception to the case of **Salmon vs. Salmon and Co. Ltd**, therefore it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.

The cases cited by Counsel for the Defendants should be distinguished since the facts are different. Particulars of fraud were pleaded in **Fredrick J.K Zaabwe-Vs Orient Bank Ltd and 5 others** where Katureebe JSC (as he then was) observed that "an allegation of fraud needs to be fully and carefully inquired into, fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others."

Counsel submitted that in the instant case, it's clear on record that;

- a) The 2nd and 3rd Defendants are Directors in the 1st Defendant's company which obtained goods from the Plaintiff for consideration
- b) The 1st Defendant did not pay the consideration despite several commitments to do so resulting to civil suit No.071 of 2011
- c) The 1st Defendant defaulted in its payments and the cheques issued were dishonoured upon presentment.
- d) The 2nd Defendant received payments from KCCA for the work for which the Plaintiff had supplied the products but never paid the Plaintiff his outstanding dues.
- e) The known properties were transferred to another company in which the 2nd Defendant is a Director called Jokas.
- f) The 2nd Defendant has been using the 3rd Defendant as means to get payments
- g) The 3rd Defendant denied being a Director yet it is evident and her name is reflected on the company form that was exhibited by the Plaintiff
- h) The 2nd Defendants are the minds and brains of the 1st Defendant company which is a legal fiction or abstraction that does not have a mind of its own

- i) The 2nd Defendant admitted to have received payments from the sale of land and did not make any payments to the Plaintiff.

By inference the Defendants dealt with the assets and resources of the company and denied or neglected to furnish consideration for the goods received from the Plaintiff despite benefiting from their usage vide payments from KCCA. In the case of **Corporate Insurance Ltd vs. Savemax Insurance Brokers Ltd (2002) 1 EA 41**, the commercial court of Kenya noted that the veil of incorporation may be Lifted where it is shown that the directors have dealt with the assets and resources of the company as their personal bounty for their own purpose. The evidence of DW2 is a clear manifestation of the directors dealing with the resources of the company as described in the above suit. DW2 admitted receiving the money from KCCA and using it for "OTHER THINGS".

The Plaintiff's Counsel submitted that it is a basic legal principle that the mind of the company is the mind of the Directors (See **HL Bolton Co vs. T.J Graham & sons (1956) 3 All ER 624**, per Lord Denning at page 630 cited with approval in High Court Miscellaneous Application No. 0845 of 2013 **Stanbic Bank (U) Ltd vs. Duet Lubricants and other** by Justice Christopher Madrama Izama).

The 2nd Defendant diverted the funds, assets of the 1st Defendant to other use despite the fact that those funds were meant for payment of the Plaintiff's outstanding balance as it had been promised since 2011. The decree was never satisfied by the Defendants and the 2nd and 3rd Defendants have been using the corporate veil to avoid liabilities. The Plaintiff proved that the 2nd and 3rd Defendants have been acting fraudulently using the company as a shield as defined in the case of **Salomon vs. Salomon & Co. Ltd**. The 1st Defendant received payments through 2nd Defendant using the 3rd Defendant. It is not true that the 1st Defendant has not been paid by KCCA. Court should take note of the 2nd Defendant's evidence in cross examination. Counsel submitted that regarding the liability of the 3rd Defendant, it is clear on record that she is one of the Directors and that no contrary evidence was adduced by the Defendants. Therefore the 3rd Defendant is jointly and severally liable on the company's contracts and the promises or commitments made by the 2nd Defendant for and on behalf of the 1st Defendant. It was the 2nd Defendant's testimony that the 3rd Defendant always used to run company matters and solicit for

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

payments given her sympathy vote. Therefore it's not true that the 3rd Defendant was not aware of this debt and she was running the business jointly with the 2nd Defendant alas making them jointly held liable for any acts or questions as the directors of the 1st Defendant's company.

Counsel further submitted that the Plaintiff has not departed from its pleadings. The submissions are inter alia based on the cross examination and can only help this Honourable court to reach a just decision by exposing the mind and intentions of the 2nd and 3rd Defendants to defraud and deprive the Plaintiff of its payment by the acts of shifting the location of its known office, non-disclosure of its valuable properties, all these are indicators to show that the 2nd and 3rd Defendants have been acting fraudulently to defeat the interests of the Plaintiff and avoid liability. He contended that the Plaintiff has proved fraud against the 2nd and 3rd Defendants and the corporate veil ought to be lifted.

Judgment

I have carefully considered the Plaintiff's suit, the defence and arguments of Counsel.

This is a suit for lifting the veil of incorporation so as to proceed against the directors who are Defendant numbers 2 and 3. The Companies Act, Act No. 1 of 2012 and section 20 thereof confers jurisdiction on the High Court to lift the veil of incorporation so as to proceed against the directors or members. It provides as follows:

“20. Lifting the corporate veil.

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.

The question for consideration is whether the veil of incorporation may be lifted in the circumstances of this suit. I have duly considered the evidence and written submissions and certain questions of law arise from the averments in the plaint. It is averred that the Plaintiff's cause of action arose when the second Defendant who is the Managing Director of the first Defendant company in which the third Defendant is also a shareholder and director, requested the Plaintiff and the Plaintiff supplied it with 200 drums of bitumen valued at Uganda shillings

92,000,000/= and deposited Uganda shillings 26,100,000/= leaving an outstanding balance of Uganda shillings 65,100,000/=. The Plaintiff on 20th May, 2011 supplied the first Defendant with the requested for drums of bitumen. The first Defendant defaulted in paying the balance of Uganda shillings 65,100,000/= within the agreed period in time and on the 6th of May 2011 it was agreed in a memorandum of understanding that the first Defendant shall pay the balance of the Plaintiff within 14 days from the date of delivery. The first Defendant further undertook to pay a monthly default rate of 10% on the outstanding amount after the expiry of 14 days from 29th of June 2011 and indeed the first Defendant defaulted in the payment after the period had expired. The first Defendant issued cheques in the names of the Plaintiff on its account number 2215100699 dated 16th June, 2011 at Centenary Rural Development Bank totalling to Uganda shillings 65,100,000/= but they were dishonoured upon presentation.

Pursuant to do the dishonour of the cheques issued in favour of the Plaintiff, the Plaintiff instituted **High Court Civil Suit No. 71 of 2012 in the High Court against the first Defendant** and obtained a decree against the first and second Defendants for a sum of **Uganda shillings 139,447,362/=** with interest at commercial rate and costs of the suit. The Plaintiff however failed to execute the decree against the first Defendant since it has no properties without any encumbrances on third-party claims. The second and third Defendants are in charge of running the company affairs and they have no known properties and were not parties to **Civil Suit Number 071 of 2012**. The first Defendant received payment of over US\$350,000 from KCCA through their lawyers and has account number 0102040944501 held with Standard Chartered bank account in City Branch but diverted the said amount to other uses and did not clear the Plaintiff.

It is alleged that the Defendants acted improperly in diverting the promised amount from KCCA to create another business instead of clearing the outstanding balance after making a commitment. As a result of the Defendant's conduct the Plaintiff suffered loss and damages for which it holds the Defendant liable. According to the Plaintiff in the particulars of fraud averred in the plaint, the Defendant's actions or conduct of diverting the payments from KCCA to other uses was done in bad faith and amounted to fraud. Secondly it was arbitrary, illegal and unconstitutional and intended to deprive the Plaintiff of its payment. Thirdly, the Plaintiff

contended that the Defendant's actions caused financial loss and damages for which it seeks general damages. In the premises the Plaintiff prayed for the corporate veil of incorporation to be lifted in lieu of recovery of Uganda shillings 139,547,362/= being the amount on the dishonoured cheques drawn by the Defendant in favour of the Plaintiff as special damages. The Plaintiff also prayed for interest at commercial rate, general and exemplary damages as well as costs of the suit.

The prayer of the Plaintiff in the main is for recovery of a liquidated amount of Uganda shillings 139,547,362/=. The Plaintiff seeks to enforce this amount against the second and third Defendants who are averred to be the directors of the first Defendant Company. In paragraph 10 in addition to the claim for the liquidated amount mentioned above, the Plaintiff seeks interest at commercial rate, general damages and exemplary damages as well as costs of the suit. The cheques attached to the plaint annexure "C" are for the year 2011. It averred that the Plaintiff filed Civil Suit No. 071 of 2012 and in annexure "D" on 20th April, 2012, default judgment was entered for the sum of Uganda shillings 139,547,362/= with interest at commercial rate from 1st July 2011, until payment in full as well as costs of the suit.

In the summary suit the Plaintiff seeks to recover the same amount of money as well as interest at commercial rate as mentioned in the decree dated 23rd August, 2012. The only difference is that the Plaintiff seeks to enforce the decree against the directors of the first Defendant. These are averred to be the second and third Defendants. An issue arises as to whether the current suit is not res judicata? To put it another way, the second question is whether execution proceedings cannot proceed against the directors of the first Defendant without filing another suit. Both questions are questions of law. The remedies sought in the plaint are no different from the remedies awarded by the court in the default decree except for the prayer to lift the corporate veil so as to proceed against the second and third Defendants.

The court was never addressed on the point of law above and the question is whether I can deal with the matter as currently disclosed in the pleadings. In the written statement of defence, the Defendant averred in paragraph 8 that the Plaintiff's suit is frivolous, vexatious and does not disclose a cause of action and the Defendants would raise a preliminary objection for it to be struck out with costs. No such objection was raised and this matter proceeded for hearing without

any determination of the point of law. The question of whether a suit discloses a cause of action is considered by a perusal of the plaint alone and any documents attached to it forming part of the claim.

In the case of **Attorney General vs. Oluoch (1972) EA 392**, it was held by the then East African Court of Appeal, per Spry Ag. President at page 394 that:

“In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeraj Shariff & Co. vs. Chotai Fancy Stores, [1960] E.A. 374) and assumes that the facts alleged in it are true.”

The court can at the point of writing a judgment raise a new issue not covered by the parties. This is enabled by Order 15 rule 5 of the Civil Procedure Rules which provides that the court may amend any issues not properly framed before judgment and Order 15 rule 5 provides as follows:

“5. Power to amend and strike out issues.

(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The court may also at any time before passing a decree strike out any issues that appear to it to be wrongly framed or introduced.”

Issues primarily arise from the pleadings as prescribed by Order 15 rule 1 of the Civil Procedure Rules. An issue arises when a material proposition of fact or law is affirmed by one party and denied by the opposite side.

The question of whether the suit is res judicata and whether a separate suit is barred in proceedings against directors is a point of law arising from pleading a decree in a former suit and making the same claim again in a fresh suit. Corollary to the issue is whether the court can enforce the former decree under a separate suit.

Res Judicata:

Section 7 of the Civil Procedure Act bars a suit on the same cause of action where the former suit has been finally decided and provides as follows:

7. Res judicata.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 1.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2.—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4.—Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Explanation 5.—Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The doctrine of *res judicata* was considered by the East African Court of Appeal in **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263**. Law, Ag. VP, with the concurrence of Spry Ag. P and Mustafa J.A. held 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.**)”

In this case the Plaintiff is seeking the same remedy in which it had got judgment. The plaint discloses that the Plaintiff filed High Court Civil Suit No. 071 of 2012 and in annexure "D" on 20th of April 2012, default judgment was entered for the sum of Uganda shillings 139,547,362/= with interest at commercial rate from 1st July, 2011 until payment in full as well as costs of the suit. In this suit the Plaintiff prays for the corporate veil of incorporation to be lifted for recovery of Uganda shillings 139,547,362/= with interest at commercial rate and with costs of the suit. The Plaintiff in paragraph 10 (c) also prayed for general and exemplary damages. However, the Plaintiff in a letter to the registrar dated 20th April, 2015 abandoned the prayer for general damages and costs of the suit and prayed for a decree to be extracted for the claimed liquidated amount. The Plaintiff subsequently got a default judgment which was eventually set aside. The plaint was never amended to reintroduce the prayer for general damages and exemplary damages. In annexure "D" to the plaint, the Plaintiff had obtained the same remedy together with interest at commercial rate from 1st July, 2011 until payment in full in High Court Civil Suit No. 071 of 2012.

The conclusion is that the prayer for the sum of Uganda shillings 139,547,362/= together with interest at commercial rate is *res judicata* having been conclusively determined by the entry of

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&\$\$# xtra+ maximum735securityx 2017 style*

default judgment on 20th April, 2012 and a decree was extracted there from on 23rd August, 2012 and attached as annexure "B" to the plaint. In so far as the suit is for the claim of the said money together with interest at commercial rate, it is *res judicata* and the court is barred from hearing it by section 7 of the Civil Procedure Act.

The second aspect of the claim concerns the prayer for lifting the veil of incorporation which is the only new cause of action left as reflected in the plaint. The question for consideration is whether the suit is as well barred because it is a suit against the directors of the company for enforcement of an earlier decree of the court against their company. In **High Court (Commercial Division) Civil Suit No. 232 of 2007 Jimmy Mukasa vs. Tropical Investments Ltd, John Mary Mpagi, Joseph Mulindwa and Equator Technical Agencies Limited**, I dealt with the same issue where a suit was filed against directors of the judgment debtor on the ground that they had spirited away or concealed and transferred the assets of the judgment debtor company.

I noted that there were two fundamental points to be considered. The first was whether the suit against the first Defendant Company was barred by the doctrine of *res judicata*. The second issue was bound up with the first but addressed the issue as to whether a separate suit could be brought against the Defendants on the basis of an arbitral award which had been confirmed by the High Court and was enforceable as a decree of the court. I found that the subsequent suit was barred by the doctrine of *res judicata*. Secondly directors are not immune from being followed in execution of a decree against their company and the suit was barred by section 34 of the Civil Procedure Act. The basis of the ruling was that directors were the limbs and brains of the company. The court was persuaded by the dictum of Lord Denning in the case of **H L Bolton (Engineering) Co Ltd vs. T J Graham & Sons Ltd [1956] 3 All ER 624** where Lord Denning held at page 630 that:

“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)"

Spiriting away the property of the company is enforceable against the directors without the need for a new suit by commencing proceedings within the suit under section 34 of the Civil Procedure Act as an enforcement proceeding. Modes of enforcement are provided for under section 38 of the Civil Procedure Act which provides for the powers of the court executing the decree in the following terms namely:

"38. Powers of court to enforce execution.

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require.

Among other things a judgment creditor can enforce the decree by the attachment of debts owed to the first Defendant by KCCA. The decree could also be enforced by arrest and detention of any person in prison such as the directors of the first Defendant. It can be enforced by the appointment of a receiver or in such other manner as the nature of the relief granted may require. In the premises, there is no need to file another separate suit for enforcement of a decree of the court. In any case such a suit is expressly barred by the doctrine of res judicata and is against the spirit of section 7 of the Civil Procedure Act. Last but not least a separate suit against directors of a company when there is a decree against the company when the allegation arises out of execution or enforcement of the decree is barred by section 34 of the Civil Procedure Act. Section 34 of the CPA provides as follows:

“34. Questions to be determined by the court executing the decree.

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, that question shall, for the purposes of this section, be determined by the court.”

Section 34 (1) of the Civil Procedure Act is quite clear that questions relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The allegations of the Plaintiff are that it tried to execute the decree in Civil Suit No. 071 of 2012 and failed due to the action or inaction of the directors. It is superfluous to allege fraud of the directors as this will not give rise to another separate suit but would be a question arising out of the execution of the decree. The acts of the directors of spiriting any property away can be taken to be the acts of the company. The alleged property that is diverted is the alleged property of the company. Moreover the court under section 38 of the Civil Procedure Act can appoint a receiver for purposes of enforcement of the decree. It follows

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

that a judgment creditor is not toothless and the court executing the decree has all power in its hands to enable the Plaintiff to realize the fruits of its litigation. There is in short no need to file a separate suit which in any case is barred by statute. This is reinforced by other judgments in East Africa. In the Tanzania Court of Appeal case namely **Civil Appeal No. 78 of 2002, Yusuf Manji vs. Edward Masanja and Abdallah Juma [2005] TZCA 83** the Court of Appeal of Tanzania sitting in Dar es Salaam upheld the decision of the lower court lifting the corporate veil and directing execution proceedings against the directors of the Defendant company. This is what they held at pages 6 and 7 of their:

“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.

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.”

I followed this judgment in **High Court (Commercial Division) Civil Suit No. 232 of 2007 Jimmy Mukasa vs. Tropical Investments Ltd, John Mary Mpagi, Joseph Mulindwa and Equator Technical Agencies Limited**. To the best of resources availed to me by way of judicial precedents that decision has not been overturned by an appellate court. Furthermore I referred to the Kenyan case of **Corporate Insurance Company Limited vs. Savemax Insurance Brokers Ltd [2002] 1 EA 41**, a judgment of the Milimani Commercial Court of Kenya at Nairobi where Ringera J held at page 46 on the same issue of proceedings against directors in execution against the company which is indebted as follows:

“However, for whatever it is worth, I may observe in passing that in my opinion the fact that the Second Defendant was struck out of the suit does not mean that he cannot be held liable for the debts of the First Defendant Company in an appropriate case. 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)

Ringera J held that the veil of incorporation can be lifted against the directors at the execution stage in appropriate cases. In my opinion where there is a decree and the judgment creditor is following up the assets of the company judgment debtor and alleges that the directors are concealing the company assets or misapplying it, his remedy lies in execution proceedings or proceedings arising out of execution under section 34 of the Civil Procedure Act and not in a separate suit. Section 34 of the Civil Procedure Act bars the filing of a separate suit for enforcement of a decree. Section 34 of the Civil Procedure Act is discussed by Mulla in **Mulla the Code of Civil Procedure 17th Edition volume 1 page 707** where a section in *pari materia* is considered. He writes that:

“It is 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.”

Finally I have held that the directors acting in their capacity as directors have been considered in earlier precedents as the limbs, mind and will of the company and act on behalf of the company. They represent the mind and will of the company and in appropriate cases proceedings can be brought against them when the suit proceeded against the company. In such cases where the matter arises out of execution of a decree, a separate suit is barred.

In the premises the Plaintiffs suit is barred by sections 7 and 34 (1) of the Civil Procedure Act and is accordingly hereby dismissed with costs without prejudice to any right of the Plaintiff to

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

commence or continue execution proceedings in **High Court Civil Suit No. 971 of 2012 Wavenets Communications Ltd vs. Zimwe Enterprises Hardware and Construction Ltd and Kakan (U) Ltd**, which rights, if any, can be established on the merits.

Judgment delivered in open court on the 23rd August, 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Golooba Muhammad for the Defendants

Parties are absent

Plaintiff's Counsel is absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

23rd August, 2017