

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 231/2019

STIRLING CIVIL ENGINEERING LIMITED..... APPLICANT

VERSUS

1. PLINTH TECHNICAL WORKS LTD..... RESPONDENT

BEFORE HON. JUSTICE DR. HENRY PETER ADONYO

RULING

This application is brought under section 98 of the Civil Procedure Act, Cap. 71, section 33 Judicature Act, section 20 of the Companies Act, Order 38 rule 5 (d) and Order 52 rules 1 and 3 of the Civil Procedure Rules for orders;

1. That the veil of incorporation of the 1st Respondent/ judgment debtor be lifted
2. The 2nd and 3rd Respondent who are the Directors and Shareholders of the 1st Respondent be ordered jointly and severally to pay the decretal sum of USD 220, 467 (Two hundred twenty thousand four hundred sixty-seven) in addition to taxed costs of UGX 24,321,793 and the said decretal sums continues to accrue interest.
3. The Respondents do pay costs of this Application.

The grounds of the Application in the affidavit of Mr. Hasib Ur Rahman the Administrator of the 1st Applicant/Judgment Creditor, and are that:

1. The Applicant sued the 1st Respondent in this Honourable Court vide Civil Suit No. 191 of 2017 which suit was determined in favour of the Applicant.
2. The Applicant has carried out a due diligence search to establish the assets of the 1st Respondent and there are no known assets to be attached in satisfaction of the Judgment debt. Moreover the 1st Respondent has relocated to an unknown address from that recorded with the URSB
3. The 2nd and 3rd Respondents are the Directors and Shareholders of the 1st Respondent/Judgment debtor and are the persons conducting the business on its behalf.
4. The 2nd and 3rd Respondents are using the veil of corporate personality of the 1st Respondent company as a mask for fraud
5. The 1st Respondent issued several cheques to the Applicant and the same were returned by the bank unpaid with the inscription "R/D" (Refer to Drawer). The said cheques were signed by the 2nd Respondent in his capacity as Director/Shareholder of the 1st Respondent.
6. The 2nd and 3rd Respondents are directing the mind, will and conduct the business of the 1st Respondent and are liable to indemnify the 1st Respondent company
7. The drawing of cheques by the 2nd Respondent well aware that there are insufficient funds on the bank account of the 1st Respondent is an element of fraudulent intent to take benefit of goods without pay.
8. The contracts which were executed by the 1st Respondent have long been completed. The said projects were funded by the World Bank and payments to the 1st Respondent were made by the procuring entity and the 2nd and 3rd respondents as Shareholders and Directors must have taken benefit of the payments without paying the Applicant.

Mr. Kasasira John Bosco, a director of the 1st Respondent, swore an affidavit in response to the application and he deponed that;

1. The Applicant filed civil suit no. 191/2017 against 1st Respondent pursuant in which judgment was entered against the 1st Respondent
2. It is not true that the 1st Respondent has non known assets, as it is a well- established going concern company
3. The issue of the 1st Respondent's issuance of cheques to the Applicant was determined by court and cannot be raised in the application
4. Being a director of accompany and a shareholder does not qualify one to indemnify the company against its debts
5. The outstanding amounts cannot be paid by the 2nd and 3rd Respondents without giving them a hearing first
6. The 2nd and 3rd Respondents are carrying out the business of the 1st Respondent as mandated by law and not for personal benefit
7. The Applicant is well aware of the location of the 1st Respondent's business premises
8. The 1st Respondent has instituted arbitration proceedings before CADRE to recover a sum of UGX 11,000,000,000/= (Uganda Shillings Eleven Billion) which proceedings are still pending determination, and this is a clear indication of the financial standing and capability of the 1st Respondent, and is also proof that it was never fully paid by Hoima Municipal Council

Applicant's submissions

In his submissions, Counsel Patrick Alunga raised three issues for determination including;

1. Whether the 1st Respondent's veil should be lifted
2. Whether the Applicant ought to take a new suit altogether
3. Whether the 2nd and 3rd Respondents are liable to pay the decretal sum

Counsel submitted that the Applicant obtained judgment against the 1st Respondent on the 18th March 2018, and was awarded the sum of USD 220,000,467/= with interest of 11% per annum. Counsel submitted that the Applicant made a demand for the sums that were awarded to it in a letter dated 19th September 2018 but no response has been made to that letter.

Counsel submitted further that when the applicant conducted due diligence on the 1st Respondents assets in order to settle the decretal sum, they found no assets registered in their name. Additionally that , the 1st Respondent can no longer be found at their previously known premises at Plot 1325 Bukoto-Kisasi Road. He argued that the 1st Respondent failed to notify the Company Registry of its change in location yet this is a requirement under the Company's Act. In his view, this points to an element of fraud on the part of the 1st Respondent and raises the need to lift the veil. He referred to ***Muhimbura Stephen and Another vs Katasha Coffee Buyers and Family Ltd. Misc. Application No. 052/2014 and Guning Onimu vs Naguru Tirupati Ltd M/A No. 232/2017*** where the court lifted the veil for the purposes of execution.

Counsel implored the court to lift the veil on account of the 2nd and 3rd Respondents being shareholders in the Company (1st Respondent); and that the 2nd Respondent owns 70% shares while the 3rd Respondent owns 30%; and that they are the mind of the company. Counsel also pointed the court to the issues of signatures, and submitted that the signatures on the dishonoured cheques were similar to those on the annual return which were signed by the 2nd Respondent Mbazzi Muguluma Joseph. According to counsel, this is also an element of fraud. Applicant's counsel also submitted that the Applicant has been giving preferential treatment to creditors by choosing which ones to pay.

Respondent's Submissions

Counsel for the Respondents, Mr. Kagoro Friday Roberts, opposed the application. He submitted that the corporate veil can only be lifted in instances where there is fraud and improper conduct. He argued that the 2nd and 3rd

Respondents being shareholders of the 1st Respondent Company does not amount to fraud.

Counsel denied that the 1st Respondent issued cheques which were dishonoured. He submitted that, the judgement in which the decree was issued determined that the cheques were returned and paid. He distinguished the case of ***Paulinas Chuku Elofor vs Byamugisha Charles and Others Misc. Application No. 309/2016*** which was cited by the Applicant's counsel and argued that the facts in that case were different from the case before the court

Mr. Kagoro also told the court that the 1st Respondent has a matter before CADER in which it is seeking a claim against Hoima Municipal Council, and in that matter the Applicant claims that Hoima Municipal Council paid the 1st Respondent fully, whereas not.

He contended that the Applicant failed to provide any convincing evidence of fraud or any other evidence upon which the court can act to lift the veil of incorporation. He submitted that the 1st Respondent is a company fully incorporated that does business in Uganda and any allegations that it does not exist were not true. He referred to ***Eastern Builders and Engineers Limited vs Malva Construction*** and ***John Lubega Matovu vs Mukwano Investment Ltd. M/A No. 156/2012*** on this point.

Decision:

Having perused the parties' affidavits and submissions, the court considers that there are two issues for determination.

Whether the Applicant ought to have filed a separate suit to prove fraud for the purposes of executing a decree

Mr. Alunga argued that for the purposes of executing a decree, there is no need to bring a separate suit to prove fraud, and that this can be determined in the same suit pursuant to section 34 of the Civil Procedure Act while the Counsel

for the Respondents argued that a separate suit ought to have been filed to prove fraud.

Section 34 (1) of the Civil Procedure Act provides that 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 decrees shall be determined by the court executing the decree and not by a separate suit.

This section was the subject of discussion in ***Guning Onimu vs Naguru Tirupati Ltd and 3 Others*** where a similar issue arose and the court found that there is no need to file a separate action in such cases, as the application may be treated as a suit itself.

The court found that requiring the parties to file a separate suit would lead to unnecessary delays, expenses and long periods of waiting to access justice. It was found that courts should determine all issues related to execution, discharge and satisfaction of decrees pursuant to section 34 within the same suit. That the executing court should dispose of the question by granting relief.

It is true that the application in the case before court was filed by motion accompanied by affidavit but the court is not precluded from allowing oral evidence to be given by persons other than the deponents.

Taking into account all the above mentions provisions and laws, the court finds that this application is properly before the court.

Whether the Applicant has established grounds for lifting the corporate veil

Lifting the veil means disregarding the corporate personality of a company in order to apportion liability to a person who carries out any act. See ***Guning Onimu vs Naguru Tirupati Ltd***

In ***John Lubega Matovu vs Mukwano Investment Limited Misc. Application No. 156/2012*** the court noted that the concept of corporate personality separates a company from other nature of business organisations and also means that a company is a legal entity that is distinguishable from its members. It enjoys rights and is subject to its duties, which are different from those that accrue to its members.

The court referred to the principle in ***Salmon vs Salmon & Co. Ltd (1897) A.C 22 HL*** it was established that the company is at law a different person altogether from the subscribers to the memorandum of association and though it may be that after the incorporation, the business is precisely the same as it was before and the same persons are managers and the same persons receive profits, the company is not in law the agent of subscribers or trustees nor are subscribers as members liable in any form or shape except to the extent and in the manner provided by the Act.

The court may set this principle aside where it deems that an injustice would be caused to the Applicant if the veil were not lifted.

It has also been settled that directors can be subjected to 'execution proceedings where it has been shown that the defendant company was nothing more than a clock, a creature of the directors, a device and a sham See, a mask which they had before their faces in an attempt to avoid recognition by the eye of equity'. See ***David Baingana vs SDV Transami Miscellaneous Application NO. 48/2013***

Section 20 of the Company Act of 2012 provides that;

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.

As such, the fraud is one of the instances where the corporate veil may be lifted. The court can only lift the veil where the Applicant has proved the existence of fraud to the court's satisfaction. See also ***Samuel Abbo vs Cimeel Engineering Ltd Misc. Application No. 29/2013***

In that case, the court also cited ***Fredrick J.K Zaabwe vs Orient Bank Ltd and Others Civil Appeal No. 4/2006*** where it was held that;

“an allegation of fraud need to be fully and carefully inquired into. Fraud is a serious matter.”

Moreover, fraud must be proved strictly, with the burden being heavier than that applied generally in civil matters. See ***Samuel Abbo vs Cimeel Engineering Ltd***

It is also a common law principle that the state of mind of the company is the state of mind of the directors and is treated by law as such. See ***Stanbic Bank Ltd vs Ducat Lubricants (U) Ltd & 3 others Misc. Application No. 845/2013***

In case before me, the Applicant alleges that the 2nd and 3rd Respondent are misusing the corporate personality of the 1st Respondent as a mask for fraud by issuing several payment cheques to the Applicant but these were dishonoured.

It is also alleged that the Applicant has been unable to execute the decree against the 1st Respondent because it has no known assets which the Applicant can attach. That the 1st Respondent has relocated to an unknown address from that which is registered with the Uganda Registration Services Bureau.

Although the Applicant has made these two allegations, they are not substantiated by any documentary evidence, and upon the court's assessment are not evidence of fraud on which the court can act to lift the corporate veil

Regarding the failure to honour cheques, this also insufficient to prove evidence of fraud. This finding also applies to the Applicant's allegations that the 2nd and 3rd Respondents are using the company for their private benefit, and that the Respondents have approved payments to other creditors.

On the whole, taking into account the above mentioned findings and also the principles highlighted above, including that the standard of proof for fraud is higher than that generally applied to civil matters, I find that the Applicant has not made out a case for the lifting of the corporate veil of the 1st Respondent.

The application is accordingly dismissed.

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HON. JUSTICE DR. HENRY PETER ADONYO

JUDGE

20TH MARCH 2020