IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Miscellaneous Application No. 239 of 2023

In the matter between

ROBERT KIRUNDA **APPLICANT**

And

1. JACQUELYN AMOKO

2. AFRICAN KINGS (U) LIMITED

3. PRESTIGE PINE VILLAGE LIMITED

4. DENNIS BABIGUMIRA **RESPONDENTS**

Heard: 03 May, 2023.
Delivered: 25 September, 2023.

Civil Procedure *- An omnibus application will be found incompetent for combining two or more distinct reliefs governed by different laws with a different yardstick or timelines - Review - An order may not be set aside in the process of review unless clear or manifest error was committed in arriving at the decision - conclusions arrived at on appreciation of the evidence before Court and cannot be characterised as an error apparent - Judgments - they bind those who stand in privity with parties. Privity arises through a congruence of interests; where the parties are really and substantially in interest the same - Such persons are considered bound by the judgment, although not named as parties. All privies, either in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity.*

Companies *- Lifting the veil of incorporation - this will only be done when there is evidence to show that the corporate structure was used purposely to avoid or conceal liability - where the applicant pleads and proves that the company did not operate as legal entity separate and apart from the officers, directors and shareholders such that the*

company was actually the alter ego of the shareholders, officers and directors and not a separate legal entity; where the corporation is just a shell designed to shield liability, a mere instrumentality of the shareholders - Court cannot remove the corporate veil only because it is in the interests of justice. The corporate veil can be removed only if there is impropriety.

***Statutes** — Interpretation — if the statute lists certain things and the list begins with or ends with a general statement to include other things (a "catch-all"), the court will assume that the general statement only includes things that are similar to the items listed and will interpret it ejusdem generis to include items of the same kind, class, or nature.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] The 2nd respondent is a private limited liability company and the majority shareholder in the 3rd respondent. Sometime during the year 2017 the two corporations entered into an arrangement whereby the 2nd respondent was to acquire 23 acres of land comprised in Kyadondo Block 185 Plot 546 for the development of an upscale housing estate to be known as "Prestige Pine village." The applicant is a former director, nominal shareholder in and was counsel for the 3rd respondent Company, having accepted one share in the company and a position on the board, essentially to safeguard his professional fees.

[2] The 1st respondent paid a total of US $ 83,963 and shs. 46,307,500/= as part payment towards the purchase of two units of the planned housing estate. She subsequently sued the 3rd respondent, in HCCS No. 24 of 20l9 for the recovery of that sum. Without the applicant's knowledge, the 4th respondent who is a director of the 3rd respondent entered a Consent Judgment dated 14th June 2019 by which the 3rd and 4th respondents undertook to pay the 1st respondent the sum claimed together with interest and costs.

[3] When it was discovered that the land comprised in Kyadondo Block 185 Plot 546 not only belonged to the 2nd respondent but was also mortgaged to Absa Bank, the 1st respondent filed HCMA No. 407 of 2020 seeking to lift the 3rd respondent's corporate veil citing inability to enforce the decree against it for lack of assets. The Court granted the application on ground that the acts of the 3rd respondent were indicative of fraud, lifting of the corporate veil in order to satisfy a decree. The Court permitted execution to proceed against the directors of the 3rd respondent, including the applicant. The 1st respondent then filed EMA No. 498 of 2021 seeking execution of the decree.

The application:

[4] The application is by Notice of motion made under the provisions of 5 section 33 of *The Judicature Act*; sections 34 (1) and (2), 82 and 98 of *The Civil Procedure Act*; Orders 46 rules 1 (1) (b) and Order 52 Rules 1,2 and 3 of *The Civil Procedure Rules.* The applicant seeks an orders that; - (i) the court's lifting of the 3rd respondent's veil of incorporation in Misc. Application No. 407 of 2020 against selected directors and shareholders, while excluding the 2nd respondent who is the majority shareholder, constitutes an error apparent on the face of the record and an illegality, and is sufficient cause thus warranting a review of that decision; (ii) the Court reviews, sets aside, and/or otherwise varies the ruling in Misc. Application No. 407 of 2020 lifting the veil of the 3rd respondent and orders M/s African Kings Uganda Limited and Mr. Denis Babigumira liable for the Judgment debt in Civil Suit No. 24 of 20l9 and/or fairly apportions the liability of the shareholders for the said debt in accordance with their liability for the alleged fraud in the 3rd respondent; (iii) the Court finds that the 2nd and 4th respondent have wholly assumed and/or taken over liability for the entire judgment debt in HCCS No. 0024 of 2019 due to the 1st respondent and enjoins the 2nd respondent as Judgment Debtor; (iv) the Court discharges the applicant for any liability and/or as a Judgement Debtor in HCCS No. 0024 of 2019; and (v) in the alternative, and without prejudice, the Court apportions the outstanding liability amongst the

judgement debtors and the 2nd respondent *pro rata* their respective shareholding in the 3rd respondent; or on such terms as the court may deem just.

[5] It is the applicant's case that there are material errors on the face of the record in HCMA No. 407 of 2020 constituting grounds sufficient for this court to reviews the decision therein and make remedial Orders that are essential for the satisfaction of the remainder of the Judgment Debt in HCCS No. 24 of 2019. The 2nd and 4th respondents have since admitted to being the majority shareholder in the 3rd respondent and severally accepted liability for the 1st respondent's judgement debt. Further the 2nd respondent has actively taken steps to fulfil the obligation to pay the decretal amount, and indeed made payments in this regard. The 2nd and 4th respondents have since effectively taken over the judgment debt and demonstrated willingness and ability settle it in its entirety. The two respondents have the means and opportunity to settle the outstanding judgment debt in full and in a timely manner. The applicant is no longer an officer or member of the 3rd respondent and has no means to compel it to settle the outstanding debt it has since formally assumed. The 4th respondent is a director of the 2nd respondent and has the means and ability to ensure that the 2nd respondent honours any court orders compelling it to settle the judgment debt. It is in the interest of justice that the court grants the application.

<u>The affidavit in reply</u>:

[6] In the 1st respondent's affidavit in reply, it is contended that the application is an abuse of court process, does not raise any matters for Review, is a disguised appeal, is prolix, argumentative and full of contradictions, is bad in law and ought to be dismissed on a point of law. The application seeks many contradictory orders which are incapable of being reconciled namely; moving liability from parties to a non-party to the application and the main suit; discharge of the applicant who is a party to the application and by extension a party to the main suit; discharge of the applicant from liability under the judgment debt; and apportionment of liability

among all the parties. The 2nd respondent was not party to the application or the main suit and cannot be subject to liability on the basis of orders made under an application and main suit to which it was never a party. The applicant misrepresented to court as to the size of the said land, withheld information on third party rights attaching thereto and the fact that a significant part of the land was in a wetland.

[7] There was neither premise nor measure of the extent of involvement of the liable persons under the application for the fraud committed by the sham company to justify apportioning liability, hence the joint and several liability for all the persons against whom the veil was lifted. The purpose of lifting the corporate veil was to go beyond corporate identity of the debtor company which committed fraud against the plaintiff/judgment creditor and it would defeat the purpose if another corporate entity in the name of the 2nd respondent were to take up liability. The 2nd respondent has had to borrow to pay the judgment creditor and even shown deceit by borrowing to clear the judgment debt and failing/refusing to do so upon obtaining the finances to do so. The 2nd and 4th respondents are heavily indebted and incapable of satisfying the judgment debt willingly.

Submissions of Counsel for the applicant:

[8] Counsel for the applicant submitted that the application is omnibus with five orders sought. The questions to be determined are in execution. The lifting of the veil was incomplete, contrary to section 20 of *The companies Act*. The 2nd respondent is the majority shareholder. The 1st respondent knew the directors of the company. The 4th respondent is also the Managing Director of the MD of the 2nd respondent. The consent judgment is an illegality. The application seeks to add a third party who held the property. The judgment creditor has accepted payment from the 3rd party. In F*rancis Micah v. Nuwa Wakakira S. C. Civil Appeal No. 24 of 1994*, the Supreme Court held that the object of section 34 of *The Civil Procedure Act* is to

save unnecessary expense and delay and to afford relief to the parties finally, cheaply, and speedily without the necessity of a fresh suit.

[9] It was an error when the 1st respondent sought to lift the corporate veil of the 3rd respondent, by listing five of the shareholders leaving out the 2nd respondent who is the majority shareholder. The 2nd respondent has since notified the applicant by way of letter that it acknowledges the debt and is willing to take it on. The 1st respondent therefore ought to have named and, and the court ought to have joined the 2nd respondent to the proceedings in HCMA 407 of 2020. The property out of which the 1st respondent purchased a housing unit was not in the names of the 3rd respondent but in the names of the 2nd respondent who was not a party to the suit. Liability upon lifting the veil ought to have been attributed to the shareholders that were responsible for any actions based on which the veil of incorporation had been lifted. The court ought to have determined the extent to which any persons were individually liable. The court in its ruling did not attribute joint and several liability, neither did it determine the basis and parameters of liability, thereby occasioning an injustice to the applicant.

[10] The Court ought to have asked itself whether all directors and shareholders participated in the fraud which the Court had formed the view had been proved. Thereafter, the Court was required to apportion liability on that basis. There is nothing on the face of the record in the ruling o which shows that the Judge was alive to this duty or that he considered these questions and arrived at any conclusion regarding the same. The 2nd respondent is the majority shareholder in the 3rd respondent and the 4th respondent is its principal officer, representing its interests. The 2nd respondent has, consistently admitted to being the correct debtor and shown willingness to take over· the debt and pay it. On 4th November, 2022 the 2nd respondent passed a resolution assuming responsibility for the judgment debt and undertaking to indemnify the applicant and other judgment debtors in respect of the debt. Since the commencement of execution proceedings, the 2nd

respondent has so far deposited at least shs. 116,200,000/= which the 1st respondent has accepted in partial settlement of the decretal sum.

[11] The applicant on 16th May, 2022 relinquished his shareholder interest in and resigned from directorship of the 3rd respondent. Despite that, the applicant faces the constant threat of execution in the form of arrest and detention and his fate continues to be saddled with the 2nd and 4th respondents' conduct. It would be unjust and inequitable to require the applicant, a previous holder of one share in the 3rd respondent to be liable for the entire judgment debt. Moreover, to uphold the present status would be unfair in that it would mean not attributing any of the said debt to the 2nd respondent, who remains majority shareholder and possessed with the means and willingness to settle the said judgment debt, and who has made part payment in settlement of the said judgment debt. It just and equitable that the outstanding debt be split or apportioned amongst all existing judgment debtors on the basis of their shareholding, and due liability attributed to the 2nd respondent, who has assumed the same in any event.

Submissions of Counsel for the 1st respondent:

[12] Counsel for the 1st respondent submitted that review is inapplicable as error apparent does not arise. The 1st respondent never added the 2nd respondent as a party. Liability cannot be waived by implication. Judgment was by consent and it can only be varied by consent. There is no novation. They deposited money onto her account. They cannot approbate and reprobate the decision of offer of the property. They transferred property from one party to another. The supplementary affidavit lists the property of the 2nd respondent. The joinder is not possible. They frustrated the Court process.

[13] Review is meant to deal with matters where an appeal is not an appropriate remedy. Matters where there is an error apparent on the face of the record, or where there is a discovery of new and important evidence which was not available

to the applicant at the time the case was determined and hence was not considered by court. An application for review can be made where no appeal has been preferred or where no right of appeal exists. The matters raised in the application challenge the basis upon which court decided to lift the corporate veil. The 2nd respondent was never a party to the main suit and the application for lifting of the corporate veil. No application has been made to add the 2nd and 4th respondents as parties to the suit. The remedy of review is only exercised for correction of mistakes and not to substitute the court's view.

[14] There is no point in discharging the applicant from satisfying a judgement debt when he has not clearly demonstrated nor shown practical step on how the judgment debt is to be paid but has instead relied on future promises from the 2nd respondent on how it will pay off part of the decretal sum after it has been paid for some contractual work. His willingness to pay even his so-called part of the debt when apportioned directly to him by court is so improbable, considering the fact that he misled court on oath causing the variation of the warrant of arrest issued against him and his fellow directors after he stated that the 2nd respondent had furnished a title which was capable of being sold in satisfaction of the judgment debt which unfortunately turned out to be untrue. The appropriate remedy available to the applicant is to apply for leave to appeal against the decision in Misc. Application No. 407 of 2020 instead of filing misconceived applications whose motive is to delay the satisfaction of the judgement debt in full.

The decision:

[15] The general principle is that except as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly (see Order 2 rule 4 (1) of *The Civil Procedure Rules*). Just as there is no law that bars the combination of distinct reliefs or applications in one application, there is also no hard and fast rule of practice developed by Courts to discourage combination of two or more distinct reliefs in one application.

Consequently, Courts encourage the combination of one or more reliefs in one application to avoid a multiplicity of applications usually aimed at saving time, costs and effort to make the conduct of several claims for multiple reliefs more convenient, provided that the reliefs sought are not diametrically opposed to each other.

[16] An omnibus application will be found incompetent for combining two or more distinct reliefs governed by different laws with a different yardstick or timelines. That not being the case in the instant application where the applicant seeks five relief which have been condensed into four, they will now be considered separately.

a) Review, setting aside, and/or otherwise varying the order.

[17] Order 46 rules 1 of *The Civil Procedure Rules*, empowers this court to review its own decisions where there is an error apparent on the face of the record. The error or omission must be self-evident and should not require an elaborate argument to be established. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. There are two facets to the application now before Court; to review the decision made to lift the 3rd respondent's veil by setting it aside as against the applicant, or alternatively varying it.

i. Review with a view to setting aside;

[18] An application for review, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on

the part of the Court. It may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of an appellate court.

[19] An error apparent on the face of the record is one which is based on clear ignorance or disregard of the provisions of law or facts. Such error is an error is one which is a patent error and not a mere wrong decision. Conclusions arrived at on appreciation of evidence cannot be classified as errors apparent on the face of the record. In a review, it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible.

[20] To set aside an order is to give a remedy that deprives the order of binding legal force where court committed fundamental errors in its ruling, by treating it as legally inoperative, in the sense of being disregarded. Once the court deprives its decision of binding force, it can declare that the applicant has no duty to comply. An order may not be set aside in the process of review unless clear or manifest error was committed in arriving at the decision; when the reviewing court, on the face of the record, is left with the definite and firm conviction that a mistake was committed. A finding is not clearly erroneous if it is arrived at on appreciation of evidence, save where there is a manifest ignorance or disregard of relevant provisions of law or facts.

[21] The application arises in the context of lifting the veil of incorporation. Section 20 of *The Companies Act, 1 of 2012* empowers courts to pierce the "corporate shield" or lift the "corporate veil." This will only be done when there is evidence to show that the corporate structure was used purposely to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). This

may be done by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed “dehors” the company.

[22] The personal liability of shareholders and directors arises only when the corporate veil is pierced where the applicant pleads and proves that the company did not operate as legal entity separate and apart from the officers, directors and shareholders such that the company was actually the alter ego of the shareholders, officers and directors and not a separate legal entity; where the corporation is just a shell designed to shield liability, a mere instrumentality of the shareholders.

[22] Sometimes the principles of the corporate veil must yield to practical justice. This is because “…a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation….” (see *Lennard’s Carrying Co Ltd v. Asiatic Petroleum Co. Ltd, [1915] AC 705*). Therefore, where it is established that a company’s director, officer or shareholder wields undue dominion and control over the corporation, such that the corporation is a device or sham used to disguise wrongs, obscure fraud, or conceal crime, the veil of incorporation will be pierced.

[23] Courts are willing to look behind the corporate veil as a matter of law so as to establish the directing officer behind the decisions and actions taken by the company. “Lifting the veil” is allowed only in certain exceptional circumstances. Ownership and control are not sufficient criteria to remove the corporate veil. The Court cannot remove the corporate veil only because it is in the interests of justice. The corporate veil can be removed only if there is impropriety. Even then, impropriety itself is not enough. It should be associated with the use of the corporate structure to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London*

Borough Council [1976] 1 WLR 852 and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). The court will then go behind the mere status of the company as a legal entity, and will consider the persons who as shareholders or even as agents, direct and control the activities of a company, which is incapable of doing anything without human assistance.

[24] Courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct. As such courts acknowledge that their equitable authority to pierce the corporate veil is to be exercised "reluctantly" and "cautiously." Piercing is done by courts in order to remedy what appears to be fraudulent conduct. Corporate personality cannot be used as a cloak or mask for fraud. Where this is shown to be the case, the veil of the corporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud (see *Salim Jamal and two others v. Uganda Oxygen Ltd and two others [1997] II KALR 38*).

[25] The courts have in the rare circumstances ignored the corporate form and looked at the business realities of the situation so as to prevent the deliberate evasion of contractual obligations, to prevent fraud or other criminal activities and in the interest of public policy and morality. In order to remove the corporate veil, it is necessary to prove the presence of control, and the presence of impropriety, that is, the use of the company as a "facade," "cloak" or "sham" to hide violation of law. This is proved by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed "dehors" the company. The court will treat receipt by a company as receipt by the individual who controls it if both conditions above are satisfied. It enables a claimant to enforce a contract against both the "puppet" company and the "puppeteer" who at all times was pulling the strings.

[26] There are two suggested categories of cases in which it may be appropriate to pierce the corporate veil on account of fraud, including (i) cases in which the

company was shown to be a facade or a sham; and (iii) cases where the company was involved in some impropriety associated with the use of the corporate structure to avoid or conceal liability (see *Mugenyi & Company Advocate v. The Attorney General [1999] 2 EA 199*; *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647* and *VTB Capital plc v. Nutritek International Corp [2013] 2 AC 337*).

[27] Although public policy demands that court judgments, orders and decrees are not issued in futility, hat of itself is not justification for lifting the corporate veil. For example, in *Samuel Abbo v. Cimeel Engineering Ltd, H.C. Misc. Application No. 29 of 201*3, judgment was passed on admission against the respondent in the sum of shs. 24,600,000 /= The respondent's last known address or registered office could not be located for purposes of recovery of that sum, nor could the location of its property nor that of its directors be ascertained. It was contended that the directors had deliberately lost touch with their lawyers with the intention of defrauding the applicant, having undertaken to pay the money, and finally that it was fair, just and equitable that the corporate veil be lifted in order for the applicant to recover his money. It was held that for the court to lift the veil, the applicant must prove fraud to the satisfaction of court. Fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. The applicant did not prove fraud; he merely stated that the director lost touch with his former lawyers. The applicant failed to prove that the director only used the name of the company as a mere front to perpetuate fraud and the application was accordingly dismissed.

[28] The scope of section 20 of *The Companies Act, 2012* though is not closed to cases of tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum. These are given as

examples, prefixed by the word “including.” When a statute provides a list of specific items, that list is presumed to be exclusive; the statute applies only to the listed items and not to others. But if the list starts with a phrase like “at a minimum” or “including” or “such as” or ends with a general catch-all term, the court will interpret the list as illustrating the types of things the statute applies to and not as an exclusive list.

[29] In *Beatrice Odongo and another v. Tamp Engineering Consultants Limited, CA. Civil Appeal No. 8 of 2020*, an appeal challenging the lifting of the veil of incorporation upon the respondent’s failure to trace assets of the judgment debtor company in respect of which the applicants were the directors, for purposes of execution of a decree of Court issued in its favour, it was held that the provision covers “acts that include, but are not necessarily limited to tax evasion, fraud or membership [falling] below the statutory minimum.” The Court observed that “flagrant injustice and improper conduct” would justify lifting of the veil. The Court considered closure of the business premises of the company in Uganda soon after commencement of litigation against it, and the directors’ breaking contact with the defence counsel at the closure of the plaintiff’s case, as sufficient evidence of using the corporate status as a buffer against legal responsibility for breach of contract and avoidance of execution of the resultant decree. Not to lift the corporate veil in the circumstance was considered to be a blatant mockery of justice.

[30] It is trite that if the statute lists certain things and the list begins with or ends with a general statement to include other things (a “catch-all”), the court will assume that the general statement only includes things that are similar to the items listed and will interpret it *ejusdem generis* to include items of the same kind, class, or nature. Therefore section 20 of *The Companies Act, 2012* includes conduct similar to tax evasion, fraud and membership of the company falling below the statutory minimum. Applying that tenet of statutory interpretation, wrongful or fraudulent trading by the directors would fit within the definition, to the extent that it results in the deception and defrauding of the company’ creditors since it constitutes

"flagrant injustice and improper conduct." The expression includes conduct that has a fraudulent effect that is so shockingly noticeable, evident, or obvious, or conduct that is glaringly unjust.

[31] Directors and shareholders can be held personally responsible for debts and/or liabilities of the business if they engage in fraudulent transactions such as taking payments from customers while knowing that goods or services cannot be delivered in return, engaging in fraudulent trading, such as providing misleading or inaccurate information on finance applications, and knowingly permitting the company to act unlawfully. In Miscellaneous Application No. 407 of 2020, evidence was adduced to show that circumstances exited that justified the lifting of the 3rd respondent's veil of incorporation. The relevant part of the ruling delivered on 28th January, 2021 is as follows;

> Relating the above-mentioned principles to the matter before me, I find that the applicant has gone to great lengths to show that the 7th respondent has no established and known address or place of business, has not filed annual returns, or that, as per Annexure "D" to the affidavit in support of the application, the company does not have a record at the companies' registry. Further the applicant has also pointed out that the property comprising the housing units at Kyadondo Block 185 Plot No. 546 at Namugongo Kira is registered in the names of another entity known as African Kings Limited where the 2nd, 3rd and 5th respondents are members thus according to the applicant, these acts are indicative of possible fraud on the part of the respondents which I consider pointers sufficient to support the assertions that the respondents committed fraudulent acts is it would appear to me that the respondents only used the name of the company which is a sham and a creature to hide behind it to avoid recognition and perpetuate fraud given that the circumstances regarding the registration of the company are that the 7th respondent company which is registered at the Companies Registry as demonstrated by the certificate of incorporation, memorandum and articles of association and other documents annexed and marked as "B", to the affidavit of Mr. Noah Wasige shows that the land on which the housing units were constructed is registered under another entity known as African Kings (U) Limited which fact is not denied by the I-6th respondents…..[who] had the intention to use the 7th respondent company as a mere facade, cloak or sham to hide violations of the law,

> or that there was fraudulent misuse of the company structure….. That being so, I would find this application meritorious and grant the prayers…. This application for lifting the corporate veil of incorporation of the 7th respondent company is hereby lifted. The cost of this application is granted to the applicant.

[32] These clearly are conclusions arrived at on appreciation of the evidence before Court and cannot be characterised as an error apparent. They are maters which, if considered erroneous, can only be appealed. Counsel for the applicant however submitted that it was an error for the 1st respondent to have sought to lift the corporate veil of the 3rd respondent, by listing five of the shareholders leaving out the 2nd respondent who is the majority shareholder. This submission is misconceived in so far as it was unnecessary to join a corporate shareholder in an action for lifting the veil of incorporation. Firstly, it is trite that a plaintiff in a suit, being "*dominus litis*" (master of the suit), cannot be compelled to sue a person against whom he or she does not claim any relief. However, where the pleadings have been skilfully drafted to avoid naming a necessary party, and in order to avoid passing an ineffective decree, the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of such a person to be joined. Joining the 2nd respondent was, on the facts of this case, not necessary to give efficacy to the decree.

[33] Secondly, it is not true that judgments are always without practical or substantial effect on non-parties; they bind those who stand in privity with parties. Privity arises through a congruence of interests; where the parties are really and substantially in interest the same. It denotes mutual or successive relationship to the same right of property, and it is classified as privity in estate, privity in blood, and privity in law, in all of which kinds there must be an identity of interest. A privy in estate is one who derives title to property from another. He comes in by succession to property by contract or law. To make one person a privy in estate to another, that other must be predecessor in respect to the property in question, from whom the privy derives his right or title. Examples of this class of privies are joint tenants, donor

and donee, lessor and lessee, and successors in office. Privies in representation are illustrated by executor and testator, administrator and intestate.

[34] In litigation, persons considered to be in privity are those who control the proceeding although not a named party, those whose interests are represented by a party to the proceeding, and successors in interest of a party. In such situations, fair trial requirements are met when the non-party has sufficient notice of the "representative" litigation in order to preserve its interests by, for example, joining in the proceedings or disputing the adequacy of the representation. Such persons are considered bound by the judgment, although not named as parties. All privies, either in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. The 2nd respondent is in privity with the five shareholders that were named as parties, and therefore is bound by the decision that lifted the 3rs respondent's veil of incorporation.

[35] As a consequence of the lifting of the corporate veil, the company as a separate legal entity is disregarded where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, such that the people behind it are identified irrespective of the personality of the company. The effect of "lifting" or "piercing" the corporate veil is that the all the shareholders and directors jointly and severally, rather than the company, are regarded as the relevant actors on whom liability of the obligations of the company are placed. Consequently, upon lifting the veil of incorporation, all directors (shadow directors inclusive) will be held personally liable (see *Powers v. Greymountain Management Limited [2022] IEHC 599*). There is no reason to distinguish between shadow directors and the active directors, minority and majority shareholders, when deciding to pierce the corporate veil. Therefore, any person before they become a company director, must be familiar with their legal responsibilities, obligations and duties attaching to the position and they must actively engage in all the affairs of the company to exercise appropriate oversight and supervision of delegated functions.

[36] Ordinarily the facts justifying lifting of the corporate veil should be established in the *viva-voce* hearing at the main trial and not merely by affidavit, so that the directors and shareholders have the opportunity to know the full extent of the case against them and a proper opportunity to defend themselves. However, this may not be the case in post-judgment proceedings for lifting the veil of incorporation. For example, in Broward *Marine, Inc. v. S/V Zeus, No. 05-23105CIVOSULLIVAN, 2010 WL 427496 (S.D. Fla. Feb. 1, 2010)*, the U.S. District Court for the Southern District of Florida pierced the corporate veil, finding that the corporation's dominant shareholder should be personally liable for the torts of his corporation. In that case, the plaintiff sued the defendant yacht corporation for foreclosure of its mortgage on a yacht. Upon obtaining judgment against the yacht corporation, the plaintiff instituted proceedings supplementary after learning that the yacht corporation had transferred all of its assets, post-judgment, to other corporations controlled by the yacht corporation's sole shareholder. Through the proceeding supplementary, the plaintiff sought to hold the transferee-corporation, and the sole shareholder, liable for the underlying judgment against the yacht corporation. Specifically, the Court found that the yacht corporation had transferred all of its assets, post-judgment, in order to hinder, delay, or defraud the Plaintiff. Resultantly, the yacht corporation had its veil pierced and its sole shareholder and one of his other closely-held corporations were found liable for the underlying judgment. The proceeding were by affidavit evidence.

[37] The order sought to be reviewed in the instant case having arisen out of an application that arose in the course of execution of a decree, the proceedings were conducted under section 34 of *The Civil Procedure Act* which envisages a hearing by affidavit. The applicant, who was named as the 4th respondent in those proceedings, was given a fair opportunity to defend himself. The 2nd respondent, being in privity with the five other shareholders that were named, and having had sufficient notice of the "representative" litigation such that in order to preserve its interests it could have applied to join in the proceedings but did not, it is

nevertheless bound by the ruling. That it was not joined to the proceedings, is not an error apparent of the facet of the record. This ground therefore fails.

ii. Review with a view to varying the order by reason of a mistake apparent.

[38] Judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom. The court may therefore vary its orders when it is proved that; - (i) aspects of the order were erroneously granted; (ii) there is an ambiguity, or a patent error or omission in the order, but only to the extent of such ambiguity, error or omission; (iii) the order was granted as the result of a mistake common to the parties, or the facts on which the original decision was made were (innocently or otherwise) misstated; (iv) circumstances have arisen that render the order inoperative or impracticable. Where there has been a material change of circumstances; (v) any other sufficient case. The court has a wide discretion to vary or revoke previous orders, but consideration must be given to the finality of litigation and the need to avoid undermining the concept of appeal.

[39] The power should not be used to circumvent the important principle that final orders are intended to be final and that the only way to set aside a final order is ordinarily by way of an appeal. It is either interlocutory or continuing orders that may call for variation as they continue. Interim orders or interlocutory orders do not finally decide anything as of right between the parties. They include case management decisions which govern the procedure by which those rights will be determined. In contrast, final orders determine between the parties the issues which are the subject matter of the litigation and which give rise to a cause of action estoppel between those parties. Justice requires that any challenge to final orders

is via the appeal process rather than applications for variation or revocation, unless there are exceptional circumstances.

[40] Generally this power will be invoked where the original order was made on the basis of erroneous information or where subsequent unforeseen events have destroyed the basis on which it was made, or where it is necessary for accommodation of a wider constellation of interests. However, given the public policy principle of finality of litigation, it does not automatically follow that where such facts are proved, the order will be varied where it is a final order. It will normally take something out of the ordinary to lead to variation of an order, especially where there has been no change of circumstances. The court will have performed its duty once it made a final order. That being so, save where the court has (exceptionally) retained jurisdiction and power over the performance of final orders, the only route of challenge is by way of appeal or by way of separate proceedings seeking to set aside the order as having been induced by false representations.

[41] It is not appropriate for an applicant making repeated applications for variation to have "innumerable bites of the cherry" without showing either a material change of circumstances or an obvious mistake in the original decision. Circumstances which were known to and within the control of the party at the material time cannot found a material change in circumstances. It sometimes happens that what was anticipated when a court order was made, does not occur, or the factors upon which it was based have since changed materially or substantially. In both case the order may have to be varied to reflect the changed circumstances. If the circumstances which were relevant to the making of the original order change in a way that cannot have been predicted, then an application to vary that order can be made.

[42] In the instant case, not only is the decision to lift the 3rd respondent's veil of incorporation final so as to trigger the doctrine of *functus officio*, but the applicant

has as well not demonstrated that there has been a material change of circumstances or that there is an obvious mistake in the original decision. This ground therefore fails as well.

b) A variation of the order by apportionment of the outstanding liability amongst the judgement debtors.

[43] At common law, if two or more people acted in concert or caused an indivisible harm, each is jointly and severally liable to the victim. This means that the victim could seek recovery of the entire damage from any one or any combination of the defendants. Consequently, when a judgment is entered against multiple debtors, then all of them are jointly and severally liable for the full amount of the debt. A joint and several liability is an obligation shared by several parties that is enforceable, for the full amount of the obligation, against any one of the parties. Joint and several liability arises where each debtor to a common debt is liable to repay the debt both individually and jointly with their co-debtors. This enables a lender to seek payment from either debtor or jointly from all debtors. Under the several part of the liability, one debtor is liable for the full debt to the lender and can be pursued individually. This allows the judgment creditor to strategically cherry pick and recover from a judgment debtor based on arbitrary whims, including acting out of vengeance or spite, the depth of his or her pocket, or the ability (or lack thereof) to defend himself or herself.

[44] In practice, the principle allows the judgment creditor to pursue judgment debtors with deeper pockets who can then pursue contribution after fully satisfying a judgment. Nevertheless, the judgment creditor cannot recover the decretal sum twice but can pursue all the debtors, or just one of them, for all amounts still outstanding until they have obtained full payment. The debtor who pays the debt has a right of subrogation towards any other debtor to the transaction commensurate to their share of the monies paid to which they were initially liable. A debtor who pays more than their equal share of a debt owed will have this right

against the other debtor(s) to sue to recover the difference between what they paid and what they should have paid if each debtor paid their commensurate share. The burden of proof then shifts to the defendants to either absolve themselves of liability or apportion the damages between themselves. However, if a creditor enters into an agreement with one debtor by which they accept partial payment of the debt and agree to not pursue the debtor for the balance, the lender can pursue the remaining debtor(s) for the balance. The agreement to not pursue one debtor for the balance is an agreement that is only enforceable between the creditor and that debtor.

[45] There are three distinct bases for imposing on one person joint and several liability for the harmful conduct of another: contract (a defendant may be held liable for the harm of another if the defendant has entered into an agreement, the legal result of which is such liability), causation (when the conduct of the defendant is a "substantial factor" in the accomplishment of the harm either by inducing, encouraging, or assisting in its commission), and participatory conduct (the wrongful conduct of the defendant himself).

[46] From the contractual perspective, having entered into an agreement whose performance includes tortious misconduct, the defendant becomes jointly and severally liable for all conduct that is done in furtherance of the agreement, including conduct in which the defendant has no direct participation, conduct of which the defendant may not have specific knowledge, and including conduct that may have been completed prior to the defendant's having joined the conspiracy. Joint and several liability under a conspiracy theory flows from the agreement, not from the defendant's specific conduct, and a defendant may be jointly and severally liable for harm caused by the conspiracy even if the conspiracy is terminated prior to the defendant's active participation. From the perspective of causation, the defendant is liable by virtue of having substantially induced, encouraged, or assisted in the commission of the wrongful act. In such cases, there need not be an agreement or a meeting of the minds, but the defendant must

have knowledge of the nature of the wrongful conduct. Furthermore, the defendant's actions need not be an independent violation of a legal duty.

[47] In litigation involving lifting the veil of incorporation of closely-held companies, these theories of joint and several liability are not incredibly important. Directors have the duty, individually and collectively not to act illegally dishonestly, or *ultra vires*. A director will be found liable if his or her individual actions or omissions were a substantial contributing factor leading to the plaintiff's injury, loss or damage, or at the time it occurred. A director will be found collectively liable if knew or had reason to know that the actions or omissions of the other directors would result in the plaintiff's injury, loss or damage in a reasonably foreseeable manner; or where such director failed to adequately warn of such a danger; and such failure to adequately warn of the danger was a substantial contributing factor in causing plaintiff's injury, loss or damage.

[48] The law of indivisible injury applies when two or more parties are jointly and severally liable for a wrongful act, such that each party is independently liable for the full extent of the injury, damage or loss stemming from the wrongful act. In cases where liability is joint and several, the Court is not required to distinguish the damages caused by one defendant from the other. All defendants are jointly and severally liable for all the damages caused by the breach because they are deemed to have participated in the commission of the same breach, and this is true even if the actions of one are greater than those of the other. Therefore that the Court never apportioned the outstanding liability amongst the judgement debtors is not an error that requires review by way of correction.

[49] That notwithstanding, situations such as this raise questions of equity about joint and several liability which require the Court to explore alternative methods of recovery. When two or more judgment debtors are liable for one incident of corporate fraud, but the court cannot determine which judgment debtor is more responsible and to what degree, then the court may lessen the liability of either by

holding each proportionately liable in accordance with their *pro rata* percentage shares in the corporation. This relief can be granted by way of variation of the order lifting the 3rd respondent's veil of incorporation on account of the obvious injustice to the applicant.

c) The 2nd and 4th respondent's assumption / taking over of liability for the entire debt.

[50] As a general rule liabilities under a contract cannot be assigned unilaterally. They can only be assigned with the consent of the other party to the contract. This is what is known in law as novation. It is s the discharge of the rights and obligations between contracting parties and a recreation of them in a new contract with a third party stepping into the shoes of one of the original parties. In simple terms, a party to a contract transfers its rights and obligations to a new party with the consent of the other contract party. Generally, in a novation agreement, the continuing party is obligated to owe a duty to the new party whatsoever agreed to owe to the outgoing party under the original contract. Thus, novation is the only method by which the original contract can be effectively replaced by another. It follows that to novate a judgment debt, the judgment creditor has to agree to release the original judgment debtor and replace him with a new one. Having found that the order lifting the veil of incorporation is binding upon both the 2nd and 4th respondents, they cannot be regarded as third parties stepping into the shoes of any of the other directors or shareholders. Considering the two respondents as having assumed liability for the entire debt on basis of a novation therefore is a misconceived argument.

[51] Be that as it may, there is even no evidence of a tripartite mutual agreement among all parties concerned for discharge of any of the directors and replacing them with the 2nd and 4th respondents. By receiving part payment from the 2nd and 4th respondents, the 1st respondent did not expressly or by implication discharge any of the other directors or shareholders from their liability on the debt being claimed.

A novation is the substitution of a new obligation for an existing one. Consideration must be provided for this new contract unless the novation is documented in a deed signed by all three parties. Receipt of a part payment of the existing judgment debt did not substitute a new obligation for an existing one whether by changing its subject matter, basis, or source or by changing the debtor and creditor, being the circumstances under which an old debt is extinguished in order to be substituted by the new debt. Instead, it was nothing more than an acknowledgement of part payment of the debt by the 2nd and 4th respondents as shareholders, and hence as principal debtors. This ground fails.

d) Discharging the applicant from all liability.

[52] A person even when disqualified from being a director of, or having ceased to be involved in the management of a company, upon lifting of the corporate veil will be liable for all those debts of the company which were incurred when he was so acting. The applicant has not advanced any basis upon which he can be discharged from the judgment debt which was incurred while he was still director of the 3rd respondent. He has only succeeded in causing a reconsideration, on equitable principles.

Order:

[53] In the final result, the order lifting the 3rd respondent's veil of incorporation is accordingly varied to the extent that the applicant's liability for the outstanding amount shall be limited to the *pro rata* percentage of his shares in the 3rd respondent. The application having succeeded only in part, each party is to bear its costs of this application.

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Stephen Mubiru

Judge.

Appearances

For the applicant : M/s Kirunda & Wasige Advocates.

For the 1st respondent : M/s V. Agaba Advocates & Legal Consultants.