THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 90 OF 2020

(Arising out of Civil Suit No. 59 of 2010)

KAGORO EPIMAC :: APPLICANT

VERSUS

1. **SAMALIEN PROPERTIES LTD**
2. **JOTENA(U) LTD**
3. **BAKIJULULA COFFEE FACTORY LTD**
4. **GWENDIDDE MIXED FARM NAGALAMA LTD**
5. **EDWARD NSUBUGA MPERESE ::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING ON A PRELIMINARY OBJECTION

Introduction

This application was brought under Section 20 of the Companies Act, Section 98 of the Civil Procedure Act (CPA), Order 38 Rule 5(d) and Order 52 Rules 1 and 3 of the Civil Procedure Rules (CPR). It seeks for orders that:

1. An order doth issue lifting the corporate veil of the 1st, 2nd,3rd and 4th Respondents.
2. The other Respondents be held liable for the liability of the 1st Respondent in Civil Suit No. 59 of 2010.
3. The Applicant be allowed to proceed with execution against the 5th and the other Respondents or their Directors jointly and severally.
4. Costs of the application be provided for.

The application was supported by the affidavit of **Kagoro Epimac**, the Applicant, which set out the grounds of the application. The application was opposed by the 1st, 2nd and 5th Respondents. An affidavit in reply of the 1st and 5th Respondents was deponed to by **Edward Nsubuga Mperese**, the 5th Respondent and a Director in the 1st Respondent Company. The affidavit in reply of the 2nd Respondent was deposed by **Edith Nassuna**, a Director in the 2nd Respondent Company. The Applicant filed an affidavit in rejoinder.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Nsamba Abbas Matovu, Ms. Esther Bakundane and Mr. Bandali Isaac. The 1st and 5th Respondents were represented by Mr. Nsimbe Musa while the 2nd Respondent was represented by Mr. Kintu Felix. The matter proceeded ex parte against the 3rd and 4th Respondents since they were absent and unrepresented despite evidence of proof of service.

When the application came up for hearing, Counsel for the 1st, 2nd and 5th Respondents indicated that they wished to raise some preliminary points of law which, in their view, would dispose of the application. Counsel prayed that the same be raised before the application could be heard on its merits. It was agreed that the same be raised by way of written submissions which were duly filed.

Preliminary Points of Objection

Counsel for the Applicant raised three points of objection, namely that:

1. The application arises from a suit that is not pending before this Court and thus it is an abuse of Court process.
2. The application is against third parties who were not parties to the main suit and are neither directors nor shareholders in the 1st Respondent company.

3. The application is premised on allegations of fraud which cannot be proved by affidavit evidence.

Court Determination

Point one: The application arises from a suit that is not pending before this Court and thus is an abuse of Court process

Submissions for 1st and 5th Respondents

Counsel for the 1st and 5th Respondents submitted that the Applicant wrongly seeks to proceed with execution against the Respondents and or their directors in a court which did not pass the decree in HCCS No. 59 of 2010. Counsel relied on Section 30 of the Civil Procedure Act which provides that *"a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution."* Counsel argued that this Court cannot entertain this application since it is neither the court that passed the decree nor a court to which the decree was sent for execution.

Counsel further submitted that Miscellaneous Applications arise from pending suits which is not the case in the instant case. Counsel relied on ***Bigirwa & Anor vs Kaguta Museveni Misc. Cause No. 63 of 2016*** wherein it was held that for a miscellaneous application to be recognised by the court, it must arise from a head suit or cause. Counsel argued that the Suit No. 59 of 2010 which this application seeks to rely on was heard and finally determined in the Land Division and not in this Court. Counsel also relied on the decision in ***Hon. Gerald Kafureeka Karuhanga & Another Vs Attorney General & 2 Others, Misc. Cause No. 60 of 2015*** to argue that the Applicant was on a fishing expedition since there was no way this application can be competent before this Court when the main suit is not pending before the same Court.

Counsel therefore concluded that this application is a gross manifestation of abuse of court process and, as such, the application is incompetent and should be struck out with costs.

Submissions for the 2nd Respondent

Counsel for the 2nd Respondent reiterated the submission raised by Counsel for the 1st and 5th Respondents to the effect that under Section 30 of the CPA, this Court cannot entertain this application as it is neither the court that passed the decree nor has the decree been sent to it for execution. Counsel relied on the case of ***Basile Difasi & 3 Others Vs The National Unity Platform & 8 Others, Misc. Cause No. 226 of 2020*** for the submission that the court will not allow a litigant to devise alternative procedure in order to circumvent established procedure. Counsel concluded that this application is therefore incompetent and improperly before this Court and should be dismissed with costs.

Submissions for the Applicant in reply

Counsel for the Applicant submitted that the Respondent's submission to the effect that this Court has no jurisdiction to entertain this matter is misguided. Counsel submitted that under the Constitution, jurisdiction is placed with the High Court as a unit and the creation of Divisions was an administrative arrangement which cannot be used to stifle the course of justice. Counsel relied on the case of ***Former Employees of G4S Security Services vs G4S Security Services Ltd, SC Civil Appeal No. 18 of 2010*** wherein the original unlimited jurisdiction of the High Court was asserted. Counsel implored the Court, in case it is persuaded to hold otherwise, to have the application transferred to the Land Division rather than dismissing it.

Counsel further relied on the decision in ***Alia Vs Amati, HC M.A No. 0039 of 2015*** for the argument that if the Court were to dismiss this application for

reason of having been filed in one Division and not the other, it will amount to undue reliance on technicalities by the Court contrary to the provisions of Article 126 (2) (e) of the Constitution. Counsel also referred the Court to the decision in ***Gunning vs Naguru Tirupati Ltd & 5 Others, HC M.A No. 232 of 2017*** on the application of Sections 30 and 33 of the CPA.

Submissions in Rejoinder for the 1st and 5th Respondents

In rejoinder, Counsel for the 1st and 5th Respondents submitted that although the unlimited jurisdiction of the High Court is not disputed, such jurisdiction is conferred by the "Constitution or other law". As such, other laws exist that are intended to streamline the judicial system and ensure proper case management to avoid abuse of court process. Counsel argued that the provisions of Section 30 of the CPA are one such law which does not take away the original jurisdiction of the High Court but acts to streamline the judicial process.

Counsel submitted that the Applicant was, by this application, flouting the provisions of Section 30 of the Civil Procedure Act by having this Court execute a matter it neither tried nor sent to it by another court for execution. Counsel concluded that this Court does not have the original jurisdiction over this matter and any orders passed by it in respect of matters arising will be a nullity.

Resolution by the Court

It is not in dispute that Civil Suit No. 59 of 2010 was heard and determined in the High Court Land Division. The Applicant subsequently filed an application similar to this one in the High Court Execution and Bailiffs Division which was dismissed. This Court was not fully upraised as to the reasons for dismissal of the application in the High Court Execution and Bailiffs Division. What is clear, though, is that the said dismissal did not act as a bar to the present

application. The Applicant then filed the present application in the High Court Civil Division for the orders indicated herein above in pursuit of the fruits of the judgment and decree obtained in Civil Suit No. 59 of 2010 of the Land Division.

It is not clear as to why the Applicant chose to file this present application in the High Court Civil Division and not the Land Division where the main suit was heard and determined. The Applicant neither explains this anomaly nor does he attribute any reason for the same. However, whatever the reason is, it is clear to me that the filing of the present application in the Civil Division and not the Land Division where the original case file is, was a mistake. This is because, it is trite that miscellaneous applications arise from main suits or causes. It follows therefore that at the filing of a miscellaneous application, the original file must be present. In fact, the recommended practice is that the miscellaneous application file should be placed onto the original file upon filing. This matter was well dealt with by **Justice Stephen Musota** (as he then was) in ***Bigirwa & Anor vs Kaguta Museveni Misc. Cause No. 63 of 2016*** which I find of much persuasive value on the matter.

Secondly, the provision of Section 30 of the Civil Procedure Act is imperative. It provides that a *"decree may be executed either by the Court which passed it or by the Court to which it is sent for execution."* It is true as submitted by Counsel for the Applicant that the High Court is one unit and is vested with unlimited original jurisdiction. However, for orderly conduct of court business, Divisions and Circuits were created to achieve operational efficiency and effectiveness of the High Court. Divisions were created pursuant to powers conferred upon the Chief Justice under Article 133 (1) of the Constitution; and upon the Principal Judge under Article 141 (1) of the Constitution and Section 20 (1) of the Judicature Act. One goal of the arrangement was to have specialised matters

handled by specialised Divisions to ensure a more efficient and effective administration of justice.

That being the case, it is not proper for a matter heard and disposed of in the Land Division to have its judgment and decree executed in the Civil Division; just as it is not proper for a purely land dispute to be filed in the Civil Division. The question is, however, if such happens, is it fatal to the case? Does such mistaken filing make a suit incompetent or improper before the Court warranting its dismissal or striking off? My answer is No. As submitted by Counsel for the Applicant, the High Court is one unit, clothed with unlimited original jurisdiction; and the Divisions were created for administrative expediency. If a matter is of a Civil nature (as opposed to criminal), in whatever Division or Circuit of the High Court it is filed, it remains validly filed and can only be transferred to the most appropriate Division but not dismissed or struck off.

It was argued for the Respondents that in the instant case, the application was filed without existence of a head suit. From the facts, this is not true. The head suit existed in the High Court, albeit in a different Division. It is immaterial that it had been disposed of. Interlocutory applications can and often do arise from completed files; particularly so, applications that are connected with execution of court orders and decrees. It is therefore not true as contended by the Respondents that the present application was filed in absence of a head suit.

For the foregoing reasons, although the present application ought to have been filed in the Land Division where the head suit was heard and determined, the filing in this Division does not make the application incompetent. Subject to the decision on the next two objections, I would therefore order that the application be transferred to the Land Division for handling on its merits.

Point Two: The application is against third parties who were not parties to the main suit and are neither directors nor shareholders in the 1st Respondent company

Submissions by Counsel for the 1st and 5th Respondents

Counsel submitted that the Applicant's reliance on Section 20 of the Companies Act is misplaced as the provision only allows for action against directors of a company which the 2nd to 4th Respondents are not; they are independent companies that are not shareholders or directors in the 1st Respondent company. Counsel submitted that there is no nexus between the 1st Respondent and the 2nd to 5th Respondents who were not parties to the suit and who cannot, therefore, be judgment debtors in the original suit. The Applicant cannot therefore sustain a cause of action against the said Respondents. Counsel relied on the case of ***Bolton (HL) Engineering Co. Ltd vs TJ Graham & Sons Ltd [1953] 3 WLR 804*** for the above submission.

Submission by Counsel for the Applicant

Counsel for the Applicant submitted that, by this objection, the Respondents are prematurely delving into the merits of the application. Counsel relied on the authority of ***Guning vs. Naguru Tirupati Ltd & 5 Ors (supra)*** in which the Learned Trial Judge held that the Respondents in that case were not immune to enforcement proceedings as they were not ordinary employees of the 1st Respondent company. The Learned Trial Judge concluded that in so far as there were allegations that the Respondents concealed or used the 1st Respondent's corporate entity as a shield in a bid to defraud the Applicant, the application was in nature a suit to enforce judgment which could proceed against the 2nd to 6th Respondents as representatives of the 1st Respondent.

Counsel prayed to Court to be persuaded by the above decision and dismiss this point of objection.

Submissions in Rejoinder for the 1st and 5th Respondents

Counsel for the 1st and 5th Respondents submitted that the ***Guning*** case (supra) is distinguishable from the present case; in that, whereas the 2nd to the 6th Respondents therein were directors or representatives of the 1st Respondent company, in this case they are independent entities and are not liable. The Applicant has not demonstrated otherwise.

Resolution by the Court

The Applicant in his application shows the nexus between the five Respondents and attempts to justify why they are linked to the execution of the judgment and decree in Civil Suit No. 59 of 2010. The Applicant claims in the affidavit in support of the application that the 1st Respondent had transferred its only known properties to what he termed as "sister companies" to the 1st Respondent. These transfers were done by the Directors of the 1st Respondent who included the 5th Respondent. The transfers were carried out after judgment in Civil Suit No. 59 of 2010 had been passed against the 1st Respondent. The Applicant further alleged that the 5th Respondent is a Director and majority shareholder in the 1st, 3rd and 4th Respondent companies only that he had tactfully interchanged his names. Some of the Directors and shareholders of the 2nd and 3rd Respondents are children of the 5th Respondent and are connected to the dealings of the 1st Respondent.

The 1st and 5th Respondents denied these allegations in the affidavit in reply. The allegations have not been subjected to proof on their truthfulness and on merits of the case. It would therefore be premature and prejudicial for court to pronounce itself on such serious allegations pointing to fraud and manipulation before hearing of the application on its merits. I am therefore in

agreement with the Applicant's Counsel that this point of objection invites the Court to prematurely delve into the merits of the application. This objection cannot therefore be taken and it is accordingly dismissed.

Point Three: Application is premised on allegations of fraud which cannot be proved by affidavit evidence

Submissions by Counsel for the 1st and 5th Respondents

Counsel submitted that the Applicant had in the application raised serious allegations of fraud that he ought to have particularized and in respect of which he should have adduced cogent evidence which cannot be done by affidavit evidence. Counsel implored the Court to dismiss the application as legally untenable. Counsel relied on a number of decided cases for this proposition, namely; ***Samuel Abbo vs. Cimeel Engineering Ltd, HC MA No. 29 of 2013; Frederick Zaabwe vs. Orient Bank & Ors, SC Civil Appeal No. 4 of 2006*** and ***Yahaya Walusimbi vs. Justice Nakalanzi & 4 Ors, CA MA No. 386 of 2018.***

Submissions by Counsel for the Applicant

Counsel for the Applicant submitted that this objection was also brought prematurely as it seeks to discuss the merits of the application. Counsel submitted that the known procedure for lifting the corporate veil is by motion on notice and there is no other procedure. Counsel submitted that all the cases cited by Counsel for the Applicants are for proof of fraud which is a matter for the application on its merits.

Submissions in Rejoinder for the 1st and 5th Respondents

In rejoinder, counsel for the 1st and 5th Respondents reiterated their submission that according to the Court of Appeal in the case of ***Yahaya Walusimbi vs. Justine Nakalanzi (supra)***, fraud cannot be proved by

affidavit evidence; which decision is binding on this Court unlike the decision in ***Guning vs. Naguru Tirupati Ltd & 5 Ors (supra)*** relied on by the Applicant, which is merely persuasive.

Resolution by the Court

Let me start with the construction attached to the decision of the Court of Appeal in ***Yahaya Walusimbi vs. Justine Nakalanzi (supra)*** by Counsel for the 1st and 5th Respondents. In that case, the applicant sought orders to set aside the judgements of the High Court and of the Court of Appeal and for a retrial of the head suit in the High Court. The main ground was that the agreement upon which the head suit had been decided was later discovered to be a forgery having been made long after the death of the alleged vendor. The Court of Appeal held that although the Court was empowered to set aside its own judgments, this power only extended to judgments proved to be null and void after they have been passed. The Court went on to hold:

> ***Both the trial court and the court of appeal made their decisions based on the existing evidence presented to court at the time and the discovery of new important evidence cannot be a ground for setting aside judgment of this court. Counsel relied on the Supreme Court decision in Orient Bank Vs Fredrick Zaabwe & Another ... which we find distinguishable from this case. ... In the present case, there is no fraud proved in procuring the judgment in this court. The fraud the applicant is alleging is that there were material facts attributable to people who have since passed away. <u>This alleged fraud has not been proved and cannot be proved by affidavit evidence. Ideally, the parties would have to apply to adduce fresh evidence which we think will meet the ends of justice if adduced in the trial court and not this court</u>.*** [Emphasis added]

In the context of the above passage by the Court of Appeal, I do not understand that holding as intended to form a general rule of law that "fraud can never be proved by affidavit evidence." All the Court stated was that in that case, fraud had not been proved and could not be proved by affidavit evidence. That finding was based on the facts and circumstances of that particular case which the court laboured to lay out before reaching that conclusion. It cannot be the case that the Court of Appeal intended to make a rule of general application that fraud can never be proved by affidavit evidence; it stated and meant to say that in the circumstances before the Court, "fraud has not and cannot be proved". This is clear to me given the fact that the Court found that such a finding could only be arrived at after the party has applied to adduce fresh evidence before the High Court and not in the Court of Appeal. That is why the Court held that fraud could not be proved before it by affidavit evidence.

In my view, if the Court is to accept the construction assigned by the Respondents' Counsel to the above decision, it would mean that the ground of fraud provided for under Section 20 of the Companies Act can never be relied upon by a party to secure lifting of the corporate veil. As submitted by the Applicant's Counsel, the known procedure for lifting of the corporate veil is by way of an application by Notice of Motion. I do not agree to the suggestion that the above said decision of the Court of Appeal was meant to affect that procedure.

To my understanding, it is possible for an applicant to plead and prove fraud through affidavit evidence. Going by the provision of Order 19 Rule 2 of the CPR, such evidence can be tested through cross examination and strict proof. As such, depending on the nature of the cause, the facts and circumstances of a particular case, it is possible to prove fraud through affidavit evidence. The mere fact that the evidence in the application was brought by way of affidavit cannot be a ground to defeat this application. Section 20 of the Companies Act

specifically allows a party to rely on fraud to seek lifting of the corporate veil and there is no suggestion that such an action must be brought by way of a plaint.

Consequently, this application is properly before the Court and shall be investigated on its merits. This point of objection also fails and is accordingly overruled.

Decision of the Court

Having found as I have above, the first point of objection partly succeeds while the two other preliminary points of objection are without merit and accordingly fail. The same are dismissed. The case file shall be transferred to the Land Division, placed onto HCCS No. 59 of 2010 and handled on its merits. The Registrar of the Civil Division is hereby directed to effect this transfer. The costs of this proceeding shall abide the outcome of the application on its merits.

It is so ordered.

Dated, signed and delivered by email this 9th day of March, 2021

Boniface Wamala
JUDGE