

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)**

**MISC. APPLICATION NO 338 OF 2021  
(ARISING FROM CIVIL SUIT NO 119 OF 2018 NAKAWA CHIEF  
MAGISTRATES COURT)**

**ETOMA THOMAS.....: APPLICANT / J. CREDITOR**

**VERSUS**

- 1. ZZIWA PETER**
- 2. JOHN BOSCO HABUMUGISHA**
- 3. TOM SENGALAMA**
- 4. EARTHDOM UGANDA LTD.....:RESPONDENT/ J. DEBTORS**

***BEFORE: HON. JUSTICE SSEKAANA MUSA***

**RULING**

The Applicant brought this Application under section 20 of the Companies Act, section 98 of the Civil Procedure Act, Cap 71 & Order 52 rule 1 & 3 of the Civil Procedure Rules (as amended), for the declarations and orders that;

1. The corporate veil of the 4<sup>th</sup> Respondent be lifted to enable the Applicant commence execution proceedings against the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Respondent for the enforcement of the Decree in *Civil Suit No.119 of 2018- Etoma Thomas vs Earthdom Uganda Ltd.*
2. Costs of this application be provided for.

The grounds of this application are contained in the affidavit of the Applicant which briefly states;

1. That the Applicant successfully sued the 4<sup>th</sup> Respondent in Civil Suit No. 119 of 2018 and got a decree against it.
2. That the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondent who are the Directors and also Shareholders in the 4<sup>th</sup> Respondent and are only hiding themselves under the 4<sup>th</sup> Respondent to defraud me and the public and intentionally evade liability.
3. That the Applicant verily believes that the 4<sup>th</sup> Respondent is nothing more than a sham and a mere creature of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are also the Directors behind which they hide and avoid recognition. As such, the 4<sup>th</sup> Respondent has no physical address, no assets and is not carrying on business in the ordinary way but rather being used by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents only when they want to carry out acts of fraud like in this instance.

In opposition of the Application, none of the Respondents filed any affidavit or submissions in regards to or response to the Applicant. This leaves the application unopposed. I shall now determine its merit only on matters of law.

The Applicant was represented by BASIMA ARMSTRONG while the Respondents were absent. Court directed the applicant parties to file submissions which have been considered by this court.

### ***ISSUES FOR DETERMINATION***

1. *Whether the Directors of the 4<sup>th</sup> Respondent operated the company as a sham to defraud the Applicant?*
  2. *Whether the 4<sup>th</sup> Respondent's veil of incorporation should be lifted by court and the execution proceed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents personally?*
- Whether the Directors of the 4<sup>th</sup> Respondent operated the company as a sham to defraud the Applicant?***

Counsel for the Applicant submitted that S.20 of the Companies Act, which is the enabling law for this application provides thus:-

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, have for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil.”*

It's the Applicants submission that the actions of the 4<sup>th</sup> Respondent brought to this courts attention by the Applicant in his affidavit with annexure therein attached in support of the Notice of Motion are sufficient evidence of fraud by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as the Directors.

In paragraph 5 to 9 of the affidavit in support, the Applicant points out that the 4<sup>th</sup> Respondent's Company Form 9 where they just indicated their physical address as Kyaliwajjala Namugongo Road minus mention of the building and or plot number for clarity is the first form of fraud exhibited. That the applicant proceeded together with the court bailiff Mugisha William to the physical address but it was all in vain. Out of curiosity, the Applicant decided to search the internet for the 4<sup>th</sup> Respondent where he found her details indicated with their physical address as Unit F1 Former East African Community quarters Plot 3 Bukoto Old Kira Road (Opposite Frobels stage) Nakawa Division. That together with the Bailiff they proceeded to that address only to find different occupant who did not know anything about the 4<sup>th</sup> Respondent.

The Applicant further noted that there was no return filed for change of address with the Uganda Registration Services Bureau yet the 4<sup>th</sup> Respondent is not in any of the locations indicated which the Applicant believes is intentionally meant to enable the 4<sup>th</sup> Respondent hide from the members of the public and carry out acts of fraud in peace.

The 4<sup>th</sup> Respondent also filed a resolution with Uganda Registration Services Bureau to open up a bank account in Ms. Equity Bank and appointed three signatories that is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who are the Directors and

or controllers of the 4<sup>th</sup> Respondent and in the said resolution, the mandate to the Bank was to honor any two of the signatories per annexure E.

That however the 1<sup>st</sup> Respondent on the 1<sup>st</sup> day of March, 2018 single handedly signed and gave the Applicant three cheques in his names Etoma Thomas knowing that the cheques will be dishonored because of not being signed as per the mandate given to the bank. That indeed when the applicant banked the cheques, they were returned to him rejected with words “not signed as per mandate”

The applicant asked court to take cognizance of the fact that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent being signatories to the 4<sup>th</sup> Respondents bank account confirms that they are directors and transact business for the 4<sup>th</sup> Respondent hence control the decisions of the 4<sup>th</sup> Respondent and trade under the name of the 4<sup>th</sup> Respondent as a shield intended to defraud creditors like the Applicant.

Further the Applicant submitted that why would the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent create a company with a fictitious physical address unless their intention is to benefit from the illegal act. That the creation was only meant to shield themselves from anyone who might want to trace the person behind the 4<sup>th</sup> Respondent.

The Applicant came to a conclusion that the company is just a cover and a sham with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s face behind the mask benefiting directly from the benefits.

The Applicant stated the case of *Guning vs. Naguru Tripati Ltd & 5 Ors Misc Application No. 232 of 2017*, where Justice Flavia Senoga Anglin stated that; “As already pointed out in this ruling, fraud or improper conduct on the part of the shareholders or directors of a company is one of the circumstances under which the corporate veil maybe disregarded. The corporate veil may also be lifted to prevent deliberate evasion of contractual obligations”.

## ***Analysis***

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."*

***BLACK'S LAW DICTIONARY 11<sup>th</sup> Edition page 802***, defined fraud as;-

*"A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment; 'Fraud has also been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and another unfair way that is used to cheat any one, is to be considered as Fraud'*

*A reckless misrepresentation made without justified belief in its truth to induce another to act.*

*Actual fraud: A concealment or false representation through an intentional or reckless statement or conduct that injures another who relies on it in acting."*

Defraud is also defined in ***Black's Law Dictionary 11th Edition*** at page 535 as follows;

*"To cause injury or loss to (a person or organization) by deceit; to trick (a person or organization) in order to get money"*

The burden of proof and standard of proof in cases involving fraud was discussed in the case of *Ratilal Gordhandhai Patel vs Laljimakanji* [1957] EA 314 at page 317, where the court stated;

*“.....he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than mere balance of probabilities is required...”*

In the case of *Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 Others SCCA No. 4 of 2006* [2007] UGSC 21 Katureebe, JSC (as he then was) had this to say about dealing with allegation of fraud:-

*“In my view, an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter.*

*He relied on the celebrated case of KAMPALA BOTTLERS LTD Vs DAMANICO (U) LTD, (S.C. CIVIL APPEAL NO. 22/92) and held that;-*

*“Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”*

In the context of these authorities, it is clear that the burden of proving fraud is higher than in ordinary civil cases. In this case the Applicant has failed to adduce evidence of fraud and also impute the same on the Respondents.

Failing to point out building and or plot number in the 4<sup>th</sup> Respondent's Company Form 9 and instead just indicated their physical address as Kyaliwajjala Namugongo Road cannot amount to fraud much later after the proceedings ended in a civil case that was subsequently determined by court without any alleged fraud. It is very clear from the pleadings on record and annexure thereto that the 4<sup>th</sup> respondent hired tractor backhoe of the applicant were hire charges were UgSh 500,000/ per day and was to be paid by weekly basis but the defendant later defaulted leaving a balance of UGx.23,945,000/- .

The failure to pay for the said services should not be assumed that the company was operated as a sham intended to defraud the applicant. This court appreciates that the applicant is very desperate to recover the unpaid rent which resulted in a decree but cannot allow the applicant to label a company which remained operational within the law as sham that was created to defraud him. The applicant failed to carry out due diligence on the company when he accepted a cheque signed by one signatory not executed in accordance with the mandate of the company.

Therefore, the directors of the 1st respondent never operated the company as a sham to defraud the applicant.

This issue is determined in the negative.

***Whether the 4<sup>th</sup> Respondent's veil of incorporation should be lifted by court and the execution proceed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents personally?***

Counsel for the applicant submitted that that a company at law is a separate legal entity from its promoters and subscribers. (*Salmon vs. Salmon* [1987] A.C 22). According to L.C.B Gower in his book; *Gower's principle of Modern Company Law, 4th Edition at p.112*, he notes that courts have refused to apply the logic of the principle of Salmon's case where it is flagrantly opposed to justice.

It is clear from the foregoing that courts will go behind the corporate veil in interest of justice on grounds of fraud, to enforce compliance with contractual obligations or enforce economic realities obtaining under a company and its directors who are actual decision makers. See *National Enterprise Corporation vs. Nile Bank S.C.C.A No. 17/1994 (unreported)* & *Earn International vs. Mohamed Halid el Faith S.C.C.A No. 6/1993*. The directors should not be shielded by the corporate veil but court should be able to look at the reality behind the corporate veil so as to do justice the parties. In order for the application to succeed, it is incumbent on the applicant to

demonstrate that the Respondent's officers have been merely using the corporate status of the company as a mask, cloak and sham indeed to shield fraudulent persons from the eye of equity.

Counsel for the applicant submitted that the actions of the 4<sup>th</sup> Respondent brought to this courts attention by the Applicant in his affidavit with annexures therein attached in support of the Notice of Motion are sufficient evidence of fraud by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as the Directors.

In paragraph 5 to 9 of the affidavit in support, the Applicant points out that the 4<sup>th</sup> Respondent's Company Form 9 where they just indicated their physical address as Kyaliwajjala Namugongo Road minus mention of the building and or plot number for clarity. That the applicant proceeded together with the court bailiff Mugisha William to the physical address but it was all in vain. Out of curiosity, the Applicant decided to search the internet for the 4<sup>th</sup> Respondent where he found her details indicated with their physical address as Unit F1 Former East African Community quarters Plot 3 Bukoto Old Kira Road (Opposite Frobels stage) Nakawa Division. That together with the Bailiff they proceeded to that address only to find different occupant who did not know anything about the 4<sup>th</sup> Respondent.

### *Analysis*

*Section 20 of the Companies Act* provides for;

*Lifting the corporate veil;*

*"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, have for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil."*

The case of *Delhi Development Authority v Skipper Construction Co. (P) Ltd [1996] 4 SCC 623: AIR 1996 SC 2005* bears emphasis, that the corporate veil should only be disregarded in cases where it is being used for a deliberately dishonest purpose or fraud. When the corporate character is employed for the purpose of committing illegality or defrauding others, the court can



ignore the corporate character and look at the reality behind the veil, so as to enable it to pass appropriate orders to do justice between the parties concerned.

In the case of *Salim Jamal & 2 others vs. Uganda Oxygen Ltd & 2 others* [1997] 11 KALR 38, the Supreme Court held *that corporate personality cannot be used as 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. There is limited principle of law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's legal personality. See Prest v Petrodel Resources Ltd* [2013] 3 WLR 1

The privileges accorded to companies must operate in accordance with the terms upon which they are granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation.

When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present. See *Infrastructure Projects Ltd v Meja Projects Ltd* HCCS No. 2351 of 2016

*In the case of Corporate Insurance Company Limited vs. Savemax Insurance Brokers Ltd* [2002] 1 EA 41, 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.”*

The Applicant failed to adduce evidence to prove the alleged fraudulent actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents after 30/04/2019 the date of his judgment against the 4<sup>th</sup> Respondent. Hence there no grounds on which the Court can rely to lift the corporate veil. Secondly, after the enactment of Section 20 of the Companies Act 2012, the authorities cited by the Applicant were curtailed and have little relevance if any in light of Section 14(2) (a) and (b) of the Judicature Act Cap 13 of the Laws of Uganda.

In order for one to petition court to lift the corporate veil, the Applicant’s case must fit squarely within Section 20 of the Companies Act and not any other law.

In the case before this court, the Applicant alleges that the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondent are misusing the corporate personality of the 4<sup>th</sup> Respondent as a mask for fraud by issuing payment cheques to the Applicant but these were dishonored.

It is also alleged that the Applicant has been unable to execute the decree against the 4<sup>th</sup> Respondent because it has no known assets which the Applicant can attach. That the 4<sup>th</sup> 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, upon the court's assessment they are not evidence of fraud on which the court can act to lift the corporate veil.

Regarding the failure to honor cheques, this also insufficient to prove evidence of fraud. 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 4<sup>th</sup> Respondent.

The application is accordingly dismissed and I make no order as to costs.

**SSEKAANA MUSA**

**JUDGE**

**9<sup>th</sup> May 2022**