

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

**CORAM: HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.**

CIVIL APPLICATION NO.96 OF 2005

**1. COMMODITY EXPORT INTERNATIONAL
2. KARIM SOMANI:.....APPLICANTS**

VERSUS

**1. MKM TRADING COMPANY LTD.
2. JAHEDD MANAGEMENT COMPANY
ESTABLISHMENT LTD:..... RESPONDENTS**

[Arising out of Civil Appeal No.61 of2005J

RULING OF THE COURT

This is an application by notice of motion brought under rules 5(2) 42(1) of the Court of Appeal Rules. It seeks for the following orders.

“(a) The proceedings in the High Court (Commercial Division) in HCCS No. 298 of 2001 be stayed pending the determination of the appeal herein.

(b) The costs of and incidental to the application abide the result of the appeal”

The main grounds of the application are:

1. The applicants have filed a notice of appeal against the decision and order of the Honourable Lord Justice Egonda-Ntende in Misc. Application No. 214 of 2005 and have since filed the appeal.
2. That, despite the appeal, the respondent intends to continue with the hearing of the above suit and the hearing has been fixed for 19th January 2006.
3. The hearing of the main suit is likely to be completed before the hearing of the appeal which would defeat the appeal.

The notice of motion is supported by the affidavit of Karim Somani, the second applicant, sworn on 3rd October 2005. There is an affidavit in reply sworn by Mervin Melville, the director of MIKM Trading Company Ltd, the respondent. Further, there is an additional affidavit sworn by the second applicant on 17th February 2006.

The following is the brief background to the application. Commodity Export International, hereinafter to be referred to as the first applicant, entered into a joint venture agreement with MKM Trading Company Ltd. and Jahedd Management Company Establishment Ltd, hereinafter to be referred to as the respondents. After the conclusion of the joint venture the respondents sued the first applicant in HCC Suit No. 496 of 2001. The suit was filed in the High Court on 15th June 2001 and subsequently in the Commercial Court Division as Civil Suit No. 298 of 2001. The respondents filed Miscellaneous Application No. 213 of 2005 in which they sought to amend the plaint. The application was allowed. On 16th March 2005 the respondents filed Miscellaneous Application No. 214 of 2005 seeking to lift the corporate veil of the first applicant company and to add the second applicant as a party to the suit. On June 2005 Egonda-Ntende, J. allowed the application. The applicants filed a notice of appeal against the said ruling. Subsequently, they filed a memorandum of appeal. The respondents amended their plaint and included the second applicant as a party to the suit. The applicants filed their defence to the suit. The applicants filed the instant application to this Court on the grounds already mentioned.

During the hearing of the application, the applicants were represented by learned counsel, Mr. Sekabanja Kato. Learned counsel, Joseph Luswata, appeared for the respondents.

Counsel for the applicants submitted that despite the fact that the applicants had lodged an appeal in this Court, the respondents intend to continue with the hearing of the suit in the Commercial Court. He argued that the ruling of the judge that allowed the lifting of the corporate veil, in essence, disposed off the issue in the suit. According to counsel, the applicants would be prejudiced by the continued hearing of the suit before the determination of the appeal because the lifting of the corporate was based on two grounds, namely:

1. That, the second applicant had transferred the assets of the first applicant to defeat any resultant judgement and
2. That, the second applicant was fraudulent.

Counsel argued that as the order to lift the corporate veil had been granted so as to proceed against the second applicant personally, the respondents do not have to prove fraud. He contended that the judge had prejudged the issue and wondered how the hearing of the Suit can be continued before the same judge.

In reply, counsel for the respondent opposed the application. He submitted that the court's power to lift the corporate veil is discretionary. It is trite law that the appellate court would not interfere with the discretionary powers unless it is shown that the powers were wrongly exercised.

Counsel disagreed with the applicant's counsel contention that the trial judge had prejudged the issue of fraud as far as the applicants were concerned. He argued that lifting a corporate veil is normally on grounds of fraud. It is proper that it is done at the beginning so that a person concerned is given a chance to make a defence. Counsel argued that stay of proceedings is exercised in special circumstances but the applicants had not advanced any. He submitted that the judge's ruling that allowed the lifting of the corporate veil was merely an interlocutory order, which could be made a ground of appeal in case there is an appeal in the main suit. In support of his submissions he relied on the following authorities: **DFCU Vs Begmohamed Ltd. C.A. Civil Appeal No. 65 of 2005, Sanyu Lwanga Musoke Vs Sam Galiwango S.C. Civil Appeal No. 45 of 1995 and in The Estate of Osman Brothers No. 2 1923-60 ALR 367 (Malawi).**

Mr. Sekabanja argued in reply that the applicants could not wait until the appeal in the main suit because this involves a corporate personality. In case the Suit proceeds, the second applicant would be greatly prejudiced. In support of his submission, counsel relied on **Halsbury's Laws of England 4th Ed. Para 437** which reads in part:

“Nature of stay of proceedings. A stay of proceedings arises under an order of the court which puts the stop or “stay” on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the court’s discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.”

We have carefully perused all documents filed by the parties and listened to their counsel’s submissions. We note that after considering the matter before him, the learned judge made an order to lift the veil and to add the second applicant as defendant to the suit. He was satisfied that such an order was necessary to effectively and completely adjudicate upon the matters in dispute between the parties. The judge used his discretionary powers. As rightly pointed out by counsel for the respondents, this Court would not interfere with discretionary powers of a trial court unless the judge used such powers wrongly. In the instant application the applicants’ learned counsel has not demonstrated to us in which way the judge was wrong in the use of his discretion.

Applicants’ counsel’s submission has been only that the applicants and more especially, the second applicant would be prejudiced because this is a company matter. The second applicant is protected by the legal corporate personality of the company. With due respect, this argument is not tenable. The legal personality of a company does not protect a director or a shareholder for the purpose of defrauding the company itself or members of the public. In the instant appeal, the

respondents allege that the second applicant defrauded them. This is a matter for investigation. We do not accept applicant's counsel submission that when the learned judge allowed the lifting of the corporate veil and adding the second applicant as party to the action, he prejudged the issue of fraud as far as the second applicant is concerned. In paragraph 12A of the amended plaint, which is Annexure "A" to the affidavit in reply, fraud is pleaded. It will have to be proved by the respondents during the trial of the main suit.

This Court's power to stay proceedings is discretionary and would be exercised by this Court in exceptional circumstances. As stated by this Court in **DFCU Ltd Vs Begmohamed Ltd, (supra)**, we should be mindful of the backlog in the High Court. This Court should not, therefore, stay proceedings in the High Court unless it is absolutely necessary. We also take note of the fact that the matter in this application concerns an interlocutory order that the applicant could make a ground of appeal. A multiplicity of suits should be avoided. See. **Sanyu Lwanga Musoke Vs Sam Galiwango (supra)**.

For the foregoing reasons, we are of the view that this application is devoid of merit. In the result it is accordingly dismissed with costs to the respondents.

Dated at Kampala this 16th day of June 2006.

S.G. Engwau
JUSTICE OF APPEAL

A. Twinomujuni
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL