

5 **THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**  
**MISCELLANEOUS APPLICATION No. 596 OF 2015**

*Arising From Civil Suit NO. 224 Of 2012*

10 **NILE ENERGY LIMITED ::: APPLICANT**

**VERSUS**

**1. PHOENIX PETROLEUM LIMITED** }  
**2. ABDUL KARIM ALI** } ::::::::::::::::::::::::::::::::::: **RESPONDENTS**  
**3. ABDULLAH ALI** }

15 **BEFORE: HON. MR. JUSTICE B. KAINANURA**

**RULING**

The applicant, Nile Energy Limited commenced this application under Order 38 Rule 5(d), order 52 rules 1 and 3 of the CPR and Section 20 of the Companies Act, 2012 for orders that the corporate veil of the first respondent be lifted and the respondent be made jointly and severally  
20 liable for the outstanding judgment debt of USD 96,840.55 (united states dollars ninety six thousand eight hundred forty five cents) accruing to the applicant under High Court Civil Suit No. 244 of 2012. The applicant further prays for the costs of the application.

The grounds of the application are set out in the Notice of Motion and further contained in the affidavit of Abdulswamad Mohamed.

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The first ground is that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents have fraudulently concealed and or dissipated the property of the 1<sup>st</sup> respondent with a view of defeating the judgment creditor/applicant.

Secondary, that there are no assets left in the names of the 1<sup>st</sup> respondent company which may satisfy the judgment debt in execution.

Thirdly, that at the time of obtaining credit supplies from the applicant company; and entering into a consent judgment subsequently; the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents were aware of the fact that  
5 the 1<sup>st</sup> respondent would not be able to pay its creditors in full.

Fourthly, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are operating their company in deceitful and fraudulent manner as their conduit, a device and a sham, a cloak, a mask which they held before their faces in an attempt to avoid recognition by the eye of equality.

Fifthly, that the 2<sup>nd</sup> respondent immediately after signing the consent judgment has purportedly  
10 and fraudulently transferred his majority shareholding in the 1<sup>st</sup> respondents company to his brother the 4<sup>th</sup> respondent in order to shield himself from personal liability to the applicant company.

And finally that it is in the interest of justice that Court lifts the corporate veil to recover the amounts owed to the applicant.

15 In the affidavit in support of the application deposed by Abdulswamad Mohamed the General Manager of the applicant company, the following facts in support of the application were deposed.

That the 1<sup>st</sup> respondent company was incorporated on the 18<sup>th</sup> day of March 2003 with shareholders being Abdul Karim Ali (2<sup>nd</sup> respondent) holding 60 shares and Ali Hersi owning 40  
20 shares. A copy of the Memorandum and Articles of association was attached as 'annexure A'. In addition to being the majority share holder in the 1<sup>st</sup>, the 2<sup>nd</sup> respondent is the sole signatory to most of the company accounts in various commercial banks. A copy of a resolution reflecting that position was attached as annexure 'B'. On or around the years 2009 to 2011, the 1<sup>st</sup> Respondent Company was supplied with petroleum products amounting to approximately  
25 USD 200,530 [United States dollars two hundred five thousand five hundred thirty] as of the 6<sup>th</sup> May 2010. A reconciliation was done and after the 1<sup>st</sup> respondent company attempted payment of the said sums. However, it failed and thus left an outstanding amount of USD 132,727.58

[United States Dollars One Hundred Thirty Two Thousand Seven Hundred Twenty Seven Fifty Eight Cents] as of October 2010.

On or around 3<sup>rd</sup> October 2010 to 3<sup>rd</sup> November 2010, the 1<sup>st</sup> respondent company issued to the applicant company three cheques for the total amount of USD 25,400 which were all rejected by  
5 the clearing bank on the ground that the company did not have sufficient funds in the account to satisfy the value amount. Copies of the three cheque leaves were attached as annexure 'E'

The 1<sup>st</sup> respondent had on 12<sup>th</sup> June 2009 resolved to transfer majority of its assets to Hashi Energy Uganda Limited at a consideration of UGX 2,900,000,000. A copy of the said resolution is attached as annexure 'F'

10 The respondents on 20<sup>th</sup> December 2010 resolved to transfer all the remaining assets to Kobil Uganda Limited and indeed they were transferred. [Copies of the resolution and search certificates were attached as annexure 'G' and 'H'

On or around June 2012, the applicant company filed High Court Civil Suit No. 244 of 2012 against Phoenix Petroleum Uganda limited for recovery of USD 132,728 and other remedies.

15 That on the 10th day of February 2014, the applicant company and the 1<sup>st</sup> respondent entered into a consent judgment for payment of the principal sum of USD 132,278 plus USD 13,272 and a 10 percent interest thereby bringing the total sums sue to USD 146,00, which sums were to be paid in 14 equal monthly instalments beginning from the 15<sup>th</sup> March 2014 and that on any default in payment, the entire sums outstanding would fall due to the applicant company which shall be at  
20 liberty to commence execution proceedings.

The 1<sup>st</sup> respondent company attempted payment of the above sums to a tune of USD 49,159 leaving a balance of USD 96,840.55 that is still owing.

The 2<sup>nd</sup> respondent resigned on the 17<sup>th</sup> July 2014 from his directorship and shareholding in the 1<sup>st</sup> respondent's company by transferring his majority holding of 60 shares in the company to the  
25 4<sup>th</sup> respondent, his brother.

Consequently, the deponent asserts that the conduct of the respondent amounted to carrying on business to defraud as they were aware that there was no reasonable prospect of the creditors

receiving payments of their debts and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are operating their company in a deceitful and fraudulent manner as their conduit, a device, a sham, a cloak and a mask which they have held before their faces in an attempt to avoid recognition by the eye of equality and prays that the court lifts the corporate veil against the respondents to recover the amounts owed to the applicant.

The respondents raised a preliminary point of law and asserted that the application is premature, bad in law and the prayers sought cannot be supported by the nature of evidence on record that is to say, allegations of fraud which they asserted had not been strictly proved and subsisted by the applicant as required by law.

10 The following issues arise from the above facts.

1. Whether the respondents committed fraud against the applicant company.
2. Whether the court is convinced that the company is a mere facade, concealing true facts.
3. Whether the justice of the case requires the lifting of the veil.

### **Ruling**

15 Section 20 of the Companies Act 2012 gives The High Court jurisdiction in cases of tax evasion, fraud or the membership of the company falling below the statutory minimum, to lift the corporate veil. It provides as follows:

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

According to **The Principles of Modern Company Law at pg 126**, it is stated that the veil of corporate personality can be lifted in certain circumstances such as those in which the corporate entity principle is being used as an instrument of fraud.

***Issue one: Whether the respondents committed fraud.***

25 The applicant alleges that the respondents committed fraud. The respondents on the other hand argue that it has not been proved to the satisfaction of the court.

**BLACK's LAW DICTIONARY 6<sup>TH</sup> Edition** page 660, defined fraud as;-

5           *“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by*  
10           *conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or*  
15           *gesture.....A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated.*  
              *“Bad faith” and “fraud” are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. ....*

20           *As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture.....”*

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In a landmark case of **Kampala Distract Land Board and Anor Vs National Housing and Construction Corporation (2005) 2 E.A at page 83- 84**, the Supreme Court stated that it is well established in law that fraud means actual fraud or some act of dishonesty.

30 The applicant assert that the act of the 2<sup>nd</sup> respondent resigning from the board and transferring his shareholding was fraudulent and aimed at shielding his personal assets from execution and

paying the debt since he was well aware that the 1<sup>st</sup> respondent company would not be able to repay its debt as it had sold all its assets in an effort to defeat its creditors including the applicant company. They led evidence to show the transfer of the shareholding in annexures J and K.

5 The question to be asked here is whether the act of the 2<sup>nd</sup> respondent to resign and transfer his shareholding, was fraudulent.

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;

10 “.....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...**” (emphasis mine).

15 In a more recent 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.

20 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.”

25 In the context of these authorities, it is clear that the burden of proving fraud is higher than in ordinary civil cases.

Section 83 of the Companies Act, 2012 provides that

*The shares or other interest of any member in a company shall be moveable property transferable in the manner provided by the articles of association.*

This therefore means that the member's shareholding rights are *prima facie* freely transferable unless the articles provide to the contrary.

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In the case of ***Re Discoverers Finance Corporation Ltd, Lindlar's Case [1910] 1 Ch. 312***, Buckley J, held that, by the Companies Acts;-

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*"...it is provided that the shares in a company under these Acts shall be capable of being transferred in manner provided by the regulations of the company. The regulations of the company may impose fetters upon the right of transfer. In the absence of restrictions in the articles, the shareholder has by virtue of the statute the right to transfer his shares without the consent of any body to any transferee, even though he be a man of straw, provided it is a bona fide transaction in the sense that it is an out-and-out disposal of the property without retaining any interest in the shares-that the transferor bona fide divests himself of all benefit. In the absence of restrictions it is competent to a transferor, notwithstanding that the company is in extremis, to compel registration of a transfer to a transferee notwithstanding that the latter is a person not competent to meet the unpaid liability upon the shares. Even if the transfer be executed for the express purpose of relieving the transferor from liability, the directors cannot upon that ground refuse to register it unless there is in the articles some provision so enabling them."*

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Further, in the case of ***re: Smith & Steel Brothers And Company Ltd [1942] 1 Ch. 304*** Court held that;-

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*"it must be borne in the mind that one of the normal rights of a share holder is the right to deal freely with his property and to transfer it to whomever he pleases. The shareholders prima facie right, if it is to be cut down, must be cut down with satisfactory clarity"*.

It is therefore well established that a shareholder has *bonafide* rights to sell and transfer his shares any time as long as the articles of association does not limit it. In my view the mere act of the 2<sup>nd</sup> respondent transferring his shares does not prove any intention to deceive or cheat the applicant since the applicant has failed, in my view to show any nefarious intentions by the 2<sup>nd</sup> respondent in transferring the shares.

The applicant led evidence in Annexure ‘F’ to show that the company resolved to transfer some of its assets at a consideration of UGX 2,900,000,000 = to Hashi Energy Uganda Limited. However, this was done on the 12<sup>th</sup> day of June 2009 long before the consent judgment of 10<sup>th</sup> February 2014.

Further, annexure G shows that the 1<sup>st</sup> respondents sold some of its properties to Kobil Uganda Limited on the 20<sup>th</sup> day of December 2010. Again this was before the consent judgment.

It should be noted that the applicant did not adduce any evidence to show the exact dates of its supply of the petroleum products but deposes that it was around the years 2009 to 2011. This was the exact period when the 1<sup>st</sup> respondent transferred its properties to Hashi Energy Uganda and Kobil Uganda Limited. This in my view, defeats the allegations that the act of the 1<sup>st</sup> respondent transferring its own properties was calculated at defeating the execution of the judgment.

Further it should be noted that the 2<sup>nd</sup> respondent ceased to be a shareholder of the 1<sup>st</sup> respondent after transferring his shares to the 4<sup>th</sup> respondent. In the case of **Henry Kawalya vs Dan Semakadde [1992] I KALR 104** Court Held that;

*A shareholder ceases to be such upon payment to him of a consideration for his interests in the Company. And even if the corporate veil was lifted, he still would not be liable personally, but the current shareholders.*

In the result therefore, I find that the applicant has failed to prove fraud to court’s satisfaction and I resolve the first issue in the negative.

Section 20 clearly provides that involvement in fraud is a ground for lifting the veil and since fraud has not been satisfactorily proved, I find no reason to lift the veil.

**Issue Two:                    Whether the court is convinced that the company is a mere facade concealing true facts.**



The applicant's argue that the fact that the 2<sup>nd</sup> respondent transferred his shares four months after the signing of the consent judgement was evidence of improper conduct which was done to shield him from liability.

In the case of ***D.K. Construction Co. Ltd & Jametex Intra Sales Ltd Vs Barclays Bank Uganda Ltd C.S 644 of 2000*** court held that;

*“In order to ascertain whether a company is being used as a mask the court is entitled to look at the reality of the situation, the motive for the transactions and other relevant facts must be considered before coming to the conclusion that the company is a mere facade concealing the true facts.”*

10 Further, In ***Re Williams Bros Ltd (1932) 2ch.71***, court found that, a company was insolvent but the directors continued to carry on its business and purchased its goods on credit. It was held that if a company continues to carry out business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospects of the creditors ever receiving payments of these debts, it is in general a proper inference that the company is carrying on business with  
15 intent to defraud.

From the evidence on record, the 1<sup>st</sup> respondent attempted to honour the consent judgment. It paid monthly instalments and when faced with financial hardships, it formally communicated to the applicant through its Counsel to restructure the monthly instalments and the applicant failed to reply. The 1<sup>st</sup> respondent's company is not wound up and neither is it going into liquidation. In  
20 my view it can still be pursued to honour its debts.

There is already a consent judgement in favour of the applicant and on failure by the 1<sup>st</sup> respondent to pay, the proper course of action is to apply for execution. There is no evidence to show that this has been done and failed.

25 In the circumstances, therefore, the applicant has failed to prove the fact that the company is a mere facade.

***Issue Three: Whether the interests justice require that the veil be lifted.***

My finding in issue one sufficiently answers this issue.

In the result this application is dismissed with costs.

5 **B. Kainamura**

**Judge**

**25.07.2017**

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