THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

MISC. APPLICATION No. 1171 OF 2023

[*Arising out of execution miscellaneous application no. 628 of 2018*]

(arising out of civil suit no. 59 of 2010)

KAGORO EPIMAC..... APPLICANT

VERSUS

1. **SAMALIEN PROPERTIES LIMITED**
2. **EDWARD NSUBUGA MPERESE**
3. **JOTENA (U) LTD**
4. **BAKIJULULA COFFEE FACTORY (U) LTD**
5. **GWENDIDE MIXED FARM**

NAGALAMA LIMITED.....RESPODENTS

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

RULING

This application is brought under section 98 and 34 (1) of the Civil Procedure Act, Order 52 rule 3 of the Civil Procedure Rules and section 20 of the Companies Act for orders that the corporate veil be lifted against the 1st, 3rd,4th and 5th defendants and the applicant be allowed to proceed with execution against the same respondents and or directors of the said respondents jointly and severally.

The grounds supporting the application were; are contained in the notice of motion and in the affidavit of the applicant Kagoro Epimac but briefly that; -

1. That the applicant instituted the main civil suit against the 1st respondent vide civil suit no.59 of 2010 and he was the successful party.
2. That the 1st respondent was ordered by court to refund ugx 1,173,328,737. =(Uganda shillings one billion one hundred seventy three million three hundred twenty eight thousand seven hundred thirty seven only.
3. The applicant extracted the decree and commenced execution proceedings against the 1st respondent.
4. That the applicant has since traced for any known properties of the 1st respondent (judgment debtor) I vein as the said properties have either been fraudulently or deliberately transferred and concealed in to the 4th and 5th respondent through the 2nd respondent.
5. The applicant is thus left with no choice but to institute this instant application for an order lifting the veil of incorporation so he can proceed jointly and severally against the directors of the 1st respondent personally and or 3rd ,4th and 5th respondents so as to recover the monies that are rightfully owned to him.
6. That this is the only way that the applicant will be able to enjoy the fruits of his judgements.
7. That it is in the interest of justice that this instant application be allowed since the 1st respondent is a mere façade intended to defeat justice.

The respondent opposed the application based on their affidavits in reply.

Both counsel made filed written submissions which I shall consider in this Ruling.

Before I delve on the main issues for resolution, I wish to deal with an issue raised by counsel for the 1st, 2nd and 5th in their written submissions that there is a pending

application to adjudge the 2nd respondent as a person of unsound mind and that it is reason enough for this application to be stayed.

This application proceeded by affidavit evidence and the 2nd respondent signed and filed his affidavit on court record opposing the application. The advocate that represented him at hearing confirmed that he has instruction to proceed with application. The issue of declaring the 2nd respondent being a person of unsound mind does not affect this application since the 2nd respondent signed his affidavit and gave instructions to the lawyer when he was of sound mind. The role of an intended guardian if appointed will have an affect continuing with the case in the names of the 2nd respondent. At the moment there is no such order and this court cannot rely on mere speculations. Therefore, these proceeding are not affected by the future decisions. A guardian can be appointed at any time even after this court has concluded this application and whoever is appointed will continue with the 2nd respondent's business.

Further the 5th respondent's counsel submitted that since the 1st respondent company was legally ceased by URSB and therefore in his view this application fails on the onset.

In my view, a company which is legally existing after a decree of court has been issued and continues to perform activities cannot escape liability from what has been done wrongly before as an action for lifting the veil is concerned with the past and not the future. That is actually the very reason for an inquiry to establish whether there is any evidence to warrant lifting of the corporate vail. In my view, Court can still consider the activities done before and come up with a decision in one way or other.

Therefore, the preliminary issues are overruled.

I shall now proceed with the merits of this application.

The main issue for determination is **whether the corporate veil should be lifted.**

The applicant averred that applicant instituted the main civil suit against the 1st respondent vide civil suit no.59 of 2010 and he was the successful party and 1st respondent was ordered by court to refund **ugx 1,173,328,737. =(Uganda shillings one billion one hundred seventy three million three hundred twenty eight thousand seven hundred thirty seven)**. That the applicant extracted the decree and commenced execution proceedings against the 1st respondent but no known properties of the 1st respondent (Judgment debtor) was traced as the said properties were transferred by the 2nd respondent who is the sole director of the 1st respondent company to the 3rd respondent company where he is a sole signatory to its accounts and consequently to the 4th and 5th respondent where he is a director. That this was aimed at defeating execution and that it is in the interest of justice that a corporate veil be lifted against the respondents.

The respondents in reply opposed the application and stated that the applicant has never had any interest in the said land and that the said land was legally transferred to the 4th and 5th respondents without any fraud.

Section 20 of the Company act 2012 provides that;

"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".

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.

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.

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.

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.

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).**

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.

In the case before me, from the evidence on record, the 1st respondent is a judgement debtor in civil suit no 59 of 2010 as per annexure A of the applicant's affidavit. The said judgement was delivered on 7th day of May 2010. The applicant filed for execution vide EMA no 628 of 2018 and indeed the only executable property of the 1st respondent i.e land comprised in Mengo LRV453 FOLIO 22 PLOT 90 had allegedly been sold to a one Edith Nassuna and later transferred to the other respondent companies. **The question for court to answer is whether the transfer was done to defeat execution or not.**

The case against the 1st respondent was filed in 2010 and Judgement delivered on 7th day of May 2010. However as per annexure D of the applicant's affidavit, the 1st respondent on the 5th day of November 2010 after Judgement had been delivered executed a purchase agreement on behalf of the 1st respondent company transferring its only property comprised in Mengo LRV453 FOLIO 22 PLOT 90 to a one Edith Nassuna. This is a period of 6 months after judgement.

Clause three of the said purchase agreement says, "*the purchaser may assign her interest to a nominee a limited liability company to be incorporated in whose names the vendor shall execute transfer forms upon receiving the full amount.*

In furtherance of the above in a letter dated 8/12/2010 annexure C, the said Edith Nassuna nominated the 3rd respondent a company as an assignee of the property as agreed in the purchase agreement. Evidence on record shows that the 2nd respondent is a sole account signatory of the 3rd respondent as per annexure L in the affidavit in support of the application. This is a clear indication that is a child of the 1st and the 2nd respondent.

Subsequently on the 14/04/2015 as per annexure E, a special resolution was passed by the 3rd respondent company to sell the said land to the 5th respondent company. Days later another special resolution dated 21/04/2012 was passed by the 4th respondent company to purchase the said land. However, he said land as per annexure N is currently in the names of the 5th respondent where the 2nd respondent is a shareholder as well. The 2nd respondent is also a shareholder in the 1st, 4th and 5th defendant Companies as per evidence in company form 7- annexures B1 and annexure D to the applicant's affidavit in respect to particulars of Directors and Secretaries (form 7). It is also on record that the 2nd respondent is the only signatory of the 3rd respondent company as per annexure L. The 3rd respondent having acquired the property from one Edith Nassuna who had purchased the same property from the 1st respondent and 2nd respondent is seen as a seller on behalf of the 1st respondent company. It is surprising to me that the 3rd defendant had even to sue the 1st respondent under civil suit no. 48 of 2011 seeking declarations of ownership and orders for its registration for the land properly acquired. The purpose is only known by the 3rd respondent.

As a whole, it is crystal clear that the 2nd respondent is at the Centre of all the transactions and transfers concerning land comprised in Mengo LRV453 FOLIO 22 PLOT 90. Practically, the 2nd respondent was in effect selling the suit land to himself as his hand and mind is traceable in all the respondent companies. This was definitely not for anything but to defeat execution.

Court in the case of ***Stanbic Bank Uganda Ltd Vs. Ducat Lubricants (U) Ltd & 3 Others Misc. Appl No. 845 of 2013*** stated;

> *"It is a basic common law principle that the mind of a company where guilty intent or responsibility is being considered cannot meaningfully be separated from the minds of the Directors where the will of the company is to be discerned".*

In the case of ***HL Bolton Co Vs TJ Graham and Sons [1956] 3 All ER 624,*** Lord Denning held at page 630;

> *"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.... That is made clear in Lord Haldane's speech in* ***Lennard's Carrying Co Ltd Vs Asiatic Petroleum Co Ltd ([1915) AC 705 at pp 713, 714****. So also in the criminal law, in cases where the law requires*

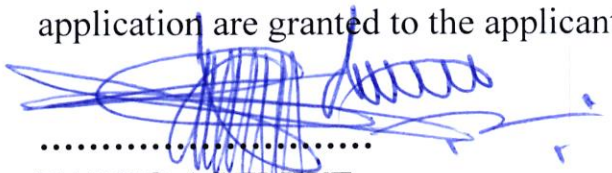
a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

A suit can be filed against a Director/individual who is a member of the company in their own individual capacity and it would be a matter of evidence to prove that the use of the company name was merely a front or vehicle to perpetrate the alleged fraud by the individual.

Wrongful or fraudulent trading occurs when a company carries out business with the intent of purposefully deceiving and defrauding its creditors. Such will be the case when a company continues to trade as normal even though its directors are aware (or should have been aware) that the company was insolvent and has no realistic prospect of avoiding a formal insolvency process (such as liquidation or administration).

In this application, considering the fact that that the 2nd respondent is the majority shareholder of the 1st, 4th and 5th respondent companies and a sole signatory on the accounts of the 3rd respondent Company, it is my considered view that the 1st ,3rd, 4th and 5th are sister companies being controlled by the 2nd respondent who is the core mind behind their functionality. In other words, it's the same brain operating sister companies to his best interest. The 2nd respondent transferred his own property from the 1st respondent to himself under a cover of the 3rd, 4th and 5th respondent for the purpose of evading execution. This was nothing but fraud. All the respondent companies are a mere conduit of the 2nd respondent. To uphold the principle of corporate personality in the circumstances of this case is to defeat justice. Consequently, the corporate veil of the 1st, 2nd, 3rd and 5th respondents is lifted and leave is hereby granted to the applicant to proceed with execution in respect to the property comprised in Mengo LRV453 FOLIO 22 PLOT 90 which originally belonged to the 1st respondent/ Judgement debtor in civil suit number 59 of 2010.

The applicant prayed for costs. Ordinarily, costs follow events. The applicant having succeeded in this matter, he is entitled to costs. Accordingly, costs of this application are granted to the applicant.



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TADEO ASIIMWE

Judge

28.03.2024.