THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO 912 OF 2017
(ALL ARISING FROM H.C.C.S NO. 114 OF 2011)

MARTIN ORECH:: APPLICANT

VERSUS

1. **SUNRISE PROJECTS LTD**
2. **FRANCIS BUWULE**
3. **CHARLES PETER MAYIGA:: RESPONDENTS**
4. **RITA BUWULE**
5. **MARGARET MAYIGA**

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this Application under Section 20 of the Companies Act, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 38 rule 5 and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules for declarations and orders that;

a) That the veil of incorporation of the 1st Respondent/ judgement debtor be lifted and that the judgment and decree of the trial court in H.C.C.S No. 114 of 2011 be executed as against the 2nd, 3rd, 4th & 5th Respondents in their capacity as shareholders and Directors personally accountable for the 1st Respondent's judgment debt.

The grounds of this application are specifically set out in the affidavits of Martin Orech and Thomas Kamishani Taremwa which briefly state;

1. That the Applicant sued the 1st Respondent vide; H.C.C.S No. 114 of 2011, obtained judgment and decree for among others recovery of USD 42,000 (United States Dollars Forty Two Thousand) being special damages, of USD 6,000 (United States Dollars Six Thousand) as general damages, interest of 10% p.a on special damages from the date of filing, interest on general damages of 8% p.a from the date of judgment and agreed costs of Ushs. 7,785,000/=.
2. That to date no appeal has been preferred against the said judgment or decree and no amount whatsoever has been paid by the Respondent towards settlement or satisfaction of the judgment debt.
3. The Applicant is desirous of realizing the fruits of the said judgment/decree and applied for warrant of movable property but was unable to as the Respondent does not own any known assets for being undercapitalized and the 2nd, 3rd, 4th and 5th Respondents have since ceased operations of the 1st Respondent by deliberately transferring/ or otherwise sold off all its known assets to defeat execution of the decree passed by this Honourable Court.
4. The 2nd, 3rd, 4th and 5th Respondents are shareholders and directors of the 1st Respondent who had its control at the time of executing a tenancy agreement with the applicant followed with an addendum dated 7th April 2010.
5. That consequently the Directors of the 1st Respondent Company have operated the company as their conduit, a device, a sham, a cloak, a corporate mask which they held before their faces in attempt to avoid recognition by the eye of equity in a deceitful and fraudulent manner.
6. That the Corporate veil of the 1st Respondent should be lifted to enable the Applicant to recover from the 2nd, 3rd, 4th and 5th Respondents in their personal capacity as shareholders and Directors of the 1st Respondent all the amounts owed to the Applicant in satisfaction of the decree.

7. That it is in the interest of justice that the veil of Respondent's veil of incorporation be lifted and execution proceeds against the 1st Respondent's directors personally by way of arrest and detention in civil prison or by attachment of their personal property.

In opposition to this Application the Respondents through the 2nd Respondent, who is one of the Directors holding powers of attorney from the 3rd, 4th and 5th Respondents filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought.

The Applicant was represented by *Isootah Suleiman* while the Respondents were represented by *Mutaawe Geoffrey*.

Court directed both parties to file submissions which have been considered by this court.

ISSUES FOR DETERMINATION

a) *Whether the Directors of the 1st Respondent Company have operated the company as a sham to defraud the Applicant?*
b) *Whether the Respondent's veil of incorporation should be lifted by Court and the execution proceed against the directors personally?*

ISSUE 1

Whether the Directors of the 1st Respondent Company have 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."

The foregoing provision stipulates as far as is relevant here that where the company or its directors are involved in acts of fraud, the High Court is empowered to lift the veil of incorporation. Fraud is defined by Black's law dictionary 8th Edition as follows;

"A knowing misrepresentation of the truth or concealment of a material fact, to induce another to act to his or her detriment."

It is the Applicant's submission that the actions of the Respondent's directors brought to this Court's attention by the Applicant in his affidavit and further affidavit by Thomas Kamishani Taremwa in support of Notice of Motion are ample evidence of fraud. The directors in question are one Mr. Francis Buwule, Mr. Charles Peter Mayiga, Mrs. Rita Buwule and Mrs. Margaret Mayiga, all of whom double as shareholders.

In paragraph 2 & 4 of the Applicant's affidavit, he points out that the 1st Respondent owes him USD 42,000 being special damages, USD 6,000 as general damages, interest of 10% p.a on special damages from the date of filing, interest on general damages of 8% p.a from the date of judgment and agreed costs of Ushs. 7,785,000 which amounts have never been paid to him. In his affidavit in reply to the application, Francis Buwule did not challenge or controvert the fact that the Applicant is entitled to payment but instead pleaded in paragraphs 3 & 6 thereof that when the company could no longer continue operating, it closed business by end of September 2011 and has not ever carried out any business after that date or in any other place. He further contests in paragraph 7 that the failing to pay rent in 2011 by the 1st Respondent cannot amount to fraud in 2018 to compel court to lift the corporate veil to make directors liable for the unpaid rent when the applicant last dealt with the company in 2011.

Applicant's counsel further submitted that Mr. Francis Buwule's affidavit in reply is a misconception of the law governing the instant application for substitution of the directors for payment of the debt against the 1St Respondent. The Respondents in their affidavit in reply admit that the 1st Respondent ceased to exist and cannot be resuscitated by pleading in paragraphs 3 & 6 thereof that the company closed business in September 2011 when it could no longer continue to operate and do not demonstrate any capacity of the company to satisfy its due debts including for the applicant herein.

Copies of the annual return 2020 and board respective resolutions of 6th February 2004, 28th May 2007, 1st September 2010 were attached to the affidavit of Thomas Kmishani Taremwa marked as "H", "I", "J", "K" & "L" to prove the assertion that the 1st Respondent has no assets to satisfy the decree in H.C.C.S No. 114 of 2011 but was being used as a sham designed to mislead creditors and now to mislead court. The Respondent's contention regarding affidavit evidence has since been answered by court in a host of authorities that much as court agrees that fraud must ordinarily be proved by calling evidence in an ordinary suit, it is not to say that fraud cannot be proved through petitions. Parties have the liberty to call the deponents to clarify positions or be cross examined to enable court arrive at a just decision based on properly tested evidence.

Counsel for the Applicant finally cited the case of ***Haroon Ahmed Nsibambi vs Tulyaguma Isaac & another H.C.M.A No. 214 of 2017,*** it was held that evidence by affidavits is evidence by a party who knows the facts. And the deponent was deponing to facts from his own knowledge. And if it was a normal suit and not an application, she could have been called as witness for the respondent. The only difference is she is giving affidavit evidence if the Applicant had any doubts about her qualifications, they should have applied to have her cross examined.

Counsel for the Respondents submitted that the Applicant did not file any Affidavit in Rejoinder to the 2nd Respondent's Affidavit in Reply to rebut the evidence therein implying that the Applicant accepted the Affidavit as the whole truth. For emphasis, the salient points in that Affidavit in Reply are that the 1st Respondent was a tenant of the Applicant from 2007 until September 2011 and as acknowledged in the Plaint in H.C.C.S No. 114 of 2011 filed in June 2011, the 1st Respondent paid US $ 108,000 as rent to the Applicant and of that US $ 24,000 was paid between April 2010 and April 2011. No entry in the circumstances pointed out above can be said to have been a sham. The 1st Respondent after leaving the Applicant's premises at the end of September 2011, did not ever carry out any business thereafter, the submissions of the Applicant on this issue are off the mark.

Respondent's counsel further submitted that the wording of Section 20 of the Companies Act, 2012 is very clear. It is in the present tense. Past fraud, if any cannot be a ground for lifting the corporate veil. The fraud under that section must be on-going at

the time of petitioning court. No fraud was alleged nor proved against the 1st Respondent in the main suit. It cannot be raised just because there is nothing to attach.

Lastly as regards affidavit evidence to prove fraud, the Supreme Court decision in ***Ssanyu Lwanga Musoke case*** still represents the law in that particular aspect. ***Article 132(4)*** of the Constitution of Uganda is very clear on that. It states;

"*The Supreme Court may while treating its own previous decisions as normally binding, depart from a previous decision when it appears right to do so, and all other courts shall be bound to follow the decision of the Supreme Court on questions of law.*"

In that regard therefore with respect, the ***Haroon Ahmed Nsibambi*** case is inapplicable to the present case on its own facts and in light of the decision in ***Ssanyu Lwanga Musoke.***

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 11TH 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 organisation) 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****…" (emphasis mine).*

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 pay rent by the 1st respondent in 2011 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 annextures thereto that the applicant entered into a Landlord-Tenant relationship on 8th August 2007 and this relationship subsisted until 2011 when they stopped operating. For all this period the company was able to pay its rent and only defaulted later to the tune of $ 42,000.

The failure to pay rent came much later after a long time when they were keeping their rent obligation in check. It would be very wrong to assume or assert 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.

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 Respondent's veil of incorporation should be lifted by Court and the execution proceed against the directors personally?

Counsel for the Applicant submitted that it is trite law 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 fragrantly 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 Respondent submitted that the Applicant failed to adduce evidence to prove the alleged fraudulent actions of the 2nd – 5th Respondents after 28/03/2014 the date of his judgment against the 1st 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. Therefore, the Applicant has failed to do in the present case.

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 KARL 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 Infrastracture 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 having failed to prove the fraud against the Respondents, it becomes hard for this court to lift the corporate veil. There is no basis for the court to be moved to lift the veil since the nature of the debt incurred was genuine and arose from a *bonafide* transaction of the company. The 2nd to 5th respondents never continued to operate Ekitobero Restaurant in any disguised form in order to justify imputing any fraudulent intent on their part to defraud the applicant.

I therefore dismiss this application and I make no order as to costs.

I so order.

SSEKAANA MUSA
JUDGE
13th August 2021