**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 156 OF 2012**

**(ARISISNG FROM MISC. APPLICATION NO. 317 OF 2011)**

**(ARISISNG FROM HCCS NO. 172 OF 2011)**

**JOHN LUBEGA MATOVU** **:::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VEVRSUS**

**MIKWANO INVESTMENT LIMITED::::::::::::::::::::::::::::RESPONDENT**

**BEFORE : HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This application was brought under Order 38 rule 5 and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR). The applicant is seeking for orders that the respondent’s corporate veil be lifted and costs of this application be provided for.

The affidavit in support of this application was sworn by the applicant. The grounds as stated in that affidavit also give the background to this application. In a nut shell, the grounds are that on 16th July 2008 the applicant gave power of attorney to the respondent company authorizing it to use the certificate of title of his land comprised in Bukoto Private Mailo Register Volume 2018, Kyadondo Block 213 Plot 2033 Folio 22 to obtain a loan from Standard Chartered Bank.

On 25th July 2008 the respondent entered into a mortgage facility with the said bank where upon the applicant was surety and his land was the subject of the mortgage. The respondent failed to pay the loan and the mortgaged property was sold. The applicant redeemed the mortgage debt by paying Shs. 139,843,041/= and sued the respondent on 11th May 2011 to recover that amount. A consent judgment was entered and a consent decree issued for the applicant by which the respondent company was to pay the applicant Shs. 139,843,041/= in monthly installments of Shs. 3,000,000/=. Only Shs. 2,500,000/= had so far been paid as at the time of bringing this application.

The applicant avers in paragraphs 13 and 14 of his affidavit in support that when he instructed his bailiffs to execute the consent decree it was discovered that the directors of the respondent had abandoned, altered and or changed the name of the respondent company at the respondent’s last known places of business. He deposed that the respondent has failed to satisfy the decree by attachment and sale of the respondent’s assets because it has no assets that can be attached in execution of the decree.

He averred that the corporate veil should be lifted since the respondent’s directors have been using the respondent’s name to transact business and gain trust fraudulently.

Two affidavits in reply were filed. One was sworn by Mr. Kavuma James in his capacity as the Managing Director of the respondent company and another by Mr. David Oundo Wandera an advocate in the firm representing the respondent company.

Mr. Kavuma in his affidavit denied that the respondent company abandoned, altered and or changed the name or place of its business save that it faced financial difficulties and it is temporarily reorganizing its business. He averred that mere failing to execute a decree or lack of access on the respondent’s part is not reason to lift the veil. He also averred that the allegation of using the respondent’s name to transact business and gain trust fraudulently is speculative and false in so far as it is not supported by any evidence showing that the respondent is a mere sham and nominee of the undisclosed directors to defraud the creditors.

Mr. Oundo on his part deposed that the application is incompetent, misconceived, incurably defective and bad in law in so far as:

1. **The suit is vague as much as it does not disclose against whom the veil should be lifted;**
2. **The person(s) to be affected by the lifting of the veil not being parties to the original suit resulting into the consent decree cannot belatedly be made liable to pay the decretal sum without being heard on the original suit;**
3. **Failure to execute or attempted execution of a decree of whatever nature, which evidence is not shown, is not reason for lifting corporate veil;**
4. **The lack of assets on the part of the respondent for satisfaction of a decree is not a reason for lifting the corporate veil;**
5. **The allegation of fraud in paragraph 15 of the applicant’s affidavit in support of the motion is not only serious which require investigation through trial, but also so contentious that it cannot be conveniently resolved by motion and an affidavit;**
6. **The supporting affidavit is defective and unreliable in so far as it does not separate matters of knowledge from those based on belief and thus the application is not supported by any evidence.**

Mr. Oundo further deposed that the application lacks merit and is an abuse of the process of court in so far as it is based on hearsay and heavily relies on speculation which should be dismissed accordingly.

When this application came up for hearing, the applicant was represented by Mr. Samuel Tinyinondi and the respondent by Mr. David Oundo Wandera. They filed written submissions which I have carefully read and considered in this ruling together with the affidavits and the documents attached to them. I wish to observe that counsel for the applicant in his submission raised five issues which in my view were not necessary in this application. Some of those issues like cause of action and damages were not for determination in this application. I also find that it was not appropriate to raise the issue of disobedience of court order for consideration in this application.

To my mind the single issue for determination in this application is whether the corporate veil should be lifted as prayed. The question as to whether the respondent carried on business in a manner that was intended to defraud the applicant would be considered in determining that issue. For the above reason I will only consider the issue as to whether the corporate veil should be lifted and ignore the rest of the irrelevant issues.

The applicant is seeking for an order lifting the corporate veil of the respondent company. According to ***Section 15 (2) of the Companies Act*** ***Cap. 110***, once a company has been incorporated, then the subscribers to the memorandum, together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum. The concept of corporate personality is what distinguishes a company from other forms of business organizations. Simply put, it means that an incorporated company has separate legal entity distinct from its members. The company is capable of enjoying rights and being subject to duties, separate from its members.

This principle was first established in the case of ***Salmon v Salmon &Co. Ltd (1897) A.C. 22*** HL where Salmon carried on business as a leather merchant. In 1892, he converted the business into a limited liability company by forming Salmon & Co. Ltd. The company consisted of Salmon, his wife and five children as members, with Salmon as the M.D. Shortly after incorporation, the company experienced difficulties and it was wound up a year later. Because the company did not have enough assets to meet the creditors’ demands, the creditors sued Salmon personally to recover their money.

On appeal, the Court heldthatthe company is at law a different person altogether from the subscribers to the memorandum of association and though it may be that after the incorporation, the business is precisely the same as it was before and the same persons are managers and the same persons receive profits, the company is not in law the agent of subscribers or trustees for them nor are subscribers as members liable in any form or shape except to the extent and in the manner provided by the Act.

However, the application of the principle has in certain instances been disregarded where court is satisfied that it would cause injustice. In certain situations the court will disregard corporate personality and pay attention to where the real control and beneficial ownership of the company's undertaking.

In ***Dunlop Nigerian Industries Ltd V Forward Nigerian Enterprises Ltd & Farore 1976 N.C.L.R 243***, the High Court of Lagos stated that in particular circumstances, for example where the device of incorporation is used for some illegal or improper purpose, the court may disregard the principle that a company is an independent legal entity and lift the veil of corporate identity so that if it is proved that a person used a company he controls as a cloak for an improper transaction, he may be made personally liable to a third party. This is what is referred to as lifting/ piercing the veil of incorporation as prayed for by the applicant.

One of the instances where a corporate veil can be lifted is where there has been fraud or improper conduct***.*** The veil of incorporation may also be lifted where the corporate personality is used as a mask for fraud or illegality. I will examine a few English cases where the corporate veil was lifted so as to illustrate the circumstances under which a corporate veil can be lifted.

In ***Gilford Motor Co v Horne [1933] Ch. 935***,Mr.Horne was the former employee of Gilford Motor Co. He agreed not to solicit its customers when he left employment. He then formed a company which solicited the customers. Both the company and Horne were held liable for breach of the covenant not to solicit. The company that Horne formed was described as a *“****mere cloak or sham for the purpose of enabling him to commit a breach of the covenant*”.**

In ***Jones v Lipman [1962]1 W.L.R 832***, Mr. Lipman in order to avoid the completion of a sale of his house to Jones formed a company and transferred the house to the company. Court ordered him and the company to complete payment, even though the ownership of the house was no longer in his names but in the name of the newly formed company. The company was described as *“****a creature of Lipman, a device and a sham, a mask which he held before his face in an attempt to avoid recognition by the eyes of equity”.***

In ***Re Williams Bros Ltd (1932) 2ch.71***, 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 prospect of the creditors ever receiving payments of these debts, it is in general a proper inference that the company is carrying on business with intent to defraud.

In ***R v Graham*** **(1984) QB.675** it was held that a person is guilty of fraudulent trading if he has no reason to believe that the company will be able to pay its creditors in full by the dates when the respective debts become due or within a short time thereafter.

In our jurisdiction courts have also lifted corporate veil where it is proved that a company is being misused by its directors to perpetrate a fraud or other dishonest or improper purpose. See ***Bank of Uganda Ltd v Mutiso and 4 Others Civil Suit No. 0152 of 2007*** relied upon by counsel for the applicant. In ***Salim Jamal & 2 Others v Uganda Oxygen Ltd & 2 Others (1997) II KALR 38*** the Supreme Court held that corporate personality cannot be used as a 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.

It is noteworthy from the above cases that; firstly, the directors that were sought to be proceeded against personally were parties to the suit I believe for obvious reason that the order would affect them. Secondly, it must be proved to the satisfaction of court that the corporate personality is being used as a cloak or mask for fraud.

In the instant application, first of all the directors of the respondent company were not made party to this application and yet it is prayed that an order be made by this court so that the consent decree is executed against them personally. In my view, that would be making an order that affects them without giving them a hearing in contravention of the principle of natural justice. I do not see why the applicant did not join them as respondents to this application.

Secondly as regards proof of misuse of the corporate personality, it is alleged that the applicant’s bailiff discovered that the directors of the respondent had abandoned, altered and or changed the name of the respondent company at the respondent’s last known places of business. It is also alleged that the respondent has failed to satisfy the decree by attachment and sale of the respondent’s assets because it has no assets that can be attached in execution of the decree. Apart from those two allegations which are not even substantiated by any documentary evidence I do not see any other material that this court can base its decision to lift the corporate veil.

The applicant did not attach any documents to show who the exact directors of the respondent company are and their shareholdings. He alleges that the directors have changed the name of the respondent company and does not even attach certified copies of the relevant documents to prove that. From what is stated in the affidavit in support it appears that the allegation that the name of the respondent company was changed was based on the new name that was written in the last known places of business of the respondent. Surely, can this court act on that evidence to make a finding that the respondent company is being used to defraud people including the applicant and lift its corporate veil? I am afraid it cannot do so.

The best place to get information on the status of any company in this country is the Uganda Registration Services Bureau which registers companies/documents and keeps all its records. In my view any person who wants to rely on any document from that office is at liberty to apply for a search to be conducted with a view of getting a certified copy of the document. The applicant did not do that. He is relying on hearsay evidence that is merely speculative to prove its case.

I also find that the mere allegation that the respondent company does not have property which can be attached and sold for purposes of executing the consent decree is not evidence of fraud which this court can rely on to lift its corporate veil. Similarly, the allegation that the respondent’s directors have been using the respondent’s name to transact business and gain trust fraudulently is not supported by any evidence.

Allegation of fraud as rightly argued by counsel for the respondent is a very serious matter that needs to be specifically pleaded with particulars given and strictly proved. The standard of proof required in cases of fraud was considered by this court in ***Makau Nairuba Mabel v Crane Bank Ltd Civil Suit No. 380 of 2009.***

In that case, this court referred to a passage in ***Bullen & Leake & Jacob’s Precedents of Pleadings, Fourteenth Edition, Volume 2***, at page 809 where the authors referred to a number of cases including the decision of ***Lord Denning in Bater v Bater [1951] P.35*** to the effect that:-

***“…….A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, but it still does require a degree of probability which is commensurate with the occasion”.***

This court also referred to decisions of the Supreme Court in **Kampala Bottlers Ltd v Damanico (U) Ltd [1009-1994] EA 141** and ***Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 Others SCCA No. 4 of 2006 [2007] UGSC 21***. In **Kampala Bottlers Ltd v Damanico (U) Ltd** (supra), fraud was pleaded but its particulars were not given and Platt, JSC stated in his brief judgment in concurrence with Wambuzi, CJ who wrote the leading judgment that:-

*“****In the first place, I strongly deprecate the manner in which the respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2******and plead fraud properly giving particulars of the fraud allege…****”.* (Emphasis added).

In ***Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 others*** (supra), Katureebe, JSC observed that:-

*“****In my view, an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others”.***

On the basis of the above authority, I find that the allegation of fraud as casually stated in the applicant’s affidavit does not pass the test required in pleading and proving it. I must observe that the applicant’s counsel made an elaborate submission where he even gave particulars of the fraud committed by the respondent. However, I am afraid that was giving evidence from the bar which this court cannot accept.

On the whole taking into account the aforementioned observations and findings, I am of the firm view that the applicant has not provided any facts upon which this court can act to lift the veil of incorporation. I am fully persuaded by the decision of ***Mukasa, J*** in ***Eastern Builders & Engineers Ltd v Malva Construction (U) Ltd Misc. Application No.0563 of 2008 (arising from Civil Suit No. 0044 of 2002)*** who having found as I have done above dismissed the application.

In the result, I find no merit in this application and I accordingly dismiss it with costs.

I so order.

Dated this 11th day of July 2012

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 3.30 pm in the presence of:

1. Mr. Samuel Tinyinondi for the applicant.
2. Mr. David Oundo Wandera for the respondent.
3. Mr. John Lubega Matovu - Applicant.
4. Mr. James Kavuma- Managing Director of the respondent company

**JUDGE**

11/07/2012