

UGANDA / JUDGMENT

Opolot v The Development Analyst (Miscellaneous Application 458 of 2022) [2023] UGCommC 240 (28 August 2023)

[2023] UGCommC 240

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Miscellaneous Application 458 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
ICOMMERCTAL DrVrSrONl MISCELLANEOUS APPLICATION NO.458 OF 2022
(ARISTNG OUT OF CrVrL SURT NO. 822 OF 201s)

OPOLOT JOSEPH APOLLO T/A EMIRATES SAFARIS AND CAR RENTAL
SERVICES::: APPLIC VERSUS

THE DEVELOPMENT ANALYST::::::::::::::::::::: 3 ::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADYJUSTICE ANNA B. MUGENYI RULING

This application is brought by way of Notice of Motion under Section 98 of th Civil Procedure Act Cap 71, Sections 33 and 39 of the Judicature Act Cap ¹³ Order 38 Rule 5 (d), and Order 52 Rules 1 and 3 of the Civil procedure Rules S. 71-1 for orders that the Respondent's corporate veil be lifted to enable th Applicant to execute the decree in Civil Suit No. 822 of 2015, and that ^h Directors and shareholders be ordered jointly and severally to pay the decretal su as set out in the decree, and for costs ofthe application.

The Application is supported by the affidavit of Opolot Joseph Apollo, th Applicant. The Application was opposed by the affidavit in reply of Ocilaj Michael, the Managing Director and shareholder of the Respondent Company.

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Background of the application

civil Suit No. 822 of 2015 was entered in favour of the Applicant on the 9th day of April 2019, after which, counsel for the Respondent intimated that he was going to appeal but neither the Applicant nor his lawyer were served with any appeal. That the Respondent has gone underground to avoid paying the debt as it cannot be found at its ordinary place of business at Dewinton Road, and the evidence provided by witnesses during the suit show that it was established to conduct its business fraudulently when necessary to avoid its obligations and responsibilities.

That the company register at the Uganda Registration Services Bureau shows that it is still operational, therefore, all those actions are pointed at frustrating the judgement of the court, hence this application to lift the corporate veil of the Respondent. The Applicant avers that it is in the interest of justice that this application be allowed.

In his Affidavit in reply, the Respondent contends that the Applicant has not proved any grounds for lifting of the veil such as tax evasions, fraud or that the Respondent has fallen below the statutory minimum shareholding. That evidence was produced to show that the Respondent has gone into hiding and that the employment of the said witnesses Churchill Ongole and Adriko Simon Peter was disputed, and that the alleged fraudulent ways are prior to the decree that the Applicant seeks to execute.

Further that the judgment was delivered in the absence of both the Applicant and their lawyers which is irregular; although the Respondent interchanged and said 'Applicant' while referring to themselves in paragraphs 16, 17, 18 and 19 of the Affidavit in Reply. In addition, the said annexure B to the affidavit in reply is written on behalf of the Respondent, not the Applicant. That they filed

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Miscellaneous Application No. 330 of 2020 seeking for extension of time within which to appeal but the same has not been fixed for hearing. They prayed that the Application be dismissed with costs.

In his Affidavit in Rejoinder, the Applicant added that the Respondent cannot equally be found at the Equatorial Mall, the address in the Memorandum of Understanding executed with Fireworks Advertising (U) Ltd. That the Respondent had not been regularly filing annual company returns which makes it impossible to access their tax liabilities. That the judgment passed by Court is final and can only be set aside using the right procedure, and that the Respondent does not have interest in the matter because the application for extension of time was filed more than 2 years from the date of the judgment and that they have not taken any steps in prosecuting the application.

REPRESENTATION

The Applicant was represented by M/S Murungi, Kairu & Co. Advocates whereas the Respondent was represented by M/S Ojambo & Ojambo Advocates.

Submissions

Counsel for the Applicant cited Section 20 of the Company's Act that allows for lifting of the veil and cited case law on the same, specifically on fraud. He further argued that the Applicant has demonstrated that he is the judgment creditor in Civil Suit No. 822 of 2015 which the Respondent has not disputed; and that since the same has not been set aside it still stands. He added that the Respondent cannot be found at all its physical places of address including its ordinary place of business at Dewinton Road, and yet all evidence points to the fact that they are operational therefore it points to fraud characterised by misrepresentation to avoid satisfying the judgement.

Counsel further submitted that the Respondent has been involved in acts of evasion as shown by annexure E which shows that the Respondent has not been filing a balance sheet which is evidence of tax compliance. In addition, he added that the Respondent is also in contravention of Section 135 of the Companies Act and the letter from URSB shows that no annual returns have been filed by the Respondent over five years. Similarly, the Respondents did not annex copies of company returns which points to absence of any certified copies of the balance sheet as required by Sections 132 and 135 of the Companies Act.

In reply, counsel for the Respondent submitted that the Applicant did not prove any tax evasion in the Notice of Motion or affidavit in support; and that the Respondent has never been pursued by the relevant body for tax evasion. In addition, he said that the Applicant did not produce evidence of the tax evasion and that the assertions are ridiculous because tax compliance is not done with URSB but rather by URA, and that no evidence from URA has been produced. He added that the said Annexure E is not a conclusive document of all documents filed by the Respondent, but a mere response to a confirmatory search report, therefore there is no tax evasion to warrant lifting of the veil.

In reply to the allegation of fraud, counsel for the Respondent submitted that ⁿ evidence has been adduced to show that the Respondent has gone underground. Annexure E shows the Respondent is still operational. In addition, that the purported proof of alleged fraud from the statement of Adriko Simon is evidence in the main suit prior to the judgment and cannot be a basis to claim that the Respondent has gone underground after judgment, therefore it is an imagination which does not warrant lifting of the veil. He also submitted that fraud is a serious matter that ought to be raised in a normal suit where the grounds are specifically pleaded and he cited authorities in support.

As the allegation that the Respondent cannot be found is merely a submission to the bar since no attempts have been made. He said the application lacks merit and therefore should be dismissed. He added that the Applicant has not attempted to execute against the Respondent.

In rejoinder, counsel for the Applicant submitted that since the application ^w premised on Section 20 of the companies Act, it set the premise for th{ consideration of tax evasion which is a matter of law just like Sections 132 and 13{ of the Act. He added that paragraph 9 of the affidavit in support had thos{ misrepresentations by the Respondent which puts them under the ambits of thJ sections cited above. In response to the allegation that the annexure E 1, ,ol exhaustive, Counsel submitted that it is mere speculation and that the reliance or{ the statements of Adriko Simon peter and churchill ongole was to show a panerr{ of fraudulent misrepresentation.

RULING ^I

I have read and considered the pleadings and submissions of the parties in this matter. The main Issue for determination by this court is whether this is a proper case for lifting the veil of incorporation of the Respondent as prayed by the Applicant.

It is not a disputed fact that the Applicant is the judgement creditor in civil Suit No. 822 of 2015 and that execution has not taken place. whereas the Respondent filed Miscellaneous Application No. 330 of 2020 seeking for extension of time within which to appeal, the same has not been heard and therefore, the substantial appeal has not yet been filed. That notwithstanding, even if there had been an appeal, it is trite law that an appeal does not serve as a stay of execution.

Therefore, the Applicant cannot be deprived of the fruits of their judgment wherf no stay has been granted. I now proceed to the merits of this Application.

AC 22). However, there are instances where the cor?orate veil is lifted and th directors or shareholders are personally held liable because a company has no mi or body of its own. In Digital Disptoy Ltd v Tim construcion company Ltd & ors civil suit No. 21 of 2015, Honourable Justice Mubiru held that the corpora veil is removed where there is impropriety 'associated with the use of the corpora structure to avoid or conceal liability.' The general rule is that a company is a legal person separate from its director{ shareholders, employees and agents therefore, it can sue and be sued in it, oJ capacity as a company (see salomon v A. salomon & company Limited 119g4

L ^o ^o ^o rpor^a ^e Is pro ^d sup>ed for ^un^d r Sect, Ioⁿ)⁰ of th^e Compoⁿ ft ⁿ f the ^t Act, which states that: I

" The High Court may, where a company or its directors are involved in ac including tax evasion, fraud or where, save for a single-member company, th membership of a company falls below the statutory minimum, lifi the corporat, veil. "

In the instant case, the Applicant alleges fraud and tax evasion as the grounds fo lifting of the corporate veil to enable them execute the decree in civil Suit No. g22 of 2015. I will deal with each of the grounds separately.

a. Fraud

Fraud was defined by court in the case of *Fredrick Zaabwe v orient Bank & Others* SCCA No. 4 of 2006 to mean:

the intentional or negligent falsification of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her to surrender a legal right. It is a false or misleading allegation or concealment of that which deceives and it is intended to deceive another so that he or she can act upon it to his or her legal injury. "o

As pointed out by Counsel for the Respondent, the burden of proving fraud is slightly higher than the usual burden in civil matters. In *Kompala Bottlers Ltd Damanico @) Ltd* SCCA No. 22 of 1992, it was held that:

"fraud must be strictly proved and its burden is heavier than one on balance probabilities generally applied in civil matters "

I have taken into consideration submissions from both counsel and in light of the above decision, whereas counsel for the Respondent claims that the Applicant did not plead fraud, paragraph 3 of the Notice of Motion states that the Respondent has fraudulently gone underground in order to avoid execution. The Applicant went ahead to provide evidence of the Respondent's ordinary place of business being at Dewinton Road, and stated that the Respondent Company was no longer at that address, a fact which the Respondent has not disputed or rebutted. The Applicant also went on to mention other online places of business including at the Equatorial Mall and equally stated that the Respondent Company could not be found there. This too was not disputed by the Respondent.

In light of the definition of fraud in *Frederick Zaabwe* (supra), intentional concealment of a material fact amounts to fraud. whereas Counsel for the Respondent contends that the Applicant has not even attempted to "prove it", I find that the attempt just as they stated would be frustrated by the fact the Respondent cannot be found, and yet the evidence from URSB shows that they are still

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operational, a fact that the Respondent confirms. I find that, this, coupled with the evidence in Annexures B and C to the affidavit in support point to a deliberate move to avoid liability although the evidence was given prior to the judgement; but it is only relevant in so far as giving a background to the concealment of movement from the known ordinary place of business. It shows that the Director was using the company as a cloak or sham to hide violation of the law (See *Salmir Jamal & Others V Uganda Oxygen Ltd & 2 Others* [1997] II KA LR 38).

The issue of lifting the corporate veil was further explained in Halsbury's Laws England 4h Edition paragraph 90 that:

" Notwithstanding the effect of a company's incorporation, in some cases the co will pierce the corporate veil in order to enable it to do justice by treating particular company, for the purpose of the litigation before it, as identical with persons who control that company. This will be done not only where there is or improper conduct but in all cases where the character of the company, or t, nature of the persons who control it, is a relevant feature. "

In the instant case, the character of concealing the place of business is a relev feature and therefore, I find that the Applicant has proved the existence of fraud way of misrepresentation and concealment of material facts to avoid execution o the decree. It is therefore a proper case where the corporate veil can be lift pursuant to Section 20 of the Companies Act.

b. Tax evasion

Tax evasion can generally be defined as the illegal non-payment and underpayment of tax and it is aimed at depriving the relevant authorities of th respective amounts to be paid in tax. Tax evasion can also take the form ^o deliberately failing to disclose one's income to the tax authority.

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Without going deeper into whether or not the Respondent evaded tax as a gro for lifting of the corporate veil, I am inclined to agree with Counsel for Respondent that this was not pleaded earlier and therefore could have been afterthought as it was a new issue raised in paragraph 6 of the Affidavit rejoinder.

It is trite law that in a rejoinder, a party is restricted to respond to only new issue raised in the reply, and in this case, the issue had not been raised. In Mutembu, Yusuf V Nagwomu Moses Musambu & Another Election Petition No. 43 o, 2016, the Court of Appeal agreed with the decision of the learned trial Judge whi stated that;

"In the usual practice and procedure under the CPR, the applicant or petitione files an application or petition supported by an affidavit. The respondent replies o answers by filing an affidavit in reply which may raise nsu matters or fresh issu touching the subject matter of the dispute. In such circumstances the applicant petitioner may, as of right, file an ffidavit in rejoinder only to explain or clar the specific new matters or issues mentioned in the ffidavit in reply or answer, A no point is a petitioner or applicant permitted to introduce new pleas in his or he ffidavit in rejoinder so as to alter the basis of his or her claim." I

Following that the Applicant in this case introduced the issue of tax evasion in th affidavit in rejoinder, I will not consider it.

However, since the first ground was proved, the Application is hereby allow with the following orders:

1. The corporate veil of the Respondent is lifted to enable the Applicant execute the decree in Civil Suit No. 822 of 2015.

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- 2. The Respondent's Directors and shareholders are ordered to jointly and severally pay the decretal sum as set out in the decree.
- 3. Costs of the Application are awarded to the Applicant.

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HON. LADY JUSTICE ANNA B. MUGENYI DATED.....

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Prepared on 14 October 2026 · Esheria