



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCCC. NO. 509 OF 2013**

**VIMAL VELJI SHAH.....APPLICANT/DECREE HOLDER**

**VERSUS**

**CHEMAFRICA LIMITED**

**SRUNGARAPU RAJA .....1<sup>ST</sup> RESPONDENT/JUDGMENT DEBTOR**

**SEKHAH.....2<sup>ND</sup> RESPONDENT/JUDGMENT DEBTOR**

**ABOTULA VENKATA SATHYA**

**NARAYANA VASU.....3<sup>RD</sup> RESPONDENT/JUDGMENT DEBTOR**

**VENKAJESWAR RAO.....4<sup>TH</sup> RESPONDENT/JUDGMENT DEBTOR**

**SWASTHIKA INVESTORS**

**LIMITED .....5<sup>TH</sup> RESPONDENT/JUDGMENT DEBTOR**

**BABA ENTERPRISES**

**LIMITED.....6<sup>TH</sup> RESPONDENT/JUDGMENT DEBTOR**

**RULING**

1. The Notice of Motion dated 2<sup>nd</sup> September 2020 pleads that the corporate veil of Chemafrica Limited (Chemafrica) be lifted and its Directors be held personally liable to pay the decretal sum due from the Company.
2. On 25<sup>th</sup> November 2014 Gikonyo J, entered judgment on admission in favour of the Plaintiff against Chemafrica for Kshs.17,000,000/= together with costs. In a separate Ruling, of 22<sup>nd</sup> June 2015, the Judge made an award of interest at 12% per annum in favour of the Plaintiff from the date the principal debt was advanced until payment in full.
3. It is common ground that the debt remains unpaid to date.

4. Following an application by the Plaintiff, Abotula Venkata Sathya Narayana Vasu (Vasu), a director of Chemafrica was orally examined on the affairs and assets of the company. The order directing his oral examination also required him to produce all books, accounts and all other relevant materials relating to the company.
5. It is the Decree holder's contention that notwithstanding that the directors were the actual beneficiaries of the sums advanced, Chemafrica has no intention of honouring the decree. It is asserted that the device of incorporation is being used to cover mischief and deceit by the directors to evade the debt.
6. In an affidavit in support of the Motion, sworn by the Plaintiff on 2<sup>nd</sup> September 2020, he deposes that Vasu concealed material information during the oral examination and the directors of Chemafrica are guilty of improper conduct warranting the piercing of the corporal veil.
7. In reply, Chemafrica states that the Application is an abuse of the Court process as it seeks to encumber directors of the company with debts belonging to the company yet it is a company limited by shares. It reiterates the distinction between a company and its shareholders and states that the Applicant has not demonstrated any improper conduct on the part of the directors.
8. The Court has considered the written arguments made by Counsel for and against the motion.
9. It is common ground that the veil of incorporation can be lifted where its directors are abusing the device of incorporation for a dishonest, illegal or improper purposes or to avoid a debt due from the company (See for instance Nairobi HCCC 1287 of 2000 (unreported) Ultimate Laboratories vs. Tasha Bioservice Limited). But the corporate veil is not to be lifted simply because a company is insolvent and unable to pay its debts. See the discussion in Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd (2002) 1 EA 41.
10. The Application before Court requires that I revisit the oral examination of Vasu so as to establish whether the allegation that the incorporation of Chemafrica has been abused is well founded.
11. In answering to the order that the directors of Chemafrica be orally examined on the assets of the company, the directors were required to produce all the books, accounts and all other relevant materials relating to the company.
12. Chemafrica chose to be represented by Vasu in the oral examination. The highlights of what he told Court are; Chemafrica ceased operations before the end of 2014 owing to reduction of business and the company has no assets and it is saddled with debts to various creditors. It gave a list of 11 creditors who it owed a total of Kshs.18,382,189.00. This list excludes the debt herein, the Decree Holder perceives this as evidence that Chemafrica has no intention of meeting its obligation under the decree here.
13. Vasu produced copies of statements of the accounts of the company at Bank of Baroda which showed a credit balance of USD 49.84 in the dollar account on 9<sup>th</sup> September 2014 and an overdraft of Kshs.16,016,860.00 as at 31<sup>st</sup> October 2016 in a second account.
14. Vasu says he was a sleeping partner in the company and not involved in running its affairs and that the directors were at loggerheads. Asked about the bank balances as at 2017, he said that he could get a statement if given time but added that the status would still be that in the statement.
15. He stated that he had not spoken to Raja Sekhah, a co-director, since April/May 2019 and that the managing director was in a better position to answer questions on the operations of the company in the years 2014 and 2015. As to where the company is currently situated, he told the Court that the office closed in 2016 and the company ceased operations.
16. The session of oral examination is one in which a director or directors of a company ought to candidly and transparently reveal the status of the company. It is in that session that they have an opportunity of persuading the Court that there is no abuse of the veil of incorporation.
17. In this matter, the person who turned up for oral examination was Vasu. Yet he stated that he was not involved in the day to

day running of the company. He was unable to answer questions on the operations of the company in 2014 and 2015 and said the Managing Director would be in a position to do so.

18. A search of Chemafrica at the company's registry shows that as at 1<sup>st</sup> September 2018, Srungarapu Raja Sekhah and Suryadevara Venkajeswar Rao were the other two Directors. Information as to the person who was involved in the daily affairs of the company was not availed. So, the Court poses the question; why did the company chose to keep the person who was directly charged with the day to day operations of the company away from the oral examination and, instead, to allow one who was distant from those the affairs to testify"

19. I hold that there was lack of condour on the part of the directors of the company. As noted by the Decree holder, the accounts of the company for 2016 and 2017 were incomplete. For instance, pages 1, 2, 6, 7, 8, 9 and 10 were missing. Vasu conceded to this. Why would incomplete accounts be produced" The debt is a loan granted by the company to Chemafrica in the year 2012. The onus was on the company to give a full and truthful picture of its state of affairs from that date of the debt to the date of the oral examination of the directors. Only a full and frank disclosure of that state of affairs would exonerate the company from the accusation that the corporate veil was being abused to avoid the debt to the Plaintiff.

20. There is an argument by counsel for the company that the Applicant has not commenced execution against the company and that the Applicant is seeking to lift the veil so as to avoid the inconvenience of executing against the company. This argument is made even against the backdrop of Vasu's own evidence that the company has no assets and ceased operations. What then would execution against the company yield" This submission by the company does not help it explain why a full, frank and candid disclosure of its affairs was not made during the oral examination.

21. The Application of 2<sup>nd</sup> September 2020 is merited and is hereby allowed as prayed. Costs to the Applicant.

**Dated, Signed and Delivered in Court at Nairobi this 2<sup>nd</sup> Day of June 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Nixon: Court Assistant

Ouma for Applicant/Decree Holder



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