Owino v Silicon Consulting Limited & another (Civil Appeal 405 of 2021) [2024] KEHC 9196 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9196 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 405 OF 2021

AC BETT, J

JULY 26, 2024

BETWEEN

IBRAHIM HAGGAI OWINO ..... APPELLANT

AND

SILICON CONSULTING LIMITED ..... 1ST RESPONDENT

ACORN VENTURES LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. W. Murage (SRM) in Nairobi CMC Civil Case No. 8600 of 2019 delivered on 11th June, 2021)

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 15th November, 2019, the 2nd respondent sued the appellant and the 1st respondent for damages in the sum of Kshs. 1,780,000/ for breach of contract, costs of the suit and interest.

2. The 2nd respondent's case was that sometime in the year 2015, it entered into an agreement with the 1st respondent wherein the 1st respondent agreed to transfer 50% of its shareholding to the 2nd respondent at a consideration of Kshs. 5,000,000/ to be paid in six installments with the 1st installment expected to be paid on or before 25th March 2015 and the last installment to be paid on 8th November 2015. In compliance with the terms of the agreement, the 2nd respondent paid Kshs. 1,000,000/ to the 1st respondent's account, a cheque of Kshs. 750,000/ was drawn in favour of the 1st respondent and Kshs. 30,000/ was paid to the appellant via Mpesa on behalf of the 1st respondent. Come 3rd January 2017, the 2nd respondent averred that the appellant informed it that the contract had been frustrated and proceeded to terminate the same and that he personally committed to refund the total amount of

Kshs. 1,780,000/ that had been paid. The 2nd respondent asserted that a debt settlement agreement was executed detailing the repayment instalments which the appellant and the 1st respondent have failed to honour.

3. In an application dated 4th September 2020, the appellant sought to have the suit against him struck out and his name be expunged from further proceedings on the ground that any action that he undertook was in his capacity as a director of the 1st respondent company.

4. The trial court in a judgment delivered on 11th June, 2021 dismissed the application on the grounds that the appellant was part of the negotiations and since he personally received money through his phone, his presence was crucial to enable the court solve questions involved in the suit.

5. Aggrieved by the decision of the trial court, the appellant lodged a memorandum of appeal dated 12th July, 2021 seeking for orders that the ruling dated 11th June, 2021 be set aside and that the appellant's application dated 4th September 2020 be allowed. The appeal is premised on the following grounds;

    a. That the learned trial magistrate erred in law and in fact by failing to consider the submissions of the appellant herein before delivering her ruling.

    b. That the learned trial magistrate erred in law and in fact by failing to hold that it would be highly prejudicial to the appellant herein for the honourable court to lift the corporate veil at this juncture.

    c. That the learned trial magistrate erred in law and in fact by lifting the corporate veil when the 2nd respondent herein had not established any grounds warranting the lifting of the corporate veil.

    d. That the learned trial magistrate erred in law and in fact by failing to hold that the appellant herein was only but a director as such he was improperly enjoined in the proceedings before the lower court.

    e. That the learned trial magistrate erred in law and in fact by failing to hold that the appellant herein was not privy to the contact between the 1st and 2nd respondents herein.

    f. That the learned trial magistrate erred in law and in fact by failing to hold that the appellant herein was only discharging his duties and responsibilities as a director with respect to the contract between the 1st and 2nd respondents herein.

6. The appeal has been canvassed by way of written submissions and parties have filed their respective submissions which are as below.

Appellant's Submissions

7. It is the appellant's submission that the trial court failed to consider his submissions which he feels had it done so, the trial magistrate would have arrived at a different ruling. The appellant further submits that the trial court erred in failing to realize that the appellant was only acting in his capacity as a director of the 1st respondent company in his dealings with the 2nd respondent. He contends that a company is a separate legal entity from its subscribers and he cites the case of Shadrack Obuya Mukanda v Jason Mogaka Otiso (2019) eKLR in that regard.

2nd Respondent's Submissions

8. It is its submissions that the appellant was properly joined in the suit because one, he received a sum of Kshs. 30,000/ to his personal Mpesa account towards the performance of the agreement. Two, the

appellant in his supporting affidavit on pages 76 to 78 of the record of appeal has admitted to playing a key role in the negotiations and three, the appellant rescinded the agreement and acknowledged the owed sums and subsequently committed to refund the total amount of Kshs. 1,780,000/ in his personal capacity.

9. They contend that the presence of the appellant is needed for the determination of the suit and they cite the case of *Uba Kenya Bank Limited v Farm Transport and Technical Services Ltd & 5 others* (2017) eKLR where the court declined to grant the application for removal of the 6th Defendant sued alongside the company and other directors for reasons that the court will only be able to make a proper determination after hearing the parties in the case.

Issue for Determination

10. This court has considered the grounds of appeal, the application dated 4th September 2020 and the ruling delivered on 11th June 2021 and identifies the issue for determination to be whether the appellant acted on his behalf or on behalf of the 1st respondent in the sale of part of the shareholding of the 1st respondent company and the events culminating thereafter.

Analysis

11. It is now settled law that a company is a judicial person and this position was echoed in the case of *Kolaba Enterprises Ltd –v- Shamsudin Hussein Varvani & Another* (2014)eKLR where the court held as follows;

> " It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of Salomon & Co Ltd v Salomon [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities".

12. I have looked at the agreement between the 1st and 2nd respondent in which the 1st respondent agreed to sell half of its shares to the 2nd respondent at a sum of Five Million Kenya Shillings. Though the contract is unexecuted, the events succeeding the drafting of the agreement brought life into the contract hence it is enforceable and in so arriving I resonate with the decision in the case of *Erick Barasa Makokha & 2 others v Neema Ya Mungu Investment Co Ltd* [2021] eKLR where the court held as follows;

> " What, then, is the effect in law of an unsigned contract? Is it enforceable? The life of an unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. The court in, Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J), said as follows, with respect to the effect of an unsigned agreement:
>
> "... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly."

13. That notwithstanding, none of the parties questioned the validity of the contract. In its statement of defence dated 14th January 2020, the 1st respondent expressly admitted that it entered into a contract with the 2nd respondent and did not dispute receiving money from the 2nd respondent pursuant to the contract.

14. In line with the terms of the agreement, the 2nd respondent paid the 1st respondent a sum of Kshs. 1,780,000/ out of which Kshs. 30,000/ was paid directly into the appellant's account, and before the 2nd appellant could complete the payment, the appellant rescinded the contract. The 2nd respondent contends that the appellant pledged personal responsibility for the refund of the already paid sums and it asserts that this can be depicted from the email trail and the unexecuted debt settlement agreement.

15. Though the email trails emanated from the appellant's account, the state of mind of a director has been held to be the state of mind of the company as was observed in the case of *H. L. Bolton (Engineering Co. Ltd v T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held as follows;

> " 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 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 law as such".

16. The unexecuted debt settlement agreement which was a culmination of the correspondences between appellant and the 2nd respondent appears to have been between the 1st and 2nd respondent and in my opinion, this supports the appellant's stand that he was acting in his capacity as a director of the 1st respondent company.

17. There are instances where the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors. These instances are addressed in the Halsbury's Laws of England, 4th Edition para. 90 to be as follows;

> " Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted."

18. The reasoning advanced by the trial court for retaining the appellant as a party in the suit was that his presence was crucial to enable the court solve questions involved in the suit. The instances warranting the piercing of the veil of incorporation are very limited in order to maintain the purpose a company serves in terms of liability as enshrined in the *Companies Act*. These instances were enumerated in *Mugenyi & Company Advocates –v- The Attorney General* (1999)2 EA 199 to be as follows;

> " (i) Where companies are in the relationship of holding and subsidiary companies'

(ii) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;

(iii) In certain matters relating to taxation;

(iv) In the law relating to exchange control;

(v) In the law relating to trading with the enemy;

(vi) In the law of merger control in the United Kingdom;

(vii) In competition of the European Economic Community;

(viii) In abuse of law in certain circumstances;

(ix) Where the device of incorporation is used for some illegal or improper purpose; and

(x) Where the private company is founded on personal relationship between the members."

19. I believe that the reasoning by the trial court for lifting the corporate veil is not within the above listed instances and that the testimony of the appellant can be attained by him being a witness of the 1st respondent company where he is a shareholder. In any event, if at the end of the hearing the court finds it necessary to lift the corporate veil, it can still do so with no prejudice to the parties herein.

Rendition and Final Orders

20. Accordingly, for the reasons set out above, I allow this appeal in toto. Costs shall abide the outcome of the case.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

No appearance for appellant

No appearance for 1st respondent

Ms. Malenya for 2nd respondent

Court Assistant: Polycap Mukabwa