Guardians Worldwide Kenya Limited & another v Bisco Investment Limited (Civil Appeal 53 of 2021) [2023] KEHC 18627 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18627 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 53 OF 2021

SM GITHINJI, J

MAY 25, 2023

BETWEEN

GUARDIANS WORLDWIDE KENYA LIMITED ..... 1ST APPELLANT

NICOLA CACCIATORI ..... 2ND APPELLANT

AND

BISCO INVESTMENT LIMITED ..... RESPONDENT

(Being an appeal from the decision and/or judgment of the Chief Magistrate Court at Malindi (Hon Cm Dr J.Oseko dated 19th February, 2021 in Malindi CmccNo.195 of 2017 Bisco Investment Limited-vs-Guardians Worldwide Kenya Limited & Another)

JUDGMENT

1. On 22nd September 2017, the Respondent instituted a suit before the Malindi Chief Magistrate's Court, CMCC No. 195 of 2017. The Respondent's claim as in an amended plaint dated 28th March 2018 is that it entered into a contract with the Appellant Company to rent some six quad bikes for a period of one year at a monthly rent of Kshs. 70,000/- plus Kshs. 28,000/- for the month of September 2016. The said contract further provided that the Appellant Company would purchase the business, goodwill and the quad bikes at Kshs. 1,850,000/- to be paid on or before 31st March 2017.

2. That the Appellants paid the rent irregularly and refused to pay the purchase price in breach of the contract causing the Respondent to incur loss to the tune of Kshs. 1,920,000/-. According to the Respondent, the Appellants misrepresented themselves by making false promises to lure the former to enter into the contract. The Appellant prayed for orders inter alia specific performance by way of payment of Kshs. 1,920,000/- and damages for breach of contract.

3. The Appellants contested the suit. They filed a joint amended statement of defence dated 10th May 2018.

The Evidence

4. Daniele Scholart (PW1), herein the Respondent's director, testified that upon the 2nd Appellant's request, he agreed to sell his quad bikes at the price of Kshs. 300,000/- each for the first five bikes and Kshs. 350,000/- for the last one. The 2nd Appellant was however to utilize the bikes on a rental basis until February 2017, then pay the agreed purchase price in March 2017. The agreed rent was Kshs. 70,000/-. At the end of it all, the 2nd Appellant failed to pay the purchase price and was in one month rent arrears all amounting to Kshs. 1,920,000/-. He added that he delivered the bikes to the 2nd Appellant's house at Timboni area and that he utilized the bikes since then, of which he even changed their colors.

5. On cross examination, the witness testified that he did not have the original agreement but that the 2nd Appellant signed the agreement on behalf of the 1st Appellant. He told the court that he was not able to repossess the bikes as per the said agreement because the colors had been changed.

6. Kasena Karisa Kenga (PW2) adopted his statement dated 20th April 2018 as evidence in chief. He testified that one Yaa who was the driver of the bikes informed him that they did not have the bikes anymore. On cross examination, he could not identify the Appellant and was not aware of any agreement between the parties. He added that he was not employed by PW1 but he knew that the bikes belonged to PW1.

7. Patrick Juma Chemiati (PW3) equally adopted his written statement dated 31st July 2019 as evidence in chief. He testified that as a manager of a tour company identified as Watamu Safaris, he would hire quad bikes from PW1 until sometime later when he learned that the said bikes had been transferred to the 2nd Appellant. He added that on 13th August 2018, he hired three bikes for his client's excursion and paid cash to one Patrick Yaa, then the 2nd Appellant's employee. On that particular day, he took a video clip of the excursion, which he produced in court as PEXH 10.

8. On cross examination, the witness told the court that he did not have any certificate for the video clip he produced. He was not aware of the agreement between the parties. The witness testified that the registration numbers of the bikes as indicated in his statement was a typographical error.

9. On his part, Nicola Cacciatori (DW1) produced the 1st Appellant's certificate of incorporation and a copy of its CR12 establishing him and one Eunice Ayub Maewa as directors. He testified that the parties to the agreement were the Respondent and 1st Appellant only. That the agreement was first made orally on 19th September 2016 and later reduced to writing, however the same was not signed by either party.

10. He testified that out of the six bikes only four were in good working condition a fact he informed the Respondent. That on 15th February 2017, he wrote a termination letter to take effect on 1st March 2017 but the Respondent failed to collect the bikes or at all respond to the letter.

11. The witness told the court on cross examination that the terms of their oral agreement was to lend five bikes. He was shown the PEXH-1, an agreement in Italian language, which he admitted to have signed. The 2nd Appellant also admitted that he was to pay a monthly rent of Kshs. 70,000/- for the bikes and after a period of 12 months, purchase the bikes at 3500 euros and equivalent of Kshs. 350,000/- each. It was his testimony that he made payments via Mpesa and Bank but he did not have the receipts or payment messages in court. The witness added that the said Patrick Yaa used to repair the bikes and as that time, the bikes were stored in his (DW1) yard in Watamu.

12. On re-examination, the witness told the court that he did not agree to purchase the bikes.

13. On 19th February 2021 the Hon. J. Oseko entered judgment in favour of the Respondent for the sum of Kshs. 1,920,070/-. Dissatisfied with that finding, the Appellants filed the present appeal raising a total of eight grounds in a memorandum of appeal dated 9th June 2021, as follows;

    1. That the learned trial magistrate fundamentally erred in both law and fact by unreasonably disregarding and dismissing the defendant's/appellants defence, submissions and the evidence tendered in the subordinate court without evaluating and/or considering in totality the facts and evidence by the Appellants/defendants tendered thereof.

    2. That the learned trial magistrate erred both in fact and in law by basing and/or relying in her judgment in totality on a purported terms of a written agreement between the Plaintiff and the 1st Defendant/1st Appellant and totally failed to take into account that the said contract was not executed by the parties specifically the Plaintiff hence it was unenforceable contract in law as it was contrary to the provisions of section 3 of the *Law of Contract Act* Cap 23 Laws of Kenya.

    3. That the learned trial magistrate erred both in law and in fact by relying on an non existing term of the oral agreement between the 1st Appellant and Respondent specifically that the 1st Appellant was to buy the subject 6 quad bikes at a price of Kshs. 1,920,000/- which term did not exist in the oral agreement between the Respondent and 1st Appellant and the Respondent did not prove its existence during trial.

    4. That the learned trial magistrate fundamentally erred in fact and in law by purporting to rely on terms of an agreement which agreement had been formally terminated by the 1st Appellant on 1st March 2017 vide a notice of termination dated 15th February 2017 and the respondent had willingly failed to take back his quad bikes.

    5. That learned trial magistrate erred both in law and in fact by relying on inadmissible evidence tendered by and/or on behalf of the plaintiff specifically relying on photographic, video evidence and WhatsApp messages which are electronica evidence where no certificates were produced to their effect as envisaged under sections 65 (8), 106A read together with section 106B of the *Evidence Act* Cap 80 Laws of Kenya.

    6. That the learned trial magistrate erred in both fact and law by ordering that the 2nd Appellant/Defendant Nicola Cacciatori to pay the Plaintiff Kshs. 1,920,000/- together with costs of the suit while there was no privity of contract between the Respondent/Plaintiff and the 2nd Appellant/2nd Defendant as the 2nd Appellant had only acted in the contract in his capacity as a director of the 1st Appellant/Defendant.

    7. That the learned trial magistrate fundamentally erred in both fact and law by ordering that the 2nd Appellant/Defendant Nicola Cacciatori to pay the plaintiff Kshs. 1,920,000/- together with costs of the suit while the Respondent/plaintiff had failed to lift the veil of incorporation as provided under the *Company's Act*, 2015.

    8. That the learned trial magistrate erred in both fact and law by holding that the Respondent/plaintiff had proved its claim on balance of probabilities while it is clear that the Respondent/plaintiff had totally failed to discharge the burden of proof as envisaged under section 107 of the *Evidence Act* Cap 80 Laws of Kenya thereby arriving at unjustified, unreasonable and unfair decision.

14. The appeal was canvassed by way of written submissions.

Appellant's Submissions

15. Counsel identified seven issues for determination. Firstly, that the suit before the lower court was incurably defective for offending the provisions of Order 4 rule 2 and 4 of the Civil Procedure Rules, 2010 for lack of a verifying affidavit and board of resolution authorizing Daniele to institute suit on behalf of the Respondent herein. That he had no locus standi to file the suit. Counsel relied on the case of *Affordable Homes Africa Ltd –v- Henderson and 2 others* [2004] eKLR.

16. Secondly, that the subordinate court had no jurisdiction to entertain the suit by virtue of the arbitration clause in the said contract. That a court has no duty to rewrite contracts for parties but only the power to infer, interpret or enforce the intentions of the parties as they are bound by the terms of contract as it was held in *Patricia Bini –v- Melina Investments Ltd and 3 others* [2015] eKLR. Counsel argued that as envisaged under section 10 of the *Arbitration Act*, the court had no authority to interfere with the issues. Counsel relied on the case of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR to buttress this point.

17. Thirdly, that there was no privity of contract between the Respondent and the 2nd Appellant. Relying on the case of *Agricultural Development Corporation of Kenya –v- Nathaniel K. Tum and another* [2014] eKLR; and *Stephen Njoroge Gikera and another v Econite Mining Company Limited and 7 others* [2018] eKLR, counsel submitted that a company being a separate juristic person capable of acting in its own name, the learned trial magistrate erred in holding the 2nd Appellant culpable even when the veil of incorporation was not lifted.

18. Fourthly, counsel argued that the trial magistrate based her decision on an unsigned written agreement contrary to the provisions of section 3 of the *Law of Contract Act*.

19. Fifthly, it was submitted that there was no breach of the oral agreement since it was never agreed that the Appellants were to buy the bikes. That the Appellants paid the rent as required until he terminated the agreement vide a notice served by way of registered mail to the Respondent.

20. Counsel further submitted that the Respondent failed to prove that the Appellants operated the bikes after terminating the contract. That the photographs and videos produced were inadmissible as they failed to meet the threshold of admitting electronic evidence envisaged under sections 65, 78, 106A and 106B of the *Evidence Act*.

21. Finally, counsel urged the court to be guided by section 27 of the *Civil Procedure Act* and find that costs follow the event and allow the appeal as prayed.

Respondent's Submissions

22. Counsel for the Respondent submitted that the issue of existence of the contract was overtaken by events since the Appellants admitted its existence and relied heavily on it to challenge the jurisdiction of the court.

23. To counsel, invocation of sections 65, 106A and 106B was not proper since the photographs and video produced had not been taken for the purpose of the suit but for personal marketing purposes, therefore no need for a certificate.

24. Counsel added that the appeal was filed out of time and inordinately so without leave or any explanation and should therefore be struck out. He argued that the issue of authority and verifying affidavit was never canvassed at the lower court therefore the court cannot grant orders not sought.

Analysis and Determination

25. Having considered the pleadings and evidence before the lower court, the grounds raised in the memorandum of appeal and submissions filed by both parties herein, I find that the following issues arise for determination; -

    1. Whether there was an enforceable agreement between the parties herein to purchase the six quad bikes.

    2. Whether the lower court lacked jurisdiction to entertain the suit by virtue of the arbitration clause.

    3. Whether the electronic evidence is admissible.

    4. Whether there was breach of contract.

    5. Whether there was privity of contract between the Respondent and the 2nd Appellant and in turn whether the 2nd Appellant was properly sued.

26. Before I address the above issues, I note that the Respondent posited in its submissions that the appeal should be dismissed for being filed out of time without leave of the court. It is evident that the impugned judgment was delivered on 19th February 2021 and the memorandum of appeal filed on 10th June 2021, way beyond the 30 days limitation period stipulated under section 79G of the *Civil Procedure Act*. I have perused the entire record of the court; I do not find anywhere that the Appellants sought leave to file the appeal out of time, or that such leave was granted. However, I note that the appeal was admitted for hearing on 28th March 2022. The Respondent never filed any application or objection to have the appeal struck out for that reason. It will in my view be inappropriate to dismiss the appeal at this stage on the technical ground raised at the final stage of submissions.

27. Having said so, I will now proceed to address the issues identified above.

Whether there was an enforceable agreement between the parties herein to purchase the six quad bikes.

28. I have perused the contents of the amended defence, what comes out clearly is that the Appellants did not deny the existence of an oral agreement between the parties herein. At paragraph 8, the Appellants averred that they agreed to reduce the oral agreement into writing. That the 1st Appellant then drafted the agreement but upon forwarding the same to the Respondent, they declined to sign. In essence, the Appellants' argument is that the contract was invalid for failure of execution.

29. However, I have perused the copies of agreements attached by both parties. They appear similar in content. One of the terms therein is that the Appellants were to purchase the bikes as stated by PW1. Indeed, the original agreement drafted in Italian language was signed by both parties. What appears to not have any signatures is the translated version of the agreement. The Appellants did not contest the contents of the translated version of the agreement. In any case, the document was part of their list of documents. The Appellant's contention that there was no signed agreement has no basis whatsoever. Moreover, the 2nd Appellant admitted in cross examination that the 1st Appellant was to purchase the bikes after the agreed rental period. In the circumstances, I hold that there was an enforceable agreement between the parties herein to purchase the six quad bikes.

Whether the lower court lacked jurisdiction to entertain the suit by virtue of the arbitration clause.

30. On this issue I have nothing much to add save for the fact that parties are bound by their pleadings. At Paragraph 25 of the amended defence, the Appellants admitted the jurisdiction of this court. I see no basis to depart from the reasoning of the lower court on this issue.

Whether the electronic evidence was admissible.

31. Section 106A of the *Evidence Act* (Cap 80) provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106B deals with the admissibility of electronic records in the following terms:-

    1. "Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

32. The conditions to be satisfied are provided in sub-section (2) as follows:

    a. "the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

    b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities

    c. throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

    d. the information contained in the electronic record reproduces or is denied from such information fed into the computer in the ordinary course of the said activities.

33. Subsection 4 further provides; -

    " In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

        a. identifying the electronic record containing the statement and describing the manner in which it was produced;

        b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

        c. dealing with any matters to which conditions mentioned in subsection (2) relate; and

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

e. shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

34. Section 78A of the *Evidence Act* on admissibility of electronic evidence also states as follows.

Admissibility of electronic and digital evidence

1. In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

2. The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

3. In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—

a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

b. the reliability of the manner in which the integrity, electronics and digital evidence was maintained;

c. the manner in which the originator of the electronic and digital evidence was identified; and

d. any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

35. I am satisfied that the video clip and photographs taken by PW3 fit within the provisions of section 78A (4) above since they were taken in the ordinary course of his business. The common denominator however in the quoted provisions, is that a certificate of authentication has to produced. PW3 testified that he was the one that recorded the video and photographs but he did not have any certificate to certify the same. I agree with the arguments raised by the Appellant that a certificate had to be produced to authenticate the video recording. In the absence of such a certificate, I admit that the learned trial magistrate erred in relying on the same as it was inadmissible.

36. That notwithstanding, I note that, a fact that was also noted by the learned trial magistrate, the 2nd Appellant admitted to have been in possession of the bikes even at that point. Therefore, inadmissibility of PW3's evidence does not make any major difference to the Respondent's case. This is because, PW3 evidence was meant to demonstrate that the Appellants were still in possession of the bikes.

Whether there was breach of contract.

37. One of the terms of the agreement was that the Appellant Company was to purchase the bikes by 31st March 2017. Undoubtedly, the Appellant did not do so. I say so because one of the Appellants' contention was that they did not agree to purchase the bikes. Having found that there existed an enforceable agreement between the parties, particularly drafted by the Appellants themselves, I am inclined to find that the Appellants were in breach of the contract dated 21st September 2016.

Whether there was privity of contract between the Respondent and the 2nd Appellant and in turn whether the 2nd Appellant was properly sued.

38. It was undisputed that the agreement was between the Appellant Company and the Respondent Company. The Court of Appeal deliberated on the doctrine of privity at length in *Savings & Loan (K) Limited –v- Kanyenje Karangaita Gakombe & Another* (2015) eKLR. The Court rendered itself as follows: -

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus:
>
> > " My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
>
> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lendetia Ltd* (*supr*a), *Kenya National Capitalcorporation Ltd V Albert Mario Cordeiro & Another* (supra) and William Muthee Muthami V Bank Of Baroda, (supra).
>
> Thus in *Agricultural Finance Corporation v Lendetia LTD* (*supra*), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
>
> > " As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."
> >
> > Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in *Shanklin Pier v Detel Products Ltd* (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which

proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In Darlington Bourough Council V Witshire Northen LTD [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.'

39. In the present case, the parties to the agreement were undoubtedly two companies. The law is clear that a company is a separate legal entity or person from its owners unless there has been the lifting of the corporate veil. In *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another* [2014] eKLR the court observed that:

> " 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. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality."

40. In *China Wu Yi Company Ltd –v- Edermann Property Ltd & 2 Otherrs* [2013] eKLR it was stated as follows: -

> " Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman v Saloman & Co Ltd* (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court's attention was drawn to the finding of Ringera J (as he then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor*. HCCC No. 125 of 2002 (unreported) when he stated:
>
> > 'The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.'"

41. Having said that and considering that the corporate veil was not lifted, neither was there any valid reason to lift the veil, I do find that the 2nd Appellant as a director was not a necessary party to the proceedings. The Appellant Company was the only proper defendant.

42. In the ultimate, I see no basis to depart from the lower court's findings save for that the judgment should have been entered only against the Appellant Company, Guardians Worldwide Kenya Limited and not Nicola Cacciatori; To the said extent only, the appeal succeeds. Each party to bear own cost in the appeal.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF MAY, 2023.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Bosire holding brief for Mr Sausi for the Respondent

2. Ms Mulwa holding brief for Mr Kilonzo for the Appellant