



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 39 OF 2012**

**PROTUS OPWORA WABWOTO..... APPELLANT**

**VERSUS**

**KEN MANDA..... 1<sup>ST</sup> RESPONDENT**

**ADRIANO MANDA..... 2<sup>ND</sup> RESPONDENT**

**PATRICK SHITEMI.....3<sup>RD</sup> RESPONDENT**

***(All trading as Kevina Trading Company,***

***Far East Car Bank Trading Company) .....4<sup>TH</sup> RESPONDENT***

***(Being appeal from the judgment and decree of Original Bungoma CMCC No. 269 of 2005 delivered on the 10<sup>th</sup> June, 2010 by R. Nyakundi Chief Magistrate)***

**J U D G M E N T**

By plaint dated 11<sup>th</sup> May, 2005, the Appellant (plaintiff in the magistrate's court) sued the Respondents (defendants in magistrate's court) seeking recovery of Ksh.521,000/-. Costs of the suit and any other relief the court order may consider fit to grant. The appellant's claim was that by written agreement dated 20<sup>th</sup> August, 2000 between the appellant and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondent, the respondents agreed to sell a motor vehicle Nissan Caravan matatu Engine No. VTGL 24-do2940 Registration No. KAM 027R to him at an agreed consideration of Ksh.790,000/-. He paid Ksh.320,000 as deposit and/or payment on that day. He further paid Ksh.106,000/- and spent Ksh.95,000/- on improvement of the motor vehicle. The motor vehicle was later repossessed by M.s Far East Car Bank Trading Company who it turned out were the registered owners of the vehicle. He then averred that the respondent's action of selling him a vehicle they did not own was fraudulent. He gave particulars of fraud as: -

- 1. Misrepresenting important facts that they were owners of motor vehicle registration No. KAM 027R as per the agreement.***
- 2. Obtaining money from the plaintiff when they knew that they were not owners of motor vehicle registration Number KAM 027R purporting to sell that same to the plaintiff while knowing they were not owners.***
- 3. Stamping the agreement and not signing.***
- 4. Concealing important facts from the plaintiff at the time of sale."***

The suit proceeded to full hearing and by judgment dated 10<sup>th</sup> June, 2016 the trial magistrate ruled: -

***"The agreement if any was recorded with Kevina Trading Company Limited as deduced from the documents exhibited.***

***The basis upon which 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were enjoined to this suit are not clear. I also found no cogent and credible evidence to link the said persons to the sale agreement or subsequent dealings on the motor vehicle.***

***What is clear is that payments on the motor vehicle were received by Kevina Trading Company. They also should account for the money and whereabouts of motor vehicle sold to the plaintiff.***

***There is no evidence by the defence to challenge that finding on liability. In the result, I would enter judgment in favour of the plaintiff for Ksh.521,000/- against Kevina Trading Company Limited plus costs and interest at court rates from the date of filing suit.”***

It is this judgment that triggered the appeal by the appellants on the following grounds: -

- i) That the learned trial magistrate erred in law and fact when he dismissed the appellant’s suit against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.***
- ii) That the learned trial magistrate did not appreciate the evidence on record at reaching at his decision.***
- iii) That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the respondents were using KEVINA TRADING COMPANY as a veil to shield themselves.***
- iv) The learned trial magistrate erred in law and fact by granting judgment against KEVINA TRADING COMPANY while knowing or ought to have known same was incapable of being enforced.***

By consent this appeal was canvassed by way of written submissions.

Mrs. Chunge for the appellant submitted that the trial court erred when it failed to lift or pierce the corporate veil of the 4<sup>th</sup> Respondent as a company. Counsel submitted that there was evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents were trading in the name and style of 4<sup>th</sup> respondent and were, therefore, agents of 4<sup>th</sup> respondents. Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents misrepresented facts to the appellants in particular that they were owners of the motor vehicles and executed the said agreement. In executing the agreement they acted fraudulently and used the name of the 4<sup>th</sup> Respondent as a shield from legal obligations and liability. Counsel, therefore, submitted that the trial court erred in finding against that the 4<sup>th</sup> Respondent a company and absolving the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents who received the money as agents.

Mr. Wesusa for the 2<sup>nd</sup> respondent Andriano Manda submitted that there was no evidence adduced by Appellant to connect the 2<sup>nd</sup> Respondent with the transaction or that he received the sum paid. He submitted that the trial court rightly found that the transaction was between the appellant and Kevina a Corporate entity. He, therefore, submitted that the appeal lacks merit and should be dismissed with costs.

This is a first appeal. The duties of the first appellate court are now settled. The court should delve in the evidence presented at the trial analyse the same, evaluate it and arrive at its own independent conclusion but always bear in mind that it did not have the advantage at seeing and hearing the witnesses. This is the principle set out in the **Sielle Vs Associated Motor Boat Co. Ltd (1968) EA 123** where the court stated: -

***“The Appellant court is not bound necessarily to accept the findings of fact by the court below. An appeal to the court of appeal from a trial by the High Court is by way of re-trial and the principles upon which the Court of Appeal acts are that the court must re-consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular court is not about necessarily to follow the trial judge’s finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities meteorically to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”***

The evidence in the trial court from the record was offered by the plaintiff/appellant alone. He testified that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondent had a business based in Mumias where the plaintiff was also working as an Insurance broker. The Respondents were trading in the name of Kevina Trading Company. They sold him motor vehicle KAM 017R and entered into an agreement. The purchase price of the motor vehicle was agreed at Ksh.790,000/-. He paid a total of Ksh.521,000/-. After being in possession of the motor vehicle for 2 months, it was repossessed by an Asian who said the vehicle belonged to him. The appellant on being cross-examined by Kundu for 2<sup>nd</sup> Respondent testified that 2<sup>nd</sup> respondent was working with Kevina Trading Company. He also testified that he paid the money to 2<sup>nd</sup> Respondent although his name is not in the agreement nor did he sign it.

The record shows that 1<sup>st</sup> respondent Ken Manda passed on. The 2<sup>nd</sup> respondent did not call any evidence for the defence and matter was set for judgment.

From the evidence and submissions, there is no dispute that the appellant brought the motor vehicle from Kevina Trading Company. Both parties are satisfied on the finding and judgment against the 4<sup>th</sup> Respondent. Indeed the Appellant has not appealed against that finding. What the appellant appeals against is the finding that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not liable as the matter involved a corporate entity. From the submissions of the appellant, he submits that the trial court should have lifted the veil of incorporation to find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents liable as agents of the company.

In company law, once registration of a company has been successfully completed a legal person separate from its Members is created. With the formation of the company the new entity acquires a veil of incorporation that completely separates the members’ from being held responsible for the liabilities of the company which they have subscribed to. This veil of incorporation blocks the members from being held liable for acts of the company. This principle was set out in the old English case of **Salmon and Salmon & Co. ltd (1897) AC 22**. The effect of this is that there is a fictional veil between the company and its members, protecting them from being personally liable for the companies debts and obligations.

In spite of the fact that a company is a separate legal person, it can only act through human agents. In realization of this, there are situations provided for when the veil can be lifted to see the activities of the persons in the company. Situations have been provided for in the statutes and in other cases by the courts. In Kenya the statutory provisions include: -

- a) Section 33 of the Companies Act whereby a Company's Articles of Membership has been reduced.
- b) Section 3.23 where a company is incorporated with an intention to defraud.
- c) Section 154 where the debtor is a wholly owned subsidiary of the principal debtors.
- d) Section 109 where there is a mis-description of company name.

The other situations where the veil has been lifted by court is where the principle of incorporation has been used to pursue fraudulent activities in the name of the company.

The judicial grounds for lifting the veil includes cases of fraud or improper conduct, when it is used for tax evasion or to circumvent tax obligations, when the shareholders are residents of the enemy county, where the company is a sham, or where it is necessary to protect public interest. In all these statutory and judicial grounds the court can lift the corporate veil.

Lifting of the corporate veil means disregarding the corporate personality and looking behind the real person who are in the control of the company. In other words where a fraudulent or dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality in **United States Vs Milwaukee Refrigerator Company (2004) 122 Comp. Case 4681**) the court said:-

***"A corporation will be looked upon as a legal entity as a general rule... but when the notion of legal entity is sued to defeat public convenience justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons."***

In **Littlewood Mail Stores Ltd Vs Inland Revenue Commissions (IWL 1969 IWL 1214)** Lord Denning observed: -

***"The doctrine laid down in Salmon Vs Salmon & Co. Ltd has to be watched carefully. It has often been supposed to cast a veil over the personality of a limited liability company through which courts cannot see. But that is not true. The courts can and often draw aside the veil. They can and often do pull off the mask. They look to see what lies behind."***

In **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 7 paragraph 9**, the conditions for lifting the corporate veil are indicated as follows: -

***"90. Piecing the corporate veil 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 purposes of 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 person who control it is a relevant feature. In such a case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even agents directors 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 pierced."***

It is, therefore evident from these decisions that the corporate veil is not permanent. The grounds upon which it can be pierced are set out both in the Companies act and also by judicial decisions. The issue of whether the conditions for lifting the veil have been established is a question of fact for each case.

In this case, the appellant testified to how he bought the vehicle from the Kevina Company. Kevina Company dealt with him through the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent on behalf of Kevina Company entered into an agreement for sale of the motor vehicle. He presented to the appellant that the motor vehicle belong to the company and told authority to sell the same. After paying the sum and taking possession for two months the real owners Far East Car Bank Trading company repossessed it from the appellant. That is when it dawned to him that the motor vehicle did not belong to them. All this time Kevina Trading Company had continued receiving monies paid by the appellant for installments as agreed.

The Appellant in his evidence testified that he dealt with the 2<sup>nd</sup> Respondent and in his plaint averred and gave particulars of fraud. None of the defence witnesses testified to challenge this contention. Where it is shown that a person is hiding behind the veil of incorporation to commit an act of fraud, the court will lift this veil. The representation to appellant by 2<sup>nd</sup> Respondent that the Kevina Trading was the owner of motor vehicle or had authority to sell the motor vehicle, the receipt of Ksh.521,000/- towards that purchase by the 2<sup>nd</sup> respondent all the time knowing that they had no legal right to do so was in my view a fraudulent act.

From the evidence, it is clear that in reality it is the 2<sup>nd</sup> respondent rather than the company that perpetuated the fraud. I am, therefore, satisfied that it is the 2<sup>nd</sup> Respondent and others who were the relevant actors behind the veil of Kevina Trading. I, therefore, find that this is a fit case for the court to lift the veil of Kevina Trading Company and find the 2<sup>nd</sup> Respondent Adriano Manda liable for the satisfaction of the decree in Bungoma Civil Case No. 269 of 2005.

The Appellant will have the costs of this appeal and the lower court.

**Dated, signed and delivered at Bungoma this 29<sup>th</sup> day of May, 2020.**

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**S N RIECHI**

**JUDGE**