



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 758 OF 2016

PINNACLE TOURS AND TRAVEL LIMITED.....1ST APPELLANT

EDWARD NJOROGE.....2ND APPELLANT

ZEPHANIA GITAU MBUGUA.....3RD APPELLANT

PEGGY WANGARI KIUNA.....4TH APPELLANT

VERSUS

PAULINE NGIGI T/A SAFARI MARKET TOURS.....RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate – Hon. E. K. Usui

delivered at the Chief Magistrate’s Court on 18th November, 2016

in Civil Case No. 6998 of 2008)

JUDGEMENT

1. By a plaint dated 29/9/2008 the respondent/plaintiff filed suit against appellants claiming –

(1) Kshs.897,939/=

(2) Costs; and

(3) Interests

2. The background of the matter being that the respondent, by a way of a plaint dated 29th September, 2008 instituted the suit herein claiming payment of the specific amount of Kshs. 897,939/= from the appellant herein. The respondent also alleged fraud and unjustified enrichment by the appellants. The respondent alleged that the amount pleaded arose from a contract that was entered into between the respondent and the appellants in 2002 whereby the respondent was to lease buses to the appellants. According to the respondent, the contract terminated in February 2003.

3. The respondent alleged that the appellants partially settled the agreed amounts that were due, but did not settle the outstanding amount claiming in the plaint. On 22nd December 2008, the appellants filed a defence dated 19th December, 2008 wherein the appellants specifically denied the respondent’s claim and put the respondent to strict proof thereof.

4. In its judgement of 18th November 2009, the Chief Magistrate’s Court held that the appellant were truly indebted to the respondent as pleaded in the plaint and awarded the respondent the sum of Kshs.897,939/= plus interest and costs.

5. The appellants, being dissatisfied with the said judgement, appealed to this honourable court against the same in its entirety. The grounds of appeal are as set out in their memorandum of appeal dated 15th December 2016.

6. The appellants opted to argue consolidated grounds namely:-

(i) *Whether the respondent has successfully discharged her evidentiary burden of proof in proving her case against the appellants on a balance of probabilities particularly regarding the alleged amount owed to her by the appellants.*

(ii) *Whether the 2nd, 3rd and 4th sued as directors of the 1st appellant were liable as directors to carry personal liability for the debts of the appellant was wholly liable for the loss of the respondent's goods.*

(iii) *Whether the respondent had adduced sufficient evidence to prove the imputed fraud or illegality by the appellants as required by law.*

(iv) *Whether the learned magistrate grossly erred in his analysis of the case by finding that the respondent was entitled to damages as awarded.*

7. Directions were given that appeal be canvassed by way of submissions of which the parties filed.

APPELLANTS' SUBMISSIONS:

8. The appellant submitted that, the learned magistrate erred in holding that the appellants were indebted to the respondent. It is the appellants' submission that when proving a debt, the party alleging the debt must adduce sufficient evidence as a condition precedent for liability to arise. Such proof was not availed and/or tendered by the respondent. The burden of proof lay on the respondent herein to prove that the appellants owed her the alleged outstanding amount. It is trite law that he who alleges must prove.

9. In the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR* the court held as follows with regard to the burden of proof:

“...As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs.98,200/= the debt being claimed herein.”

10. The respondent pleaded special damages amounting to Kshs.897,939/=, but failed to provide any evidence to prove her claim as required by law. In fact, the respondent did not produce any official documentation proving the alleged outstanding amount claimed to be owed to the respondent by the appellants.

11. Whereas the respondent produced two Local Purchase Orders namely 2723 and 2731, the respondent did not provided any evidence to support her entitlement to payment as required. The respondent did not adduce the required work receipts or invoices which would indicate that the work was done and that the alleged amount is outstanding.

12. The respondent sought to rely on an unofficial document which she purported to be **“a statement of account”** which supposedly set out the calculations of the outstanding amount. The alleged statement did not have a heading or any form of verification it was merely a word document containing calculations.

13. During cross examination, the respondent admitted the aforementioned document was not an official statement or document and that she did not have an official statement setting out the alleged outstanding amount. Furthermore, under cross examination, she admitted that she did not have any invoices or work receipts to prove her claim.

14. The appellants also invite the honourable court to take note that the respondent wrote to the appellants in 2006, three years after the contract was cancelled, asking for the alleged outstanding amount, without attaching any form of documentation indicating that the amount is outstanding.

15. On cross examination, the respondent admitted that she did not have any work receipts to prove her claim. Her claim for the alleged outstanding amount is therefore unsubstantiated and clearly untrue.

16. It rightly follows that in the event the respondent provided the alleged services, had the respondent provided all the work tickets, the Government of Kenya would have paid it in full for the services that it is now claiming from the appellants.

17. In the case of *Francis Muchee Nthiga vs David N. Waweru [2-14] eKLR* the Court of Appeal held as follows with regard to special damages:

“Considering that the plaintiff's claim was based on a contract of employment, it follows that a claim for damages arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be proved as well. Without having been specifically pleaded or proved, the appellant's claim could not have succeeded and the learned magistrate was correct in dismissing it.”

18. In their statement of defence, the appellants unequivocally repudiated the respondent's claim that the services were rendered and also put her to strict proof on the same. It should also be noted that the claims were not fully particularized.

19. It is the appellants' submission that the learned magistrate misdirected himself in determining that the amount claimed was indeed owed, despite not being provided with the particulars. It was also improper for the court to determine the validity of the amounts allegedly owed and consequently infer the appellants' liability to pay the same without sufficient evidence to base its decision.

20. In the case of *Francis Muchee Nthiga vs David N. Waweru (Supra)*, the court held as follows in this regard;

“As things stand there were no particulars of special damages and therefore there was nothing to prove. Without anything to prove the appellant’s suit was stillborn. I would, in the circumstances uphold the learned magistrate’s decision and dismiss the appellant’s appeal with costs.”

21. Notwithstanding the above and without prejudice to the foregoing, in this regard, the appellants submit that the general principle in Company Law is that, a company has a separate personality from the personalities of its shareholders and directors and they are protected from being personally liable for the company's debts and other obligations.

22. The mere fact that, one is a director of a company does not ipso facto make him or her liable for the debts of the company unless circumstances are such that the veil of incorporation can be lifted.

23. The appellants' submission is that this is not a proper case to warrant the lifting of the veil of incorporation. The corporate veil can only be lifted in exceptional circumstances both under express statutory provisions and under judicial intervention principally, if the corporate personality is being used as a mask for fraud or improper conduct.

24. The 2nd to 4th appellants being directors of the 1st appellant in this case have not in any way whatsoever acted fraudulently and or improperly.

25. The Court of Appeal in the case of *Charles Ray Makuto vs Almakony Limited & Another [2016]* has this to say on incorporation:

“It is long standing legal principle that a company is in law a separate person distinct from its members. (See Salomon vs Salomon [1897] AC 78. In Victor Mabachi & Another vs Nurturn Bates Ltd Civil Appeal No. 247 of 2005 [2013] eKLR the court held that a company “as a body corporate, is a *persona juridica*, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil. For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lifting of the veil is a question of fact in each case.”

26. The appellants submit that the respondent failed to particularize her claims in the plaint and witness statement of the appellants having committed fraudulent acts, unjustifiable enrichment and has also failed to adduce any evidence to substantiate her claim against the appellants, consequently she has not discharged the burden of proof as is required.

27. That notwithstanding, section 3(4) of the Evidence Act provides that a fact is not proved when it is neither proved nor disproved. In view of this the fact that the respondent has failed to discharge the burden of proof, the appellants thus submit that the respondent has failed to prove her case against them.

28. The appellant submits that the learned magistrate erred in his determination and analysis of the facts presented before him at the trial.

29. Firstly, the learned magistrate erred in failing to appreciate that the respondent had not sufficiently discharged its burden of proof by providing evidence to support its case and consequently that the respondent had not proved its case on a balance of probabilities.

30. Secondly, the learned magistrate failed to apply his mind to the fact that the 1st appellant is a separate legal entity from the 2nd to 4th appellants and in that regard, the 2nd to 4th appellants who were the directors of the 1st appellant did not carry personal liability for the debts of the company.

RESPONDENT'S SUBMISSION:

31. It should be noted from the proceedings that the appellants did to file any witness statement or documents in compliance with Order 11 of the Civil Procedure Rules despite being given adequate time to do so.

32. During the hearing the respondent adopted her witness statement and referred to the list of documents she had filed and which became exhibits. The appellants' advocate indicated that they were “*not calling any witness.*”

33. The court closed the defence case. This means that the respondent's witness statement and evidence which adopted the statement were unchallenged.

34. As already indicated, the appellants neither filed any witness statements before the trial court nor did they call a witness to testify and support their defence.

35. Consequently the testimony of the respondent in support of her claim was uncontroverted. It stands, in respondent submission as the factual position of the contract between the respondent and the appellants and the appellants' fraudulent acts of defrauding the 1st appellant by transferring its staff and resources to the Pinnacle Tours & Travel (K) Ltd in order to defeat the respondent's claim.

36. On the other hand the appellants' allegations in the defence remain mere allegations which the court should not look at. It is surprising that none of the appellants could record and file a witness statement or even attend court to testify to support the allegations in the defence.

37. In the case of *Kitololo Consultants Ltd vs East Africa Portland Cement Co. Ltd – Milimani HCCC No. 210 of 2005*, the **Honourable Justice Mary Kasango**, giving her view about an unsupported defence stated as follows:

“Although Portland filed a defence in this case it did not adduce evidence in support of that defence. In other words it did not avail a witness in this case. It follows that the defence filed on its behalf, in as far as it relates to rebuttal or denial of Kitololo’s claim, it remains mere allegations, and it cannot be relied upon by Portland.”

38. **Honourable Justice Mary Kasango** again in the case of *D.T. Dobie & Co. Ltd vs Wanyonyi Wafula Chebukati – Mombasa HCCA No. 88 of 2009* cited various previously decided cases supporting her views regarding an unsupported defence and concluded that:

“It follows that appellants defence filed in the lower court remained allegations which had not been proved accordingly. Grounds No. 3, 5, 7 and 8 are hereby rejected. Those grounds are rejected because they wholly relied on appellants’ defence which was not proved by evidence.”

39. The learned magistrate whose judgment is the subject of this appeal stated about the appellants’ defence that:

“Devoid of evidence to support the defence, I find that it is a mere denial and the same is dismissed.”

40. This holding is correct and in accordance with the law as shown by the authorities cited.

EVIDENCE ADDUCED:

41. PW1 Pauline Wanjiku Ngigi stated that she is the plaintiff in the matter. She used to run the buses of Safari Market Tours. She filed her witness statement and list of documents. She wished to rely on them. She claimed a balance still outstanding for a contract given by 1st defendant since 2002 to provide transport for an IGAD meeting.

42. She provided service between 19th October 2002 - February 2003. The company was paid the money by the government. She found out that after investigation. They should have paid what she was claiming. That is why she holds that directors are liable. She asked court to adopt her statement as part of her evidence in chief and her list of documents as exhibits.

43. On cross examination she stated that her claim is per the plaint. She filed a statement indicating amount paid upfront for fuel and drivers’ allowance. She subtracted less advance. She arrived at amount claimed. It is exhibit O in her list.

44. It was attached to a letter she sent to Mr. Njoroge. It is not an invoice. It is not a work ticker. She had an LPO to confirm she was given the contract. She had the letter for the work and one to terminate. She attached cheques for payment. She had received advance payment for fuel and drivers’ allowance.

45. Exhibit 3 in her documents is payment by government. It is payment to Pinnacle Tours and Travel Ltd. it says less unsupported by invoices by work tickets. It was not upon her to make the invoices to the government. She had her invoices and tickets.

46. It was Pinnacle’s work to make the invoices. She was not paid. Pinnacle registered for account of the money she had been given as per the contract. She gave statement. She did not provide any work tickets.

47. On re-examination, PW1 stated that the defendant never raised issue of documents with her. They subcontracted her to provide transport. She had no role to play in invoicing the government. It was upon Pinnacle. She had proved they received well above what she invoiced.

ISSUES

48. After going through pleadings, evidence and parties submissions on record, I find the issues are; ***Whether the respondent has successfully discharged her evidentiary burden of proof in proving her case against the appellants on a balance of probabilities particularly regarding the alleged amount owed to her by the appellants?***

Whether the 2nd, 3rd and 4th sued as directors of the 1st appellant were liable as directors to carry personal liability for the debts of the appellant was wholly liable for the loss of the respondent’s goods?

Whether the respondent had adduced sufficient evidence to prove the imputed fraud or illegality by the appellants as required by law?

Whether the learned magistrate grossly erred in his analysis of the case by finding that the respondent was entitled to damages as awarded?

Analysis and determination:

49. It is trite law that he who alleges must prove. In the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR* the court held as follows with regard to the burden of proof:

“....., in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs.98,200/= the debt being claimed herein.”

50. The respondent pleaded special damages amounting to Kshs.897,939/=, The respondent produced two Local Purchase Orders namely 2723 and 2731 but did not produce the work receipts or invoices which would indicate that the work was done and that the alleged amount was outstanding.

51. The respondent sought to rely on an unofficial document which she called “a statement of account” which supposedly set out the calculations of the outstanding amount. The alleged statement did not have a heading or any form of verification it was merely a word document containing calculations.

52. During cross examination, the respondent admitted the aforementioned document was not an official statement or document and that she did not have an official statement setting out the alleged outstanding amount. Furthermore, under cross examination, she admitted that she did not have any invoices or work receipts to prove her claim.

53. The respondent wrote to the appellants in 2006, three years after the contract was cancelled, asking for the alleged outstanding amount, without attaching any form of documentation indicating that the amount was outstanding.

54. On cross examination, the respondent admitted that she did not have any work receipts to prove her claim. Her claim for the alleged outstanding amount was therefore unsubstantiated and apparently untrue.

55. It submitted and rightly so that, it rightly follows that in the event the respondent provided the alleged services, had the respondent provided all the work tickets, the Government of Kenya would have paid it in full for the services that it is now claiming from the appellants.

56. In the case of *Francis Muchee Nthiga vs David N. Waweru [2-14] eKLR* the Court of Appeal held as follows with regard to special damages:

“Considering that the plaintiff’s claim was based on a contract of employment, it follows that a claim for damages arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be proved as well. Without having been specifically pleaded or proved, the appellant’s claim could not have succeeded and the learned magistrate was correct in dismissing it.”

57. In their statement of defence, the appellants denied the respondent’s claim that the services were rendered and also put her to strict proof on the same. It should also be noted that the claims were not fully particularized.

58. In the case of *Francis Muchee Nthiga vs David B. Waweru (Supra)*, the court held as follows in this regard;

“As things stand there were no particulars of special damages and therefore there was nothing to prove. Without anything to prove the appellant’s suit was stillborn.....”

59. It is contended that the suing of appellants 2,3 and 4 violated the doctrine of separate legal entity of the general principle in Company Law to wit,, a company has a separate personality from the personalities of its shareholders and directors and they are protected from being personally liable for the company’s debts and other obligations.

60. The mere fact that, one is a director of a company does not ipso facto make him or her liable for the debts of the company unless circumstances are such that the veil of incorporation can be lifted.

61. The corporate veil can only be lifted in exceptional circumstances both under express statutory provisions and under judicial intervention principally, if the corporate personality is being used as a mask for fraud or improper conduct.

62. The 2nd to 4th appellants being directors of the 1st appellant in this case have not been demonstrated with evidence to have acted fraudulently and or improperly.

63. The Court of Appeal in the case of *Charles Ray Makuto vs Almakony Limited & Another [2016]* has this to say on incorporation:

“It is long standing legal principle that a company is in law a separate person distinct from its members. (See Salomon vs Salomon [1897] AC 78. In Victor Mabachi & Another vs Nurturn Bates Ltd Civil Appeal No. 247 of 2005 [2013] eKLR the court held that a company “as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil. For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lighting of the veil

is a question of fact in each case.”

64. There were no particulars in respondent claims in the plaint and witness statement of the appellants having committed fraudulent acts, unjustifiable enrichment and no evidence was adduced to prove her claim against the appellants, consequently she did not discharge the burden of proof as is required.

65. That notwithstanding, section 3(4) of the Evidence Act provides that a fact is not proved when it is neither proved nor disproved. In view of this the fact that the respondent failed to discharge the burden of proof her case against the appellants.

66. Secondly, the learned magistrate failed to apply his mind to the fact that the 1st appellant is a separate legal entity from the 2nd to 4th appellants and in that regard, the 2nd to 4th appellants who were the directors of the 1st appellant did not carry personal liability for the debts of the company.

67. Thus the court find that the appeal has merit and makes the following orders ;

i) Appeal is dismissed and parties to bear their costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

C. KARIUKI

JUDGE