



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 288 OF 2012

KENYA BUS SERVICE LIMITED.....1ST APPELLANT

KARANJA KABAGE.....2ND APPELLANT

SAMUEL KIMUCHU GICHURU.....3RD APPELLANT

EDWINS MUKABANA MASSIMBA.....4TH APPELLANT

JOHN PETER MBOGUA.....5TH APPELLANT

VERSUS

P K K.....1ST RESPONDENT

J K (Minor suing by her next Friend

and mother P K K).....2ND RESPONDENT

**(Being an appeal from the ruling and order of the Chief Magistrate T.W.C Wamae delivered on
25th May, 2012 in CMCC No. 3851/ 2004)**

JUDGMENT

1. The Respondents filed suit before the lower court against the 1st Appellant, Kenya Bus Services Limited (herein after the company) seeking damages for injuries sustained in a road traffic accident which occurred on 1st May, 2001. The Appellants were passengers in the company's bus registration number KAG 173H. The Respondents were awarded damages in the sum of Kshs.907,520/= plus costs and interest on 20th September, 2007.

2. The decree remained unsatisfied. Subsequently, the Respondents filed the application dated 22nd September, 2008 where they sought orders to the effect that the directors of the 1st Appellant being the judgment debtor be examined on oath as to the judgment debtors means, property and assets capable of satisfying the decree herein and to produce its books of accounts and other documentary evidence showing the same, failure to which they do satisfy the decree personally jointly and severally. In the

ruling the trial magistrate ordered the judgment debtor's directors to pursue the settlement of the decree with their insurer APA insurance Company within 30 days and in default, the directors do personally and jointly and severally settle the decree.

3. Aggrieved by the decision of the trial court, the Appellants lodged this appeal to challenge it vide an amended Memorandum of Appeal on the grounds that:

“i. The learned Magistrate erred in law and fact in finding the Directors of the company jointly and severally liable to settle the decree obtained against the defendant company contrary to the doctrine of corporate personality where the registered company is deemed to be a legal person distinct and separate from its directors.

ii. The learned Magistrate erred in law and fact in lifting the veil of incorporation in an application filed under Order XX 1 Rule 36 of the Civil Procedure Rules (in place at the material time) when the purpose of such an application is limited to discovery for purposes of execution. Lifting of the veil of incorporation should be pursued under the Companies Act.

iii. The learned Magistrate erred in law and fact in finding the Directors of the company jointly and severally liable to settle the decree obtained against it when there was no proof of fraud or wrong doing on the part of the directors.

iv. The learned Magistrate erred in law and fact in holding the directors of the company personally liable for the decree against it on the basis that they had fraudulently transferred its assets to Bus track Ltd in order to defeat the Respondents decree and numerous decrees against it when there was no evidence to support such a finding.

v. The learned Magistrate erred in law and fact in finding the directors of the company jointly and severally liable to settle the decree obtained against it when there was no iota of evidence that they were its directors at the material time.

vi. The learned Magistrate erred in law and fact in finding the directors of the company jointly and severally liable to settle the decree obtained against it, if its insurer at the material time defaulted in settling the decretal amount within 30 days of the order when this is against the position of the law which allows the decree holder to file a declaratory suit against an insurer.

vii. The learned Magistrate erred in law and fact in finding that the role of the directors be limited to informing its insurer to defend and settle the claim.

viii. The learned Magistrate erred in law and fact in failing to consider the submissions filed on behalf of the appellant.”

4. The appeal was argued by way of written submissions. I have duly considered the said submissions.

5. It is common ground that the 1st Respondent is a limited liability company and therefore a distinct legal entity. As stated by the Court of Appeal in the case of **Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR;**

“[A company] as a body corporate, is *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

A useful discussion on circumstances where a court will be entitled to lift the corporate veil appears at paragraph 402 of Halsbury's Laws of England 4th Edition Vol.7(1) where the learned authors say:

“...or where the court will ‘pierce (or lift) the corporate veil’, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the court’s ‘piercing’(or ‘lifting’) the veil.

Where, however, 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. Nor is the court entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the company will fall on another member of the group rather than the defendant company.”

6. In the case at hand, the application that is the subject of this appeal was expressed to be brought under Order XXI r 36 and 91 of the then Civil Procedure Rules and Section 3A of the Civil Procedure Act. Under the said provision a company’s director or officer can be examined for purposes of executing a decree against the company to see whether the judgment debtor has any property or any means of satisfying the decree. In such an application the court has the inherent power to lift the corporate veil of the company and order the directors to personally pay up. (See for example the case of **Ultimate Laboratories v Tasha Bioservice Ltd Nbi HCCC No. 1287 of 2000 and Abdul Razak Khalfan & another v Pinnacle Tours & Travel Ltd & another [2009] eKLR**). I agree with the Respondents counsel that the court had the discretion to lift the veil.

7. During the hearing of the application before the lower court the 4th Appellant, Edwins Mukabana Massimba identified himself as the managing director of the company. In his evidence he stated that motor vehicle registration number KAG 173H was involved in an accident and the 1st Appellant reported the matter to the Pan African Insurance Company Limited which had merged with Apollo Insurance Company to form APA Insurance. He admitted that as at 1st May 2001, the vehicle was owned by Kenya Bus Service ltd but on 30th April, 2003, it was transferred to Bus Track Ltd. He further conceded that the company (1st Appellant) ceased to operate in 2005 after its property was attached and sold by their creditors and averred that the motor vehicles were sold to satisfy various judgments. On cross examination, he confirmed that the motor vehicle registration number KAG 173H was transferred to Bus Track Ltd. He also admitted that the company (1st Appellant) is still listed as a company though it has no assets and that it is yet to be wound up. He denied that the company (1st Appellant) had transferred its assets fraudulently and requested the court to give him time to follow up with his insurer to pay up.

8. In her ruling the trial magistrate held that the company (1st Appellant) transferred its assets to Bus Track Ltd to defeat the execution of the numerous decrees that had been issued against it. The magistrate found the action of the company (1st Appellant) to be fraudulent. She however took into consideration the plea by the director to follow up with the insurer and gave the company (1st Appellant’s) directors 30 days to pursue the settlement of the decree with the insurer failure to which the directors would be held personally and jointly and severally liable.

9. It is clear from the said proceedings of the trial court that the directors (2nd -5th Appellants) were given an opportunity to attend court and give an explanation why they should not be held liable. The director who attended court shed light on the matter. He had the opportunity to produce whatever evidence he wished to produce in support of his claim. In his evidence he admitted that indeed the 1st Appellant transferred its motor vehicles to Bus Track Limited and the motor vehicle registration number KAG 173H which was the subject of the suit was one of those transferred. The decision of the trial magistrate

cannot be faulted as the said director admitted that at the time the company (1st Appellant's) liabilities were more than the assets and they were forced to dispose off some of the vehicles to pay up decretal sums in various cases. They however did not dispose off the motor vehicle registration KAG 173H which was involved in accident which accident is the subject of this case. The vehicle was taken over by Bus Track Ltd.

10. Following the evidence of the director as presented above, there was an aspect of fraud on how they transferred the motor vehicles to Bus Track Ltd including the motor vehicle in question. It is evident that the Appellants were involved in various court cases between the year 2001 and 2007. It was conceded by the company Director who appeared in court that after the transfer of it's buses to the sister company, Bus Track Ltd, Kenya Bus Service Ltd stopped trading as a result of the said transfer of the motor vehicles. The Respondents could not trace any attachable assets of Kenya Bus Service Ltd. The transfer of the assets defeated the Respondents bid to execute the decree. The transfers were therefore not made in good faith and were used as a mask to cover fraud or improper conduct. The transfer was meant to avoid the settling of the claims in question. The accident the subject matter of this case had already occurred before the Transfer of the motor vehicle in question. The Respondents were therefore among those expected to come up with new claims.

11. In their submissions, both counsels for the respective parties have stated that the sum of Ksh. 907,520/= was paid and only the costs and interest remain unpaid. No explanation has been given by the Appellants why the entire decretal sum has not been paid. It was the Appellants duty to ensure the payment of the entire decretal sum through the company's insurer. Although the Respondents have the option of filing a declaratory suit against the company's insurer, the Respondents also have the various options within the law that are available to them to ensure the full payment of the decretal sum.

12. With the foregoing, I find no merits in the appeal and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 31st day of Jan.,2017

B THURANIRA JADEN

JUDGE