



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT NO. 25 OF 2005

BETWEEN

CHARLES LUTTA KASAMANI trading as

KASAMANI & COMPANY ADVOCATES PLAINTIFF

AND

UNITED INSURANCE COMPANY LIMITED (Under

Statutory Management)..... 1ST DEFENDANT

MBUU HOLDINGS LIMITED 2ND DEFENDANT

KIKI INVESTMENTS LIMITED 3RD DEFENDANT

KIRAGU FAMILY HOLDING LIMITED 4TH DEFENDANT

JOHN KARIUKI MBUU 5TH DEFENDANT

PETER KIRAGU MWANGI 6TH DEFENDANT

GEORGE NGURE KARIUKI 7TH DEFENDANT

ALLAN N. NGUGI 8TH DEFENDANT

JANE W. MICHUKI 9TH DEFENDANT

THE ATTORNEY GENERAL 10TH DEFENDANT

INSURANCE REGULATORY AUTHORITY 11TH DEFENDANT

JUDGMENT

1. The plaintiff's claim is essentially one for fees for legal services rendered to the 1st defendant ("the Company") between the years 2000 and 2004. In the plaint filed on 3rd June 2005, the plaintiff claimed Kshs. 27,761,501.00 based on certificates of costs issued in his favour after his bills of costs against the Company were taxed. He later amended the plaint to include Kshs. 10,838,068.00 being the amount for

untaxed bills of costs. After filing the plaint, the plaintiff applied for and was granted summary judgment for Kshs. 27,761,501.00 against the Company on 6th July 2005. The Company's application to set aside judgment was dismissed.

2. The 2nd, 3rd and 4th defendants are shareholders of the Company. The plaintiff's claim against them is that they benefitted from the Company that was trading while it was undercapitalized. His claim against the 5th, 6th, 7th, 8th and 9th Defendants, who were directors of the Company, was that they knew that the Company was operating below the solvency margins between 1991 to 2004 before it was placed under statutory management. The case against the Insurance Regulatory Agency ("IRA") and its predecessor, the Commissioner of Insurance represented by the Attorney General, was that it was negligent and failed in its statutory duty to protect the plaintiff, insureds and other service providers.

3. In the Further Further Amended plaint dated 11th February 2014 ("the plaint") the plaintiff seeks the following reliefs:

(i) The 1st Defendant's corporate veil be lifted.

(ii) A declaration that the 1st Defendant is insolvent.

(iii) A declaration that the 2nd to 9th Defendant used the 1st Defendant as a cloak to defraud the public and other service providers and are thus jointly and severally liable with the 1st Defendant to the Plaintiff.

(iv) Judgment against the 2nd and the 9th Defendants jointly and severally for Kshs. 27,761,297.80 being taxed costs and Kshs. 10,838,068.60 being work in progress/untaxed bills.

(v) Judgment for the Plaintiff against the 1st to the 10th Defendant jointly and severally for Kshs. 27,761,297.80 being taxed costs.

(vi) Judgment for the Plaintiff against the 1st to the 10th Defendants jointly and severally for Kshs. 10,838,068.60 being the cost of work in progress/untaxed bill or such other sum the Court finds due to the Plaintiff for the balance of the work done/service rendered.

(vii) Interest at 9% per annum from the date of each fee note/certificate of costs till payment in full.

(viii) Costs of this suit with interest at court rates from the date of filing suit until payment in full.

(ix) Interest at court rates on such sums as may be found to be due to the Plaintiff from the date of filing suit until payment in full.

4. The Company denied the plaintiff's claim. It contended that the Company was placed under statutory management by the Commissioner of Insurance under **section 67C(2)(i)** of the **Insurance Act (Chapter 487 of the Laws of Kenya)** on 15th July 2005 and a moratorium on all payments having been declared, the plaintiff could not be paid by the Company. The Company also denied that it owed the plaintiff the amount claimed.

5. The Attorney General acting on behalf of the Commissioner of Insurance ("the Commissioner") also denied the claim. It asserted that the Commissioner conducted his regulatory duties in good faith and never allowed the Company to operate below its authorised statutory margins.

6. Following amendment of the **Insurance Act** by **Legal Notice No. 11 of 2006** which established the IRA and designated the Commissioner as the Chief Executive, the IRA was joined to these proceedings as the 11th defendant. IRA denied the plaintiff's claim in its defence and contended that it was not privy to any fee arrangements between the plaintiff and Company. It stated that its predecessor acted with good

faith and complied with all statutory requirements before placing the Company under statutory management on 15th July 2005

7. The 2nd to 9th defendants denied that the Company continued to trade with the intent to defraud the insuring public and its service providers. They also defended the claim on the basis that they could not be held liable in this suit as directors and shareholders of the Company.

8. All the parties called witnesses. The plaintiff testified. Christopher Onyango (DW 1) testified on behalf of the Statutory Manager. Kalai Musee (DW 2) testified on behalf of IRA while George Ngure Kariuki (DW 3) testified on behalf of the 2nd to 9th defendants. Their testimony mirrored what was stated in their pleadings. The parties also filed written submissions. After hearing the parties and reading their written submissions, it became apparent that the scope of dispute between the parties is narrow as the facts relied on are not in dispute. It is not in dispute that the plaintiff rendered legal services to the Company and is entitled to fees according to the certificates of costs issued by the courts in various cases. It is also agreed that the Company is under statutory management under the provisions of the **Insurance Act** and as a result there is in force a moratorium on all payments by it.

9. It is a matter of record that the Company was already insolvent in 2005. In **R v Minister of Finance ex parte United Insurance Company Ltd KSM HC Misc. App. No. 125 of 2005**, the plaintiff filed an application for judicial review proceedings against the Minister of Finance seeking, amongst others, an order of mandamus directing the Minister to commence, prosecute and conclude winding up proceedings against the Company. Tanui J., granted the order of mandamus on the basis that the Company was insolvent. Despite setting aside the order of mandamus, the Court of Appeal affirmed the finding that the Company was insolvent. In **Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani t/a Kasamani & Co., Advocates KSM CA Civil Appeal No. 281 of 2005 (UR)**, the Court stated as follows:

21. There was in our view, more than sufficient and uncontroverted evidence before the court of the inability of United Insurance to pay its debt. There was a plethora of unsatisfied certificates of taxation. There were cheques that were dishonoured on presentation. There were offers of land in lieu of payment of debt by United Insurance. The finding by the learned judge that United Insurance was unable to pay its debts was well supported by the evidence. As noted by the editors of Palmer's Company Law, the fact that a creditor has made repeated applications for payment and the company has neglected to pay affords cogent evidence that it is unable to pay its debts. There is therefore no merit in this complaint either.

10. As I stated earlier, there is already judgment against the Company for the sum of Kshs. 27,761,297.80. In his written submissions filed on 11th October 2017, the plaintiff abandoned the claim for Kshs. 10,838,068.60 for the untaxed bills. Since liability for fees taxed costs has been settled by judgment entered against the Company and the other claim has been abandoned, the issue I need to resolve is whether the other defendants are liable to pay or settle his legal fees. In doing so, the following questions arise for determination:

(a) Whether the 2nd to 9th Defendant's as shareholders and directors of the Company can be held liable to pay the plaintiff's fees.

(b) Whether the 11th Defendant was negligent and in breach of statutory duties.

11. On the first issue, the principle that a company duly incorporated is a separate person from its directors and shareholders established in the case of **Salomon & Co., Ltd v Salomon [1897] AC 22 [HL]** is still good under Kenyan law. The Court of Appeal in **Victor Mabachi & Another v Nurturn Bates Ltd NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR** held that, “[A company] as a body corporate, is a *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.”

12. The issue in this case is whether the plaintiff can bring himself within the exceptions to the corporate personality rule by establishing that the 2nd to 9th defendants were involved in fraud. The principles regarding the lifting or piercing of the corporate veil are summarised in **Halsbury's Laws of England (4th Ed)** at para 90 as follows:

90. Piercing 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 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, and will consider who are the persons, as 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 pierced.

13. The burden to lift the corporate veil is on the plaintiff and in **Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor [2002] EA 41**, Ringera J., sounded a word of caution when he noted that:

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.

14. Since the plaintiff's case must be founded on fraud in order to pierce the corporate veil, I must turn to the plaint to see whether the claim has been pleaded with particularity as required (see **Arthi Highway Developers Ltd v West End Butchery Limited & Others NRB CA Civil Appeal No. 246 of 2013 [2015]eKLR** at para. 53). In **Vijay Morjaria v Nansingh Madhusingh Darbar & Another Civil Appeal No. 106 of 2000 [2000] eKLR**, Tunoi JA (as he then was) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

15. The claim for fraud is set out in para. 13 of the plaint where the plaintiff avers that, "despite being insolvent, and with the following mortgages, the 2nd to 9th Defendants have continued trading with intent to defraud the insuring public and its service providers" The plaintiff enumerated various securities issued to Kenya Commercial Bank and Credit Bank between 1999 and 2003 for a total of Kshs. 257,250,000.00. The plaintiff did not particularise or explain how these securities were used as an instrument of fraud by the 2nd to 9th defendants. In his testimony, the plaintiff referred to the Company trading by a subsidiary known as Fidei Holdings Limited but the nature and extent of trading through this company was not pleaded as required by law.

16. In **Arthi Highway Developers Ltd v West End Butchery Limited & Others (Supra)** the Court of Appeal adopted the following definition of fraud:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to

another, or by which an undue and unconscientious advantage is taken of another.

17. Viewed against the aforesaid definition of fraud, the pleadings in this case are lacking in particularity. Likewise, the allegations and evidence by the plaintiff falls far short of what is required to prove fraud. Insolvency is an ordinary incident of business and does not, of itself, necessarily connote fraud which would result in piercing the corporate veil (see ***Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor (Supra)***). In this case, the plaintiff did not articulate how each of the 2nd to 9th defendants acted their respective positions to defraud the Company or the public. Equally, the borrowing of money from commercial banks is within the competence of a large insurance company and that, without more, cannot be used to implicate the 2nd to 9th defendants in fraud. Nothing emerged from the evidence that the borrowings were such as to amount to fraud. On the whole, the pleadings and evidence cannot support a finding of fraud against the 2nd to 9th defendants that would entitled the court to pierce the corporate veil. I therefore dismiss the claim against them.

18. I now turn to the case against IRA. I did not understand that the plaintiff's case to be a claim *in rem* for breach of statutory duty and negligence on behalf of insurers and other creditors. As the counsel for IRA pointed out, the claim for fees is between the plaintiff and the Company and the law provides specific procedures for recovery of such fees. In this case, there is already judgment and since the Company has been placed under statutory management, the plaintiff may lodge his claim for payment along with the other creditors in the event the Company is revived or if it placed in liquidation as a result of winding up.

19. The plaintiff's claim against the IRA is also based on negligence and breach of statutory duty. In both cases the plaintiff has to establish breach of some legal duty, either founded on the law generally or on a statute, and that he sustained damages as a result of the breach. Specifically, and in respect of breach of statutory duty, I would like to quote ***Clerk & Lindsell on Torts (18th Ed)*** at paragraph 11-04 which states:

The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute.

20. The plaintiff's claim is one for his fees. His fees are due from the Company to which he rendered legal services and not the IRA. There is no provision in the ***Insurance Act*** or at least none has been shown that contemplates that the IRA shall be liable for or pay an advocate's legal fees upon default by an insurer. Even assuming that the plaintiff succeeded in establishing breach of duty of care and or statutory duty, I doubt that the plaintiff has suffered any loss or damage contemplated in law. He has a judgment for fees due to him against the Company. The legal process is still open to him. The statutory manager has not rejected him claim or otherwise failed to consider it. Since the legal process for recovery has not been exhausted, I find and hold that the plaintiff has not proved loss.

21. Save for the judgment entered for Kshs. 27,761,501.00 against the 1st defendant, I dismiss the plaintiff's suit against the 2nd to 11th defendants with costs.

DATED and DELIVERED at KISUMU this 30th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Kasamani, the plaintiff in person.

Mr Njoroge instructed by Igeria & Ngugi Advocates for the 1st defendant.

Ms Ithondeka instructed by W. J. Ithondeka and Company Advocates for the 2nd – 9th defendants.

Mr Que, State Counsel instructed by the Office of the Attorney General.

Ms Lwande instructed by L.M. Kambuni & Associates Advocates for the 11th Defendant