



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 1194 OF 1997

MUGO MWENJE & SONS LTD.....1ST PLAINTIFF/JUDGEMEN-DEBTOR

PETER NJERU MUGO.....2ND PLAINTIFF/RESPONDENT

ALEXANDER KANG'ETHE MWENJE.....3RD PLAINTIFF/RESPONDENT

-VERSUS -

KENYA NATIONAL ASSURANCE COMPANY LIMITED...DEFENDANT/DECREE HOLDER

RULING

1. The Defendant's application dated 28th September 2015 seeks the following 5 orders;

i) That Peter Njeru Mugo and Alexander Kangethe Mwenje, who are the directors of Mugo Mwenje & Sons Limited, should show cause why the execution of the judgement herein should not be effected against them personally.

ii) That the corporate veil of the Company be lifted, so that the 2 directors be liable to meet the decretal amount.

iii) That the 2 directors be orally examined as to the debts, if any, owed to the Company, and as to what property or means the Company has, for satisfying the decretal amount. The 2 directors could also be required to produce all the documents and books of account pertaining to the affairs of the judgement-debtor.

iv) That the Decree-Holder be permitted to attach and sell the property, Title No. EMBU TOWNSHIP/52, which is registered in the names of the 2 directors. The Decree-Holder also sought to be allowed to attach and sell any other assets of the 2 directors, in satisfaction of the decree.

v) That a Prohibitory Order do issue to stop the 2 directors from transferring or charging the property Title No. EMBU TOWNSHIP/52. It was intended that the Prohibitory Order would also stop all persons from taking any benefit from such purported transfer or charge.

2. The Decree-Holder, **KENYA NATIONAL ASSURANCE COMPANY LIMITED**, was awarded the sum of Kshs. 3,941,116.20 with interest thereon at 18% per annum from the dates when the respective portions of the principal sum were disbursed to the company.

3. Mbaluto J, who was the trial Judge, also awarded the costs of the suit to the defendant, against the Company.
4. The judgement in question was delivered on 30th September 2003.
5. However, the defendant has been unable to recover the decretal amount. It is because the decretal amount was still outstanding that the defendant now wished to have the court lift the corporate veil of the company, so that the 2 directors could be held to account for the outstanding decretal sum.
6. According to the defendant, the judgement-debtor had been a shell company from its inception. It did not have any attachable assets.
7. Therefore, the defendant asserted that the 2 directors of Mugo Mwenje & Sons Limited had knowingly used the shell company to commit fraud against the defendant, by entering into contractual obligations which the directors knew that the company could not honour.
8. It was the defendant's further case that the company had no place of business or assets, and that the company had never conducted business since its inception in the year 1990.
9. In answer to those assertions, the 2nd plaintiff swore an affidavit, denying the contention that the company was a shell. He deponed that the company was a going concern, which had not only a physical address but even a bank account.
10. He exhibited the company's bank statement, to show that the company was transacting business.
11. Meanwhile, the 3rd plaintiff took exception to the allegations of fraud, which had been directed against the company. He pointed out that at the time the company had applied for the loan from the defendant, he had disclosed that he was a director of the defendant.
12. The 3rd plaintiff also pointed out that when the company's application for the loan was being considered by the defendant, he did not participate in the defendant's deliberations.
13. It was the view of the 3rd plaintiff that the minutes which were maintained by the defendant would have helped to demonstrate the fact that the 3rd plaintiff did not participate in the meeting which gave consideration to the company's application for a loan.
14. As the defendant had failed to make available the minutes of the relevant meeting, it was the 3rd plaintiff's view that the defendant's allegations were being made in bad faith.
15. Both the 2nd and 3rd plaintiffs emphasized that it was the defendant which had frustrated the company's investment, by making late disbursements of the loan and also by failing to disburse the whole loan amount of Kshs. 5,000,000/-. They said that the defendant had only disbursed Kshs. 3,931,116.20.
16. In the light of the understanding that the loan would be repaid out of the rental income earned from the project, the plaintiffs reasoned that it was the defendant's actions which frustrated the company's intentions of paying the loan.
17. The project was not completed, as had been anticipated by the company, and the company blames the defendant squarely for the said non-completion.
18. Therefore, the plaintiffs visualize the defendant's application as an attempt by the defendant to take advantage of its own wrongful deeds, to punish the company's directors.
19. In determining this application, I note that the trial Judge had already made a finding that the defendant did not canvass its case for the lifting of the corporate veil, which could have led to the

possibility of the 2nd and 3rd plaintiffs being held liable, alongside the company.

20. To my mind, there is a distinction between the case in which a party was found liable in law, say for a breach of contract, and a situation in which a person was held to account although he/she was not liable for the breach.

21. Whereas the directors were not held liable to compensate the defendant, there could be a possibility that if the corporate veil of the company were to be lifted by the court, the said directors may nonetheless be held to account for the decretal amount.

22. Of course;

“...it is an established rule of evidence that where a party does not come clean in his evidence or is guilty of material non-disclosure, or when his conduct is not above-board, then adverse inference could be drawn against him.

.....

If any of the parties is not open or candid with the court then there would be consequences. Certainly, lack of candour will be held against such a party with fatal consequences?.

23. That is what the Court of Appeal held in Malindi, in **C M A W M Vs P A W M CIVIL APPEAL No. 2 of 2014;**

24. In the circumstances, the failure by the defendant to make available the minutes of the meeting at which the defendant approved the company's application for a loan, may not augur well for the defendant.

25. In the case of **GIVAN OKALLO INGARI & ANOTHER Vs HOUSING FINANCE COMPANY of KENYA LIMITED, Hccc No. 79 of 2007** M.A. Warsame J. (*as he then was*) said;

“In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute?.

26. I believe that line of reasoning is what led the trial court to find that the company could not escape liability when it had not repaid the money it had borrowed from the defendant herein.

27. In this case, the defendant is now alleging fraud. This court wishes to remind the defendant as follows;

“To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding?.

- per the Court of Appeal in **KINYANJUI KAMAU Vs GEORGE KAMAU NJOROGE, CIVIL APPEAL No. 132 of 2005.**

28. There can be no doubt that allegations of fraud must be specifically pleaded and strictly proved.

29. By finding that the directors were not personally liable, the learned trial Judge must be said to have found no proof of the allegations of fraud which had been directed against the said directors.

30. It is thus not open to this court to now interrogate the question as to whether or not the company had been incorporated for the purposes of fraudulently obtaining a loan from the defendant. The company has already been found liable, whilst the directors have already been exonerated from liability.

31. Nonetheless, as Kimaru J. held in the case of **POST BANK CREDIT LIMITED (IN**

LIQUIDATION) Vs NYAMANGU HOLDINGS LIMITED, Hccc No. 2285 of 1996, in relation to Order 22 Rule 35 of the Civil procedure Rules;

“I think the above rule grants this court jurisdiction to summon any officer of a company to attend court so that he may be examined on the assets and means of the company to settle the sum decreed to be paid by the company. By examining such an officer, the court may or may not lift the veil of incorporation?.

32. The learned Judge went on to state that even former directors of the company could be summoned to court, for examination, with a view to establishing whether or not the company had property or other means for satisfying the decree.

33. In this case the directors have indicated that the company was a going concern. The directors have denied the contention that the company was a shell.

34. In the circumstances, I hold the considered view that the directors must be summoned to court, to be examined on oath, concerning the property and other assets of the company, which could be used to settle the decree. In the circumstances, I do order that the directors be summoned to attend court, for examination about the assets of the company. The directors shall produce the company’s records and books of account, together with comprehensive upto-date statements of the company’s bank account.

35. I wish to emphasize the fact that this is not an order for the lifting of the corporate veil. The determination as to whether or not the corporate veil will be lifted will only be made after the directors are given an opportunity to answer the questions from the defendant.

36. Finally, the legal status of the defendant is such a substantive issue that I find it inappropriate to determine as a side-wind, brought about as an answer to the defendant’s application. If the plaintiffs consider it necessary to have the issue determined, I direct that the plaintiffs should move the court, through appropriate proceedings.

37. Meanwhile, the costs of the application dated 28th September 2015 are awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of December 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mutai for the 1st Plaintiff/Judgement-Debtor

.....for the 2nd Plaintiff/Respondent

.....for the 3rd Plaintiff/Respondent

Mrs. Kuria for the Defendant/Decree-Holder

Collins Odhiambo – Court clerk.