



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 45 OF 2012**

**JOSPHAT NYABUTO MOGOKO ..... 1<sup>ST</sup> APPELLANT**

**FUNAN CONSTRUCTION &**

**GENERAL MERCHANTS CO. LTD ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**K- REP BANK LIMITED ..... RESPONDENT**

*(Appeal from the Decree and Order of P.L. Shinyada, SRM delivered at Kisii in Civil Suit No. 575 of 2008)*

**JUDGMENT**

1. This suit was based on the amended plaint dated 20<sup>th</sup> March 2009, in which the first plaintiff was **Josphat Nyabuto Mogoko** (herein, the first appellant) and the second plaintiff was **Funan Construction & General Merchants Co. Ltd** (herein, the second appellant). They both sued the defendant, **K-Rep Bank** (herein, the respondent), for orders that the defendant be compelled to allow them to operate their bank A/C No. [particulars withheld] – K-Rep Bank Kisii Branch and to waive the restrictions over its operation.

2. The plaintiffs (appellants) averred that at all material times prior to the institution of this suit the first plaintiff was one of the directors of the second plaintiff and the authorized signatory to the bank account aforementioned, but on the 7<sup>th</sup> November 2007, was arrested while withdrawing money from the account. He was subsequently charged with the offence of stealing contrary to S.275 of the Penal Code vide Nairobi CMCC No. 1865 of 2007. However, he was discharged on the 19<sup>th</sup> August 2008, under S.202 of the Criminal Procedure Code.

3. The plaintiffs further averred that prior to being charged in court, the material bank account had been rendered inoperative by the defendant pending the hearing and determination of the criminal case. As a result, the plaintiffs were personally and professionally immobilized as a construction company. They therefore prayed for judgment against the defendant in terms of the orders referred to hereinabove together with costs of the suit.

4. The defendant (respondent) countered the plaintiffs' allegations against itself by filing a statement of defence dated 21<sup>st</sup> April 2009, in which it denied the allegations but admitted that the first plaintiff was indeed arrested and charged with a criminal offence at a Nairobi Court.

The defendant denied that the first plaintiff was a director of the second plaintiff and the authorized

signatory of the material bank account.

5. The defendant also denied that the plaintiffs were the holders of the material account and if at all they were, it (defendant) contended that the account was unlawfully and irregularly operated by the first plaintiff resulting in his arrest and prosecution.

The defendant therefore prayed for the dismissal of the plaintiffs' case with costs.

6. At the trial, the first plaintiff testified that he was the Managing Director of the second plaintiff, Funan Construction and General Merchants Ltd. He was one of the three directors of the company alongside Stela Nyamaiya and Julius Kinaiya Mogoko. They opened the material account at the defendant's Kisii branch in 2007 and in doing so, they submitted all the required documents including national identity card, certificate of registration, Articles of Association respecting the second plaintiff as well as its P.I.N number (P. Ex 1 – 3).

7. The first plaintiff testified that the Certificate of Incorporation was in the name of Funan Construction and general merchants Ltd and the account was No. [particulars withheld] but the cheque book issued to him bore the name Funan Construction Co. Ltd. He produced a cheque leaf No. 50015 (P.Ex 4) and explained that the Ministry of Youth affairs had paid him Kshs. 1.76million for constructing a workshop for them. A cheque (P.Ex 5) was drawn in the name of Funan Construction Co. Ltd and when it matured, he made money withdrawal on five occasions. However, on the 7<sup>th</sup> November 2007, he was arrested while inside the defendant's bank on allegation that he was stealing from the bank.

8. The first plaintiff testified further that he was accordingly charged in court but was eventually discharged under S. 202 of the Criminal Procedure Code. In the meantime, he could not operate the material account as it had been rendered unoperational by the defendant such that a cheque (P.Ex 7) made in favour of a client was dishonoured yet the account had a credit balance of Kshs. 318,606/90cts. He produced the necessary statement (P.Ex 8) and on the 22<sup>nd</sup> August 2008, met the defendant's legal officer who promised to revert back to him but did not. He produced another statement (P.Ex 9) showing that the account had a debt balance of Kshs. 8,857/20cts yet he never withdrew any money from the account.

9. The first plaintiff contended that the account had never been closed but he could not withdraw any money as the defendant's position was that there was a case in court. He pleaded with the trial court to allow him to operate the material account. He did not call any witness to support his case.

10. The defendant through its Kisii Branch Manager, **Isaac Ngeroine Lekaki (DW 1)**, testified that the plaintiffs opened the material account on 22<sup>nd</sup> September 2007. It was a current account in the name of Funan Construction Co. Ltd whose director was said to be Josephat Mogoko (first plaintiff) who was to operate the account solely although such accounts required a minimum of two signatories. A cheque was deposited in the account by the first plaintiff when it was opened. It was drawn Ministry of Youth Affairs in favour of Funan Construction Co. Ltd for Kshs. 1,724,706/90cts.

11. The defendant testified that the account became operational after the cheque was deposited but it was later discovered that there was another company registered in the name of Funan Construction Co. Ltd and that the first plaintiff had taken a cheque belonging to that company. He was therefore arrested and charged in a criminal court but the case was terminated for lack of attendance of the witnesses yet they (defendant) were not bonded to attend court.

12. The defendant went on to testify that the material account was frozen after they were forced to pay Kshs. 1.7million as compensation. They checked with the Registrar of Companies and found that Funan Construction Co. Ltd was registered in the year 2003 and were the bona-fide owners of the cheque which was deposited into the material account rather than the second plaintiff, Funan Construction and General Merchants Ltd which name was not similar to that in the account opening form.

13. The defendant continued to state that Funan Construction Co. Ltd was in existence and had a total of four (4) directors who did not include the first plaintiff as indicated in a search certificate. They

(defendant) had to freeze the account to protect the remaining funds as they had to pay the proper Funan Construction Co. Ltd in compensation. They paid Kshs. 1,724,706/90cts vide a cheque No. 002279. As at the time the account was frozen it had a credit balance of Kshs. 317,206/90cts.

14. The defendant contended that they lost money through the material account and that the second plaintiff had never opened an account with them. They lamented that it would be unfair for the account to be reopened and called for the dismissal of the plaintiffs' case with costs. They called a witness, **Peter Gacheru Wambogo (DW 2)**, who was a Logistics Manager and director of Funan Construction Co. Ltd.

15. He (DW 2) testified that the company was a family business dealing in construction and was based in Nairobi from where they were normally contracted for jobs in different parts of the country. He confirmed that the first plaintiff was not one of the company's directors and was unknown to him. He said that they carried out a project in 2007 at Nyamagesa Youth Polytechnic whereupon they constructed classes. Thereafter, the payment cheque amounting to Kshs. 1,724,706/90cts was collected by a stranger from the Ministry of Youth Affairs in Nairobi. They lodged a complaint with the Ministry and later learnt that the money was deposited at the defendant bank and about Kshs. 1.4million had already been withdrawn.

16. Peter (DW 2) testified further that the bank compensated them, Funan Construction Co. Ltd, since no other person was entitled to the money payment respecting the project carried out at Nyamagesa Youth Polytechnic.

All the foregoing evidence by both the plaintiffs and the defendant was duly considered by the trial court which ultimately rendered its judgment in favour of the defendant by dismissing the plaintiffs' case with costs.

17. The trial court in its judgment observed thus:-

***“There is no doubt that the second plaintiff is a limited liability company suing and being sued in its own capacity. The first plaintiff was just a director in the said company and a separate legal person from the said company. The 1<sup>st</sup> plaintiff could therefore not purport to bring up any suit in person against the defendant and this has come out clearly in the evidence. His suit against the defendant is incompetent under the law and cannot stand because his testimony clearly shows that it is the second plaintiff who held an account with the defendant herein”.***

18. With regard to the second plaintiff, the trial court concluded that the verifying affidavit deposed by the first plaintiff on behalf of the second plaintiff was incompetent for want of necessary authorization and could not therefore sustain the statement of claim (plaint).

The court also concluded that the second plaintiff was known by the name Funan Construction and General Merchants Co. Ltd, but the account opened with the defendant belonged to Funan Construction Co. Ltd. Therefore, there was no relationship between the second plaintiff and the defendant hence no cause of action against the defendant by the second plaintiff.

19. Being dissatisfied with the judgment of the trial court, both the first and second plaintiffs preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 27<sup>th</sup> March 2012, filed on their behalf by **Zablon Mokuu & Co. Advocates**.

After the hearing of the appeal, learned counsel, **Mr. Magara** holding brief for **Mr. Mokuu**, appeared for the appellants/plaintiffs while learned counsel, **Mr. Anyona**, appeared for the respondent/defendant.

20. The hearing proceeded by way of written submissions and in that regard, both parties filed their respective submissions.

This court has considered the appeal in the light of the supporting grounds and the rival submissions. Its duty was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had

the benefit of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123** and **Williamson Diamonds Ltd Vs. Brown (1970)EA 1**).

21. Accordingly, the evidence for the appellants and the respondent was hereinabove considered and in the opinion of this court the appellants' case against the respondent was clearly unsustainable on both law and facts. This is because a limited liability company is a separate and distinct legal entity from its individual directors (see, **Salomon Vs. Salomon (1897)AC 22**). Therefore, the first plaintiff/appellant could not purport to institute this suit in person on behalf of the second appellant/plaintiff company. He had no "locus standi" to do so. Similarly, he had no "locus standi" to depone a verifying affidavit on behalf of the second appellant without necessary authority.

22. Indeed, in **Elite Earthmovers Vs. Krisha Behal & Sons (2005)1 KLR 379**, the court held that an affidavit by a corporation whether of verification of a plaint or an application thereunder, will be struck out on the ground of being defective and incompetent if it is not authorized and signed by a person who is not only an officer of the corporation but must also be authorized to so sign.

In the present case, it was not demonstrated by the appellants that the first appellant was authorized to depone or sign the verifying affidavit on behalf of the second appellant. In the circumstances, the first appellant's action to bring this suit against the respondent on behalf of the second appellant was legally invalid.

23. As for the second appellant, its suit against the respondent was unsustainable from the beginning for want of a proper and valid verifying affidavit depone by an authorized individual officer of the company.

Be that as it may, there was sufficient undisputed evidence showing that the second appellant, **Funan Construction & General Merchants Co. Ltd**, was a distinct company from **Funan Construction Co. Ltd**.

24. The former company (second appellant) vide its Memorandum and Articles of Association dated 20<sup>th</sup> September 2007 was incorporated on 12<sup>th</sup> October 2007 as per its certificate of incorporation.

The later company (Funan Construction Co. Ltd) was, incorporated on 6<sup>th</sup> October 2003 as per its certificate of incorporation. It was in existence long before the second appellant was formed and had no linkages whatsoever with the first appellant who was a director of the second appellant.

25. The bank account subject of this case was opened on 22<sup>nd</sup> September 2007, a few days before the second appellant was formerly incorporated. The account, most intriguing, was opened by the first appellant in the name of an alien company, Funan Construction Co. Ltd. He therefore held himself out as a director of Funan Construction Co. Ltd and opened the account with an initial deposit of a cheque for the sum of Kshs. 1,724,706/90cts drawn in favour of the company and not the non-existent second appellant.

26. The action by the first appellant of opening the bank account in the wrong name and depositing a cheque which did not belong to him or the second appellant smacked nothing short of fraud. If a mistake had been committed at the time of the opening of the account, why didn't the first appellant and indeed, the second appellant alert the respondent at the right time and why did he go ahead to deposit a cheque which was not made in favour of the second appellant???

27. The issue in this case was not who between Funan Construction Co. Ltd and Funan Construction & General Merchants Co. Ltd was awarded a contract to undertake construction works by the Ministry of Youth Affairs but rather, whether the material cheque was drawn in favour of Funan Construction & General Merchants Co. Ltd (second appellant) to enable it to operate the material account opened in favour of Funan Construction Co. Ltd.

**28.** Obviously, the Ministry of Youth Affairs would not have paid by cheque for construction works not commissioned by itself. So, it issued the material cheque of Kshs. 1,724,706/90cts to the party who undertook the works. This was Funan Construction Co. Ltd and not the second appellant. Therefore, the second appellant through its director, the first appellant, had no rights to operate a bank account which did not bear their name and by purporting to do so, they acted unlawfully as they were not entitled to the money held in the account or even handle a cheque which did not belong to them to conduct any transaction pertaining to the material account.

**29.** Peter Gacheru (DW 2), confirmed that the cheque was due to Funan Construction Co. Ltd from the Ministry of Youth Affairs but was handled by the two appellants to open a wrong account with it and withdraw money therefrom.

The letter dated 16<sup>th</sup> November 2007 from the Ministry of Youth Affairs clearly indicated that the first appellant had no business in handling that cheque for onward transmissions to the respondent or otherwise.

**30.** The arraignment of the first appellant before a criminal court in relation to the material cheque and bank account was a confirmation that the operation of the account by himself or his company was suspect. His acquittal by the criminal court was not on merit but technicality and did not absolve him from any criminal liability that he may have had in connection with the material cheque and account.

**31.** The present claim by the appellants against the respondent was clearly misconceived and devoid of merit. It was therefore rightly dismissed by the trial court which invariably translates to dismissal of this appeal with costs to the respondent.

It is accordingly ordered.

**[Delivered and signed this 8<sup>th</sup> day of December 2016].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Sagwe for Mr. Anyona for Respondent

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