



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 416 OF 2012**  
**JOEL NDEMO ONG'AU**  
**DIRECTOR OF O'JAYS INVESTMENTS LTD.....APPELLANT**  
**VERSUS**  
**LOYCE MUKUNYA.....RESPONDENT**

**JUDGMENT**

1. The Appellant filed this appeal on grounds that:-

- i. *That the learned trial magistrate erred in law and fact in holding that the Appellant had failed to establish that the sum of KShs. 5,399,500/= set aside in 2003 to pay for services provided by the Respondent was spent when indeed there was no money set aside in 2003 but what was carried forward was unpaid suppliers to the tune of KShs. 5,399,500/=.*
- ii. *That the learned trial magistrate erred in law and in fact in holding that the sum of KShs. 5,599,500/= was misappropriated by the Directors of O'jays investments limited when indeed there was no such evidence to that effect.*
- iii. *That the learned trial magistrate erred in law and fact by failing to appreciate that a veil of incorporation is not to be lifted merely because the Appellant company has no assets and thus insolvent.*
- iv. *That the learned trial magistrate erred in law and fact by failing to appreciate the Appellant had not committed any fraud to warrant the lifting of the corporate veil.*
- v. *That the learned trial magistrate erred in law and fact in lifting the corporate veil.*
- vi. *That the learned trial magistrate erred in law and fact by making a finding that the Appellant company was not run diligently and therefore was mismanaged when indeed there was no such evidence.*
- vii. *That the learned trial magistrate erred in law and fact in holding that the Appellant personally be held liable in paying the Respondent.*
- viii. *That the learned trial magistrate erred in law and fact in making a finding that the Appellant was involved in defrauding creditors when indeed there was no evidence of fraud.*
- ix. *That the learned trial magistrate erred in law and fact in making a finding that there was substantial amount of money set aside to pay creditors and the Respondent when indeed what was carried forward in the report was unpaid creditors and not the contrary.*

2. It was the Respondent's case that on 17<sup>th</sup> March, 2003 Respondent and the Appellant entered into a hire agreement whereupon the Respondent was to provide transport services vide her motor vehicle registration number KAG 170V to delegates attending the IGAD Somali National Reconciliation Conference Secretariat. That it was an express term of the agreement that the Appellant would pay a total contract fee of KShs. 636,400/= at the rate of KShs. 7,750/= per

- vehicle per day. On diverse dates between December, 2002 and February, 2003 the Respondent provided transport services in accordance with the agreement and became entitled to KShs. 636,400/=. That in breach of the terms of the agreement, the Appellant failed to pay the Respondent the said amount.
3. The Director of the Appellant Joel Ndemo Ongau was cross-examined. He stated that the Respondent was contracted by the Ministry of Home Affairs to ferry delegates to Eldoret. She was partly paid KShs.98,100/=. The Appellant agreed to pay the Respondent if the Ministry did not pay her. He laid blame on the co-director for non-payment. He stated that in entering the agreement with the Respondent, the directors acted on behalf of the company. He stated that their buses were involved in accidents and were written off but that he had no evidence in support thereof. He stated that the transport income was KShs. 20,565,000/=. That the company incurred costs of KShs. 7,384,789/= implying they were paid one of the items relating to hiring of motor vehicles for KShs. 5,399,500/= relating to the contract between the Respondent and the Appellant dated 17<sup>th</sup> March,2003.
  4. He stated that in the year 2002, the Appellant did not hire any motor vehicles. He stated that the contract showed that KShs.2,115,750/= was owed to suppliers. He admitted that he the Respondent was not paid. Upon hearing the matter, the trial court found in favour of the Respondent and ordered the director to settle the Respondent's decree.
  5. The appeal was canvassed by way of written submissions. It was the Appellants submissions that businesses incur losses which are carried forward to be recouped once a profit is made, losses in a business does not necessarily mean acting fraudulently since the company is a going concern. That the expense of hiring costs does not represent a misappropriation of money but expense incurred and which was partially paid out and balance being part of the Respondent. It was submitted that KShs. 5,399,500/= is not a provision of money set aside but represent expense incurred on hiring cost in which suppliers were partially paid with a balance remaining which included that of the Respondent and carried forward as a creditor. It was submitted that the Appellant has at all times acted in good faith and that there was no proof of fraud.
  6. The Respondent on the other hand referring to **Gower's Principles of Modern Company Law 4<sup>th</sup> Edition at pages 136 to 138** submitted that the law is clear that corporate identity of a company can be pierced in the interest of the company's creditors where the company has not complied with certain provisions of the Companies Act which, historically, were regarded as essential conditions of incorporation or where a company has traded fraudulently. A similar observation made in Halsbury's Laws of England 4<sup>th</sup> Edition Volume 7 (1) was referred to by the Respondent and submitted that the law is prepared to recognize a company an alias of its members when corporate personality is being blatantly used as a cloak for fraud or improper conduct. It was submitted that the directors failed to demonstrate that the company was run diligently and/or that the collapse of the company was beyond their control. The Respondent relied in **HCCC No. 1287 of 2000 Ultimate Laboratories v. Tasha Bioservice Limited Re William c. Leitch Limited (1932) 2CH 71.,Electrowatts Limited v. Countryside Suppliers Limited & Another (2014) eKLR and National Social Security Fund Board of Trustees v. Ankhan Holdings Ltd & Others (2006)eKLR.**
  7. I have considered the submissions tendered and the relevant laws. **Halsbury's Laws of England 4th Edition Vol 7 (1), Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd (2002) 1 EA 41, Pioneer Laundry and Dry Cleaners Ltd v Minister of National Revenue (1939) 4 All ER** as well as **Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor. (2014) eKLR.**
  8. As regards the lifting of the corporate veil, **Paragraph 90 of Halsbury's Laws of England 4th Edition** (supra) details 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".*

9. That position has been visited on many occasions by the Courts in Kenya. Indeed the Plaintiff cited the finding of **Ringera J.** in the **Corporate Insurance** case (supra) which this Court quoted in its Ruling in **China Wu Yi Company Ltd v Edermann Property Ltd & 2 Ors (2013) eKLR** as follows:

*"Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants maintained that in accordance with the principles expounded in the well-known case of Saloman v Saloman & Co Ltd (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court's attention was drawn to the finding of Ringera J (as he then was) in Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor. HCCC No. 125 of 2002 (unreported) when he stated:*

*"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."*

10. Later in that suit this Court detailed:

*"13. The Plaintiff submitted that this case is very much along the lines of Jones & Another v Lipman & Another (1962) 1WLR 832 where Russell J. had held:*

*'... if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company'.*

*It had also referred to the local case of National Social Security Fund Board of Trustees v. Ankhan Holding Ltd & Ors. (2006) eKLR as per Ochieng J. quoting from the decision of Lord Hoffman in Standard Chartered Bank v. Pakistan National Shipping Corporation (2002 Ukhl 43 as follows:*

*'and just as an agent can contract on behalf of another without incurring personal liability, as an agent can assume responsibility on behalf of another for the purpose of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.*

*This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable'."*

11. In 2013 my learned brother **Mabeya J.** expressed his view on the topic in the case of **Multichoice Kenya Ltd v Mainkam Ltd & Anor.** (2013) eKLR wherein he detailed:

*"I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity."*

12.Perhaps the most recent decision of the High Court as cited by the Plaintiff in this connection is the finding of my learned brother, **Gikonyo J.** in the **Kolaba Enterprises** case (supra). The Judge detailed as follows:

***“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. ”***

13.Since there was a claim for dishonesty and fraud on the part of the Appellant which claim was not sufficiently controverted, I am of the view that the trial court was correct in its holding. The Appeal is dismissed with costs to the Respondents.

Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of February, 2015

J.K.SERGON

JUDGE

In the presence of:

Ondego h/b for Nyakiangara for the Appellant

Kabaiko for the Respondent