IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 2 OF 2014

BETWEEN

VALENTINE OPIYO ……..……. 1ST APPELLANT

VALEOPO GENERAL AGENCIES LTD ……..…. 2NDAPPELLANT

AND

MASLINE ADHIAMBO

t/a ELLYAMS ENTERPRISES ……...…….. RESPONDENT

(Appeal from the original judgment and decree in Civil Case No. 157 of 2013 at the Senior Principal Magistrates Court at Rongo, Hon. Z. J. Nyakundi, Ag. SPM, dated 14th January 2014)

JUDGMENT

1. The appellants appeal against a judgment entered against them jointly and severally for the sum of Kshs 792,742/= for goods sold and delivered together with interest thereon and costs.

2. In this judgment, where the context admits, I shall refer to the parties as they were referred to in the subordinate court for ease of reference and clarity. The appellants were the defendants while the respondent was the plaintiff.

3. The plaintiff's claim against the defendants was set out in an amended plaint dated 7th August 2012 in which the plaintiff claimed that the 1st defendant was an employee, servant or agent of the 2nd defendant and had authority to transact business on its behalf. On or about 4th March 2011, the plaintiff entered into a contract with the 1st defendant on behalf of the 2nd defendant for the plaintiff to supply construction and building materials.

4. The plaintiff supplied bags of cement, steel rods, tons of sand, binding wire, nails, timber, roofing nails and ballast which were used for the construction of the Rongo District Development Office, Rongo Town. The plaintiff averred that despite delivery of the material, the 2nd defendant refused to pay for the same despite demand causing the plaintiff to sue for Kshs 486,674/= together with default interest compounded at 5% per month from October 2011 to July 2012 making a total of Kshs 792,742/=. The plaintiff averred that it was agreed that default in payment would attract a penalty interest compounded at 5% per annum.

5. The defendants filed separate statements of defence through the same advocate. They separately

denied the plaintiff's claim and stated that the suit was vexatious, frivolous, misconceived, incompetent and bad in law.

6. The plaintiff testified that in accordance with the agreement she delivered the construction material between March and September 2011. She produced delivery notes dated 23rd August 2011, 31st August 2011, 6th September 2011 and 14th September 2011 acknowledged by the 2nd defendant and invoices totaling to Kshs 486,684/= to support her claim.

7. The second witness, Eliakim Siongo, PW 2, stated that he witnessed the agreement being signed on 27th March 2011. He stated that the reason the agreement was not signed on the 4th March 2011 was that the parties had not agreed on interest. He stated that the parties agreed on interest on 27th March 2011 when the rate of interest was inserted by pen.

8. The 1st defendant testified that he was a director of the 2nd defendant. He confirmed that the parties entered into an agreement but stated that he did not understand when it came into force as it was dated 4th March 2011 and signed on 27th March 2011. He stated that the rate of 5% was inserted by hand and was not binding. He also contended that the agreement did not have a contract sum or period for performance.

9. The 1st defendant admitted that the plaintiff supplied the construction goods but to the best of his knowledge, the 2nd defendant did not owe the plaintiff any money. He stated that the plaintiff would supply the goods and would be paid through cash, M-pesa or cheque for which the plaintiff never issued a receipt. He acknowledged that he received a demand for payment but denied liability.

10. DW2, Morris Okello, was the technical manager for the 2nd defendant and the manager of the construction. He testified that the agreement was signed on 27th March 2011 but that on that date the interest rate was left blank. He admitted that the plaintiff would supply material and the 2nd defendant would make payments but that the outstanding was not paid because the parties stopped communicating.
11. After considering the evidence presented, the learned magistrate made the following findings; that there was an agreement between the parties whose effective date was 27th March 2011 when the parties appended their signatures. That the interest agreed upon in the event of default was 5% per month compounded; that the 1st defendant was perpetuating a fraud and as such both defendants were liable to the plaintiff for goods sold and delivered.

12. The appellants appeal on the following grounds set out in the memorandum of appeal dated 3rd February 2014.

1. *That the learned magistrate erred in law and in fact by ignoring the 1st and 2nd applicants/appellants testimony in chief as contained in their defence.*
2. *That the learned magistrate erred in law and in fact by wholly adopting the plaintiff's case and evidence in toto.*
3. *That the learned magistrate erred in law and in fact by alleging that the 1st and 2nd applicant/appellant are one and the same entity under the law.*
4. *That the learned magistrate erred in law and in fact by alleging that the 2nd applicant/appellant has one single director being the 1st applicant/appellant.*
5. *That the learned magistrate erred in law and in fact by not considering evidential value as contained in the agreement between the applicant/appellants and the respondent.*
6. *That the learned magistrate erred in law and in fact by including matters contained in his Judgment when no party alluded to the same.*
7. *That the learned magistrate erred in law and in fact by not considering the 1st and 2nd appellant/applicants submissions, judicial decisions and authorities presented to him.*

8. *That the learned magistrate erred in law and in fact when he failed to appreciate the totality of the documentary evidence before him.*

13. Both parties filed written submissions and highlighted the same for consideration. As this is a first appeal, the court has the duty to analyze and re-appraise the evidence and come to an independent conclusion having regard to the fact that it neither heard nor saw the witnesses (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

14. From the evidence, I have outlined, it is not in dispute that there was an agreement between two parties for the supply for construction materials. The appellants argue that it was wrong to impose liability on both appellants when a company is a separate and distinct entity from its director. The appellants further argue that the learned magistrate erred in purporting to lift the corporate veil to impose liability on the 1st appellant as fraud was neither pleaded nor proved.

15. On her part, the respondent contends that the 1st appellant was properly sued as he executed the agreement in his personal capacity as an employee and/or agent of the 2nd appellant. He further argues that the agreement was never sealed as no provision was made for signing by directors and or the company secretary. Finally, that the appellant never pleaded that they had been wrongly sued.

16. According to the recitals, the agreement was made between *"VALENTINE OPIYO… on behalf of VALEOPO GENERAL AGENCIES LTD… referred to as "BUYER"* on one part and *"MASELINE ADHIAMBO on behalf of ELLYAM ENTERPRISES referred to as "SELLER" on the other part."* It was executed on 27th March, 2011 by MASELINE ADHIAMBO, Director Ellyams Enterprise and VALENTINE OPIYO, Director of Valeopo Agencies Limited.

17. The agreement was clear that the 1st appellant was acting on behalf of a limited liability company hence it cannot be said that he assumed liability on his own. This is clearly evident from the recital and execution part of the agreement which I have set out above. The principle flowing from corporate personality was established in the well-known case of ***Salomon v Salomon*** **[1897] AC 78** where the House of Lords held that a company is in law a separate person from its members. The Court of Appeal in the case of ***Victor Mabachi & Anor 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 jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."*

18. A company as corporate person can act through its agent and the 1st appellant was such an agent. Once again, the general principle is that the agent of a disclosed principle cannot be sued. In ***Anthony FrancisWareheim t/a Wareham & 2 Others v Kenya Post Office Savings Bank*****, NRB CA *Civil Application Nos. Nai 5 & 48 of 2002***, the Court of Appeal unanimously held that, *"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued." Once it was clear that the 1st appellant was acting on behalf of the 2nd appellant, it could not be sued and the suit against him could only be dismissed.*

19. The learned magistrate, while appreciating the legal position that a corporate entity is capable of suing and being sued in its own name and that the directors cannot be sued for acts of the company, purported to lift the corporate veil in order to impose liability on the 1st appellant. The House of Lords in ***Salomon v Salomon*** **(Supra),** recognized that whereas a registered company is a legal person separate from its members, the veil of incorporation may be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity. As regards the lifting of the corporate veil, ***Halsbury's Laws of England*** **(4th Edition)** at Para 90 states that lifting of the corporate veil will be done 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 …."

20. In the subordinate court, the plaintiff did not allege that the agreement or supply was procured by fraud. The learned magistrate therefore erred in making a finding which could not be supported by the pleadings or evidence. In the case of ***Anthony Francis Wareham & Others v Kenya Post Office Savings Bank (Supra)***, *the* Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

21. It was not necessary for the agreement to be under seal, as the agreement was not one of those which are required in law to be executed under seal and attested by the officers of the company. The agreement was drawn by the plaintiff who made provision for signing by the 1st defendant on the company's behalf. She could not therefore rely on the fact that it was not under seal and not attested by officers to argue that the 1st defendant was liable.

22. The respondent contends that appellants did not plead specifically that the 1st appellant could not be sued hence the court should not accept his argument that he was not liable. The defendants pleaded their defence in broad and vague terms incorporated into the rubric of, *"the Plaintiff's suit is vexatious, frivolous, misconceived, incompetent and bad in law …"* This kind of pleading is to be deprecated but in my view, the plaintiff was not prejudiced as it was clear from the evidence, submissions and judgment that the issue of capacity to contract was at the center of the suit. In ***Odd Jobs v Mubia [1974] EA 476***, *the Court of Appeal stated that the trial Court may base its decision on an unpleaded issue where it appears from the course followed at the trial that the issue has been left to the Court for decision.*

23. I therefore conclude that the learned magistrate erred in imposing liability for the agreement on the 1st appellant.

24. The next issue is whether goods were sold and delivered. The supply of good was proved on the balance of probabilities by production of delivery notes and invoices. As to whether payment was made, DW1 and DW2 acknowledged that the 2nd defendant owed some money but they did not know how much. The 2nd defendant did not file a set-off or prove that it paid some money. On the basis of the delivery notes and invoices No. 30, 31, 32, 35, I find that the plaintiff sold and delivered goods amounting to Kshs 486,674/= to the 2nd defendant for which the 2nd defendant failed to pay.

25. I would also add that I do not any merit in the appellants' arguments that the contract did not have a time period or that it there was no agreement for specific goods to be delivered. The agreement was for the supply of goods to be ordered. Each order was evidenced by delivery notes setting out the items supplied and received and invoices indicating the price of the goods. The 2nd defendant did not deny delivery nor contest the fact that the items did not cost the price stated by the plaintiff. It did not respond to the plaintiff's demand letter. Its defence was a mere denial. There is also no merit in the argument that the contract commenced on 27th March 2011 and not 4th March 2011 as all deliveries, which were subject of the debt, were made after March 2011.

26. The final issue is whether the rate of interest was agreed upon. Part of the plaintiff's claim was for 5% compound interest on the Kshs 486, 674/-. Clause 3 of the agreement states, "***that failure to which compound interest of <u>5%</u> shall be charged to that effect per month."*** The percentage interest was inserted by hand and therefore the question is whether it was part of the agreement and therefore bending. The appellants contend that there was no tangible evidence that the parties had agreed on the interest.

27. I am not inclined to believe that both PW2 and DW2 witnessed the agreement otherwise they would have appended their signatures on the agreement. I however believe the plaintiff's version of events where she states that the interest rate was filled by hand when the agreement was signed

on 27th March 2011 and not 4th March 2011. In response DW1 stated that he signed the agreement in a hurry. I find this a feeble attempt try and avoid contractual obligations.

28. I find that the 5% interest was part of the agreement and this court cannot re-write the contract in the circumstances of this case. In ***National Bank Of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd And Another*** **(2002) EA 503** the Court of Appeal stated that :-

> *This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.*

The plaintiff is therefore entitled to the claim for interest in accordance with the agreement.

29. In light of the findings I have set out above, I make the following orders;

a. The suit against the 1st appellant is dismissed. The respondent shall bear his costs in the subordinate court and of this appeal.
b. The 2nd appellant's appeal is dismissed with costs to the respondent.

DATED and **DELIVERED** at **HOMA BAY** this 24th day of November 2014.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Mosi and Company Advocates for the appellants.

Mr Anyumba instructed by Duke Onyari and Company Advocates for the respondents.