



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 246 of 2009**

**SUMMER LIMITED ..... PLAINTIFF**

**VERSUS**

**KAKA WHOLESALERS.....1<sup>ST</sup> DEFENDANT**

**RITESH SOBHAG SHAH .....2<sup>ND</sup> DEFENDANT**

**SAIJUL SOBHAG SHAH .....3<sup>RD</sup> DEFENDANT**

**LALJI RAVJI BHUDIA.....4<sup>TH</sup> DEFENDANT**

**RULING**

The defendants sought to have the plaint filed on 8<sup>th</sup> April 2009 struck off and the suit dismissed with costs to the defendants. This application is based on the grounds that the plaintiff's suit is an abuse of the court process because the subject matter contained in the suit filed on 8<sup>th</sup> April 2009 is the same subject matter under the Winding up cause No. 24 of 2008. Further the assertion by Vijay OSHA by way of a verifying affidavit that there is no other suit pending constitutes perjury. Moreover the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are directors of the 1<sup>st</sup> defendant have been sued maliciously in their own capacity.

This application is supported by the affidavit of SAIJUL SOBHAG SHAH. He has annexed a copy of the winding up cause which was filed by the 1<sup>st</sup> respondent and the plaintiff is listed as one of the creditors. According to counsel for the defendants, this suit is an abuse of the court process, as it does not seek to lift the veil of the company which is the only way the directors can be sued.

This application was opposed by the respondent who relied on the affidavit sworn on 9<sup>th</sup> July 2009 by **Suryakant Premchand Shah**. Counsel submitted that the winding up cause is a distinct process which is different from the civil suit. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have been sued because of their personal liabilities as managers of the 1<sup>st</sup> defendants. There are allegations of fraud against the defendants which was perpetuated by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who negotiated for goods and services that were delivered to the 1<sup>st</sup> defendants. The 1<sup>st</sup> defendant issued cheques for payment of those goods and the cheques were signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who were the only persons authorized to operate the 1<sup>st</sup> defendant's accounts. The dishonored cheques are annexed to the affidavit.

It is the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who negotiated for the sale of sugar, while using the 1<sup>st</sup> defendant to mask their own identity. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot hide under the veil in order to defraud the plaintiff for the goods which they ordered. The goods were supplied amounting to over 38 million and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants issued cheques in the accounts of the 1<sup>st</sup> defendants while knowing it had no funds to pay the cheques. There are allegations of fraud and particulars of the fraud on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which they must respond to.

Regarding the winding up petition, counsel submitted that the petition has never been served upon the plaintiff nor has it been advertised from the time it was filed in November 2008. Counsel urged the court to dismiss the application and allow the suit to proceed for hearing.

I have considered the rival submissions as summarized above, there are allegations against the defendants especially the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which are particularized in the plaint. The respondent has been able to demonstrate that the claim raises triable issues requiring this matter to proceed for trial. Those allegations, on whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants used the corporate veil of the 1<sup>st</sup> defendants to hid their identity in the eyes of the law and equity in order to perpetuate the fraud against the plaintiff is a triable issue. Further the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not denied that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted as agents on behalf of the 1<sup>st</sup> defendant and in that case the issue of whether they assumed personal responsibility is also a matter for trial. Moreover, the defendants do not deny that the goods were supplied and they issued cheques that upon presentation for payment in the bank were dishonored.

For the above reasons I am satisfied that there is a cause of action against all the defendants on whether they committed the acts of fraud and misrepresentation. As regards the 1<sup>st</sup> defendants, cheques were issued which were dishonored.

Accordingly the application dated 22<sup>nd</sup> May 2009 is without merit, it is dismissed with costs to the plaintiff.

On the application dated 6<sup>th</sup> July 2009 by way of notice of motion the plaintiff sought for the defence by the 1<sup>st</sup> 2<sup>nd</sup> and the 3<sup>rd</sup> defendants be struck out on the grounds that the defendants are truly and justly indebted to the plaintiff. The defence filed is a mere sham an abuse of the court process and does not disclose any reasonable defence. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants committed fraud against the plaintiff and they are using the company as a shield to hide their identity. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the sole directors of the 1<sup>st</sup> defendant.

This application is supported by the affidavit of Suryakant Premechand Shah sworn on 6<sup>th</sup> July 2009. The plaintiff's claim is for a liquidated sum of 28 million with interest. It is based on the grounds that on the 28<sup>th</sup> March 2008 and 2<sup>nd</sup> April 2008 the plaintiff supplied the 1<sup>st</sup> defendant with sugar amounting to Ksh. 38 million against which the defendants issued various cheques in settlement. All the cheques were signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and upon presentation for payment by the bank they were dishonored. The plaintiff has annexed all those bounced cheques to the supporting affidavit.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the sole directors and shareholders of the 1<sup>st</sup> defendant and they were in full control of the company which was being used to mask the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to avoid their recognition by the law and in the eyes of equity. The particulars of the fraud are stated under paragraph 12 of the affidavit. Counsel urged the court to enter summary judgments against the defendants.

This application was opposed by counsel for the defendants who relied on the replying affidavit of SAIJUL SOBHAG SHAH sworn on 17<sup>th</sup> July 2009. It is contended that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are directors of the 3<sup>rd</sup> defendant which is a limited liability company. At the time the goods were supplied, the two companies were trading in their capacities as companies. The business of the 1<sup>st</sup> defendant experienced problems when the bank recalled the overdraft facilities owned by a sister company. That is why the 1<sup>st</sup> defendant filed the winding up petition so as to reorganize its debts. The defendants have denied the allegations of fraud and contend that they were in genuine business and that is why the plaintiff trusted them with the supply of a huge consignment of goods worth 38 million.

Under the provisions of order 6 r13 (1) 1 it is provided as follows:-

***“At any stage of the proceedings the court may order to be struck out of amended any pleading on the grounds that:***

***(a) it discloses no reasonable cause of action or defence; or***

***(b) ...***

***(c) ...***

***(d) It is otherwise an abuse of the process of court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”***

The primary issue to determine is whether the defence raises triable issues. The claim against the 1<sup>st</sup> defendants is straight forward and is liquidated, and summary judgment can be entered. However the allegations against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants require to be proved through the court room process through examination and cross examination to establish whether they perpetuated the allegations of fraud against the plaintiff while using the veil of the 1<sup>st</sup> defendant. For that reason, I will disallow the application and direct the parties to comply with the pretrial processes within 60 days and fix a hearing date of the suit on priority basis.

Costs of this application will be in the cause.

RULING READ AND SIGNED ON 30<sup>th</sup> OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**