



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 88”B” of 2007

JOHN B.M. MUYA.....APPELLANT

VERSUS

KENYUA NGUNJIRI.....RESPONDENT

(Being an appeal from the whole judgment of Mrs. T.W.C. Wamae (Ag. PM)

delivered on the 8th February, 2007 in NRB CMCC No. 9915 of 2003)

J U D G M E N T

1. This is an appeal arising from a suit which was filed in the Chief Magistrate’s Court at Nairobi by Kenyua Ngunjiri, hereinafter referred to as the respondent. He had sued John B.M. Muya, hereinafter referred to as the appellant, seeking judgment for Kshs.814,293/= together with costs and interests thereon.
2. The respondent’s claim arose as follows. The appellant and the respondent were directors and shareholders of a company known as Safina Limited. Safina Limited had a subsidiary company known as Safina (Nairobi) Limited, (hereinafter referred to as the subsidiary company). The appellant and the defendant were the only directors of the subsidiary company.
3. On the 21st of September, 2001, an extraordinary general meeting of Safina Limited was held, in which it was resolved inter alia, that Safina Limited cease to trade on 30th September, 2001. It was further resolved that the staff members of Safina Limited be paid their terminal benefits and that the subsidiary company be sold to staff members of Safina Limited, at a valuation to be agreed by members of the Board.
4. On 30th September, 2001 the Board of Safina Limited held another meeting in which the debts owed to several people were identified and it was further agreed that the respondent and one Mrs. R.W. Kunyiha be considered as staff members for purposes of computing their terminal dues. Thereafter the appellant and the respondent signed a memorandum of understanding in which it was agreed as follows:

“Following the resolution to cease trading of Safina Limited as at 30th September, 2001, the following amount has been agreed to be the final dues to the non-executive directors as shown:

Mr. Kenyua Ngunjiri 814,293

Mrs. R.W. Kunyiha 338,957

1,153,250

The above amount was to be paid in full by Mr. Muya by 30th November, 2001. To secure this debt, Mr. Muya agreed to sign a blank transfer form of his vehicle KAK 169D. the log book and the signed transfer form will be kept in safe custody by Mr. Ngunjiri together with assignment of the debts Shs.1,343,000/= owed to Mr. Muya by the company.

Mr. Ngunjiri will resign as a director and shareholder of Safina Nairobi Limited after executing these memoranda.”

5. The memorandum of understanding which was dated 30th September, 2001 was duly signed by the appellant and the respondent in the presence of a witness. On the same day, the respondent signed a letter resigning as a director of the subsidiary company with immediate effect. As a result of the above resolution and agreement, the subsidiary company took over the assets of Safina Limited which included motor vehicles KAC 875D and KAA 556N. The respondent explained that in effect the appellant took over the assets of Safina Limited since he was the majority shareholder. The appellant did not however, pay the respondent's dues as agreed. As a result the respondent filed the suit against the appellant.
6. The appellant's defence was that the amount was not due to the respondent, as Safina Limited has never been liquidated, and that the respondent being a non executive director was not entitled to any dues other than the sitting allowance. The appellant claimed that the assets of Safina Limited were sold for cash to the staff in exchange for their terminal dues.
7. In his evidence the appellant explained that the Board of Safina Limited resolved that it should stop trading by 30th September 2001 and thereafter be liquidated by Elkana Mukundi Gatimo and the appellant. It was agreed that the terminal benefits of the employees of Safina Limited be paid in cash and in kind. The appellant maintained that as at 21st September, 2001 he was the only director, the respondent having resigned from his post. He explained that the memorandum of understanding was not part of the resolution of Safina Limited but that it was prepared by the respondent. The appellant signed the memorandum as a result of persistent pressure from the respondent. His understanding was that the dues will be paid if assets of Safina Limited were sold. The appellant testified that Safina Limited was not liquidated, that is why the respondent was not paid. He maintained that the respondent was not entitled to any money as he absconded from Safina Limited and further not being an executive director he was only entitled to sitting allowance.
8. Written submissions were filed on behalf of each party. For the respondent it was submitted that sufficient evidence had been produced in support of the respondent's claim, that the appellant and the respondent were partners in Safina Limited, and that the Board meeting of Safina Limited resolved *inter alia*, that Safina Limited cease trading as at 30th September, 2001. It was further submitted that there was ample evidence that the respondent was owed Kshs.814,293/= by Safina Limited after the assets were disposed of to the subsidiary company. It was maintained that the appellant personally guaranteed the payment of the money to the respondent. The guarantee was confirmed by e-mail addressed to the respondent by the appellant which was produced as plaintiff's exhibit No.10. It was argued that the liquidation of Safina Limited was not a pre-condition for the payment of the debt to the respondent which debt was due for payment on 30th November, 2001.
9. For the appellant, it was submitted that the memorandum of understanding upon which the respondent's case was founded was illegal and void, the parties having usurped the powers of Safina Limited and the subsidiary company, in executing what was a document implementing the decision of the two companies. It was argued that the memorandum was merely an expression of the intentions of the two companies. It could not stand by itself, nor did the parties have the capacity to implement or enforce the memorandum. In this regard, ***Affordable Homes Africa Ltd. vs. Ian Henderson HCCC No. 524 of 2004***, was relied upon.
10. It was further submitted that the memorandum was unenforceable for want of consideration, or for past consideration. It was argued that the appellant did not stand to derive any benefit from paying the respondent the sum of Kshs.814,293/=. The case of ***The Standard Bank Ltd. vs. Mehotoro Farm Limited & 2 Others, EACA No. 54 of 1972*** was relied upon. To the extent that the respondent's claim was for terminal dues for services already rendered to Safina Limited, it was maintained that since the respondent was seeking to enforce a separate agreement against the appellant, that could not form consideration. It was argued that a pre-existing debt cannot form a consideration for a guarantee made in future.
11. It was contended that the respondent did not have any cause of action against the appellant. This was because the evidence revealed that the appellant was acting as a director and shareholder of the two companies. Regardless of his majority shareholding, the appellant could not be held personally liable for benefits that have accrued to either or both of the companies. The old case of ***Salomon & Company Limited vs. Salomon [1897] A.C. 22 H.L.*** was relied upon.
12. Further, it was argued that the memorandum of understanding was frustrated, because Safina Limited, whose liquidation was fundamental to the implementation of the memorandum, was not liquidated. Finally, it was argued that the appellant was coerced into executing the memorandum.
13. In her judgment the trial Magistrate found that there was no dispute that the appellant guaranteed the respondent the payment of Kshs.814,293/= upon the assets of Safina Limited being transferred to the subsidiary company. She further found that the assets of Safina Limited, were actually transferred to the subsidiary company, wherein the appellant was the main shareholder. The trial Magistrate rejected the appellant's allegation of coercion,

contending that the same was not pleaded in his defence. She found that the payment to the respondent was not dependent on the liquidation of Safina Limited. She noted that the payment to the respondent was consideration for services he had rendered to Safina Limited which had ceased trading with the consent of the parties. She therefore entered judgment in favour of the respondent.

14. Being aggrieved by that judgment, the appellant has lodged this appeal raising 4 grounds as follows:

(i) That the Honourable Magistrate erred in law and fact by failing to appreciate that the parties hereto lacked the capacity to enter into the 'agreement'/guarantee/memorandum dated the 30th September 2001 and upon which the respondent's cause of action was premised.

(ii) That the Honourable Magistrate failed to appreciate that the agreement/guarantee/ memorandum dated the 30th September, 2001 was not a contract for want of consideration and/or for having past consideration.

(iii) That the Honourable Magistrate erred in law and fact by ignoring the evidence and submissions adduced and made by the appellant respectively.

(iv) That the judgment delivered fails to conform to the law, both in form and in substance.

15. In arguing the appeal, Mr. Chahenza who appeared for the appellant submitted, that contrary to the understanding of the parties, Safina Limited was never liquidated. The memorandum of understanding could not therefore take effect without the company being wound up. He maintained that the respondent's claim should be directed against Safina Limited which is still in existence. Mr. Chahenza submitted that although there was an intention by the company to wind up voluntarily, this did not take place. The amount of Kshs.814,293/= due to the respondent cannot be said to have been guaranteed by the appellant because the intention of the company was never concluded.

16. Mr. Chahenza maintained that the trial Magistrate erred in finding that the memorandum of understanding was a contract which was binding. He contended that the dues referred to in the memorandum of understanding, were in respect of dues owed to the respondent by Safina Limited over a period of time. Thus there was no benefit which was to be bestowed on the appellant. Relying on the **Standard Bank Limited vs. Mehoto Farm Limited Civil Appeal No. 54**, Mr. Chahenza reiterated that past consideration is not good consideration. The Court was therefore urged to allow the appeal.

17. For the respondent it was submitted that the memorandum of understanding was clear on what was required. This was that Safina Limited cease trading by 30th September, 2001. It was argued that the issue of liquidation was never raised in the lower Court. It was contended that the appellant had conceded that Safina Limited does not trade. It was maintained that the respondent did resign as a director of the subsidiary company and that the appellant took over the running of the subsidiary company which was wholly owned by Safina Limited. The appellant also transferred ownership of Motor vehicle KAC 878D and motor vehicle KAA 556N from Safina Limited to the subsidiary company. It was contended that the respondent performed his part of the agreement in accordance with the memorandum of understanding. The resignation of the respondent was in consideration of the guarantee given by the appellant to the respondent, while the consideration for the appellant was the assets of Safina Limited which he took over. It was argued that the appellant had clearly admitted the debt in the memorandum of understanding. The Court was urged to uphold the judgment of the trial Magistrate as it was consistent with the evidence adduced before her.

18. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. I have also considered the grounds raised in the memorandum of appeal, and the submissions made by the parties. I find that the following facts were not disputed:

(i) That the appellant and the respondent were both directors of Safina Limited and the subsidiary company.

(ii) That the respondent was a non-executive director of Safina Limited.

(iii) That at an extra-ordinary general meeting of Safina Limited held on 21st September, 2001 the shareholders resolved that Safina Limited cease trading by 30th September, 2001.

(iv) It was also resolved by the shareholders that the appellant and one E.M. Gatimo be appointed joint liquidators of the company.

(v) That the appellant and the respondent as directors of the company met as a Board on 30th September, 2001 and considered the way forward which included the liquidation of the company's assets and payment of staff benefits. The

minutes of the Board were produced as plaintiff's Exh.2.

19. I find it clear that the appellant and the respondent signed what they entitled "a memorandum of understanding" on the 30th September, 2001. Although the issues addressed in the memorandum of understanding was a follow up on the resolution by the shareholders of Safina Limited to cease trading, the memorandum of understanding was separate from the transaction carried out at the Board meeting of Safina Limited held on the same day. The document was signed by the appellant and the respondent in their personal capacity and not as directors or shareholders of Safina Limited or the subsidiary company.

20. The memorandum of understanding related to the undertaking by the appellant for payment of the sum of Kshs.814,293/= and Kshs.338,947/= to the respondent and Mrs. R.W. Kunyiha respectively. The payment is indicated in the memorandum of understanding as final dues due to the two as non executive directors of Safina Limited. The issues that arise are:

Whether that memorandum of understanding is a contract which was binding on the appellant; whether there was consideration for the agreement contained in the memorandum of understanding, and whether the appellant stood to gain any benefits therefrom; whether the agreement was illegal or void or frustrated through the non liquidation of Safina Limited.

21. It is not disputed that Safina Limited was a limited liability company. As such the company could only execute its decisions and transact its business through its Board of Directors. The minutes of the Board Meeting held on 30th September, 2001, which were produced as plaintiff's exhibit 2, is an example of the Board of Directors executing the resolution made by the shareholders of Safina Limited on 21st September, 2001 to cease trading. The minutes are signed by the directors and secretary.

22. The resolution of the extra-ordinary meeting of Safina Limited made on 21st September, 2001, was that the company will "cease to trade on 30th September, 2001." On the surface, it appears that that resolution relates to the trading activity of the company only. However, that resolution read together with resolution No.2 which was that all members of staff be paid their terminal benefits, and resolution No.4 which was that John N. Muya and E.M. Gatimo be appointed as liquidators of the company, reveal that the resolution for Safina Limited to "cease to trade" went beyond mere cessation of business activities.

23. It is evident that the shareholders in actual fact resolved to have Safina Limited liquidated and even appointed the liquidators. This was clearly understood by the directors of Safina Limited. Indeed, in the Board meeting of 30th September, 2001, the Board went to great lengths to discuss the assets and liabilities of Safina Limited and the liquidation of the company. The sum of Kshs.814,293/= and Kshs.338,957/= identified as owed to the respondent and R.W. Kunyiha, respectively by Safina Limited were a direct result of the exercise conducted by the directors in identifying the assets and liabilities of Safina Limited. At the meeting held by the Board of Directors on 30th September, 2001 it was decided that the two be considered as staff members for purposes of computing their terminal dues. The memorandum of understanding signed between the appellant and the respondent was an attempt to transfer the liability of Safina Limited with regard to payment of the respondent and Ms. Kunyiha to the appellant. The question is whether the appellant and the respondent could undertake such a decision in their personal capacity without involving the Board of Safina Limited or the shareholders of Safina Limited.

24. The respondent has attempted to justify the memorandum of understanding on the basis that the appellant being the majority shareholder in the subsidiary company to which the assets of Safina Limited were being transferred, he was the beneficiary of the transaction. That argument cannot hold. The appellant merely executed the transfer of the ownership of motor vehicles KAC 878D and KAA 556N from Safina Limited to the subsidiary company in his position as a director of Safina Limited. Safina Limited and the subsidiary company are each separate legal entities in their own right. The fact that the appellant is a director and was a majority shareholder did not in any way change this position. In his e-mail dated 8th October, 2001, which was copied to the respondent, the appellant appears to admit taking responsibility for paying the monies due to the respondent and Ms. Kunyiha. The e-mail shows that the appellant misconstrued his position as majority shareholder to infer complete ownership, making him synonymous with Safina Limited and the subsidiary company.

25. The distinction between a company and its shareholders and directors was settled in the case of *Salmon vs. Salmon & Company Limited* (supra). Neither the appellant nor the respondent have any rights over the assets of Safina Limited, nor do they have any responsibilities over the liabilities of Safina Limited or the subsidiary company other than in their capacity as directors of the company. Thus the memorandum of understanding between the appellant and the respondent in their personal capacity could not confer any liability upon the appellant for the debts of Safina Limited, nor could it confer any personal benefits upon the appellant. There was clearly no consideration for the guarantee given by the appellant in the memorandum of understanding. The respondent had no proper cause of action against the appellant

as the remedy for the debts due to him laid in an action against Safina Limited and not against the appellant.

26. I find that in coming to the conclusion that the appellant was liable to the respondent for the sum of Kshs.814,293/=, the trial Magistrate misapprehended the evidence and the law thereby arriving at a wrong conclusion. That finding cannot stand.

27. The upshot of the above is that I set aside the judgment of the lower Court, and substitute it thereof with an order dismissing the respondent's suit. Given that the appellant was party to the void agreement, I do not find it appropriate to award him any costs. Each party shall therefore bear its own costs both in the lower Court and costs of the appeal.

Dated and delivered this 21st day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Chahenza for the appellant

Gaichu for the respondent

Eric, court clerk