REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 30 of 2003

NATIONAL BANK OF KENYA LTD. ……………...…..……….….….PLAINTIFF

VERSUS

FIRST INTERSTATE TRADING CO. LIMITED ……………..….1ST DEFENDANT

ABDULLAHI ABDI IBRAHIM ……………...……………………2ND DEFENDANT

BILLY JOSEPH MISIOMI OBIRI …………….....................…..…3RD DEFENDANT

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RULING

There are two applications of the same date to strike out the 2nd and 3rd Defendants from this suit on the ground that the Plaint discloses no reasonable cause of action against them.

The jurisdiction to make such an order is under Order 6 rule 13(a) of the Civil Procedure Rules and in such an application no evidence is admissible.

It was Mr. Maina's submission, who appeared in both applications, that the cause of action was against the 1st Defendant, a limited liability company and what the Plaint sought to do was make the two Applicants who are directors of the company, liable for the company's debts contrary to the decision in the well known case of ***Salomon v Salomon & Company Ltd. (1897) AC 22 HC.***

He referred to the case of ***Transnational Bank Ltd. v Elite Communication Ltd. HCCC. No. 2655 of 1996*** in which Njagi J. referred at page 19 of his ruling to the case of Corporate Insurance Co. ***Ltd v Savemax Insurance Brokers Ltd. and another HCCC. No.125 of 2002 (UR)*** where Ringera J (as then was) 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."***

In reply Mr. Kenyariri submitted that the Plaint disclosed a cause of action against the two Applicants on the ground of fraud which is alleged in paragraph 8 of the Plaint in the following terms:-

"***8 The plaintiff avers that the 1st defendant is a "shell" company, a mere façade created by the 2nd and 3rd defendants jointly and severally with the sole intent to defraud the Plaintiff.***

PARTICULARS OF FRAUD BY 1ST, 2ND AND 3RD DEFENDANTS

(a) Dishonestly requesting for bankers cheque of Kshs17,383,748.00 (Seventeen Million, Three Hundred Eighty Three Thousand, Seven Hundred forty only) from the Plaintiff Bank on account of the 1st defendant when they knew that the account had insufficient credit and that the 1st Defendant would eventually fail to discharge the debt.

(b) Overdrawing the account with the Plaintiff bank by Kshs 17,383.748.00 (Seventeen Million three Hundred and Eight Three Thousand Seven Hundred and Forty Eight only) from the Plaintiff bank on account of the 1st Defendant when they knew that the account had insufficient credit

(c) Incurring the debt of Kshs 17,383.748.00 (Seventeen Million three Hundred and Eight Three Thousand Seven Hundred and forty Eight only) from the plaintiff bank at a time when there was, to the knowledge of the 2nd and 3rd Defendants, no reasonable prospect of repaying the debt to the Plaintiff.

(d) Failing to disclose to the Plaintiff the financial weakness of the 1st defendant by the 2nd and 3rd Defendants when they knew it was impossible for the 1st Defendant to make any reasonable repayment of the debt.

(e) ***Exercising actual dishonesty, contrary to notions of fair trading among commercial men in accepting an overdraft of Kshs 17,383.748.00 (Seventeen Million Three Hundred and Eight Three Thousand Seven Hundred and Forty Eight only) from the plaintiff bank while knowing that they were no prospects actual or otherwise of repayment of the debt by the 1st Defendant."***

He relied on the case of ***D T Dobie & co. Ltd. v Muchina & another (1982) KLR page 1*** in which it was held in holding 1 as follows:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. The court ought to act very cautiously and carefully, consider all facts of the case without embarking upon a trial thereof, before dismissing a case for disclosing no reasonable cause of action or being otherwise an abuse of the process of court;"

I also hold that the power should be used sparingly and cautiously. This does not mean that in a proper case the Plaint or other pleading should not be struck out.

He also relied on the case of ***Jones & another v Lipman & another (1962) 1 All ER page 442***, a case in which a defendant surreptitiously transferred land which he had agreed to sell to the Plaintiff to a limited liability company which he had formed for the purpose of transferring the property to it so as to defeat the rights of the Plaintiff to specific performance of the agreement for sale. Russell J stated at page 445:-

"……***..I agree with the finding by the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne."***

In order to determine whether a reasonable cause of action has been disclosed it is necessary to examine the allegation against the 2nd and 3rd Applicants.

The allegation that the 1st Defendant is a shell company may give rise to a cause of action depending on

the particulars of fraud, which are alleged.

As was decided in the ***Jones v Lipran (Supra)*** case the company had been formed purely for the purpose of defeating the Plaintiff's rights in that case.

In this case the particulars of fraud allege that the account of the 1st Defendant had sufficient credit and would eventually discharge the debt. In all of the particulars is the theme that the Applicants knew that the account had sufficient credit no reasonable prospects of **repaying the same and that there were no prospects actual or otherwise of the 1st Defendant repaying the debt.**

In my view these are no reasonable causes for complaint. Even assuming that the Applicants had all this knowledge the Respondents nevertheless lent money to the 1st Defendant. The knowledge of the Applicant was not subjective. There is no allegation that anything they said or did fraudulently misled the Respondent to give a loan to the 1st Defendant.

Indeed in every case where a loan is given to a limited liability company, which fails to repay, it can be said that the directors were fraudulent in seeking funds on its behalf where with hind sight they should have realized the company would default in payment.

It seems to me that in this case the Respondent is attempting to make the Applicants liable purely on the basis that they are directors of the company which flies on the face of the settled law that the directors and shareholders of a company are not liable for its debts as explained in the Salomon case. (supra)

As there is no reasonable cause of action alleged against the Applicants, I strike out the Plaint against them with costs.

Dated and delivered at Nairobi this 11th Day of November 2005.

P. J. RANSLEY

JUDGE