Finezza Management Solutions Ltd v Nyakundi (Commercial Appeal E196 of 2023) [2024] KEHC 4571 (KLR) (Commercial and Tax) (15 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E196 OF 2023

DKN MAGARE, J

APRIL 15, 2024

BETWEEN

FINEZZA MANAGEMENT SOLUTIONS LTD ..... APPELLANT

AND

JOSEPH OGERO NYAKUNDI ..... RESPONDENT

JUDGMENT

1. The Appellant is a judgment debtor in Nairobi SCCCOM 883 of 2021. They were ordered to pay a sum of Kshs. 1,000,000/= costs and interest on 17/11/2021.

2. They danced around the payment till the Respondents herein moved to lift the corporate veil. The court found that the directors were enjoined to settle the decree. A Preliminary Objection was raised on 25/10/2022 which was dismissed in limine as the court allowed the application.

3. This was the basis of the Appeal before court. The appellant filed an appeal from the said decision and set forth 7 grounds of Appeal. They are camouflaged as 2 grounds. They are as follows: -

    i. That the Learned Adjudicator erred in law and in fact by granting the orders sought in the 1st and 2nd Respondent's application to lift the Appellant's' corporate veil and the Directors of the companies be held liable jointly to the extent of their shareholding in the companies on the basis that the Appellants did not have a satisfactory explanation on the accounts which on the contrary, the learned Adjudicator had completely misapprehended and failed to properly evaluate the established law and the principles thereunder, the failed pleadings, exchanged written submission and unchallenged evidence on record, which had established that:_

        a. The appellant are limited liability companies with capacity to sue and be sued in their own name and whose liabilities are separate from those of its subscribers and/or

directors and as such the liabilities of the Appellants should not extend to its directors and/or shareholders.

b. Pursuant to international case lass on separation between the corporation and its member's, the company is at law a different person altogether from its subscribers and though it may be that after incorporation the business is precisely the same as it was before, and the same person are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as member's liable, in any shape or form, except to the extent and in the manner provided by the act.

c. Piercing the corporate veil is an equitable remedy and the burden rest on the party asserting such a claim to demonstrate and the Respondents herein have not provided any evidence to either demonstrate the special circumstances need by the court to pierce the corporate veil of the Appellants or show that the Appellants herein have indeed collapsed or are under insolvency.

d. The Appellants' their shareholders or directors have never acted in a fairly egregious manner, neither is there an instance of fraud nor serious misconduct in the companies to warrant the grant of an order pierce the corporate veil of the Appellants.

e. Some of the Appellants' Directors had individually injected capital Is not the companies which was also lost as a result of default of repayment of the short term loans offered.

4. An appeal should be concise. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

5. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

6. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

7. Further, most of the ground of Appeal are on points of fact. The only discernable question of law is whether a control can lift the corporate veil.

8. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act*, which provides as doth:

   (1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

   (2) An appeal from any decision or order referred to in subsection (1) shall be final.

9. There appears to be a misnomer and misapprehension that the Appellants are entitled to file an appeal on facts and law to this court. The nature of an Appeals to this court is basically a review for legality of the decision of the Small claims Court.

10. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and Another vs. Shah [1968] EA93, the Court of Appeal stated as doth:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

12. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

13. In Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal held as follows: -

> " it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

14. The main issue for determination in this case is whether the Trial Court erred in law in dismissing the Appellant's suit. A point of law is similar to a preliminary point of law but has a broader meaning. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

15. I also noted that the matter was delayed with an unnecessary raising of a baseless preliminary point of law.

16. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

17. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus the Board of Trustees of the Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

18. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

19. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

20. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

21. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or fats requiring further enquiry.

Submissions

22. The Appellant filed 7 page submissions. The bulk of which are on questions of fact on where the corporate veil should be lifted the relied on 8 authorities.

    a. Post Bank Credit Limited (In Liquidation) V Nyamangu Holdings Limited [2015] eKLR the decision to lift the corporate veil should not be taken lightly but rather sufficient causes must be proven to warrant the same. The Honourable Court stated as follows:

> " However, despite the jurisdiction the court, the decision to lift the corporate veil shouldn't not undertake lightly as it opens the directors or members of the company to personal liability. There should be sufficient circumstances provided in statutory law or judicial precedents which allow the court to do so."

b. Kolaba Enterprises Ltd Vs Shamsudin Hussein Varvani & ANO (2014) eKLR the court held that: -

> " 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] AC 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 nay 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 or 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."

(c) Riccatti Business College of East Africa Limited V Kyanzavi Farmers Company Limited [2016] eKLR cited with authority the case of Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR where Court while dealing with the issue of the distinct legal entity of corporate bodies held that:-

> " [A company] as a body corporate, is persona juristic, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

c. In the case Riccatti Business College Of East Africa Limited V Kyanzavi Farmers Company Limited [2016] eKLR where it held that:-

> " The court lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness of the end of the justice. This jurisdiction maybe exercised only in special circumstances where the court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenue.

Respondent's Submissions

23. The respondent stated that the Appeal is not necessary as the Appellants were not aggrieved. They stated that this was not a question of law but fact.

Analysis

24. Lifting of the corporate veil is done in circumstances where the directors are unable to show that the company is a legitimate enterprise. One of the things that show legitimacy of an enterprise is its books of account and evidence of assets owned. It is not enough to lift a corporate veil because a company is unable to pay its debts.

25. It is when a company is a shell, sham and meant to defraud creditors that it is said to be a sham. The court lifting the veil should never limit liability of the directors to shareholding. It should be to a fullest extent possible to pay the judgment debt. The appellant did not get any adverse order against them.

26. The order lifting the corporate veil was directed to the directors of the Appellants. The court, found and rightly so that the Appellant are a sham, a front for the directors and its owners to defraud the public.

27. The Appellants themselves were a shell and not legitimate business. This was because no books of account were produced. The directors of the Appellants were hiding behind the veil of incorporation to fail to pay lawful debtors.

28. It is not surprising that, the faceless entity behind the appellants did not appeal. There is no doubt that the Respondent has a legitimate debt. There is equally no doubt that the appellants are shams shells and fronts for its directors. There is no legitimate question of law raised.

29. There is no duty by the Respondent to show that the defendants are a sham. The Appellants have a special knowledge of their books. By failing to provide the same, there will be an adverse inference made. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
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> "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
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> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

30. There is no single question of law raised. The Appellant were not aggrieved as the order was against the directors. The duty of the Appellant is to seek their creditors and pay them. In the circumstances, the appeal is baseless and is accordingly dismissed with cost of Kshs. 85,000/=.

31. In awarding costs, the court is guided by the The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice.

> The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

32. The event herein is the dismissal of the Appeal for being baseless and untenable in law.

Determination

33. In the circumstances, I make the following orders: -

    a. The appeal lacks merit and is accordingly dismissed with costs of Kshs. 85,000/= to the Respondents.

    b. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 15TH DAY OF APRIL, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Kagendo for the Appellant

Ms Kerubo for the Respondent

Court Assistant - Brian