Njaramba v Gap Three Holdings Limited & another (Civil Appeal 107 of 2020) [2024] KEHC 10339 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 10339 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 107 OF 2020

F WANGARI, J

APRIL 18, 2024

BETWEEN

ANTHONY NJARAMBA ..... APPELLANT

AND

GAP THREE HOLDINGS LIMITED ..... 1ST RESPONDENT

SIGNON FREIGHT ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling and Order of Hon. M.L Nabibya Principal Magistrate delivered on 24th July 2020 in Mombasa *CMCC No. 2358 of 2005*. The Ruling arose from the Application dated 4th March 2020 and the Preliminary Objection dated 5th March 2020.

2. In the said Application, the Appellant sought to set aside the Notice to Show Case in execution with a finding of court that the Judgement and Decree subject of the execution was stale by effluxion of time and as such invalid.

3. The basis of the Preliminary Objection on the other hand was that the court lacked Jurisdiction to determine the matter under Section 2 as read with Section 323 of the *Companies Act*, Cap 486.

4. The Respondent opposed the Application and the Preliminary Objection. It was stated that the court had jurisdiction to hear and determine the matters under controversy. Further, that the Application and objection were merely meant to delay execution process.

5. The Trial Court considered the Application, Objection and responses thereto and rendered its Ruling on 24th July 2020.

6. In its Ruling, the court dismissed the objection on Jurisdiction for the reason that the Respondent was pursuing execution. The court also ruled that there were ongoing execution processes and the

judgement could not be said to have expired by 30th October 2016 when 12 years after delivery had not lapsed.

7. Aggrieved, the Appellant lodged the Memorandum of Appeal dated 11th August 2020 raising material grounds thus:

   a. The Trial Magistrate erred in law and fact in dismissing the Preliminary Objection and Application.

   b. The Trial Magistrate erred in law and fact in sitting on its own appeal

   c. The Trial Magistrate erred in law and fact in finding that execution had commenced

   d. The Trial Magistrate erred in law and fact in failing to find that the prayer to have the corporate veil lifted was dismissed.

Submissions

8. The parties filed respective written submissions.

9. The Appellant's position was as stated in the Memorandum of Appeal. It was submitted that the trial court erred in law and fact in failing to find limitation of actions in favour of the Appellant.

10. Further, that it was erroneous for the court to find that the execution process was ongoing when in fact the position was that the court had previously found that the veil of incorporation could not be lifted.

11. The Respondent on other hand submitted that the process of execution subsequent to the Judgement of court was in progress and there is n way the Decree could be said to have expired by effluxion of time. That it was the Appellant who was frustrating the execution process.

Analysis

12. I have perused the submissions and authorities relied upon by the parties and noted the contents therein. I have also perused the Record of Appeal, the proceedings and the Affidavits filed by the respective parties as constituted in the Record of Appeal.

13. From the outset, this is a straight forward Appeal. Whereas the Appellant's position is that the trial court previously determined that the veil of incorporation could not be lifted, the Respondent's position is that the process of execution was ongoing. What the Appellant appears to agree is that the process under which the Respondent sought to lift the veil of incorporation was a process of execution.

14. In principle, I understand this to have been the reasoning of the trial court. What the Appellant fails to acknowledge is that even after the court found that the veil of incorporation could not be lifted, the Judgement and decree of court was still valid wanting satisfaction. Therefore, a finding that the corporate veil could not be lifted at that junctures was not tantamount to a finding that the Appellant as Judgement Debtor would avoid or was not liable to settle the decretal sum.

15. In such like matters of execution, the authority of the courts to dispense justice and order in the society by suppressing impunity is usually at test. The parties agree that there is a valid decree of court to be settled. It is uncontested that there is no pending appeal or that the Appellant who is the Judgement Debtor is yet to satisfy the decree. The ruling against lifting the veil of incorporation did not divest the Appellant of the obligation to satisfy the Judgement.

16. Under Section 4(4) of the *Limitation of Actions Act*:

> An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

17. In this case, judgement was entered on 17th August 2006. On 25th March 2007, the court ruled that the action of lifting the veil of incorporation was under the jurisdiction of the High Court but allowed the prayer to summon the Appellant on the books of account of the company. It is the Appellant's stated case that on 9th October 2017, the Respondent caused the Application dated 12th October 2006 to be heard wherein the court re-issued summons for the Appellant to attend court on 30th October 2017.

18. I note also that the Respondent filed for Execution of the Decree on 28th August 2019 following which the Notice to Show Cause was issued on 5th September 2019. The Appellant contented that the Respondent went into sleep for more than 12 years since 17th August 2006 when Judgement was rendered and only arose with the Notice to Show Cause on 5th September 2019.

19. This is factually incorrect. On 9th October 2017, the Plaintiff moved court in respect of the Application dated 12th October 2006 and the Application for execution was subsequently filed on 28th August 2019. Therefore, as at 30th October 2017 as admitted by the Appellant, the Respondent was still pursuing post judgement proceedings and this was not 12 or more years after the ruling of court of 25th March 2007 or even the Judgement dated 17th August 2006.

20. Therefore, I am unable to fault the finding of the Trial Court on limitation of actions. In my view, the limitation on Judgments and Decrees under Section 4 of the *Limitation of Actions Act* applies to Judgements which have been dormant or remained unsatisfied for a period of 12 years and more due to indolence on the part of the Decree holder.

21. The indolence should be such that it is obvious from the record. The rationale of the law of limitations is to prohibit indolence on the part of those who are entitled to act. The matters exhibited herein demonstrated a frantic effort on the part of the Respondent to satisfy the Judgement and Decree of Court. I would also add that the Appellant has demonstrated a repulsive effort to disown the Judgement of Court. Those are matters within their litigation rights but to this court, a valid judgement and decree of court is pending settlement and must be satisfied.

22. The Court of Appeal has settled the meaning of 'action' and its application for purposes of the *Act*. In *M'Ikiara M'Rinkanya and Another v Gilbert Kabeere M'Mbijiwe* NYR CA Civil Appeal No. 124 of 2003 [2007] eKLR, the Court of Appeal noted that:

> The construction given to the corresponding section 4 (4) of the Act by the courts in this country is much wider. All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute – barred after 12 years.

23. Subsequently, in *Willis Onditi Odhiambo v Gateway Insurance Co. Ltd* KSM Civil Appeal No. 37 of 2013 [2014] eKLR, the Court of Appeal stated as follows:

> In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the *Limitation of Actions Act* which is in the following terms:
>
> 4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.
>
> The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008.

24. Therefore, I have no doubt that the provisions of Section 4(4) of the Limitations of Actions Act would apply where application for execution are filed after the expiry of 12 years of the delivery of the Judgement. That was the finding of the trial court.

25. Consequently, I find no merit in the Appeal. The Respondent being the successful party, costs are awarded.

Determination

26. In the upshot, I make the following orders: -

    a. The Appeal has no merits and is hereby dismissed.

    b. Costs awarded to the Respondent.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.

.....

F. WANGARI

JUDGE

In the presence of: -

Maiga Advocate for the Appellant

M/S Juma Advocate for the Respondent

Barile, Court Assistant