



**Gatabaki & 2 others (Suing as the legal representatives of the Estate of the Dr Samuel Mundati Gatabaki - Deceased) v New Attitude Limited & 2 others (Civil Suit E165 of 2019) [2024] KEHC 11137 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11137 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E165 OF 2019  
FG MUGAMBI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**NANCY WANJA GATABAKI ..... 1<sup>ST</sup> PLAINTIFF  
ESTHER SUSAN WANGARI GATABAKI ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPHINE BEATRICE GATHONI GATABAKI ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE DR  
SAMUEL MUNDATI GATABAKI - DECEASED**

**AND**

**NEW ATTITUDE LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PETER KIARIE MURAYA ..... 2<sup>ND</sup> DEFENDANT  
SUE WACHEKE MURAYA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. This suit was initiated through a plaint dated 10/6/2019, by the late Dr. Samuel Gatabaki. Upon his demise, his legal representatives continued the case. The plaintiff's claim is premised on a contractual relationship entered into with the defendants to manage the plaintiff's units within Fourways Junction Estate (the units). The 1<sup>st</sup> defendant, acting through its directors, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, took control of the units and leased them out as agents of the plaintiff. They however failed to remit the rent, security and water deposits collected from the tenants to the plaintiff.



2. In order to prove their case, the plaintiffs called 3 witnesses. PW1, Nancy Wanja Gatabaki, the wife of the deceased confirmed the contract between her late husband with the 1<sup>st</sup> defendant as a property management company. She testified that her late husband did not get any rental income from his properties and was unable contact the defendants. Eventually, he terminated the management contracts and had their daughters take over the management of the units.
3. PW2, Esther Susan Wangari Gatabaki and Pw3, Beatrice Gathoni Gatabaki both daughters to the deceased corroborated their mother's testimony. They confirmed that their late father asked them to locate the houses, identify the tenants, and manage the properties. They have been managing the properties since their father terminated the agreement with the defendant. Their testimonies aligned with their witness statements dated 10/6/2019.
4. In opposition to the suit, the 1<sup>st</sup> defendant filed a statement of defence dated 12/7/2019. While confirming the existence of the letting agreement, the 1<sup>st</sup> defendant states that it acted diligently at all times and in accordance with the Authority to Let agreements. It contends further that it did not fail to remit the rental proceeds or fail to disclose the letting status of the plaintiff's apartments as alleged.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a statement of defence dated 12/7/2019. They distanced themselves from the letting agreements arguing that the 1<sup>st</sup> defendant is a juristic person distinct from them and that the suit does not disclose any cause of action against them. Besides the statements of defence, the defendants did not file any documents to support their defence nor did they file any written submissions. The plaintiff's written submissions are dated 14/5/2024.

#### **Analysis and determination**

6. Having carefully considered the pleadings, submissions and evidence filed, I believe the main issue for determination is whether the defendants breached the terms of the agreements by failing to remit income to the plaintiff and if so, what reliefs is the plaintiff entitled to.
7. The evidence on record confirms that the deceased and the 1<sup>st</sup> defendant entered into several "Authority to Let" agreements (the agreements). Through these agreements, the late Samuel Gatabaki authorized the 1<sup>st</sup> defendant to act as his lawful agent in leasing his properties. In return, the 1<sup>st</sup> defendant was entitled to a finder's fee equivalent to one month's rent and a 15% commission per month thereafter. The agreements appear on pages 22 to 52 of the plaintiff's bundle of documents.
8. Pursuant to the said agreements, the 1<sup>st</sup> defendant entered into lease agreements with the tenants of the properties as evidenced by the leases at pages 54 to 195 of the plaintiff's bundle of documents. The leases corroborate the plaintiff's testimony that the 1<sup>st</sup> defendant indeed received rent and service charge as an agent of the plaintiff. The details of the rent received is enumerated in the demand letter dated 4/10/2016 sent to the defendants. The same is at page 212 of the bundle of documents.
9. The plaintiff's averment that the monies collected were not remitted remains uncontroverted. The assertion by the 1<sup>st</sup> defendant that all deposits collected, including rent and security deposits were duly remitted to the plaintiff and that it disclosed the letting status of the plaintiff's apartments fell squarely within the 1<sup>st</sup> defendant's burden of proof. Section 108 of the [Evidence Act](#) is clear that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



10. Further, section 112 provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

11. Given that the 1<sup>st</sup> defendant does not deny that it was under an obligation to manage the properties on behalf of the plaintiff, it is the 1<sup>st</sup> defendant and not the plaintiff that was expected to have in its possession the evidence and proof of payment of rent by the tenants and remittance of such payments to the plaintiff.

12. The law is clear that a party seeking the court's consideration of evidence must substantiate their claims. Once the plaintiffs had proved their case to the required standard, the burden moved to the defendants to disprove the assertions by the plaintiff.

13. No evidence was provided to the court to disprove the assertions in the plaint, presumably because no remittances were made to the plaintiff. If this had been done, nothing would have been easier than for the 1<sup>st</sup> defendant to provide documentary evidence of such remittances and amounts thereof. As such, I find that the plaintiff has proved its case against the 1<sup>st</sup> defendant to the required standard.

14. Regarding the liability of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, a company search dated 10/6/2019 found at page 203 confirms that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the sole directors and shareholders of the 1<sup>st</sup> defendant.

15. This court has repeatedly affirmed that while the benefits of incorporation are significant, they are not without limits. A company, although recognized as a separate legal entity, may, under certain circumstances, force the court to look beyond its corporate personality and “lift the veil of incorporation”. This typically occurs when there is a need to address fraudulent activities either by the company itself or its agents.

16. In the case of *Multichoice Kenya Limited V Mainkam Limited & Another*, [2013] eKLR the court held as follows:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make the contract, then only the company is liable on it. To my mind, there is no doubt that ever since the famous case of *Salomon V Salomon & Co*, (1897) A.C, 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards a subsidiary and its holding company as one entity.”

17. According to *Halsbury's Laws of England*, 4th Edition, paragraph 90:

“Notwithstanding the effect of a company's incorporation, in some cases, the court will ‘pierce the corporate veil’ to ensure justice by treating a company, for the purpose of litigation, as indistinguishable from the individuals who control it. This will occur not only in cases of fraud or improper conduct but also when the nature of the company or the individuals controlling it is relevant. In such instances, the court will disregard the company's separate legal identity to hold those individuals accountable. However, absent



these circumstances, the corporate veil will remain intact, even if a person's association with the company subjects a transaction to strict scrutiny.”

18. This principle was reaffirmed in *Kolaba Enterprise Ltd V Shamsudin Hussein Varvani & Another*, [2014] eKLR, where the court held that:

“... the separate legal personality of a company cannot be disregarded except where the law expressly provides for the lifting or piercing of the corporate veil, such as when directors or members use the company as a vehicle for fraud or other criminal activities.”

19. In the circumstances, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, as the only shareholders and directors of the 1<sup>st</sup> defendant, were the driving force, the “heartbeat, brains, hands, and feet”, behind the 1<sup>st</sup> defendant. Based on the finding that the company failed to do that which was supposed to be done, I am convinced that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants perpetrated the wrongful acts of the 1<sup>st</sup> defendant. They are very much aware of the scheme and were in fact at the centre of it.

20. They cannot evade liability by claiming that they are not privy to the agreements entered into between the plaintiff and the 1<sup>st</sup> defendant. Justice demands that because of their conduct in the whole scheme of things, the defendants be made jointly and severally liable in breach of the agreements to lease, and I so find.

21. As to whether the plaintiff is entitled to general damages for breach of contract, I refer to the decision in *Dharamshi V Karsan*, [1974] EA 41. In that case, the Court of Appeal for East Africa affirmed the principle that general damages for breach of contract are not awarded in addition to quantified or special damages. The court stated:

“As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, to put the claimant as far as possible in the same position they would have been in if the breach had not occurred. The measure of damages follows the rule established in *Hadley V Baxendale*, (1854) 9 Exch. 341, which stipulates that damages are those which may be fairly and reasonably considered as arising naturally from the breach itself or as reasonably contemplated by the parties at the time the contract was made as a probable result of the breach. Such damages are not ‘at large’ or general damages but are in the nature of special damages and must be specifically pleaded and proved.”

22. According to the *Halsbury's Laws of England*, Volume 12(1), paragraph 1018, damages for breach of contract are meant to compensate the innocent party's loss and to restore them, as much as possible through financial means, to the position they would have been in had the contract been performed as agreed.

23. General damages, on the other hand, are awarded for non-quantifiable losses such as pain and suffering, emotional distress, or loss of reputation. General damages are rarely awarded in cases of breach of contract. They may be considered if the plaintiff can demonstrate that the breach resulted in non-quantifiable harm beyond the specific financial losses covered by special damages.

24. In the present case, the plaintiff seeks to be restored to the financial position they would have been in if the defendants had not breached their contractual obligations by failing to remit monies due to the plaintiff. While no justification has been made for an award of general damages, I would instead award interest noting that the plaintiff has been deprived of the benefit of his monies through the defendants' wrongful acts.



## **Disposition**

25. Accordingly, I find merit in the suit and enter judgment in favour of the plaintiff against the defendants, jointly and severally, in the following terms:
- a. That the defendants jointly and severally are liable to remit to the plaintiff;
    - i. Rent received from the tenants amounting to Kshs.20,800,000/-;
    - ii. Security and water deposits amounting to Kshs.895,500/-;
    - iii. Service charge for the period 1<sup>st</sup> August 2016 to 31<sup>st</sup> October 2016 amounting to Kshs.192,000/-;
  - b. The monies under i, ii and iii above shall accrue interest at court rates from the date of filing this suit until payment in full;
  - c. The plaintiff shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

