Stuart & another v Solomon Wao Odhiambo t/a Loi Enterprises (Civil Appeal 94 of 2016) [2023] KEHC 20282 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 94 OF 2016

OA SEWE, J

JULY 11, 2023

BETWEEN

COLIN STUART ..... 1ST APPELLANT

SEA TURTLE LTD ..... 2ND APPELLANT

AND

SOLOMON WAO ODHIAMBO T/A LOI ENTERPRISES ..... RESPONDENT

(Being an appeal from the Judgment and Decree Hon. P.K. Mutai, SRM, in Kwale CMCC No. 35 of 2013 delivered on 22nd June 2016)

JUDGMENT

1. This appeal arises from the decision of Hon. P. K. Mutai, Senior Resident Magistrate, delivered on 22nd June 2016 in Kwale CMCC No. 35 of 2013: Solomon Wao Odhiambo T/A Loi Enterprises. In that suit, the respondent had sued the appellants for Kshs. 343,067/=, being the balance due for goods supplied and delivered to the appellants. The respondent disputed the claim in its Defence filed on 26th April 2013; and upon hearing the parties, the learned magistrate found in favour of the respondent in the sum of Kshs. 334,057/= together with interest and costs, in a judgment delivered on 22nd June 2016.

2. Being aggrieved by that decision, the appellant filed this appeal on 25th July 2016 seeking that the judgment of the lower court be set aside and the respondents' suit be dismissed with costs. He relied on the following grounds:

   (a) The learned magistrate erred in law and fact in awarding the respondent Kshs. 343,067/= as special damages in a case based on contract;

   (b) The learned magistrate erred in law and fact in finding that the respondent had proved the case on a balance of probability in the absence of the delivery notes;

(c) The learned magistrate erred in law and fact in awarding the respondent Kshs. 334,057/= against the respondents who are directors of the company and the company itself;

(d) The learned magistrate erred in law and fact in failing to direct who among the defendants was to pay the decretal sum together with costs and interest;

(e) The learned magistrate erred in law and fact in failing to give reasons for judgment;

(f) The learned magistrate erred in law and fact in relying on the invoices only to determine the case.

3. Directions were thereafter given herein on 1st March 2022, that the appeal be urged by way of written submissions. Whereas Mr. Muriithi for the appellant complied and filed his written submissions dated 22nd April 2022, there was no compliance on the part of the respondent. In his submissions, Mr. Muriithi took issue with the fact that the lower court did not pronounce itself on who, between the 1st and 2nd appellant is answerable for the judgment debt. He raised this issue on the basis of the principle laid down in *Salomon v Salomon & Company Limited* [1897] AC 22 that, once a company is incorporated, there is created a veil between the company and its members or subscribers, protecting them from being held personally liable for the obligations of the company. Counsel urged the Court to find that, since the respondents did not seek the piercing of the corporate veil, there was no basis for the 1st appellant, as a director of the 2nd appellant, to be held personally liable.

4. In respect of Grounds 2 and 6, Mr. Muriithi made reference to paragraph 7 of the appellants' Defence wherein it was averred that some invoices contained goods that were never received to the 2nd appellant. He submitted that, since the respondent himself conceded before the lower court (at page 29 of the Record of Appeal) that indeed some invoiced goods were not supplied, the lower court fell into error in relying wholly on the invoices produced by the respondent in his judgment. Counsel further submitted that an invoice is no proof of delivery of goods, and in this regard, he relied on *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR. Counsel posited that the respondent ought to have availed duly signed delivery notes instead; which he failed to do.

5. While Mr. Muriithi agreed with the lower court that the respondent sued the appellants for a liquidated claim in the nature of special damages in the sum of Kshs. 343,067/=, he disputed the finding of the lower court that the claim was duly proved to the required standard. It was therefore his submission that no basis had been laid for the conclusion arrived at by the lower court in the absence of delivery notes. Counsel relied on *Aquila Development Company Limited v Peter Jairo Aloo t/a Minds Export Enterprises* [2021] eKLR and urged that the appeal be allowed and the orders prayed for therein be granted, including an order for the dismissal of the lower court suit.

6. As this is a first appeal, this Court is enjoined by law to re-evaluate the evidence on record with a view of coming to its own conclusions and findings, while giving allowance for the fact that this Court did not have the opportunity of seeing or hearing the witnesses (see *Selle vs. Associated Motor Boat Company Limited* [1968] EA 123).

7. Accordingly, I have perused the record of the lower court and noted that the respondent testified before the lower court on 20th November 2012. He testified that he was a businessman running a hardware shop; and that in the year 2012 he was approached by the 1st appellant for a credit arrangement whereby the appellants would order for and collect building materials from his hardware shop on account for which the appellants would make payment within 45 days. The respondent produced the agreement dated 20th August 2012, which formed the basis of his relationship with the two appellants as the Plaintiff's Exhibit No. 1.

8. The respondent further testified that the first order was placed by the appellants on 22nd August 2012, such that by 30th October 2012, the appellants owed him Kshs. 458,000/=. He produced a bundle of the orders and invoices as the Plaintiff's Exhibits No. 3 and 4 before the lower court. The respondent, likewise, testified as to the payments made by the appellants, explaining that one of the cheques given in payment in the sum of Kshs. 105,000/= was dishonoured on presentation. He thus explained that, as at 2nd November 2012, the appellants owed him Kshs. 334,067/=. He produced a Statement of Account to that effect as the Plaintiff's Exhibit No. 6 before the lower court. He added that he opted for legal action when no payment was forthcoming by December 2012.

9. On behalf of the appellants the 1st appellant testified before the lower court on 2nd March 2016. He explained that he was a director and shareholder of the 2nd appellant; and that he came to know the respondent, from whom the 2nd appellant obtained some building materials in the year 2012. He however stressed the point that, in all his dealings with the respondent, he was merely acting on behalf of the 2nd appellant as one of its directors. He therefore posited that the goods were supplied to the 2nd appellant as a limited liability company with separate legal existence; and therefore he was not personally liable to the respondent for the debt. He further testified that, although the goods were delivered, a dispute thereafter arose between the parties over the exact amount due; and in his estimation, the disputed amount was between Kshs. 200,000/= to Kshs. 300,000/=. He concluded his evidence by stating that the 2nd respondent was willing to pay the full amount ascertained as due. He otherwise denied the claim.

10. In the light of the foregoing summary of the evidence presented before the lower court; and taking into account the grounds of appeal and the written submissions filed herein by learned counsel, the issues for determination arising from the grounds of appeal are:

    (a) Whether the respondents discharged the burden of proving their case on a balance of probabilities.

    (b) Whether the learned magistrate erred in law and fact in not specifying who of the two appellants was liable for the judgment debt of Kshs. 334,057/=;

    (c) The learned magistrate erred in law and fact in failing to give reasons for judgment.

11. A careful consideration of the totality of the evidence placed before the lower court by the parties. There is no dispute that the appellants approached the respondent for a credit arrangement, whereby the appellants would collect building materials worth no more than Kshs. 500,000/=; and that the account would be settled within 45 days of delivery. The document marked the Plaintiff's Exhibit 1 confirms that the credit arrangement was capped at Kshs. 500,000/=. Additionally, the respondent presented a bundle of orders and invoices to demonstrate that goods were ordered for by the appellants, delivered by the respondent and invoices raised therefor by the respondent.

12. Further to the foregoing, the respondent adduced credible evidence before the lower court to demonstrate that not all the invoices were settled; and that there was a balance outstanding as at 2nd November 2012 in the sum of Kshs. 334,067/=; which amount included the sums represented by a dishonoured cheque issued by the 2nd appellant. The computation of that total amount was given by way of a Statement of Account produced before the lower court as the Plaintiff's Exhibit No. 2; while a printed image of the dishonoured cheque was marked the Plaintiff's Exhibit 6.

13. In the premises, the evidential burden of proof shifted to the appellants to demonstrate, not only that the amount represented by the dishonoured cheque was thereafter paid, but also that not all the goods set out in the invoices produced by the respondent were delivered. This is because it was the

contention of the appellants, per paragraph 4 of their Defence, that "...all goods requested for by the 2nd defendant and then supplied and delivered to the 2nd defendant were fully paid for by cheques and in cash deposited directly to the plaintiff's account..." Thus, the appellants were best placed to avail such evidence.

14. In the same vein, the appellants averred, at paragraph 5 of their Defence, that the respondent issued it with "...invoices which were false, wrong and inflated for certain other goods which were not supplied and or delivered to the 2nd defendant..." It was similarly the obligation of the appellants to adduce evidence as to which of the invoices relied on by the respondent were inflated, and which ones were outright forgeries. Also, at paragraph 6 of the Defence, the appellants asserted that the cheque for Kshs. 105,000/= was paid by other cheques and by cash deposited in the respondent's account which the respondent had failed to acknowledge receipt of. No proof of such payments was availed before the lower court by the appellants. To the contrary, the 1st appellant conceded thus, in his evidence before the lower court:

> "...We engaged a contractor. I was not present at the site. I lived at a distance. After a while it became apparent that some materials were not reaching the site...The contractor conveyed majority of the items. Occasionally we would have a vehicle to carry some items from Depot to the site. Initially I was dealing with Solomon. Subsequently there was a contractor John Baraza and Ms. Jeniffer Wanjala. Jeniffer was retained by Sea Turtle Limited...I am not certain of the amount. There was a dispute regarding the amount. The issue is whether the items were indeed received at the site. The sums disputed is between Kshs. 200,000 and Kshs. 300,000. We took stock and on previous visit, we questioned Mr. Baraza on what happened and items received..."

15. The 1st appellant then went on to admit that he did not have records or invoices in dispute and added that:

> "I do not have details of Kshs. 105,000 which was allegedly not cashed."

16. It is also notable that, in cross-examination, the 1st appellant expressly conceded that their contractor, Baraza, used to collect the goods from the respondent's shop. He also stated that he did not dispute delivery of the goods; and that his complaint was that not all payments to the respondent's account were taken into consideration. At the same time, he conceded that he did not have cash deposit slips to prove the deposits, including the Kshs. 20,000/= that was allegedly paid after a demand notice was issued on behalf of the respondent.

17. Needless to say that the burden proof is on the party who would fail if no evidence is presented to prove a point in issue. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

18. Likewise, Section 108 of the *Evidence Act* provides that:

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

19. Accordingly, in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, it was held that: -

> " ...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act..."

20. Further to the foregoing, Section 109 of the *Evidence Act* provides that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

21. In the same vein, Section 112 of the *Evidence Act* 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.

22. It is plain therefore that the evidential burden of proof was on the appellants to prove the assertions made in their Defence and demonstrate that payment was duly made for all the goods received. In addition, I am persuaded by the decision of Hon. Rawal, J. (as she then was) in Drappery Empire v Attorney General (supra) in which it was held that:

> " ...where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendants to adduce evidence the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff."

23. In the circumstances, it was of importance for the appellant to refute the allegations by the respondent that the goods in question were in fact delivered to it and collected by the appellants' own agents from the respondent's shop; and therefore having failed to discharge that burden, the learned magistrate cannot be faulted for coming to the conclusion that the respondent had proved his claim to the requisite standard. His reference to the sum as special damages is inconsequential; counsel having agreed with the lower court that the respondent's claim "...was in the nature of a special damage claim..."

24. I have looked at the case relied on by the appellants, namely, *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR, wherein the court found that it was necessary for the appellant to have shown that the goods were delivered; which could only be done by production of delivery notes. The facts therein are very different from this case, as in that case, the court considered that the respondent did not participate in trial and thus the evidence of the appellant was not tested on cross-examination. In this case, however, the appellants were represented by counsel before the trial court, who had an opportunity to cross-examine the respondent's witness and not only test the veracity of the evidence adduced but to avail rebuttal evidence. As indicated herein above, no proof was availed to support the appellants' own assertions, including alleged cash payments made directly to the respondent's bank account.

25. The next issue to consider is whether the learned magistrate erred in law and fact in not specifying who of the two appellants was liable for the judgment debt of Kshs. 334,057/=. It is an enduring principle

that a limited liability company is a separate legal entity from its directors. In *Salomon & Co. Ltd v Salomon* (supra) it was held:

> "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons 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 members liable, in any shape or form, except to the extent and in the manner provided by the Act..."

26. I have looked at the parties' pleadings and the evidence presented before the lower court. It is manifest that the suit was filed against the two appellants on the basis of the primary agreement (the Plaintiff's Exhibit No. 1) which was prepared in the names of the two appellants. No doubt the 1st appellant was enjoined as a director of the 2nd defendant. There is however no gainsaying that the 1st appellant was merely executing the documents on behalf of the 2nd appellant in whose name all the invoices were raised. It was therefore imperative for the learned magistrate to pronounce himself explicitly as to which party was liable for the judgment debt; and if minded to hold the 1st appellant liable, he ought to have stated so and given his reasons for his decision.

27. Ordinarily, a director/shareholder of a company ought not to be held personally liable for the debts of the company by virtue only that he is a director/shareholder. In *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR, it was held: -

> "...I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a 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* (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 the subsidiary and its holding company as one entity...."

28. In this case, the respondent did not seek for the piercing of the corporate veil and therefore the issue did not arise at all before the lower court. It is therefore plain that only the 2nd defendant is liable for the judgment debt and that the lower court erred in failing to so hold.

29. The last issue is whether the learned magistrate erred in law and fact in failing to give reasons for judgment. Having perused the judgment of the lower court, I have no hesitation in rejecting the appellants' submissions in this regard. That the learned magistrate set out the issues for determination and considered each of them is evident at pages 40 to 42 of the Record of Appeal. He also relied on precedent in support of some of the conclusions he reached. I therefore find no merit in Ground 5 of the appellants' Grounds of Appeal.

30. In the result, other than the finding that the judgment debt ought to be paid by the company, the 2nd appellant, I find no merit in the appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF JULY 2023

OLGA SEWE

JUDGE