Stuart & another v Miya Enterprises Limited & another (Civil Appeal 95 of 2016) [2023] KEHC 20457 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 95 OF 2016

OA SEWE, J

JULY 11, 2023

BETWEEN

COLIN STUART ..... 1ST APPELLANT

SEA TURTLE LTD ..... 2ND APPELLANT

AND

MIYA ENTERPRISES LIMITED ..... 1ST RESPONDENT

MOHAMED ARIF MIYANJI ..... 2ND 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. The respondents sued the appellants in Kwale Chief Magistrates Civil Case No. 35 of 2013: Miya Enterprises Limited and Another v Colin Stuart & Another for the sum of Kshs. 467,051/= together with interest and costs on account of goods sold and delivered. The respondents had contended that, during the period between February 2012 to June 2012, the 1st appellant ordered for various goods totalling to Kshs. 1,708,057/=; that the goods were duly delivered to the appellants' premises and delivery acknowledged; and that the appellants paid Kshs. 1,241,006/= only by way of cheque, leaving a balance of Kshs. 467,051/=. Thus, the respondents had averred that the appellants had wrongfully failed and/or refused to pay the balance of the purchase price in spite of numerous reminders and notice of intention to sue.

2. The claim was resisted by the appellants vide their Defence dated 24th April 2013. They contended that they neither ordered for any such goods, nor did the 2nd respondent supply or deliver any goods to them. Accordingly, the appellants denied any privity of contract between them and the 2nd respondent.

Similarly, the 1st appellant denied that it requested for any goods from the respondents on his own behalf or for his personal benefit. He therefore asserted that the suit against him is misconceived.

3. At paragraph 5 of the Defence, the appellants conceded that the 1st respondent sold and delivered some goods to the 2nd appellant; and that the parties had a running account such that all goods requested for by the 2nd appellant would be fully paid for by cheque. They further contended that the respondents did not give the 2nd appellant full credit for all payments made. They also alleged that the 1st respondent issued false or inflated invoices for certain goods which were neither supplied nor delivered and thereafter resorted to various unorthodox means to coerce the appellants to pay, including reports at various police stations. Thus, the appellants sought that the lower court suit be dismissed with costs.

4. Upon hearing the parties, the learned magistrate, was convinced that the respondents had indeed supplied goods to the defendants; and that what was for determination was the outstanding balance. He accordingly held:

> " The plaintiff produced invoices covering the period February, 2012 and June, 2012. This is a claim of special. The law requires the plaintiff to specifically plead the claim and strictly prove. The claim is for Kshs. 467,051. Under paragraph 6 of the plaint the plaintiff stated that the value of goods supplied in total was Kshs. 1,708,057 and that the plaintiff [paid] Kshs. 1,241,006 by way of a cheque.
>
> That a balance of Kshs. 467,051 is now due and owing to. I have carefully looked at the invoices duly signed. The total of amount of goods supplied is Kshs. 1,460,547. The plaintiff admitted having received Kshs. 1,241,006 by way of a cheque.
>
> It therefore means the balance which remains due is Kshs. 219,541. This is the amount which was proved. I therefore award the plaintiff Kshs. 219,541 with interest..."

5. Being aggrieved by that decision, the appellants filed this appeal on 25th July 2016 on the following grounds:

   [a] The learned magistrate erred in law in failing to distinguish the identities of the parties in this case.

   [b] The learned magistrate erred in law and fact in failing to establish the parties to the contract the subject matter of the suit.

   [c] The learned magistrate erred in law and fact in awarding Kshs. 219,541/= to the respondents in the absence of the delivery notes duly signed by any of the appellants.

   [d] The learned magistrate erred in law and fact in awarding Kshs. 219,541/= to the respondents while the case was not proved on a balance of probability.

   [e] The learned magistrate erred in law and fact in failing to specify to which plaintiff the sum of Kshs. 219,541/= would be paid and by which defendant.

   [f] The learned magistrate erred in law and fact in failing to give reasons for the judgment.

6. Accordingly, the appellants prayed that the judgment of the lower court be set aside and the respondents' suit be dismissed with costs.

7. Directions were thereafter given herein on 21st April 2022, that the appeal be urged by way of written submissions. To which end, Mr. Muriithi, learned counsel for the appellants, filed his written submissions on 27th May 2022. In respect of Grounds 1 and 2, he submitted that since the 2nd appellant

and the 1st respondent are limited liability companies, they are distinct and separate legal entities from their directors, the 1st appellant and the 2nd respondent; and therefore that the learned magistrate ought to have made the distinction in his judgment, in line with the principle laid down in Salomon v Salomon & Company Limited [1897] AC 22.

8. Counsel pointed out that a key plank of the appellants' defence was that there was no privity of contract between the 1st appellant and the respondents; and that the goods were never ordered for by him for personal gain, but in his capacity as a director of the 2nd appellant. He therefore argued that any dealings between the parties were dealings between the 2nd appellant and the 1st respondent, one company to another; and that the 1st appellant and the 2nd respondent were merely human agents of the companies. He submitted therefore that, in so far as the two directors were non-suited, the lower court fell into error when it found that they were proper parties to the suit; and in failing to specify who, between the 1st and the 2nd appellant was answerable for the judgment sum and to whom it was due.

9. In respect of Grounds 3 and 4 of the Grounds of Appeal, Mr. Muriithi made reference to the judgment of the lower court at page 79 of the Record of Appeal in which it is plain that the lower court relied on invoices to find that the balance due was Kshs. 219,541/=. He relied on E.P. Communications Limited v East Africa Courier Services Limited [2019] eKLR for the proposition that invoices alone do not prove delivery or receipt of goods. He accordingly prayed that the appeal be allowed with costs.

10. This being a first appeal, the Court is mindful of its duty 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 it did not have the opportunity of seeing or hearing the witnesses (see Selle vs. Associated Motor Boat Company Limited [1968] EA 123). I have accordingly perused the record of the lower court and noted that Mohamed Arif Miyanji (PW1) testified before the lower court on 6th May 2015 in his capacity as the director of the 1st respondent. He explained that the 1st respondent was approached by the 1st appellant on behalf of the 2nd appellant for the supply of building materials for its new site in Msambweni; and that they proceeded to supply the goods as and when ordered. He further stated that the 1st appellant would visit their shop and pay for the goods delivered. He produced a bundle of documents comprising of orders and emails as well as invoices and delivery notes in proof of their claim.

11. PW1 further told the lower court that, in April 2012, they noted that while 1st appellant had increased his orders, the payments were low. They did not suspect foul play until 22nd May 2012 when one of the cheques issued by the appellants for Kshs. 100,000/= bounced. Thereafter, another cheque issued by the appellants in respect of their Equity Bank account also bounced. Copies of the two cheques were exhibited before the lower court by PW1 and marked Exhibits 3 and 4. PW1 explained that thereafter they looked for the 1st appellant but it was difficult to get him on phone; and that ultimately, he had no option but to report the matter to the police for assistance in recovering the outstanding balance of Kshs. 467,057/=.

12. The 1st appellant, Colin Stuart (DW1) testified before the lower court on 2nd March 2016. He explained that the was a director and shareholder of the 2nd appellant and added that he was introduced to the 1st respondent by one Robert Muzee who was constructing a project for the 2nd appellant near Msambweni. DW1 further stated that at first, everything was smooth, but after some time they noticed that the deliveries would not match with the quantities ordered for. He testified that upon conducting an analysis of the deliveries, they found that some invoices worth Kshs. 554,135/= were signed by unauthorized persons; and that he reported the matter to the police for investigations. He concluded his evidence by stating that they were only open to payment on proof of supply.

13. In the premises, there is no dispute that the appellants had a business relationship with the respondents; or that the 1st appellant and the 2nd respondent were at all material times acting in their respective capacities as directors of the 2nd appellant and the 1st respondent, respectively. It is also common ground that the 1st appellant approached the 1st respondent for a credit arrangement whereby the 2nd appellant would obtain construction materials on credit and pay on account. Thus, the only point of departure is the amount due and owing to the respondents. While the respondents contended that the amount left unpaid as at June 2012 was Kshs. 467,057/=, DW1 was of the assertion that there were contentious invoices amounting to Kshs. 554,135/= which the 2nd appellant was under no obligation to settle in the absence of proof of delivery.

14. Hence, the issues for determination arising from the grounds of appeal and the written submissions filed herein by learned counsel 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 failing to take into account that the 2nd appellant and 1st respondent are separate and distinct juridical persons for whose debts the directors cannot be held personally liable.

A. On whether the respondents proved their case on a balance of probabilities:

16. In terms of the burden of proof, 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."

17. In the same vein, 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.

18. A careful consideration of the record of the lower court shows that the respondents backed up their evidence with documentary proof from which the lower court was satisfied as to delivery and non-payment. The documents included copies of emails, invoices/delivery notes, dishonoured cheques as well as Return Cheque Advices to demonstrate that indeed, the 2nd appellant issued two cheques in payment which were returned unpaid. In the face of the foregoing evidence, the appellants contended that not all the goods ordered for were delivered; and that in their analysis, invoices worth Kshs. 554,135/= were not backed by delivery notes. It is noteworthy however that not a single document was exhibited by the appellants to prove their assertions. There was no proof for instance that a shortfall was noted in March 2012 in respect of the order for cement. Similarly, not a single invoice was produced by the 1st appellant to back up his assertion that some delivery notes were not signed by his authorized agent, Joyce Achieng.

19. Further to the foregoing, it is significant that the 1st appellant conceded that he was introduced to the 2nd respondent by his contractor, one Robert Muzee; and that the said Robert Muzee signed for some of the goods in question. In the absence of evidence to the contrary from the said Robert Muzee, the learned magistrate cannot be faulted for concluding that the goods were duly delivered. I note that the

parties were happy to use the invoices as delivery notes and that a number of the invoices/delivery notes exhibited before the lower court had the signature of the appellants' authorized agent, Joyce Achieng. There was therefore credible evidence presented before the lower court to support the conclusions and findings reached by the learned magistrate.

20. 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. This is the essence of Section 109 of the *Evidence Act*. It 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. Moreover, 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.

22. 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..."

23. In the premises, it is my finding that on the basis of the evidence presented before the lower court, the respondents' had discharged their burden of proof. In this regard I am persuaded that 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."

24. In arriving at the foregoing conclusion I have given due consideration to the authority 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. In this instance, the respondents availed proof of delivery by exhibiting delivery notes. They also presented credible evidence before the lower court of cheques issued by the 1st appellant in the name of the 2nd appellant; which cheques were returned unpaid. In fact, the 1st appellant conceded before the lower court that he issued cheques which were returned unpaid. The cheques could only have been issued for value, and therefore in the absence of proof of subsequent payment in lieu, it was plain that the appellants were indebted to the respondents as claimed. As there is no cross-appeal by the respondents to increase the judgement sum to Kshs. 467,057/=, I find no reason to disturb the judgment of the lower court in that regard.

B. On the principle of separate corporate entity:

25. Counsel made reference to the case of Salomon & Co. Ltd v Salomon (supra) to demonstrate that it was imperative for the lower court to specify who was to pay the debt. In that case, 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 and that the 1st appellant was enjoined as a director of the 2nd defendant. There is however no gainsaying that the 1st appellant was merely acting on behalf of the 2nd appellant in whose name all the invoices were raised. It is also plain that although the cheques marked the Plaintiff's Exhibit 5 and 6 were written and delivered to the 1st respondent by the 1st appellant, they were issued in the name of the 2nd appellant. 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 ought not to be held personally liable for the debts of the company in which 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 1st 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 appellant is liable for the judgment debt and that the lower court erred in failing to so hold. In the same vein, the entity entitled to receive the judgment debt is the 1st respondent; and I so hold.

29. In the result, other than the finding that the judgment debt ought to be paid by the company, the 2nd appellant to the 1st respondent, 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