



**Absolute Stocks Limited & 3 others v Mwikali (Civil Appeal 215 of 2017)  
[2023] KEHC 23977 (KLR) (Civ) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 215 OF 2017**

**JN MULWA, J**

**OCTOBER 23, 2023**

**BETWEEN**

**ABSOLUTE STOCKS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ANDREW NGURE ..... 2<sup>ND</sup> APPELLANT**

**ROSELYNE KAMAU ..... 3<sup>RD</sup> APPELLANT**

**JOSEPH GOGO ..... 4<sup>TH</sup> APPELLANT**

**AND**

**CATHERINE MWIKALI ..... RESPONDENT**

*(An appeal from the Judgment of the trial court in  
Milimani CMCC No. 5470 of 2015 delivered on 07/04/2017)*

**JUDGMENT**

1. This appeal arises from the Judgment of the trial court in Milimani CMCC No. 5470 of 2015 delivered on 07/04/2017. The Respondent sought judgment against the Appellants jointly and severally for Kshs. 3,079,710/= plus costs of the suit and interest at court rates, as well as an order lifting the 1<sup>st</sup> Appellant's veil of incorporation to hold the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Appellants personally liable for the 1<sup>st</sup> Appellant's actions on grounds of fraud. Upon trial, the trial court found in favour of the plaintiff, lifted the veil of incorporation of the 1st Appellant, and proceeded to enter judgment for the amount claimed against the 4 defendants therein jointly and severally for the amount claimed together with interest at court rates from date of filing of the suit and costs.



2. Being dissatisfied with the entire judgment, the Appellants filed this appeal dated 5<sup>th</sup> May, 2017 on the following grounds:
- a. The learned Magistrate erred and misdirected himself in law and fact in holding that the Respondent was owed Kshs.3,079,710/= by the Appellants jointly and severally without any evidence on record to support such a finding and thus took into account extraneous matters.
  - b. The learned Magistrate erred in law and fact in disregarding the 1<sup>st</sup> Appellant uncontroverted and/or admitted evidence that the Respondent deposited in the 1<sup>st</sup> Respondent's account a total amount of Kshs.7,824,504/= between 2012 and 2014 and was paid back a total amount of Kshs.8,862,504/= over the same period and that no amount due to the Appellant remained unpaid.
  - c. The Learned Magistrate erred and misdirected herself in law and fact in lifting the veil of incorporation and finding the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants liable for the obligations of the 1<sup>st</sup> Appellant without any justification and without adhering to the principles and/or conditions for lifting the veil of incorporation as known in law.
  - d. The Learned Magistrate erred in law by ignoring and/or failing to take into account and analyse cogent evidence adduced by the Appellants to rebut the Respondent's claim and treating the Respondent's evidence as unchallenged and uncontroverted thus arriving at an erroneous finding.
  - e. The learned Magistrate erred in law and in fact by holding and finding that the Respondent was depositing cash amount into the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants personal accounts which finding is not supported by any evidence before the Court.
  - f. The learned Magistrate erred in law and in fact in finding and holding that merely because the Respondent was once paid from the account held in the joint names of the 2<sup>nd</sup>, 3<sup>rd</sup> and another person who was not party in the proceedings is sufficient ground to hold the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants personally liable for the debts and obligations of the 1<sup>st</sup> Appellant generally which finding is not supported by any legal precedent, evidence before the Court, pleadings or by any logical inference.
  - g. The learned Magistrate erred in law and in fact by admitting and taking into consideration evidence not adduced during hearing but irregularly and illegally introduced in the Respondent's written submissions which was highly prejudicial to the Appellants' rights to a fair hearing.
  - h. The learned Magistrate erred in law and in fact in failing to appreciate and find that the Appellants had proved their defence of the Respondent's claims.
  - i. The learned Magistrate erred in law in shifting the burden of proof to the Appellants.



- j. The learned Magistrate erred wholly in disregarding the Appellant's submissions and the authorities submitted and proceeded to rely on his views not backed by law.
3. The Appellants therefore seek that the appeal be allowed, the judgment delivered by the lower court on 07/04/2017 be set aside and the Respondent be ordered to pay the costs of this appeal.
  4. The parties agreed to dispose of the appeal by way of written submissions but at the time writing this judgment only the 1<sup>st</sup> and 3<sup>rd</sup> Appellants had filed their submissions.
  5. The Appellants submitted that according to the incorporation rule, a company established under the 2015 *Companies Act* has legal personality and is therefore separate from its members. On this the Appellants relied on the case of *Salomon v Salomon & Co. Ltd* (1897) AC 22 wherein it is stated that the company is at law a different person altogether from the subscriber 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 an 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 law.
  6. The Appellants further relied on the following cases:

*Jones v Lipman & Another* (1962) 1 ALLER 442 and *H. L Bolton (Engineering Co. Ltd v T. J Graham & Sons Ltd* (1956) 3ALL ER for the proposition that; "A company may in many ways be likened to a human body. It has a brain and nerve Centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the Centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

The Attorney General (1999) 2 EA 199 following *Palmer's Company Law* Vol. 1 (22 ed) lists 10 instances under which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a legal persona and these are: -

1. Where companies are in the relationship of holding and subsidiary companies;
2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;
3. In certain matters relating to taxation;
4. In the law relating to exchange control;
5. In the law relating to trading with the enemy;
6. In the law of merger control in the United Kingdom;
7. In competition of the European Economic Community;
8. In abuse of law in certain circumstances;



9. Where the device of incorporation is used for some illegal or improper purpose; and
  10. Where the private company is founded on personal relationship between the members.
7. It is the Appellants further submissions that the veil was lifted without sufficient justification or persuasive evidence of a violation of the corporate personality principle, and that it was also crucial that the court considered whether the 3<sup>rd</sup> Appellant in this case was acting in her individual capacity or on behalf of the organization or company.

### **Analysis and Determination**

8. The court having carefully considered the grounds of appeal, record of appeal and the Appellant's submissions. The issues that fall for determination are:
- a. Whether the Respondent was owed Kshs.3,079,710/= by the 1<sup>st</sup> and 3<sup>rd</sup> Appellants jointly and severally
  - b. Whether the learned trial magistrate erred in law and fact in lifting the veil of incorporation of the 1st Appellant.
9. This court is the first appellate court. It is required to re-evaluate and re-analyze the entire evidence adduced before the trial court, draw its own conclusions bearing in mind that the judge never saw or F heard the witnesses testify; and taking into account that it is not bound to follow the findings of fact as found by the trial court- *Selle V. Associates Motor Boat Company* [1968] EA 123.

### **Whether the Respondent was owed Kshs.3,079,710/= by the 1<sup>st</sup> and 3<sup>rd</sup> Appellants jointly and severally**

10. In her testimony, the Respondent -PW1- in this case claimed that she was entitled to Kshs. 3,079,710/=, which represented the principle amount plus interest, which despite her repeated requests, was never paid.
11. The Respondent stated that the 1<sup>st</sup> defendant had paid all her entitlements under the agreement from August 2012 to October 2014 but failed to make the final remittances amounting to Kshs.3,079,710/= which she alleged the Appellants owe her.
12. The Appellants through their witness DW1 stated that they had paid the Respondent a total of Kshs.8,864,540/= in the period between October 2012 to December, 2014 which amount are not in dispute.
13. The Respondent's claim was for amounts due as from the 19<sup>th</sup> January, 2015 which she re-invested in Kshs.884,500/= and was to be paid a sum of Kshs.1,017,175/= with a 15% interest and a further 1,793,508.73/= which was to be returned at Kshs.2,062,535.04/= which was not paid by the Appellants.
14. It is evident that the Appellants did not remit the two final amounts to the Respondent and the Appellants claim to have paid the said amounts but do not have the relevant documents for the period they claim to have paid the Respondent all her dues.
15. It is therefore clear that the Learned Magistrate did not err by holding that the Appellants owed the Respondent the sum of Kshs.3,079,710/=.



**Whether the learned trial magistrate erred in law and fact in lifting the veil of incorporation of the 1st Appellant.**

16. As regards the lifting of the corporate veil, Paragraph 90 of *Halsbury's Laws of England* 4th Edition 4th Edition Vol 7 (1), is as follows:

Piercing the corporate veil. Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced".

17. That position has been visited on many occasions by the Courts in Kenya. Ringera J. in the *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor.* HCCC No. 125 of 2002 (unreported) which this Court cited in its Ruling in *China Wu Yi Company Ltd v Edermann Property Ltd & 2 Others* (2013) eKLR as follows:

"Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman v Saloman & Co Ltd* (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court's attention was drawn to the finding of Ringera J (as he then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor.* HCCC No. 125 of 2002 (unreported) when he stated:

"The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company."

18. In 2013 Mabeya J. expressed his view on the topic in the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* (2013) eKLR wherein he observed that;

"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 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."

19. The Respondent testified that the Kenya Revenue Authority was investigating the Appellants for alleged fraudulent dealings. However, she later discovered that the statements regarding the



investigations were untrue and that the letters she received from the KRA were fake. Subsequently, she later on learnt that the Appellants were involved in fraudulent operations, and that the 1st Appellant was experiencing financial difficulties.

20. It is therefore clear that there was some form of fraud on the part of the Appellants which claim was not sufficiently controverted, I am of the view that the trial court was correct in its holding.
21. In the *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor.* (2014) eKLR. The Judge held as follows:

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See *Salomon & Co Ltd V Salomon* [1897] A.C. 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 any 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 of 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. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”

22. For the foregoing, the court finds no merits in the appeal. It is therefore dismissed with costs to the Respondent.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2023.**

**JANET MULWA**

**JUDGE**

