



**Kings Millers Limited v Kagai (Civil Appeal 38 of 2018)
[2024] KEHC 13723 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 38 OF 2018
RM MWONGO, J
NOVEMBER 6, 2024**

BETWEEN

KINGS MILLERS LIMITED APPELLANT

AND

GRACE KABARI KAGAI RESPONDENT

*(Being an appeal against the judgment of the Learned Resident Magistrate
Y.M. Barasa dated 6th June, 2018 in Civil Case No. 302'B' of 20212 - Kerugoya)*

JUDGMENT

Background

1. The Plaintiff/Respondent, sued Jamleck Gachoki Ngari and Kings Millers Ltd to recover money for maize supplied between 29 July and 15 September 2010, but not paid for. According to the amended plaint, the 1st Defendant paid two cheques. A cheque of Shs.1,496,150/= issued for the balance of the supplied maize, did not have a date and the 1st Defendant declined to date it. The cheque was never paid.
2. Curiously, there was no written contract for the sale of the maize. The supplies were delivered to, and received by, the 2nd Defendant. Delivery acknowledgment notes were on the letterhead of the 2nd Defendant but signed by its director, the 1st Defendant. Thus, the claim was for payment by the defendants jointly and severally.
3. The Defendants denied the claim. The 1st defendant asserted that he is director of the 2nd defendant, and that there was no evidence of a contract
4. After hearing the parties, the trial court found that the 1st defendant was wrongly enjoined in the suit, and that the 2nd defendant should pay the plaintiff the balance claimed plus interest.
5. Dissatisfied, the 2nd Defendant/Appellant filed this appeal on the following grounds



1. The Learned Trial Magistrate erred in law and fact in condemning the 2nd defendant /appellant to pay Ksh. 1,496,150/- to the respondent whereas the respondent denied to have entered into the contract of sale by the 2nd defendant/appellant.
 2. The Learned Trial Magistrate erred in law and fact in considering copies of the alleged delivery notes while the originals were not produced as exhibits.
 3. The Learned Trial Magistrate erred in law and fact in concluding in his judgement that the respondent had proved a case against the appellant /2nd defendant while there was no evidence adduced against the company.
 4. The Learned Trial Magistrate erred in law and fact in admitting the delivery notes were issued by the company nor the cheque while they were not sealed by the company as required by Company Act.
 5. The Learned Trial Magistrate erred in law and fact in concluding in his judgement that the 2nd defendant/appellant had not entered appearance and filed defence while there is a valid defence by the 2nd defendant /appellant in the record.
 6. The Learned Trial Magistrate erred in law in indicating in his judgment that the respondent filed written submissions while he did not and relied on unfiled submissions.
 7. The Learned Trial Magistrate erred in law and fact and wrote unreasoned judgement condemning the appellant for no reasons and vet the respondent in her evidence in pleading her evidence in chief and cross examination had no claim against the company.
 8. The Learned Trial Magistrate erred in law and fact in failing to comply with requirement of the provisions of the Company Law, Law of Contract, *Evidence Act*, *Sale of Goods Act* as a result arrived at an erroneous decision.
6. The appeal was canvassed through written submissions.

Appellant's Submissions

7. The appellant clustered grounds 1, 3 & 7; and submitted that although the plaintiff amended her plaint on 14 April, 2015 to join Kings Millers Ltd as the 2nd defendant, she nevertheless exonerated the company (appellant) from liability throughout her evidence.
8. They refer the court to the following parts of her evidence in cross-examination:
Page 208 of the Record: -

“I entered into a contract with the 1st defendant....It was an oral contract.”

“I did not enter into a contract with King Millers”

“I know the 1st defendant was the owner of the miller. I entered into a contract with him as a person not a company”.

“I am not aware that a director of a company cannot be taken to court for the mistakes of the company. I sued him because he was the one to pay me. I don't know about the company.”



9. In his judgment the learned trial magistrate expressed himself as follows:

“I so find that the plaintiff has proved her case against the 2nd defendant on a balance of probability. The 1st defendant was wrongfully enjoined in the suit and the claim against him therefore fails with no order as to costs since he is a director of the 2nd defendant”

10. The appellant submits that the court was foisting a judgment in favour of a plaintiff who had stated unequivocally that she had no claim against the appellant. She had stated clearly that she had no contract with the appellant. In its judgment, therefore, the trial court made a contract between the respondent and the appellant without having been requested to do so. We submit that this is a grievous error of law. A court of law should be guided by and rely on the evidence adduced before it.

11. The 1st defendant Jamleck Gachoki Ngari, was found not liable on the alleged contract on the ground that he was only a director of the appellant. The respondent did not appeal against this finding and we submit that he still remains clear of any claims against him. In any case he did not sign any memorandum making him liable for the debts of the appellant.

Respondent’s Submissions

Whether the court was right to lift the corporate veil of the appellant

12. The appellant is a corporate entity and an artificial person. The general rule is that a company is a legal person and is distinct from its members. However, the law stipulates that when the concept of legal entity is used to protect fraud, justify a wrong, defeat public convenience or defend crime, the natural persons thereof will be held accountable through lifting the corporate veil. Generally, lifting the corporate veil is characterized by disregarding a company’s corporate personality in order to apportion liability to a person who carries out any act.

13. From the record of appeal at page 96 line 5 it is clear that Jamleck Gachoki Ngari admitted owing the respondent Kshs. 1,426,159/= where he proposed for the said amount be paid in 5 different instalments via cheque.

14. Further on page 96 of the record of appeal at line 12, Gachoki Ngari admitted issuing a personal cheque to the respondent, where he stated that I wrote it on my cheque leaf of Barclays Bank, it was not dated. This clearly demonstrated that he transacted by fraudulently acquiring goods on credit yet he knew that he was not capable of paying for them.

15. In Nyeri Criminal Case No. 67 of 2013, Jamleck Gachoki Ngari was charged for his wrongful acts in court and was put on his defense, thus showing that there was truly enough evidence to sustain his charge. This is well demonstrated in the proceedings and judgment of the said case at pages 31-118 of the record of appeal.

16. In the *Companies Act*, 2015, Sections 996 as read with Section 1002 provide for liability of officers who are in default and the offence of fraudulent trading as follows;

Section 996.

“ 1) If a provision of this Act provides that an officer of a company who is in default commits an offence, the officer commits the offence only if the officer-

(a) authorises or permits;

(b) Participates in; or



- (c) fails to take all reasonable steps to prevent, the contravention of the act or conduct, or the failure to comply with the requirements that constitutes the offence.
- 2) If a company is an officer of another company, the first-mentioned company commits an offence as an officer in default only if at least one of its officers is in default.
 - 3) If a company that is an officer of another company commits an offence because of subsection (2), the officer in default also commits the offence and is liable to be proceeded against and punished accordingly.”
17. Further Section 1002 of the *Companies Act* provides that:
- “ 1) If a business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, each person who knowingly participates in carrying on the business in that manner commits an offence.
 - 2) Subsection (1) applies whether or not the company has been liquidated or is in liquidation.
 - 3) A person found guilty of an offence under this section is liable on conviction to imprisonment for a term not exceeding ten years or a fine not exceeding ten million shillings, or to both.”
18. The respondent submits that the appellant's managing director, Jamleck Gachoki Ngari knowingly carried on the business of the appellant with intent to defraud the respondent and that he is responsible without any limitation of liability for the debt the appellant owed the respondent amounting to Kshs. 1,496,150/= plus interest.
19. Further, though Jamleck Gachoki Ngari as an individual - as one of the defendants - was not found liable, however, as the director of the company which was liable, he was found to have acted fraudulently, hence the lifting of the corporate veil. Reliance was placed on *Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited* [2016] eKLR where it was held that;
- “The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”
20. The respondent submitted that the appellant being an artificial person, lacks the ability to commit fraudulent acts except through its officers who are physically present but shielding themselves from their legal obligation using the doctrine of corporate veil.
21. Finally, the respondent submits that she be allowed to execute and enjoy the fruits of her judgment. Therefore, it was right that Jamleck Gachoki Ngari was held directly liable for the settlement of the judgment and decree.

Issues for Determination

22. The issues for determination are as follows:



1. Whether there was a contract between the appellant and the respondent.
2. Whether the appellant breached it.

Analysis and Determination

Whether there was a contract between the appellant and the respondent

23. The appellant claims that the learned trial Magistrate erred in law and fact in condemning the 2nd defendant /appellant to pay Ksh. 1,496,150/- to the respondent. This was despite the respondent denying having entered into the contract of sale with the 2nd defendant/appellant.
24. In the trial court the plaintiff/ respondent's claim is in respect of a contract which she claimed she entered into with the defendant/ appellant's mill in the year 2010. She sold and delivered maize to the defendant's mill at Kerugoya town which he was supposed to pay upon receipt.
25. The trial court observed that the delivery notes from the plaintiff's list of documents was proof that the plaintiff delivered maize to the King Millers, the 2nd defendant/ appellant. Further, the cheque drawn by the 1st defendant was evidence of an attempt of payment by the 1st Defendant to the plaintiff. The cheque was rejected by the bank as it was not dated.
26. The plaintiff testified that she entered into an oral contract with the 1st defendant believing that he was the owner of the company. On his part the 1st defendant testified and stated that he is a director of the 2nd defendant which is an incorporated company and a separate legal entity from its shareholders.
27. In the case of *Valentine Opiyo & Another v Masline Adhiambo T/A Ellyams Enterprises* [2014] eKLR it was stated that: the principle flowing from corporate personality was established in the well-known case of *Salomon v Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members.
28. The appellant submits that the court was foisting a judgment in favour of a plaintiff who had stated unequivocally that she had no claim against the appellant, clearly stated that she had no contract with the appellant.
29. The respondent submits that the law stipulates that when the concept of legal entity is used to protect fraud, justify a wrong, defeat public convenience or defend crime, the natural persons thereof will be held accountable through lifting the corporate veil.
30. The trial court stated that in the present case the 2nd Defendant Kings Millers Ltd in which the 1st defendant is a director entered into contract with the plaintiff. That is that the 1st defendant entered into a contract with the plaintiff/ respondent on behalf of the 2nd Defendant/Appellant.
31. In the case of *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] e KLR where the Respondent relied on section 35 of the *Companies Act, 2015* to argue that an agreement made by a representative of the Appellant was binding on the appellant in that case, given that the section provides that:
 - (1) A contract may be made—
 - (a) by a company, in writing under its common seal; or
 - (b) on behalf of a company, by a person acting under its authority, express or implied.



- (2) Any formalities required by law for a contract made by a natural person also apply; unless a contrary intention appears, to a contract made by or on behalf of a company.
32. The evidence in chief of the respondent is that she entered into a contract:
- “Where I sold and delivered maize to the defendant mill at Kerugoya town. The defendant was supposed to pay the same after receipt.”
33. It is clear that the oral agreement entered into by the respondent was to sell maize to Jamleck Gachoki Ngari, the 1st defendant, by delivering to Kings Mill Ltd.
34. On the side of the appellant, his company, Kings Mill Ltd was receiving the goods sold and delivered to it through its letterheaded delivery notes. However, payment was being made by Jamleck Gachoki Ngari through his personal cheques.
35. In my view the agreement was entered into by the respondent with Jamleck Ngari jointly and severally with Kings Mill Ltd. In this scenario it is impossible to de-link the two defendants, (Jamleck Ngari and Kings Mill Ltd) and the joint and several liability of the defendants arises. Either defendant was or could be deemed in law to be acting as the agent of the other, since there is no denial of the sale, delivery and payments made.
36. In the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR, Mabeja J 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 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 oppose 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.”
37. In the result, I do not think it was necessary for the trial court to find that the 1st defendant was wrongfully enjoined in the suit as I consider that joint and several liability was proved.
38. Ultimately, with regard to the trial court’s determination that the plaintiff/respondent was entitled to be paid Kshs.1,496.150/=, I am in agreement.
39. Accordingly, the appeal is dismissed with costs.
40. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF NOVEMBER, 2024.

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R. MWONGO

JUDGE

Delivered in the present of:

1. Mwangi holding brief for Waiganjo for Appellant
2. Asimwe for Respondent (holding brief for Magee)



3. Murage, Court Assistant

