



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 1194 OF 1997**

**MUGOMWENJE & SONS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PETER NJERU MUGO.....2<sup>ND</sup> PLAINTIFF**

**ALEXANDER KANG'ETHE MWENJE.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**KENYA NATIONAL ASSURANCE COMPANY LTD.....DEFENDANT**

**RULING**

1. On 30<sup>th</sup> September 2003 Judgment was entered, in favour of **Kenya National Assurance Company Ltd** (in Liquidation), the Defendant (herein after Kenya National) against **Mugomwenje & Sons Limited**, the 1<sup>st</sup> Plaintiff, for Kshs.3,941,116.20 together with interest and costs.

**BRIEF BACK GROUND**

2. The 1<sup>st</sup> Plaintiff is a Limited Liability Company incorporated under the Companies Act. It is not denied that it had two Directors/shareholders namely **Peter Njeru Mugo** (herein after Mugo) who is the 2<sup>nd</sup> Plaintiff in this suit and **Alexander Kang'ethe Mwenje** (herein after Mwenje) who is the 3<sup>rd</sup> Plaintiff in this suit.

3. The matters in this suit relate to the agreement, entered into in 1990, between Kenya National and the 1<sup>st</sup> Plaintiff. By that agreement Kenya National offered the 1<sup>st</sup> Plaintiff a loan on condition, amongst others, that the 1<sup>st</sup> Plaintiff would create a legal charge over the property L.R. No. 1112/52 Embu Municipality (the Property); the loan was repayable in 15 years; and the two Directors/shareholders Mugo and Mwenje would give their personal guarantees.

4. This case was filed by the 1<sup>st</sup> Plaintiff alleging that Kenya National failed to comply with the terms of the agreement and the 1<sup>st</sup> Plaintiff therefore claimed that it suffered loss and damage. The 1<sup>st</sup> Plaintiff claimed total Kshs.11,435,853.55. The 1<sup>st</sup> Plaintiff also sought a declaration that the Legal charge over the property was null and void.

5. Kenya National filed a defence and counter claim whereby it sought to recover the loan it issued to the 1<sup>st</sup> Plaintiff against the 1<sup>st</sup> Plaintiff, Mugo and Mwenje.

6. This Court by its judgment of 30<sup>th</sup> September 2003 dismissed the 1<sup>st</sup> Plaintiff's claim against Kenya National for loss and damage; the Court declared the legal charge over the property to be null and void; the Court dismissed the counter claim of Kenya National as against Mugo and Mwenje; and entered judgment for Kenya National against the 1<sup>st</sup> Plaintiff for Kshs.3,941,116.20 plus interest and costs of this suit.

7. Kenya National, after taxation of the costs, filed an execution application seeking to attach the 1<sup>st</sup> Plaintiff's moveable and immovable properties.

8. It does seem that Kenya National was unsuccessful in that execution and therefore proceeded to file a Notice of Motion application dated

28<sup>th</sup> September 2015. The prayers sought in that application are:

### **NOTICE OF MOTION**

**a. THAT** PETER NJERU MUGO and ALEXANDER KANGETHE MWENJE as Directors of MUGOMWENJE & SONS LTD, the Judgment-Debtor herein do come to Court and show cause why execution of the judgment herein should not be effected against them personally.

**b. THAT** this Court be pleased to lift the corporate veil for MUGOMWENJE & SONS LTD and order execution of the decree herein against the Directors, PETER NJERU MUGO and ALEXANDER KANGETHE MWENJE personally.

**c. THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs be orally examined as to whether any or what debts are owing to the Judgment-Debtor and whether the Judgment-Debtor has any and what property or means of satisfying the decree and for the production of all documents and books of account pertaining to the affairs of the Judgment-Debtor.

**d. THAT** the Decree-Holder be permitted to attach and sell property Title Number Embu Township/52 registered in the names of PETER NJERU MUGO and ALEXANDER KANGETHE MWENJE and/or any other assets of the Directors in satisfaction of the decree.

**e. THAT** the Court be pleased to issue an order prohibiting the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs from transferring or charging the property Title No. Embu Township/52 in any way, and all persons from taking any benefit from such purported transfer or charge.

9. That application was heard by Justice Fred Ochieng and the Learned Judge delivered his Ruling on 13<sup>th</sup> December 2017. It is because of the Learned Judges finding by that Ruling that I had to hear the cross examination of the 1<sup>st</sup> Plaintiff's Director. The Learned Judge formed the opinion that he could not grant the orders sought without such cross examination. The Learned Judge therefore ordered that cross examination to proceed and for it to proceed the said Directors were ordered to produce the 1<sup>st</sup> Plaintiff's records and books of account together with comprehensive up to-date statements of the 1<sup>st</sup> Plaintiff's bank accounts. The Learned Judge in that Ruling further expressed himself thus:

**“I wish to emphasize the fact that this is not an order for the lifting of the corporate veil. The determination as to whether or not the corporate veil will be lifted will only be made after the Directors are given an opportunity to answer the questions from the Defendant.”**

### **CROSS EXAMINATION**

10. At cross examination of the 1<sup>st</sup> Plaintiff's Directors only Mugo attended. During his cross examination he informed the Court that Mwenje had passed away. No evidence of Mwenje's demise was produced before me but in view of the fact that the Learned Counsel for Kenya National did not contradict that information it is assumed that it is indeed so.

11. Mugo's cross examination centered on the 1<sup>st</sup> Plaintiff's bank statements, he had attached to his replying affidavit sworn on 6<sup>th</sup> November 2015. In that Replying Affidavit Mugo deponed that the 1<sup>st</sup> Plaintiff, unlike what was stated on behalf of Kenya National, was not a shell Company. Mugo deponed that the 1<sup>st</sup> Plaintiff was a going concern with a bank account.

12. The bank account statements for account No: 0041142995, Mugo referred to, were from April to November 2015. They are bank statements of Barclays Bank Hurlingham Branch. The statements shows deposits made from time to time. Some of those deposits are clearly shown as being for rental. For example on 9<sup>th</sup> April 2015 someone identified as Mary Peter deposited Kshs.8,000 for April H/Rent. On 10<sup>th</sup> April 2015 there is a cash deposit of Kshs.2,000.00. That deposit was made by John Kariuki for rent. There are other cash deposits reflected in that account which have no indication who made them and for what purpose. There are also debits made by cheques by unidentified persons.

13. Mugo on being cross examined by the Learned Counsel for Kenya National confirmed that he had not produced the books of account of the 1<sup>st</sup> Plaintiff.

14. Mugo confirmed that by the bank statements of the 1<sup>st</sup> Plaintiff, attached to his replying affidavit, the credit balance in the 1<sup>st</sup> Plaintiff's said account as at 30<sup>th</sup> April 2015 was Ksh.108,439.35. That as at end of May 2015 that account had a credit balance of Kshs.125,230.15. That as at end of June 2015 the account had a credit balance of Ksh.332,580.35; while end of July 2015 the credit balance was Kshs.275,714.30; and as at end of August the credit balance was Kshs.125,736.45.

15. On being cross examined Mugo stated that he was unaware why deposits were made into the 1<sup>st</sup> Plaintiff's account. Mugo without substantiating his claim stated that the Directors of the 1<sup>st</sup> Plaintiff made deposits into 1<sup>st</sup> Plaintiff's bank account to be used to pay Kenya National and that the construction of the building on the property was both from money advanced by Kenya National and from the Director's contribution.

16. On being re-examined by his Learned Advocate Mugo stated:

**“I am receiving rent. The Company (1<sup>st</sup> Plaintiff) does not own anything.”**

## ANALYSIS AND DETERMINATION

17. The Notice of Motion dated 28<sup>th</sup> September 2015, whose prayers have been reproduced above, is premised on the grounds that Kenya National has been unable to execute this Court's judgment of September 2003 because, the 1<sup>st</sup> Plaintiff was found to be a shell Company with no attachable assets from inception; that its Directors had used that Company to commit fraud against Kenya National by obtaining a loan from Kenya National; that the 1<sup>st</sup> Plaintiff's Director Mwenje, who also was a Director of Kenya National used his fiduciary position within Kenya National to perpetuate fraud; and that the 1<sup>st</sup> Plaintiff's Directors were fraudulent and dishonest in the affairs of the 1<sup>st</sup> Plaintiff Company.

18. Kenya National referred in its application to an investigative report of Phtuma Agencies. That Agency was unable to trace the location of the 1<sup>st</sup> Plaintiff and was unable to trace any of its attachable assets.

19. Kenya National also provided a Company search done by its Learned Advocate which indeed confirmed that both Mugo and Mwenje were the 1<sup>st</sup> Plaintiff's Directors/shareholders. That search also revealed that the 1<sup>st</sup> Plaintiff had not filed any annual returns with the Registrar of Companies since inception.

20. The loan granted by Kenya National to the Plaintiff, which is the subject of this suit, was for the construction of a building on the property. It will be recalled, as stated above, that the property is registered in both the names of Mugo and Mwenje. The legal charge over the property, in favour of Kenya National, was declared null and void by the judgment of this Court. Since then Kenya National had been unable to execute the judgment it obtained against the 1<sup>st</sup> Plaintiff. Justice Fred Ochieng by his Ruling of 13<sup>th</sup> December 2017 ordered Mugo and Mwenje to be cross examined on the affairs of the 1<sup>st</sup> Plaintiff. Mugo and Mwenje were ordered by the Learned Judge to produce, during such cross examination, the 1<sup>st</sup> Plaintiff's book of accounts, records and comprehensive Bank statements. At the cross examination of Mugo no books of account were produced nor were record or Comprehensive Bank Statements provided. The only Bank statements before Court, referred to above, are for the period of April to November 2015. The loan the subject of this suit was disbursed from 1993 to 1995. The one question which remains un-answered is how were the proceeds of that loan utilized by the Company? Mugo did not provide any information in that regard. Mugo in failing to provide 1<sup>st</sup> Plaintiff's books of account, records and comprehensive bank statement denied this Court the opportunity of knowing the health or otherwise of the 1<sup>st</sup> Plaintiff Company.

21. But one thing seems clear from the documents before Court: the 1<sup>st</sup> Plaintiff was incorporated for no other reason other than to borrow money from Kenya National. The 1<sup>st</sup> Plaintiff was incorporated on 19<sup>th</sup> September 1990. The offer for the loan by Kenya National, of which Mwenje was a Director, was made on 23<sup>rd</sup> February 1990. It follows that the offer for the loan was made before the 1<sup>st</sup> Plaintiff was incorporated.

22. A search carried out by the Advocate for Kenya National confirms Mugo and Mwenje were the only two Directors/shareholders. No annual returns have ever been filed with the Registrar of Companies. Mugo when given the opportunity failed to prove, by documents whether the 1<sup>st</sup> Plaintiff was a shell Company or not. It will be recalled that Mugo while being cross examined and re-examined stated that the 1<sup>st</sup> Plaintiff is a going concern and later stated that the Company had no assets.

23. The judgment of September 2003 found as a fact that the proceeds of the loan were collected from Kenya National by Mugo and Mwenje. Mwenje had an obligation to inform the Court how that money was utilized.

24. Although Mugo, by his replying affidavit attempted to blame Kenya National for slow release of the loan I wish to caution Mugo by informing him that that was what the 1<sup>st</sup> Plaintiff pleaded in this case and which this Court by its judgment rejected. This is what was stated in the judgment:

**“What legal or moral authority do the 2<sup>nd</sup> (Mugo) and 3<sup>rd</sup>(Mwenje) Plaintiffs now have to turn around and allege a breach of the terms of the agreement by accusing the Defendant (Kenya National) of failing to disburse the loan funds as agreed. In my view the Plaintiff have no right to complain; they asked for a change in the manner the loan was to be disbursed and they got it.”**

25. Mugo also attempted to argue that Kenya National was wound up and was therefore incapable of proceedings with this matter.

26. In my view nothing can be further from the truth, in that statement. This suit was instituted by the Kenya National when it was under Liquidation. It follows that Kenya National can proceed with this case until its natural conclusion. This is because leave must have been granted to file suit, even though I cannot confirm this because the original file went missing: this present file is re-constructed file.

27. As I found herein above the 1<sup>st</sup> Plaintiff Company was incorporated for the sole purpose of obtaining a loan from Kenya National. This is supported by the fact the 1<sup>st</sup> Plaintiff did not carry out any or whatsoever business since inception. It is because of that, that I make a finding that the 1<sup>st</sup> Plaintiff was used as a vehicle to defraud Kenya National. This finding is supported by the Court of Appeal finding in the case:

**GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY V ERNIE CAMPBELL & CO. LTD & ANOTHER [2018] eKLR** where almost similar fact as in this case pertain. In that case a Company was incorporated for the purpose of contracting with the Respondent to construct a milk plant. This is what Court of Appeal stated:

**“The appellant incorporated the 2<sup>nd</sup> Respondent and then had it enter into an agreement with the 1<sup>st</sup> Respondent knowing well that I had no financial means or assets to meet the obligations related with the contract. In the absence of any reasonable**

excuse or justification from the appellant for its conduct, then we find it safe to draw an improper and fraudulent purpose necessitating lifting the 2<sup>nd</sup> Respondent's veil of incorporation for purposes of ensuring justice to both parties."

28. The Court of Appeal in that case Githunguri Dairy Case (Supra) further discussed under what circumstances the corporate veil should be lifted and had this to say:

**"However, the circumstances under which a Court ought to disregard the veil of incorporation are as stated in paragraph 90 of HALSBURY'S LAWS OF ENGLAND 4<sup>TH</sup> EDITION VOLUME 7(1) as:**

**"90. 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 when 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."**

29. The cross examination of Mugo clearly reveals that justice will be met by lifting the corporate veil of the 1<sup>st</sup> Plaintiff. Mugo and his co-Directors handling of the 1<sup>st</sup> Plaintiff Company lead me to draw an inference of fraudulent and improper conduct.

30. The Court of Appeal in that case Githunguri Dairy Case (Supra) stated what is the effect of lifting corporate veil and stated:

**"In VTB Capital PLC v Nutritek International Corp & Another & 3 Others (Supra), Court of Appeal (UK) observed that:**

**"...if the corporate veil is to be pierced, "the true facts" must mean that, in reality, it is the person behind the Company, rather than the Company, which is the relevant actor or recipient (as the case may be)."**

31. From following that quoted case it is my finding that the loan disbursed by Kenya National was received and utilized by its Directors and it is just that those Directors do satisfy the judgment entered herein.

32. It is obvious the Directors had no intention of repaying the loan granted to the 1<sup>st</sup> Plaintiff; that is obvious from the fact those Directors failed to execute personal guarantees and yet that was one of the conditions of the 1<sup>st</sup> Plaintiff obtaining the loan. It may not be far fetch, as suggested by Kenya National, that Mwenje abused his Fiduciary position, since he was a Director in both Kenya National and the 1<sup>st</sup> Plaintiff Company.

33. In view of my above finding it is in the interest of justice that an order be made to attach the property, since the money lent by Kenya National to the 1<sup>st</sup> Plaintiff was intended to be used to construct a building on the property. Whether in fact that money was used to construct that building, this Court will never know because Mugo failed to produce the books of accounts or records of the 1<sup>st</sup> Plaintiff.

34. Kenya National having succeeded in its application dated 28<sup>th</sup> September 2015 will be awarded its costs thereof.

35. In the end I make the following orders:

**a. The corporate veil of MugoMwenje & Sons Limited is hereby lifted and the judgment of this Court and all subsequent orders against MugoMwenje & Sons Limited shall be executed jointly and severally against Peter Njeru Mugo and Alexander Kangethe Mwenje.**

**b. In execution of the decree hereof L.R. NO.1112/52 Embu Municipality is hereby attached as provided under Order 22 Rule 48 of the Civil Procedure Rules until further orders of this Court.**

**c. In execution of the decree hereof L.R. NO. 1112/52 Embu Municipality shall be sold by public auction and the proceeds of sale shall be paid to Kenya National Assurance Company Ltd (in Liquidation).**

**d. The terms of sale by public auction ordered under (c) above shall be settled by the Deputy Registrar of this Court.**

**e. The Costs of Notice of Motion dated 28<sup>th</sup> September 2015 shall be paid jointly and severally by Peter Njeru Mugo and Alexander Kang'ethe Mwenje to Kenya National Assurance Company Limited (in Liquidation)**

36. Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>TH</sup> day of MAY, 2019.**

MARY KASANGO

**JUDGE**

***Ruling Read and Delivered in Open Court*** in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE 1<sup>ST</sup> PLAINTIFF

..... FOR THE 2<sup>ND</sup> PLAINTIFF

..... FOR THE 3<sup>RD</sup> PLAINTIFF

..... FOR THE DEFENDANT