



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.251 OF 2013

VINAYAK BUILDERS LIMITED.....PLAINTIFF

VERSUS

PROJECT ELECTRICALS LIMITED.....1ST DEFENDANT

ARJAN RAMJI SHIANI.....2ND DEFENDANT

J U D G M E N T

BACKGROUND

The Plaintiff filed this suit against the Defendants jointly seeking the following prayers:-

1. Kenya Shillings Twenty Nine Million, Four Hundred and Thirty Thousand, Six Hundred and Seventy Three and Twenty Cents (Kshs.29, 430,673.20);
2. Interest on (a) above until payment in full;
3. Costs of this suit.

An amended Plaintiff was filed on 4th March, 2014.

The Defendants filed a defence and counterclaim on 25th April, 2014 denying each and every allegation made on the Plaintiff. In the defence and counterclaim the 3rd Defendant contend that no resolution was made by the Board of Directors to commit the 1st Defendant to the transaction which is the subject matter of this suit rendering the transaction null and void. The Plaintiff filed a reply to defence and defence to counterclaim dated 21st May, 2014 denying all allegations contained in the defence and counterclaim.

The Defendants failed to attend Court on 13th March 2018 when this matter came up for hearing. The Affidavit of Service filed confirmed that the Defendants were served with the hearing notice on 5th December 2017.

The case proceeded for hearing *ex parte*. On 11th May 2018 despite being served, the Defendants failed to attend Court for mention to confirm filing of written submission.

SUMMARY OF EVIDENCE

The Plaintiff availed 2 witnesses. Both witnesses adopted their witness statements as evidence and relied on documents filed on 18th June 2013.

PW1 Premji Devji Vekaria who is the Managing Director of the Plaintiff company stated the 2nd and 3rd Defendants are Directors of the 1st Defendant and that the 1st Defendant is a Limited Liability Company engaged in sale and distribution of building and hardware goods and other allied products. He stated that the 2nd Defendant approached the Plaintiff on behalf of the 2nd Defendant for supply of building hardware materials and falsely represented to the Plaintiff that the 1st Defendant would be in a position to pay for goods supplied and was credit worthy.

That on reliance of 1st and 2nd Defendant's representation, the Plaintiff supplied goods worth Kshs. 29,430,673.20 on credit to the 1st and 2nd Defendant as particularized in paragraph 9 of the amended Plaintiff.

He further stated that despite the Defendant receiving the goods, the Defendants willfully refused to pay the above stated amount.

PW2 Naran Kunvarji Vaddodiya is the Supervisor and Manager in charge of operations, sales and the yard. He averred that he delivered the subject goods on behalf of the Plaintiff's company to the 1st Defendant vide delivery notes 6878, 6880, 6881, 6882, 6885, 6889 and 7286 which were signed by George Njuguna and Nelson Ouma.

DEFENCE

I have perused the Defendant statement of defence filed on 25th April 2014 and note that from paragraphs 4 to 10 the defendants deny the Plaintiffs claim but in paragraph 11 the 1st and 2nd admit acknowledgement of the Defendants claim and further acknowledged making offers for settlement of the debt. That the 2nd Defendants acknowledgement was done in his capacity as officer of 1st Defendant and not in his personal capacity. Paragraph 12 of the defence states that the repayment program was agreed with between Plaintiff and a 3rd Defendant but contend that no cause of action has been established against the 3rd Defendant.

In the counterclaim the Defendants sought the following orders:-

1. That the suit be dismissed.
2. A declaration that the transaction was not sanctioned by the 1st Defendant.
3. In the alternative, a declaration that the 1st Defendant assigned its contractual rights under the contract arising this suit to the Plaintiff and that the Plaintiff accepted payment from 3rd party signifying acceptance of such assignment and consequently Plaintiff is estopped from pursuing 1st Defendant or Defendants.
4. A declaration that no cause of action has been made out against the 3rd Defendant and that Directors of a limited company cannot be held personally responsible for liabilities of a limited liability company unless the veil of incorporation is lifted on grounds of fraud in winding up proceedings.

ANALYSIS AND DETERMINATION

I have considered evidence adduced by the Plaintiff plus written submissions filed. I have also considered defence and counterclaim filed by the Defendants.

ISSUES FOR CONSIDERATION

1. Whether the 1st and 2nd Defendants are liable to pay the Plaintiff **Kshs.29, 430,673.20** on account of goods and hardware material supplied to them by the Plaintiff plus interest
2. Whether the 1st and 2nd Defendants' representations to the Plaintiff were false and thus warranting lifting of the corporate veil.

There is no dispute that the 2nd and 3rd Defendants are Directors of the 1st Defendant. From evidence adduced the 2nd Defendants approached the Plaintiff to supply goods to the 1st Defendant for distribution. The Plaintiff supplied the 1st Defendant goods on the strength of assurance by the 2nd Defendant that the 1st Defendant was credit worthy and would pay would pay for the goods supplied. Evidence adduced demonstrate that the 2nd Defendant misrepresented to the Plaintiff with intend to defraud.

Supply of goods to Plaintiff is confirmed by paragraph 11 of the defence where the 1st and 2nd Defendant admit acknowledgment of claim to the Plaintiff. It goes further to confirm that offers for settlement of the claim was made.

Whereas the 3rd Defendant contends that no cause of action has been made against her, in paragraph 7 of the counterclaim, she confirms being a Director of the 1st Defendant. Defence indicate that the 2nd Defendant was under incapacity at the time of transaction; however no evidence was adduced to confirm 2nd Defendants incapacitation. No evidence was also adduced to controvert evidence of misrepresentation and fraud. On lifting of company's veil, **Ringera, J** (as he then was) in **Ultimate Laboratories Vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000**, stated as follows:-

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the Courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct.”

In the instant case evidence has been adduced to demonstrate misrepresentation on part of the 2nd Defendant. There is acknowledgement of debt in the defence but the 2nd and 3rd Defendants attempt to hide behind the corporate fail. It will not be in the interest of justice to allow the

2nd and 3rd Defendant to use *company (1st Defendant) as a vehicle to commit fraud.*

From the foregoing, I find that the Plaintiff has proved its claim against the Defendants.

FINAL ORDERS

- 1) Judgement is hereby entered for the Plaintiff against the Defendants jointly and severally for Kshs. 29,430,673.20.
- 2) Costs of the suit.
- 3) Interest on (1) above at Court's rate from the time of filing this suit until payment in full.

Judgment dated, signed, and delivered at Nairobi this 13th day of July, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: COURT ASSISTANT

MS. DAVI: COUNSEL FOR THE PLAINTIFF

NO APPEARANCE: COUNSEL FOR THE DEFENDANT