



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 537 OF 2014

(Appeal from the ruling of the Chief Magistrate's Court at Nairobi (Milimani Commercial Courts) delivered by Hon. T. Ngugi, SPM on 9th July 2014 in CMCC No. 8821 of 2002)

AHMED SHAKEEL SHABBIR.....APPELLANT

VERSUS

SAMUEL MUSAA NDOLO.....RESPONDENT

JUDGMENT

The Appellant, **AHMED SHAKEEL SHABBIR**, being dissatisfied with the Ruling and decree in Milimani CMCC No. 8821 of 2002 appealed to this Court on 9 grounds which can be condensed into two main grounds –

1. The learned magistrate erred in law and in fact in holding the appellant personally liable and accountable for the judgment debt.
2. The learned magistrate erred in law and in fact in finding that there was complicity/wrong doing on the part of the directors to warrant lifting of the corporate veil.

This appeal arose from a suit which was filed by the Respondent, the Plaintiff in the lower court. His claim against the Appellant as is evident from the amended plaint dated 25th July 2006 arose out of breach of contract entered into by the parties for purchase of a tractor.

The appeal was argued by way of written submissions.

The duty of this court, being the first appellate court is to re-evaluate the evidence on record and come up with a finding of its own, bearing in mind that it has neither seen nor heard the witnesses. See **Sumaria & Another -Vs- Allied Industrial Limited (2007) 2 KLR 1.**

Upon perusal of the Lower Court proceedings, only the Plaintiff testified as PW1. He testified that he entered into a contract with the Defendant Company- Natak Kenya Limited (of which Shakeel Ahmed the appellant herein was a director) for sale of a tractor Massey Ferguson size 165 Engine Size A212 worth Kshs. 525,000/-. The Sale Agreement was produced as Exhibit 1. He further averred that he paid Kshs. 200,000/- on 2nd September 1996 by bankers cheque. It was agreed that he would pay Kshs. 50,000/- upon delivery of the tractor and the balance in instalments of 11 months.

A guarantee of one year was given as well as insurance cover by the Appellant. That as the tractor was

reconditioned, it was further agreed that the Appellant would change certain parts but even after paying a total of Kshs. 426,000/-, the tyres of the tractor were not replaced as agreed.

Under mysterious circumstances, the tractor was attached in March 1998 and it is at this time that the Plaintiff sought a refund of his money from the Appellant who drew another agreement showing that the Plaintiff owed Kshs. 135,872/- which he paid. According to the Respondent (plaintiff in the lower court), he paid the whole amount as agreed (he could not produce the receipts as they were destroyed in a fire). However, on 4th November 1999, the tractor was repossessed.

The Plaintiff testified ex-parte as despite service upon the Defendant, it did not enter appearance nor did it file defence. The court found in favour of the Plaintiff as his evidence was uncontroverted. The Defendant was ordered to refund Kshs. 492,000/- with costs and interest. It was further ordered to pay general damages amounting to Kshs. 100,000/- for breach of contract.

It is at this point that the Defendant sought stay of execution of the ex-parte Judgment which application was never prosecuted as the Defendant did not appear in court thus it was dismissed and interim orders discharged. Upon application, the stay of execution application was reinstated. The ex-parte Judgment was eventually set aside in a ruling dated 3rd June 2005.

Even after being allowed to defend the suit, the Defendant did not appear at the hearing of the suit on 29th January 2008 despite having taken the hearing date by consent.

Eventually, judgment was delivered where the court noted that other than alleging that the Plaintiff was in arrears in its defence, the Defendant did not tender any evidence to show when the Plaintiff fell into arrears to justify repossession. The Court went on further to hold that the Defendant was in total breach of contract and awarded Kshs. 100,000/- for the same. The Defendant was also ordered to pay Kshs. 492,000/- being refund of the amount paid for the tractor with interest at court rates from 4th November 1999.

When execution of the decree proved an uphill task for the Respondent, he sought orders that the Directors of the Defendant be summoned in Court for examination on whether they should be held personally liable for the debts of the Defendant Company(in liquidation). This was in an application for oral examination brought under Order 22 rule 35(b) and (c) of the Civil procedure Rules, 2010.

There was no objection to this application by the Defendant or its Directors. The court delivered a ruling on 16th October 2013 to the effect that the Judgment Debtor, now the Directors of the Defendant at the material time before it went into liquidation, was to appear in Court for examination by the Plaintiff.

What emerged from the examination of the Appellant herein was that the Defendant's operations were closed in 1997 on account of rent arrears. He confirmed that the chairman of the Defendant Company, Shariff Nassir, directed that it be closed. That any pending claims against the Defendant had to be pursued up to the year 2002 which the Plaintiff didn't take up as he declined to collect the repossessed tractor. That assets of the Defendant were proclaimed and taken away by the debtors. He concurred that the Plaintiff was not notified that the Defendant was being wound up. He insisted that it is the Defendant Company that should pay the debt not the Directors.

The Court delivered its Ruling whereby it made it clear that the purpose of the examination of the Director was to establish how the Defendant Company planned to pay its debt to the Plaintiff. The Learned Magistrate averred that though the Defendant Company and the Directors are separate legal entities, the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying out the business as no more than a cloak, sham or mask, a devise or stratagem for enabling the directors to hide from the eyes of equity.

Her reasoning was based upon the fact that upon examination, the director, Mr. Shabbir, stated that he did not inform the plaintiff that the Defendant Company was being wound up. Since the directors were found

culpable of complicity having taken no action regarding the illegal repossession of the Plaintiff's tractor, and not informing him of the winding up of the Defendant Company, she found the directors of the Defendant Company and Judgment Debtor personally liable to satisfy the decree.

From the perusal of the file, it is clear that the Appellant has frustrated the Respondent for the longest time in a bid to exhaust him so that he can let go of his claim.

In **Masefield Trading (K) Ltd vs Rushmore Company Ltd & Another [2005]eKLR**, it was stated that the corporate veil of a corporate body may be lifted if it is found that the oral examination uncovers wrongdoing by an officer of the corporate body. During the oral examination, the witness clearly pointed out that the Defendant Company was wound up due to failure by the Company to pay its rent. This amounts to wrongdoing and improper conduct on the part of the Defendant. The Court therefore used its power to lift the corporate veil donated to it under Order 22 rule 35 Civil Procedure Rules as read with Section 323 of the Companies Act, Cap 486. In any case, this appeal is not against the orders of the Court allowing for lifting of the corporate veil. Those orders were never appealed against and they still stand.

The learned Magistrate termed the repossession of the Respondent's tractor by the Defendant in the suit as illegal since the contention by the Defendant that the Plaintiff was in arrears at the time of repossession was not backed by any evidence. Apart from filing defence, the Defendant did not call any evidence to substantiate its claims.

In the event, I am satisfied that the Appellant is indebted to the Respondent personally. In the end this appeal is dismissed. The award amounting to Kshs. 592,000/- is upheld payable by the Appellant and Abdul Swamad Sharrif Nassir, the Directors of Nashak Kenya Limited jointly and severally with interest at court rates from the date of filling suit in the trial court. The Respondent shall have costs of this appeal and the lower court suit.

Dated and delivered at Nairobi this 10th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE