IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Akiwumi, Tunoi & Shah JJ A)

CIVIL APPEAL NO 53 OF 1990

Between

PETER H. GAKERE .....APPELLANT

ANNE W. GAKERE .....APPELLANT

AND

NATIONAL BANK OF KENYA LTD.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice A Rauf) dated 3rd July, 1989

in

HCCC No 1749 of 1980)

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JUDGMENT

The appellants are husband and wife respectively. The first appellant (Mr Gakere) applied for loan facilities from the respondent bank ("the bank") in May, 1978 to the extent of Kshs 195,000/=. Negotiations between Mr Gakere and the bank resulted in the bank writing to Mr Gakere on 30th May, 1978 confirming the bank's willingness to sanction a loan facility to the extent of Kshs 136,000/=. The bank stated that as security for such proposed loan its Uchumi Branch had first legal charge for Shs 10,000/= over a property known as Kiambaa / Ruaka / T14.

Additionally the bank sought first legal charges over properties known as LR 209/7383/278 (Kimathi Estate) and LR No LOC 15/Mugeka / 530 /13.

In its said letter of offer the bank stated as follows to Mr Gakere:

> "You may rely on this facility being available to you for the time agreed upon provided there is no alteration as to the conditions as at present prevailing."

Mr Gakere by his letter of 12th June, 1978 (written on letterhead of 'Mwanga Complex' which was still a firm, as opposed to a limited liability company) confirmed "acceptance of the terms and conditions outlined" in the bank's letter which Mr Gakere referred to as " your letter AKN/ R1L/11/3278".

Curiously, this letter of 12th June, 1978 from Mr Gakere to the bank is signed by Mr Gakere as Director of Mwanga Transport Company.

LR 209/7383/278 earlier referred to, to be part of the security was registered in the name of Mr Gakere (see the letter of 9th May, 1978 addressed to Gakere by City Council of Nairobi).

The real issue for determination by us is as to whether the loan was advanced to Mr & Mrs Gakere or to Mwanga Complex Company Limited (the company) which company was incorporated on 19th July, 1978.

It is clear beyond any peradventure that the loan facilities were offered to and accepted by Mr Gakere at a time when the company was not yet in existence.

It is also clear that the other parcel of land sought as security by way of first legal charge belonged to Mr & Mrs Gakere, that is Plot No Kiambaa/ Ruaka/T14.

The written request for the loan facility in question was first made by Mr Gakere in his letter of 22nd May, 1978 in which letter he says:

> "I wish to apply for a loan amounting to Kshs 195,000/=. This loan would assist us in obtaining deposit to purchase 5 lorries (commercial vehicles)".

It becomes clear therefore that the company had nothing to do with the actual grant of loan facility. The authority of *Salomon vs Salomon & Co Ltd* (1897) AC 22 relied upon by Mr Wamae has no relevance to the facts of this appeal. That case (*Salomon's*) simply confirms the principle of the independent corporate existence of a company as distinct from that of an individual.

Salomon's case (supra) does not help the appellants simply as the loan was agreed to be advanced to the Gakeres when the company did not exist. So the coming into existence later of Mwanga Complex Company Limited does not help the appellants.

The learned judge did not believe Mr Gakere's version of facts. He was found to be utterly unreliable and dishonest. The learned judge said that Mr Gakere "expressed no compunction in denying even the liability to the extent of Kshs 41,208/25'. The learned judge was in a better position to assess the demeanour of Mr Gakere. He did not believe him and we will not reverse the judge's findings of facts based on evidence received at the hearing as we see no grounds to do so. Indeed we believe that the learned judge was right in concluding that Mr Gakere's evidence was a blatant attempt at avoiding liability for payment of the sum due to the bank. Indeed there is reason to believe that Mr Gakere was simply trying to pass on the debt to the company which had no assets by the time the suit was filed.

Paying-in slips produced in the superior court do not in any way suggest that the loan was advanced by the bank to the company. These paying-in slips are mere evidence of existence of accounts operated by the company with the bank. These do not change the nature of the original contract which was for the granting of a loan to the appellants (Gakeres).

It does happen, quite often, that a firm converts itself into a limited liability company but that fact *per se* does not absolve the firm from its liabilities which liabilities remain squarely on the partners of the firm even after a firm is dissolved.

We see no merits in any of the first six grounds of appeal. Perhaps the words "corporate veil" were not necessary but what the learned judge was saying is clear. He was saying that having converted the firm into a limited liability company the Gakeres were attempting to unilaterally "palm – off" the debt to the company which had become defunct.

Nothing, now, really turns on the appellants' final ground of appeal. The learned judge held that Mr Gakere holds property known as LR No 209/7383/342 upon trust for himself and the bank. That is not

correct, with respect. Trust as the learned judge has found cannot be so simply implied or deemed to be created. The Privy Council, concurring with the dissenting judgment of Newbold, JA in *Ayoub vs Standard Bank of SA* [1961] EA 743 said so in its judgment on appeal against the decision in the *Ayoub* case (supra). In a unanimous judgment delivered by Lord Guest (judgment being of Viscount Radcliffe, Lord Morris of Borth –Y Gest and Lord Guest) the Privy Council said in *Ayoub & another vs Standard Bank of SA & another* [1963] EA 619, 622:-

> "The law on the matter is accurately stated by Newbold JA, in his dissenting judgment. In *Cook vs Fountain* (1) (36 ER at p 987) it was stated.
>
> > "so the trust, if there be any, must either be implied by law, or presumed by the Court. There is one good, general and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the Court never presumes a trust; but in case of absolute necessity."

Whilst we think, with respect that the learned judge was wrong in granting the orders as prayed in prayer (iii) (b) of the amended plaint, nothing now turns on it as the appellants have apparently paid almost all sums due to the bank.

We allow this appeal to the extent of disallowing and setting aside orders made in terms of prayer (iii) (b) of the amended plaint but the appeal is otherwise dismissed and the respondent would have 4/5ths of its costs of the appeal.

Dated and delivered at Nairobi this 21st day of July 1995

A.M AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR