

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E608 OF 2024

KAPA OIL REFINERIES LIMITED.....
APPELLANT

VERSUS

HABO GROUP OF COMPANIES..... **1ST RESPONDENT**
GTEC COMPANY LIMITED..... **2ND RESPONDENT**
GLOBAL FREIGHT LOGISTICS LIMITED..... **3RD**
RESPONDENT

(Appeal from the judgement and decree of Hon. Paul K Rotich, Senior Principal Magistrate, SPM, of 30th November 2023, in Milimani CMCCC No. 836 of 2019)

JUDGEMENT

1. The suit, at the primary court, was by the appellant, against the respondents, for compensation. The claim was for indemnity to the tune of Kshs. 4,674,451.50, being demurrage charges, plus interests and costs.
2. The foundation of the claim was a road carriage arrangement, allegedly between the appellant and the respondents, jointly and severally, to transport cargo for the appellant from and to various destinations, dated 11th April 2018. The understanding was that the respondents would collect containers, at the Interior Container Depot Embakasi, and transport them to the premises of the appellant for offloading, after which the empty containers would thereafter be returned to designated drop off points. It was claimed that in 2018 the respondents defaulted in returning the empty containers to designated drop off points, with the result that the appellant incurred demurrage charges claimed in the plaint, which it was forced to settle through its clearing agent.
3. The respondents filed separate defences, denying liability.
4. A trial was conducted. Each side called 1 witness. Judgement was delivered, on 30th January 2023. The suit was dismissed.
5. The appellant was aggrieved, hence the instant appeal, on grounds that the trial court failed to find in favour of the appellant; there was an error in finding that there was no valid contract between the appellant and the respondents despite existence of a signed contract between the parties; there was failure to consider the evidence adduced and the written submissions filed by the appellant; and the findings of the trial court were plainly wrong in law and fact.
6. Directions were given, on 2nd May 2025, for disposal of the appeal by way of written submissions. Both sides complied, for they have filed detailed written submissions, supported by appropriate case law.
7. The appellant has identified 3 issues for determination: whether there was a valid contract between the parties; whether the trial court erred in dismissing the suit; and orders against the 1st respondent.

8. On the first issue, it has cited section 37 of the Companies Act, Cap 486. Laws of Kenya, on execution of documents in respect of a company, where section 37(2) states that a document is validly executed by a company on its behalf if it is signed by 2 authorised signatories or by a director of the company in the presence of a witness who attests to the signature. It is submitted that the agreement of 11th April 2018 was between the appellant and the 1st and 2nd respondents, and it was signed on behalf of the 1st respondent, trading as the 2nd respondent, by a director of both companies, and it was embossed with a stamp of the 2nd respondent. It is also submitted that the same was witnessed by the Advocate for both respondents. It is argued that there was, therefore, compliance with section 37 of the Companies Act. It is further argued that, even if the agreement were invalid, there was adequate evidence that the parties had entered into it and were bound by its terms.
9. On whether breach of contract was proved, it is argued that the respondents were contracted to provide transport services for cargo belonging to the appellant, and it was an express term of that contract that the respondents would return the containers to a designated place, upon delivery and offloading of the cargo, within a specified period of time. The appellant submits that it adduced evidence that the respondents did deliver the cargo, but did not return the containers to the designated places, in contravention of the contract.
10. On the striking out of the name of the 1st respondent, it is submitted that that party applied to the Registrar of Companies to dissolve the company after the suit had been filed, and after the said 1st respondent had responded to the suit. It is argued that the proper procedure was not followed in the dissolution of the 1st respondent, as there was no compliance with section 897(3)(b) of the Companies Act, as no such notice was brought. It is further argued that there was no compliance with section 900 of the Companies Act, with respect to notices being given to parties interested, of the filing of the application, including creditors of the company.
11. It is argued that the purported application for the striking out of the 1st respondents was fraudulent and malicious, and was intended to evade the liabilities of the company. *Multichoice Kenya Limited vs. Mankam Limited & another* [2013] KEHC 4015 (KLR) (Mabeya, J) is cited, for the argument that a director of a company can be made liable for a contract entered into by the company, as an exception to the principle in *Salomon vs. Salomon & Company* [1897] AC 22 (Lord McNaughten), where the same is flagrantly opposed to justice or convenience, or where there is a fraudulent and improper design by scheming directors or shareholders. In such instances, the approach is to go behind the corporate veil, to the individual members, or as regards a subsidiary and its holding company.
12. On their part, the respondents submit on 4 issues: execution of a contract on behalf of a company; the principle of a company being a separate legal entity; the existence of the 1st respondent as a legal entity; and the prayer for lifting of the corporate veil. *Malia & Lucas Company Limited vs. County Government of Trans Nzoia* [2019] eKLR (Chemitei, J), *Ril Logistic Limited & another vs. Kyaka* [2024]

eKLR (Nzioka, J), *Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Bundi vs. Tiger Electronics & Motorbike Ltd* [2024] eKLR (Muriithi, J) are cited.

13. From the grounds of appeal and the written submissions, I have deduced the principal issue to be whether there was a valid contract between the parties, or whether there was a contract capable of enforcement between the said parties. The matter around the existence or otherwise of the respondents as legal entities would be an integral part of that issue, and it would be around whether the respondents could bear the loss incurred by the appellant.
14. In the judgement delivered on 30th November 2023, the trial court framed 2 issues, whether there was a road carriage agreement between the appellant and the respondents, and whether the respondents were liable for the loss incurred by the appellant. It was concluded that the agreement relied upon was not executed under the seal of the 1st respondent, alleged to be trading under the name of the 2nd respondent, the rubber stamp on the agreement was of an entity identified as GTEC-Global Trade Exhibition Centre, and one part of the agreement identified the 1st respondent as trading as GTEC. It was concluded that there was no valid agreement between the parties, for the same was not executed in the name of the 1st respondent, which had since ceased to exist following dissolution, and it was not entered into by the 2nd respondent, and, in any event, the 2 were separate legal entities. It was also found that the 3rd respondent was not party in any way to the said agreement. That being the case, it was concluded that liability could not arise.
15. A copy of the impugned agreement is at page 28 of the record of appeal before me. The first page indicates that the agreement is between the appellant and the 1st respondent trading as the 2nd respondent. The last page has the execution clause. The agreement was supposed to be sealed with the common seal of the appellant and the 1st respondent, and it bears rubber stamps of the appellant and GTEC Global Trade & Exhibition Centre. There are signatures, purported to be of respective directors of the appellant and the 1st respondent.
16. My understanding of the agreement is that the same is between 2 principal parties, the appellant and the 1st respondent. The agreement was supposed to have been sealed by the respective common seals of the 2 entities. There is nothing, on the face of that contract, to evidence that there was sealing of it by the common seals of the 2 companies. All I see a rubber stamps. A rubber stamp and a common seal do not mean the same thing. Secondly, whereas I see the rubber stamp of the appellant on the document, I do not see that of the 1st respondent. I see a rubber stamp of a trade and exhibition centre instead. The agreement was, therefore, not sealed with the respective common seals of the 2 entities as anticipated on the face of the execution clause. This was a purported contract between limited liability companies. They are separate legal entities from the persons behind them, and the signatures of the principal persons are authenticated by a seal of the company.
17. Secondly, there is the curious reference to the 1st respondent as trading as the 2nd respondent. Both are purported to be limited liability companies. It is usual for a

natural person to carry on business under a business name, or through an unincorporated entity. A limited liability company cannot do a similar thing. It cannot operate under the name of another limited liability company, unless one is the subsidiary of the other, but even then, that arrangement cannot be characterised as the case of a principal company operating under the name of a subsidiary company. The 2 are, in law, separate legal entities, and any dealings between them must be supported by contractual arrangements between the 2, either in resolutions of both or in contractual agreements between them, where one carries on business as a subsidiary of the other. The appellant did not adduce any evidence to connect the 1st and 2nd respondents, particularly to bring out the fact that one of them traded under the name of the other, or was the holding company for the other.

18. From the face of the contract alone, it would be clear that the parties entered into, if at all, an imperfect contract, whether there would be difficulties with enforcement. I would agree with the trial court. There was inadequate evidence that a valid contract was entered into with the 1st respondent, as the seal of that entity was not affixed to that contract. From the face of it, the 2nd respondent was not a principal to that contract, for its name was, apparently, used by the 1st respondent as a trade name, and no evidence was adduced on the contractual arrangements between the 2 entities, which would have enabled one to trade in the name of the other. The stamp affixed to the document, purportedly to authenticate the signature of the director/company secretary of the 1st respondent, was neither that of the 1st respondent nor of the 2nd respondent, but of an entity known as GTEC Global Trade & Exhibition Centre. The appellant did not adduce evidence to connect that centre with the 2 respondents, nor to explain why the rubber stamp of that entity was used to authenticate that signature, instead of that or those of the 2 respondents.
19. It was common ground that the 1st respondent ceased to exist, through dissolution, after the suit was filed, and pleadings had closed. It was argued that the dissolution of the 1st respondent was fraudulent, designed to defeat the suit. That issue was not before the trial court. It cannot arise on appeal. In any event, these are proceedings for recovery of a loss allegedly incurred, founded on ordinary civil law, and not dissolution of limited liability companies, governed by company law. The appropriate thing for the appellant to have done should have been to challenge that dissolution within the structures set out under the Companies Act, in a suit properly initiated under the relevant companies' legislation.
20. There is also the argument about the trial court failing to lift the corporate veil of the 1st respondent. That issue, of lifting the corporate veil, was not before the trial court. It cannot arise now on appeal. The matter of the dissolution of the 1st respondent, during the pendency of the suit at the trial court, was not made an issue by the appellant, after it came to the notice of the appellant. The pleadings at the trial court were not amended to place it before that court, hence the trial court had no occasion to address it, particularly with respect to considering lifting its veil of incorporation. It should only arise, if at all, at the trial court, perhaps, with respect to execution, but not on appeal.

21. Going by *Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA), that once a limited liability company was dissolved, no action could be brought or maintained against it, the suit against the 1st respondent lost its viability once the said 1st respondent was dissolved prior to completion of the proceedings before the trial court. Once that happened, the appellant should have taken the steps alluded to in *Bundi vs. Tiger Electronics & Motorbike Ltd* [2024] eKLR (Muriithi, J), by applying to have the company reinstated to the register of companies and restored to the situation ante the dissolution, to enable completion of the suit, and resolution of the liability issue. Once the 1st respondent was dissolved, it ceased to exist, and no suit could be maintained against it.
22. The impugned agreement made no mention at all of the 3rd respondent. It was neither a party to that contract, nor did any of the persons, who appended their signatures to it, purport to do so on its behalf. Since it was not party in any way to the contract, liability against it could not arise. In any event, the appellant adduced no evidence on the connection between it and the other respondents, nor with the impugned contract, from which liability could be assigned.
23. As the validity of the impugned contract is shrouded in doubt, its enforceability is equally in doubt. No liability could accrue from it to any of the respondents. The trial court cannot be faulted for coming to the conclusions that it arrived at. There is no merit, therefore, in the instant appeal, and I hereby dismiss the same, with costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS
3RD DAY OF OCTOBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Muumbi, instructed by Muumbi & Company, Advocates for the appellant.

Mr. Amuga, instructed by Amuga & Company, Advocates for the respondents.