



Embakasi Management Limited & 8 others v Imperial Bank Limited (In Receivership) & another (Civil Appeal 113 of 2019) [2022] KECA 7 (KLR) (21 January 2022) (Judgment)

Neutral citation: [2022] KECA 7 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 113 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JANUARY 21, 2022**

BETWEEN

**EMBAKASI MANAGEMENT LIMITED 1ST APPELLANT
KIMAKIA ESTATES LIMITED 2ND APPELLANT
MASINDENI ESTATES LIMITED 3RD APPELLANT
OLD TOWN PROPERTY DEVELOPMENT LIMITED 4TH APPELLANT
PWANI WAREHOUSING LIMITED 5TH APPELLANT
SAKU DEVELOPMENT LIMITED 6TH APPELLANT
SIBEN ESTATES LIMITED 7TH APPELLANT
TURUMA PROPERTIES LIMITED 8TH APPELLANT
AIRPORT WAREHOUSING LIMITED 9TH APPELLANT**

AND

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP) 1ST RESPONDENT
INSURANCE CORPORATION 2ND RESPONDENT**

(Being an appeal from the judgement and order of the High Court of Kenya (E.K. Ogola J.) dated 19th June 2019 in Mombasa Constitutional Petition No 24 of 2018)

JUDGMENT

1. The Appellants herein are private limited liability companies that form part of the Milly Group of Companies. They have filed this appeal against the decision by the High Court to dismiss a constitutional petition they had filed therein. The said petition was supported by affidavits sworn by Mohamed Rashid, the General Manager of Milly Group of Companies, and also a director and



- a shareholder of the Appellant companies. A glance of the said pleadings reveal the following facts. The Appellants held current and fixed deposit accounts with the 1st Respondent, a limited liability company licensed to carry on banking business, until it was placed under receivership by the Central Bank of Kenya on 13th October 2015. The Central Bank of Kenya in exercise of its statutory powers thereupon appointed the 2nd Respondent as the Receiver Manager of the 1st Respondent.
2. On 11th December 2015, 19th July 2016, and 28th December 2016 the 2nd Respondent issued press releases to the depositors of the 1st Respondent, informing of the payment of claims. The 1st to 8th Appellants applied to be paid various amounts held by the 1st Respondent. The 2nd Respondent in eight (8) similarly worded letters dated between 5th October 2016 and 8th November 2016, notified the 1st to 8th Appellants that their applications would be allowed, however the funds would be used to offset a hire purchase facility advanced to Farm Africa Mills Investments Limited by the 1st Respondent.
 3. The 9th Appellant also applied to be paid a sum equivalent to 10% of the deposit held by the 1st Respondent, and the 2nd Respondent again stated that the said amount would offset a facility given by the 1st Respondent to Farm Africa Mills Investments Limited. The 9th Appellant, by a letter dated 8th January 2018, in addition sought the release of the logbook for motor vehicle registration number KBX 223 K which it had purchased through an asset finance facility from 1st Respondent. The 1st and 2nd Respondent declined to do so on the ground that there was an outstanding amount owed by Farm Africa Mills Investments Limited.
 4. The Appellants# case was that the 1st and 2nd Respondents in utilising the aforesaid funds to offset the debt owed by Farm Africa Mills Investments Limited were acting contrary to their previous lawful conduct, since they had earlier paid the 5th 6th and 9th Appellants, without offsetting the sums claimed. Further, that the Appellants# only connection to Farm Africa Mills Investment Limited was as shareholders, and they had not provided guarantees or in any other way offered security to the facility advanced to Farm Africa Mills Investments Limited, and had not authorised the 1st and 2nd Respondent to offset the debt with their monies.
 5. The Appellants denied that they were party to the Hire Purchase Finance Contract between the 1st Respondent and Farm Africa Mills Investments Limited, and contended that the Respondents did not have powers to lift the corporate veil. The Appellants# General Manager also denied signing any documents binding the Appellants to pay the debts of Farm Africa Mills Investments Limited.
 6. They Appellant therefore sought declarations that the 1st and 2nd Respondents# decision to use their deposits to offset the loan facility to Farm Africa Mills Investment Limited was a violation of the Appellants# right to property under Article 40 of the Constitution and right to Fair Administrative Action under Article 47 of the Constitution, and that the said Respondents have no statutory power to make such deductions from their deposits. They also sought an order compelling the 1st and 2nd Respondents forthwith release to the Petitioners, the sum of Kshs 13,289,994.18/- together with interest at commercial rate of 20% per annum from the date of its unlawful withholding till payment in full, and to forthwith release to the 9th Appellant, the original logbook for motor vehicle registration number KBX 223K and initiate the transfer process on the National Transport Authority#s Website.
 7. The Respondents in response filed a Replying Affidavit sworn on 6th July 2018 by Mr. David Kiptoo, the Assistant Manager in the Risk and Resolution Department of the 2nd Respondent. He denied that the Respondents were in breach and/ or violation of the Constitution and of the Fair Administrative Action Act, 2015, or of any other laws alleged by the Appellants. Further, that the Respondents followed all the transactions carried out and required of the 2nd Respondent as specifically provided for under the Kenya Deposit Insurance Act, 2012.



8. The Respondents admitted that the Appellants had various accounts with the 1st Respondent. They also stated that Farm Africa Mills Investments Limited, had a hire purchase finance facility advanced to it of USD 1,792,850/- which was approved by the 1st Respondent subject to submission of personal guarantees by its directors; submissions of duly signed and witnessed right of set off forms signed by the Directors and any other security that the 1st Respondent may determine from time to time to secure the said facility.
9. It was the Respondents# case that Farm Africa Mills Investments Limited, defaulted in repayment of the facility both the principal and interest from the year 2015 to 2018. Further that in offsetting the amounts held by the Appellants against the amount due from Farm Africa Mills Investments Limited, the 2nd Respondent was exercising its powers under section 50 of the *Kenya Deposit Insurance Act, 2012*, once it came to its attention that all the Appellants and Farm Mills Investments Limited had common ownership through common directors as shareholders. Therefore, that the Respondents acted lawfully by lifting the corporate veil. The Respondents gave details of the directors and ownership of the said companies, and averred that the fact of ownership was admitted severally by the Appellants in their petition.
10. Furthermore, that the fact that the 2nd Respondent had made earlier payments to some Appellants did not make the offsetting illegal. The Respondents averred that the Appellants# petition did not meet the threshold of a constitutional petition as there was no evidence of fundamental breach of any rights of the Appellants or exercise of power by the Respondents outside their jurisdiction, and the alleged grievances could be remedied in a civil suit.
11. The High Court in its judgement addressed two issues, firstly whether the petition raises constitutional issues, which it answered in the affirmative on the basis that money is property which must be protected under Article 40 of the Constitution, and what was of concern is whether the Appellants# property had been arbitrary deprived. Secondly, whether the Respondents could lift the corporate veil, and in this respect found that the Appellant group of companies had at the time of taking the loan facility themselves lifted the corporate veil and decided that the group#s accounts or liabilities could be settled through set-off.
12. Further, that Article 47 of the Constitution did not apply as the Appellants were aware through their common directorship and shareholding that Farm Africa Mills Investments Limited was not repaying its loan and could not demand for notice or reasons of the Respondents# actions. In conclusion, the High Court observed that the matter before the Court while couched in constitutional terms was basically a civil suit which still had no merit.
13. The Appellants being dissatisfied with the said judgment filed a memorandum of Appeal herein dated 19th August 2019, in which they raised two main grounds. The first was that the High Court erred in law and in fact in finding that the Petition was essentially a “civil suit” and second, that the said Court erred in finding that the 1st and 2nd Respondents had legal basis for combining and consolidating the accounts held by the 1st to 9th Appellants to offset the indebtedness of Farm Africa Mills Investments Limited. Although the counsel for the Appellants and for the Respondents were not present in Court during the hearing, we nevertheless proceeded to reserve the appeal for judgement since they had both filed written submissions.



14. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that;
- “..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”
15. We shall therefore proceed to consider the issues raised in this appeal by re-evaluating the evidence adduced in the trial Court and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the High Court if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.
16. It is notable that the High Court in its judgement did find that the Appellants had standing and their claim was justiciable, and specifically that the issue before it concerned the Appellants' constitutional right to property. The issue for determination in this appeal therefore is essentially one, which is whether the Appellants' legal and contractual obligations to Farm Africa Mills Investments Limited, if any, could form the basis of the Respondent's defence to the claim of breach of the Appellants' constitutional rights.
17. The Appellants submitted in this regard that there were contradictory findings on the existence of a constitutional issue and that once the trial Judge rightly found that there was such an issue, he could not again find that the matter was an ordinary civil suit, and had to treat the matter as a constitutional petition and decide on the violation of Article 47 of the Constitution. They placed reliance on the decision in *Fatuma Zainabu Mohamed vs Ghati Dennitah & 10 others* (2013) eKLR that the business of judges is “to send into the world not doubts but decisions”.
18. The Appellants further submitted that common shareholding would not operate to dislodge their independent corporate identity, and reliance was placed on the decisions *Riccatti Business College of East Africa Limited vs Kyanzavi Farmers Company Limited* [2016] eKLR and *Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited* [2016] eKLR that the court is not entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used in arrangements of the legal liability of members of the group rather than the defendant company, and that a parent company and its subsidiary companies controlled by the same shareholders should not shoulder the debts of an insolvent subsidiary company.
19. In addition, that even though the right of set off forms may have been signed for Farm Africa Mills Investments Limited, they were not signed by, nor do they mention any of the Appellants as part of the group of companies referred to therein. The Appellants submitted they could therefore not be bound by a contract that they had never negotiated. The case of *Aineah Liluyani Njirah vs Agha Khan Health Services* [2013] eKLR was cited for this position.
20. The Respondents on their part submitted that the trial court fully appreciated that the suit was a constitutional one and dealt with it as such in considering whether the Appellants had been deprived



of their property arbitrarily. Further, that the mere mention of the cases as being „civil suit# did not render the entire judgement contradictory or inconsistent. The Respondents asserted that the trial Judge satisfied himself that right of set off form not only existed but was signed making it a legally binding document, and the receipts from other accounts could be applied to the other companies in the group of companies.

21. Reference was made to the decision in *Salmon vs Salmon and Co. Ltd* (1897) AC 22 HL for the position that courts can pierce the corporate veil if there is evidence that it is being used to shield fraud or improper conduct by the shareholders or controllers of a company. The Respondents submitted that the Appellants having a common shareholding were beneficiaries of the non-compliance and default by one of the companies with respect to non-payment of loan facilities. Lastly, that the trial Judge rightly referred to the decisions in *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Anor*, Civil Appeal No 95 of 1999 and *John Njoroge Michuki vs Shell Limited* Civil Appeal No. 227 of 1999 that parties must be bound by their agreements and Courts could not interfere with the same.
22. Arising from the submissions made, we shall consider the issue before us along three limbs. The first is whether the High Court had a legal basis for considering the allegations by the Respondents as regards the Appellants# legal and contractual obligations in the constitutional petition. Second, whether the Appellants# had any contractual or legal obligations in relation to Farm Africa Mills Investments Limited; and last if so, whether the said contractual obligations were sufficient reason to deprive the Appellants of their property.
23. The right to property is specifically guaranteed under Article 40(1) of the Constitution, and property is defined under Article 260 to include any vested or contingent right to, or interest in or arising from—
 - a. land, or permanent fixtures on, or improvements to, land;
 - b. goods or personal property;
 - c. intellectual property; or
 - d. money, choses in action or negotiable instruments;
24. Under Article 40(2), no law shall arbitrarily deprive a person of property of any description, or limit or in any way restrict the enjoyment of any right to property on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. An action is arbitrary when it depends on individual discretion, preference or prejudice rather than on fixed rules and procedures. In addition, the right to property is one of the rights that can be limited under Article 24 of the Constitution, and a person limiting another person#s rights is required to demonstrate that the conditions set therein have been met, namely that one is acting according to some law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
25. Therefore, the Constitution only permits interference with the right to property where such interference is authorized by a law of general application, and when it is in accordance with the law and due process.

The law is defined by *Black#s Law Dictionary Ninth Edition* at page 962 as the “aggregate of legislation, judicial precedents and accepted legal principles, the body of authoritative grounds of judicial and administrative action, especially the body of rules standards and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them” and including common law. To this extent the Respondent could raise a defence of the legal obligations owed by the Appellant to justify any interference with the Appellants# rights to the funds in the 1st Respondent bank, so long



as they were able to demonstrate that their actions had a basis in law, and that they had followed the applicable procedure.

26. The Respondents in this respect relied on the receivership powers of the 2nd Respondent provided under section 50 of the *Kenya Deposit Insurance Act*, including the power to offset the deposits or other liabilities owed by a deposit taking institution under receivership to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution. The Respondents urged that Farm Africa Mills Investments Limited had contracted to offset its loan facility with the 1st Respondent bank, against other accounts held by its companies or group of companies, including the Appellants.
27. The Appellants however denied being party to the agreement to offset the loans of Farm Africa Mills Investments Limited, or that they are part of the group of companies mentioned in the said agreement. In this respect, a group of companies is a collection of parent and subsidiary companies that function as a single economic entity through a common source of control. The concept of a group of companies is recognised in the definitions and interpretations in section 3 of the *Companies Act* of associated and holding and subsidiary companies. Associated companies are either a subsidiary of the company; a holding company of the company; or a subsidiary of such a holding company.
28. A holding company is defined as in relation to another company, to mean a company that— (a) controls the composition of that other company's board of directors; (b) controls more than half of the voting rights in that other company; (c) holds more than half of that other company's issued share capital; or (d) is a holding company of a company that is that other company's holding company. A subsidiary on the other hand means a company of which another company is its holding company; The concept of group of companies is also expressly recognised when it comes to the accounting requirements for the groups in section 639 to 645 of the Act.
29. The Respondents in this respect provided evidence that the hire purchase facility was subject to its directors signing a right to set off form, and a copy of a signed right to set off form which indicated that the 1st Respondent could apply payments received in accounts of the group of companies to pay the hire purchase facility. Even though the right to set of form presented as evidence by the Respondents did not specify who the borrower was, and did not mention the Appellants by name as being in the group of companies, the fact that the said right to set off form was signed by a director of Farm Africa Mills Investments Limited was proved. In addition, the fact that the said director of Farm Africa Mills Investments Limited had common shareholding and directorship with the Appellants was also proved, and appears not to have been contested in the High Court.
30. Two important legal inferences that can therefore be made from the said signed set off form. First, that the Respondents were entitled to go behind the corporate veils of Farm Africa Mills Investments Limited to find out the shareholding and directors for purposes of determining who controlled the said company and which other companies were controlled by the same shareholders and directors, which led them to the Appellants. In other words, the contract signed with Farm Africa Mills Investments Limited specifically and expressly permitted the Respondents to lift the veil of Farm Africa Mills Investments Limited, and the evidence presented before the Court in this regard was that the said company and the Appellants were under the control of the same shareholders and directors, and therefore part of the same group of companies.
31. As regards the piercing of the corporate veil of the Appellants as opposed to Farm Africa Mills Investments Limited, the Court of Appeal in the case of Riccati Business College of East Africa



Limited vs Kyanzavi Farmers Company Limited [2016] eKLR extensively considered the factors warranting a lifting of the corporate veil and we agree with the conclusion made therein as follows:

“.....The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”

32. The Appellants# argument that they were not party to the set off agreement cannot in this respect be allowed to stand, as they were expressly committed to the said agreement by their common director and shareholder. The Appellants cannot therefore in the circumstances rely on the corporate veil to avoid their legal and contractual obligations, having been found to be in the same group of companies as Farm Africa Mills Investments Limited.
33. The relationship between the Appellants and Farm Africa Mills Investments Limited having being proved, it is our finding that there was sufficient reason provided by the Respondents, and grounded in the applicable law, which explained the limitation of the Appellants# right to their deposits in the 1st Respondent bank.
34. We will also briefly address the arguments made on the violation of the right in Article 47 of the Constitution to fair administrative action. It is notable in this regard that the Appellants annexed the correspondence from the 2nd Respondent on their claims to the affidavit in support of their Petition in the High Court. The 2nd Respondent in the said correspondence explained that the credit balances in the Appellants# accounts would be utilised to reduce the loan facility of Farm Africa Mills Investments Limited. The Appellants were therefore given notice and reasons for the 2nd Respondent#s actions, and there was no violation of Article 47 in this respect.
35. In addition, under section 46(2) of the *Kenya Deposit Insurance Act*, any person who sustains losses from any action of the Corporation or other person appointed as receiver is supposed to institute an action for damages, and the trial Judge therefore did not err in observing that the proper cause of action by the Appellants would have been a civil action. Lastly, section 9(2) of the *Fair Administrative Action Act* also requires the exhaustion of statutory remedies before engagement of other judicial review remedies.
36. The Appellants# appeal therefore fails for the foregoing reasons, and is hereby dismissed with costs to the 2nd Respondent.
37. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

