



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJA)

CIVIL APPEAL NO. 171 OF 2011

BETWEEN

**KENYA TEA DEVELOPMENT AGENCY LIMITED..... APPELLANT**

**VERSUS**

**VICTORY TEA BROKERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**HON. KIPNG'ENO ARAP NGENY.....2<sup>ND</sup> RESPONDENT**

**HON. (PROF) SAMSON K. ONGERI.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from a ruling and order of the High Court of Kenya at Nairobi (J. Khaminwa J.) dated and delivered on 3<sup>rd</sup> November 2009*

in

**HCCC NO. 183 OF 2009)**

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**JUDGMENT OF THE COURT**

This appeal arises from a decision of the High Court which discharged **Hon. Kipng'eno Arap Ngeny** and **Hon. (Prof) Samson K. Ongeri**, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (**the directors**) respectively as parties to the suit filed by the applicant the **Kenya Tea Development Agency Limited**.

Briefly, the appellant, who was the managing agent of the Litein, Kapset, Kiru, Momal and Kapkoros Tea Factories (**the tea factories**) claimed that at the request of the 1<sup>st</sup> respondent, Victory Tea Brokers Limited (**Victory Tea**), it agreed to employ Victory Tea as a tea broker to manage the tea factories and in return Victory Tea would be paid a commission of 0.75% all inclusive. It was alleged that the agreement was made on the fraudulent representations of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were directors of Victory Tea that the company was of good standing, and could be trusted with the proceeds of tea sales. The appellant further alleged that on diverse dates between 23<sup>rd</sup> September 2008 and 7<sup>th</sup> October 2008, the directors embarked on auctioning the appellant's tea and realized a sum of US \$ 932,385.69, which sum they had failed to remit to the appellant. As a consequence, the appellant brought an action against them claiming the sum realized from the various auctions.

Victory Tea denied receiving any proceeds from the tea auction, and instead claimed that the appellant's servants and agents, in collusion with one Messer's Chacha Tea Limited, fraudulently sold the subject tea thereby occasioning loss to the appellant.

On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied having made any false representations, or that they had refused to remit the auction proceeds to the appellant. The 3<sup>rd</sup> respondent further stated that Victory Tea was a separate corporate entity that could sue or be sued in its own right.

Subsequent to filing his defence, the 3<sup>rd</sup> respondent filed a Chamber Summons on 21<sup>st</sup> May 2000 supported by a sworn affidavit seeking to have the suit against him struck out on grounds that the Victory Tea was a limited liability company registered under the Companies Act, that was capable of being sued in its own right, and that the directors were mere agents of a company through which Victory Tea operated.

Though conceding that he was a shareholder and director, the 3<sup>rd</sup> respondent asserted that he could not be held liable for the company's debts as it was a separate legal entity, unless the corporate veil was pierced. He concluded by stating that the suit which disclosed no reasonable cause of action against the 3<sup>rd</sup> respondent was misconceived, frivolous, an abuse of the court process, and was merely intended to scandalize and embarrass the 3<sup>rd</sup> respondent.

This application was shortly followed by a similar application and sworn affidavit in support filed by the 2<sup>nd</sup> respondent on 29<sup>th</sup> May 2000 comprising substantially similar grounds.

The appellant did not file a replying affidavit but filed grounds of opposition where it contended that the suit against the two directors was separate and independent from the suit against Victory Tea, and that the claim against them related to their personal responsibility in the transaction which had given rise to the losses; that the fraudulent misrepresentations and inducement made to the appellant, and the outstanding amounts claimed were triable issues for determination.

In its ruling the High Court (Khaminwa, J), discharged the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the suit having found that the claim against them was instituted to embarrass and scandalize them. In so finding, the court stated;

***“There is no evidence of fraud or breach of fiduciary duties of directors. The plaintiff's claim does not show any fraudulent acts of the defendants 2 and 3 and the allegations of misrepresentation and fraud are not supported by the particulars.***

The applicant was aggrieved by the lower court's decision and filed an appeal to this Court on the grounds;

***“ 1. That, the said ruling is a nullity as the same was delivered without notice to and in the absence of the parties.***

***2. That, the said ruling is a nullity as the same was not delivered as is required by the law.***

***3. That the material applications leading to the ruling contravened the applicable provisions of the law.***

***4. That, the reliefs granted violated established law and principles of striking out pleadings summarily.***

***5. That, the cause of action and the reliefs sought against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the Plaintiff are such that the same cannot be determined at interlocutory stage.***

***6. That, the trial Judge misunderstood and misapprehended the applicable law on lifting of corporate veil.***

***7. That, the trial Judge misunderstood and misapprehended the applicable law on fiduciary duties of Directors of a company.***

***8. That, the ruling made is in vacuo and without substratum.***

***9. That, the Trial Judge reached an erroneous decision.***

***10. That, in all circumstances, the material ruling is not justiciable.”***

In his submissions, learned counsel **Mr. D. Kipkorir** stated that this appeal concerned an application to strike out the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the suit. Counsel went on to state that no notification of the date of the ruling issued to the appellant, which ruling was delivered two years later, and amounted to a violation of the law. Counsel submitted that under **order VI rule 13** of the retired **Civil Procedure Rules**, before pleadings are struck out, they should on their face be rendered beyond redemption, and therefore the learned judge misdirected herself when she found that no evidence existed against the two directors, as it was not a necessity at this interlocutory stage of the proceedings for evidence to be produced.

It was further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' liability was based on tort, as the contract awarded to Victory Tea was given on the basis of the representations made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were influential public officers. Counsel argued that it was trite that in such cases, corporate liability did not cover tortious liability, which allowed the corporate veil to be lifted.

Opposing the appeal, **Mr. Muinduka** submitted that it was not disputed that there was a commercial contract between the parties, and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were directors of the 1<sup>st</sup> respondent. It was their case that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents ought not to have been joined in the suit because the 1<sup>st</sup> respondent was a limited liability company, and under the principles set out in **Salomon vs Salomon [1887] AC 22**, Victory Tea, and not its directors, ought to have been sued as the sole contract holder.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondent also filed a cross appeal raising the ground that the trial judge did not make any orders as to costs in their favour, but it was not canvassed during the hearing.

We have considered the pleadings and heard the parties' submissions, and are of the view that the issue turns on whether the learned judge rightly exercised her discretion to discharge the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the suit for reasons that there was no evidence of fraud or breach of fiduciary duties of directors. In **Mbogo & Another vs Shah [1968] EA 93** this Court has stated that, unless it is demonstrated that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on

or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision; this Court will not interfere with the Judge's exercise of discretion.

To determine this issue, the following questions must be determined;

- i) whether the learned judge properly applied the prerequisites of

**Order VI Rule 13 of the repealed Civil Procedure Rules;**

- ii) whether the pleadings disclosed a reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; and
- iii) whether their inclusion as parties was intended to scandalize and embarrass.

**Order VI Rule 13** of the old **Civil Procedure Rules** stipulates that;

**“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-**

- a. It discloses no reasonable cause of action or defence or**
- b. It is scandalous, frivolous or vexatious; or**
- c. It may prejudice, embarrass or delay the fair trial of the action; or**
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have alleged that the suit disclosed no reasonable cause of action and that the suit was misconceived, frivolous, an abuse of the court process and was merely intended to scandalize and embarrass the two directors.

**Halsbury's Laws of England, 3rd Edition, Volume 30** at page 38 states;

**“The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases, and where a question of general importance or serious question of law would arise on the pleadings, the court will not strike the pleadings unless it is clear and obvious that the action will not lie.”**

In the case of ***D.T. Dobie Company (K) Ltd vs Muchina & Another [1980] eKLR;***

**“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.” (Emphasis added).**

The appellant's case is that the two directors are necessary parties to the suit as the fraudulent representations they had made to the appellant that the Victory Tea was of good standing had given rise to their personal liability for the losses occasioned by the appellant.

But in order to advance the case for personal liability on the basis of fraudulent misrepresentation, **order VI rule 8(1)** of the retired **Civil Procedure Code** specifies that;

**“Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—**

**(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and**

**(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”**

The provision makes it clear that, where any misrepresentation, fraud, breach of trust, willful default or undue influence is alleged, particulars of such misrepresentation, fraud, breach of trust, willful default or undue influence must be specifically pleaded. So that, it was essential for the appellant to plead the particulars of fraudulently misrepresentation made by

the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. A consideration of the pleadings discloses that such particulars are distinctly missing. The plaint does not provide

any specific details of the statements complained of, or the nature of the statements made that would result in the directors being held personally liable for the acts or omissions of Victory Tea. There is nothing that connected the directors to the appellant's losses. It is for this reason that the learned judge stated that, "*The plaintiff's complaint does not show any fraudulent acts of the defendants 2 and 3 and the allegations of misrepresentation and fraud are not supported by the particulars*".

Without such particulars having been specifically pleaded it is difficult to discern the nature of the cause of action that existed against the two directors, particularly where it was alleged that Victory Tea, and not its directors, entered into the agreement with the appellant. Being a company that was capable of suing and being sued in its own right, under the principle of separate legal personality as expounded in the case of *Salomon vs Salomon (supra)* Victory Tea, and not the directors, was the proper party to the suit, and we find that the learned judge was right in striking out the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the pleadings. Having so found, we are also satisfied that the joinder of the two directors to the suit was intended to scandalize and embarrass them. We have no reason to interfere with the trial judge's decision.

As such, we find that the appeal is unmerited, and is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

***It is so ordered.***

***Dated and delivered at Nairobi this 8<sup>th</sup> of February, 2019.***

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**