IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 5 OF 2017

BETWEEN

STEPHEN NJOROGE GIKERA &

PUNIT DIPAK VADGAMA

T/A GIKERA & VADGAMA ADVOCATES.....APPELLANT

AND

ECONITE MINING COMPANY LIMITED.....1ST RESPONDENT

MERI MANYIWA MERI.....2ND RESPONDENT

BERNARD SHUME CHAMUTU.....3RD RESPONDENT

MERI CHIGAMBA MERI.....4TH RESPONDENT

JUMAA MKALA MWABEJA..... 5TH RESPONDENT

MANYIWA SHUME MANYIWA.....6TH RESPONDENT

MERI CHAMUTU MERI.....7TH RESPONDENT

CHINA ROAD AND BRIDGE

CORPORATION KENYA.....8TH RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Mombasa (P.J. Otieno, J.) delivered on 21st November, 2016

in

High Court Commercial Cause No. 117 of 2016

and

HC JR No. 8 of 2016)

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JUDGMENT OF THE COURT

[1] This appeal challenges the denial of leave to the appellant to cease acting as advocates to the 1st respondent. The core issue raised therein is whether the learned trial Judge was right to lift the veil of incorporation of the 1st respondent directors, having been the managing partner

of the appellant law firm. This being a first appeal, we think it is necessary to restate albeit in brief some background information so as to place this appeal in perspective.

[2] Through an Amended plaint filed by the 8th respondent, the 1st - 7th respondents were named as defendants in respect of a claim for the sum of Kshs.8,300,000; allegedly owed to the 8th respondent by the 1st respondent in respect of a tenancy agreement.Duly instructed, the appellant's law firm entered appearance on behalf of the 1st respondent; through the memorandum of appearance dated 14th September, 2015. However, while the court was disposing off some interlocutory applications filed by the parties, the appellant filed an application dated 18th October, 2015 seeking leave to cease acting for the 1st respondent in the matter.

[3] The application was unopposed and in a ruling delivered on 21st November, 2016, the subject of this appeal, the learned trial Judge found the application to be an abuse of the court process and an attempt at delaying the dispensation of justice. In so holding, the Judge was of the view that since the appellant's managing partner was also the majority shareholder in the 1st respondent, the issue of want of instructions cannot arise. Accordingly, the application was dismissed with costs.

[4] Dissatisfied with that outcome, the appellant lodged this appeal, in which they primarily argue that the learned Judge erred in lifting the 1st respondent's veil of incorporation and essentially imposing upon the appellant the duty to represent the 1st respondent despite want of instructions. According to the appellant, the learned Judge failed to honour the principles of company law and the Advocate's code of conduct; as he failed to recognise the 1st respondent as a juristic person in law.

[5] Appearing for the appellant was learned counsel **Mr. Kithinji** who submitted that the appellant's managing partner, one **Stephen Njoroge Gikera**, was also the majority shareholder in the 1strespondent. However, for purposes of this case, the appellant was instructed to act purely as an agent of the 1st respondent; meaning the firm's authority to represent the 1st respondent ended the moment the appellant ceased receiving instructions. Consequently, and notwithstanding Mr. Gikera's relationship with either party, the appellant cannot be compelled to continue representing the 1st respondent in the matter in view of their want of instruction. Citing the case of ***Stevenson vs. Rowand, 6 English Reports, 668,*** which sums up the position of an advocate as an agent to his client counsel argued that an agent is bound to obey the instructions of his principal and should neither exceed nor fall short of those instructions lest he be held liable in damages.

[6] Elaborating further, counsel contended that being a limited liability company, the 1st respondent was a separate legal person from its shareholders and as such, could act in its own name. He added that given the fact that in this case, the 1st respondent was the principal and since the appellant's request for instructions had gone unheeded by the 1st respondent, the appellant was well within their rights to cease acting. In the circumstances he said, the court erred in lifting the veil of incorporation and refusing to grant the appellant leave to cease acting for the 1st respondent; by lifting the veil of incorporation, the learned trial Judge addressed un-pleaded matters; which renders his ultimate conclusion bad in law. Counsel urged us to take notice of the fact that the appellant's application for leave to cease acting was unopposed and that the Judge's dismissal of the application were simply based on irrelevant considerations.

[7] Opposing the appeal was **Ms. Moka** for the 8th respondent; who submitted that as director, Mr. Gikera was the mind and will of the 1st respondent and his state of mind was that of the company; as a result, his application to cease acting on behalf of the 1st respondent was without basis and was only aimed at scuttling the proceedings and to defeat the ends of justice. Counsel urged this Court to find that the parties' aim of coming to court is to seek a fair determination of a dispute; in a judicial process that only advances the cause of justice, not defeat it.

[8] This being a first appeal, our duty is as re-stated in the case of ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira& Co. Advocates [2013] eKLR,*** **whe**re it was held;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

Bearing in mind the above, we have to re-consider the whole matter and subject it to our fresh analysis of course with the usual caution that we never saw or heard the witnesses. In this case the matter was determined on the basis of affidavits and submissions.

[9] The core issue for determination herein as stated in the opening paragraph is whether the learned Judge erred in lifting the veil of incorporation and dismissing the appellant's application. On the one hand, the appellant contended that the 1st respondent is a juridical person, capable of making its own independent decisions and as such, its shareholding and directorship was immaterial to the instructions given to counsel; including to the application before court. On the other hand, the 8th respondent contended that the learned Judge was right in lifting the veil of incorporation to address the mischief behind the appellant's application.

[10] It is common ground that in the course of proceedings, it emerged that the managing partner in the appellant law firm, Mr. Gikera, was also the majority shareholder and director in the 1st respondent. Even the appellant's counsel admitted as much in his submissions before this court.As rightly submitted by the appellant, it is indeed a well established principle of law that a company is a separate juristic person in the eyes of the law; capable of acting in its own name, suing and/or being sued (See ***Salomon vs. Salomon & Company Limited [1897] AC 22***. In this regard, the company is said to be cloaked in a *'veil of incorporation'* which means that in its dealings, it is directly and independently responsible for its acts and its directors are not personally liable.

[11] However, there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance. ***The Halsbury's Laws of England, 4thEdn para. 90***; addresses the issue of

piercing the veil of incorporation and states that;

> ***"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. <u>This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it,is a relevant feature.</u> In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted"***

[12] Was the learned Judge wrong in lifting the veil in the present case? Looking at the issue within the context of the proceedings before the trial court, the record shows that prior to the application to cease acting, the 1st respondent had been directed by court to comply with some interlocutory orders issued on 5th October, 2015; which required the payment of some premiums and furnishing of accounts in respect thereof, by the 1st respondent. The 1st respondent is yet to comply. Instead, her lawyers, the appellant, filed an application to cease acting, claiming want of instructions from their client, the 1st respondent. However, in the course of proceedings, it emerged that the managing partner in the law firm of the appellant one Mr. Stephen Njoroge Gikera was also not only one of the two directors of the 1st respondent, but also the majority shareholder therein.

[13] Apparently, Mr. Gikera held 60% of the 1st respondent's shares, while the other 40% were held by a third party. This was therefore essentially and as it emerged before the trial court; a case of Mr. Gikera wearing a different hat to avoid legal obligations that came with his directorship of the 1st respondent, while hiding under the veil of incorporation. Unfortunately the veil could not cover him entirely because a bigger portion of the veil happened to be worn by himself just as the old adage goes ***"you cannot have your cake and eat it".*** It is precisely this kind of situation that the principle of lifting the corporate veil seeks to obviate. The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as 'A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.' (See ***<u>Jones vs. Lipman & Another</u>*** **[1962] 1 All ER 442)** and ***<u>H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd</u> [1956] 3 ALL ER*** where it was held;

> ***"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such"***

[14] Mr. Gikera (as one of the two directors of the 1st respondent as well as its majority shareholder) represented the directing mind, soul and hands of the 1st respondent. He cannot be said to have withheld instructions from himself (as the managing partner to the appellant law firm). It was an absurdity that the learned Judge rightly addressed by lifting the veil of incorporation. It was also a case of proceedings taken out to abuse the court process; where a party tries their luck to gain an advantage in a company as a director, but when ordered to comply with certain court orders it becomes convenient for the party, who is a majority shareholder and a director of the company, to feign lack of instructions. This state of affairs is precisely what was described in a persuasive case by the Court of Appeal of South Africa in the case of ***<u>Beinosi vs. Wiyley</u> 1973 SA 721 [SCA]*** at page 734 F-G which set out the legal principle of abuse of court as thus;

> ***"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitatethe pursuit of the truth are used for purposes extraneous, to that objective"***

The control of the 1st respondent was in this case a relevant feature within the meaning of the **Halsbury's Laws of England** *(supra.)* the above authorities and the court's attention to that detail cannot be faulted.

[15] In conclusion we are not persuaded the Judge erred and in the circumstances we find this appeal devoid of merit. We order it dismissed with costs to the 8th respondent who participated in this appeal.

Dated and delivered at Malindi this 27th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR