



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MWILU, AZANGALALA & KANTAI, J.J.A.)**

**CIVIL APPEAL NO. 325 OF 2010**

**BETWEEN**

**RICCATTI BUSINESS COLLEGE OF EAST AFRICA LIMITED ..... APPELLANT**

**VERSUS**

**KYANZAVI FARMERS COMPANY LIMITED ..... RESPONDENT**

***(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Njagi, J) given on 14<sup>th</sup> October, 2010***

**in HCCC No. 508 of 2010)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The suit at the High Court of Kenya at Nairobi was instituted by the appellant, Riccatti Business College of East Africa Limited, against the respondent Kyanzavi Farmers Company Limited, by a plaint where it was averred that the respondent, as owner of a building in Nairobi called Agriculture House, had leased to the appellant two office spaces measuring 2540 square feet and 2013 square feet for a term of 11 years each at varying annual rents. It was further averred in the plaint that the said leases commenced on 1<sup>st</sup> February, 2010 and that rent had been paid on time but that on 14<sup>th</sup> July, 2010 the respondent, through its agent, had levied distress against the appellant to recover rent arrears which the appellant denied owing to the respondent. It was therefore prayed that the said distress be declared unlawful and that an injunction do issue against the respondent restraining it from proceeding with the said distress and damages be awarded for wrongful and irregular distress and costs be awarded to the appellant.

The respondent delivered a statement of defence where the appellant's claim was denied. Contemporaneous with the plaint was a Chamber Summons brought under the then **Order XXXIX Rules 1, 2 and 3 Civil Procedure Rules and Section 3A** of the **Civil Procedure Act** where it was prayed in the main that the respondent be restrained from proceeding with the distress for rent levied against the appellant on 14<sup>th</sup> July, 2010. The grounds upon which the Summons was predicated was that the appellant did not owe the respondent any rent arrears; that the distress levied against the appellant was wrongful and irregular; that the appellant was to suffer irreparable loss if the distress levied was not stopped; that the appellant was prepared to give an undertaking to pay damages if the case failed and that

the appellant had a good case against the respondent with probability of success. The summons was also supported by an affidavit of the appellant's director where the averments in the plaint were repeated. The director deponed, *inter alia*, that his company occupied leased premises previously occupied by a company called Rocham Enterprises Limited which company had vacated the premises before his company took possession and that his company had paid all rents on time and that there were no arrears of rent due to the respondent at all.

In a replying affidavit the Chairman of the Board of Directors of the respondent deponed that the appellant's application was incompetent and was full of falsehoods; that the appellant had filed a similar suit then pending in court; that:

- “5. That from the documents annexed hereto, it is evident the Defendant has only leased its premises to one tenant Robert Mutuku carrying business under Rocham and Riccatti and if at all there is another tenant allegedly the plaintiff, then it is a trespasser and illegally in the defendant's premises and should not be entertained by the court.***
- 6. That the plaintiff is in rent arrears to well over Shs.11,000,000 but which after a meeting between his then advocates Owaga Advocates on 8/6/2010 whereof the Director of the plaintiff expressed his commitment to pay on or before 14/7/2010, which he never honoured culminating to action by the landlord to protect her interests. Annexed and marked JMM2(a) – (d) are bundles of correspondences confirming the foregoing.***
- 7. The plaintiff has come to court with dirty hands and lying lips as he is a rent defaulter and has committed other illegal acts and this disentitles him of the equitable relief he is seeking with dirty hands. Annexed and marked JMM3 are copies of one of the plaintiff's Directors correspondences and affidavit confirming this.***
- 8. That the respondent has applied all payments made by the plaintiff and Rocham to recover part of the rent arrears outstanding since 2008 and the respondent has never received any rent from the plaintiff in respect of the alleged lease and non is acceptable; there is no valid lease agreement between the plaintiff and the defendant.***
- 9. That the applicants allegation that prior to 1<sup>st</sup> February 2010, the same offices had been leased to a company known as Rocham Enterprises Ltd which has since vacated the premises is untrue and meant to blatantly mislead this honourable court. The plaintiff/applicant is actually part and parcel of Rocham Enterprises.***
- 10. That the plaintiff is a tress-passer on the defendant's premises and his continued occupation without payment of rent is causing the defendant a lot of loss and hardship the balance of convenience tilts in favour of the defendant.***
- 11.....”***

That application was heard by L. Njagi, J, who in a ruling delivered on 14<sup>th</sup> November, 2010 found no merit in it and dismissed it with costs. Those orders provoked this appeal.

Five grounds are set out in the Memorandum of Appeal where the learned judge is said to have erred in law and fact in deciding the appellant's application against the evidence on record; that the learned judge erred in finding that the appellant was an alias for Rocham Enterprises Limited; that the learned judge erred in finding that the appellant was responsible for unpaid rent owed by the said Rocham Enterprises Limited; that having granted to the appellant, in its own name, leases, the respondent could not allege that the appellant and Rocham Enterprises Limited were the same entity and finally that the learned judge erred in not granting an injunction when he had found as fact that by the time distress was made the appellant had paid rent in full.

The appeal came for hearing before us on 17<sup>th</sup> November, 2015 when the appellant was represented by its

learned counsel, **Mr. P.R. Amuga** while learned counsel **Mrs. J.M. Mutua** appeared for the respondent.

Learned counsel for the appellant faulted the learned judge for not granting orders of injunction when it had been established as fact that the appellant did not owe any rent when distress was levied. Counsel submitted that it was wrong for the learned judge to lift the corporate veil in an interlocutory application when the court had not had the benefit of taking evidence.

Mrs. Mutua in opposing the appeal submitted that the learned judge was entitled to lift the corporate veil because the appellant owed rent to the respondent.

We have considered the record of appeal, the submissions made and the law.

The learned judge, in the said ruling, identified the issue for his determination as:

***“..... I find that the main question to be determined is whether the applicant owes the Respondent any arrears of rent. In addressing that issue, the relationship between the Applicant and Rocham Enterprises Limited would take the central stage in order to shade (sic) some light on whether the two are one and the same organization .....*”**

He then proceeded to examine contents of various letters exchanged by advocates of various parties and came to the conclusion that:

***“Against the above background, Rocham and Riccatti are, prima facie, two separate and distinct legal entities .....*”**

but that:

***“Prima facie, every Company is a separate and distinct legal entity from another Company. However, on the facts of this case, it seems that there was some affinity between the two Companies which prompted Riccatti to extend some filial sympathy to Rocham ....”***

The learned judge therefore found that two companies – Rocham Enterprises Limited and the appellant – were operating as one business entity. He proceeded to lift the corporate veil, found that the appellant should have paid rent on behalf of Rocham and for all these the application for injunction was refused.

From the record two leases were granted by the respondent to the appellant both commencing on 1<sup>st</sup> February, 2010. One lease was for a space of 2540 square feet on the first floor of Agriculture House for 11 years while the second one was for a space of 2013 square feet again on the first floor of the same building for a similar period.

The learned judge found as fact that as at 21<sup>st</sup> July, 2010 when distress for rent was levied the appellant had paid its rent in full and that there were no arrears of rent due at all but that there were arrears of rent owed by the company called Rocham.

The issue for our determination in this appeal is whether the learned judge was entitled, in the matter before him, to lift the corporate veil and find that the appellant was liable to pay rental debts owed to the respondent by the company called Rocham.

It is common ground that the respondent granted two leases for premises to the appellant on the first floor of its Agriculture House. The company called Rocham was not a party to the proceedings before the learned judge and the judge did not have the benefit of taking any evidence because what was before him was an interlocutory application for injunction.

This Court in **Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR** while dealing with the issue of the distinct legal entity of corporate bodies held that:

***“[A company] as a body corporate, is persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”***

A useful discussion on circumstances where a court will be entitled to lift the corporate veil appears at paragraph 402 of **Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 7(1)** where the learned authors say:

***“.....or where the court will ‘pierce (or lift) the corporate veil’, not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade, the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the court’s ‘piercing’ (or ‘lifting’) the veil.***

***Where, however, 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 pierced. Nor is the court 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 so as to ensure that the legal liability (if any) in respect of particular future activities of the company will fall on another member of the group rather than the defendant company.***

***It may be that liabilities or obligations will arise without piercing the corporate veil because there is an agency relationship between a parent company and subsidiary, or between a company and its shareholders, but this may not be inferred merely from control of the company or ownership of its shares or from the level of paid up capital. It will depend on an investigation of all aspects of the relationship between the parties and there is no presumption of such agency.”***

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.

Ringera, J (as he then was) in **Corporate Insurance Company Limited v Savemax Insurance Brokers Limited [2002] EA 41** found that:

***“The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.”***

It is obvious, then, from all the issues we have considered that a court can lift the corporate veil subject to strict conditions being satisfied for such action to be taken.

In the case before the learned judge it was found as fact that there was no rent in arrears owed by the appellant at all. Whether or not the appellant was liable for rents or *mesne* profits owed by a previous tenant, a separate legal entity, was not an issue that could be determined at interlocutory stage where the only evidence available to the court was the affidavit evidence tendered by the appellant and the respondent. The learned judge clearly erred in reaching the conclusion that he could lift the corporate veil and find the appellant liable for debts not directly owed by the appellant. That was the function of a trial court which would have the benefit of hearing the parties whose evidence would be subjected to the necessary test before final determinations were made.

On the evidence presented by the appellant – the learned judge found as fact that the appellant did not owe any rents to the respondent – the test in **Giella v Cassman Brown & Co. Limited [1973] E.A. 358** was certainly satisfied and the appellant was entitled to the injunction it had sought. In the premises this appeal succeeds and we allow it with costs to the appellant with the order that the Chamber Summons dated 23<sup>rd</sup> July, 2010 be and is hereby allowed with costs to the appellant.

***Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2016.***

**P.M. MWILU**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**