IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 329 OF 2013

BETWEEN

CHARLES RAY MAKUTO ……….............……….. APPELLANT

VERSUS

ALMAKONY LIMITED ………………................. 1ST RESPONDENT

ALPHONCE MASIKA KONG'ANI NYUKURI … 2ND RESPONDENT

(An Appeal from the Ruling and Judgment of Kenya at Bungoma, (Muchelule, J.) dated 4th December, 2012 in HCCC. MISC. APPL. NO. 267 OF 2001)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling delivered by the High Court at Bungoma (A. O. Muchelule, J.) on 4th December 2012 dismissing the appellant's motion which had sought an order to "crack the corporate shell and lift the veil of incorporation" of the 1st respondent.

Background

2. In an amended plaint filed before the Magistrate's Court at Mumias in August 1992, the appellant sought judgment for Kshs. 36,325.00, jointly and severally, against the 1st respondent and St. Anne Boarding Primary School (the school). The basis of the claim as pleaded was that in December 1989 the 1st respondent hired a vibrator machine from the appellant for purposes of carrying out construction works at the premises of the school in Mumias; and that the 1st respondent used the said vibrator machine and should have paid the said amount of Kshs. 36,325.00 to the appellant. The appellant pleaded further that "payment should have been or ought to be made by" the school.

3. In its defence, the 1st respondent denied the appellant's claim and asserted that the vibrator machine was hired for use by the school "which was responsible for the payment of the services rendered" by the appellant's machine.

4. The appellant obtained judgment against the 1st respondent as prayed sometimes in 1995 and thereafter applied for execution of the decree but failed to find attachable assets in the name of the 1st

respondent. The appellant then attempted to attach and sell land registered in the name of the 2nd respondent, a director of the 1st respondent. The 2nd respondent objected to the attachment on the basis that his property could not be attached for the debts of the 1st respondent, which he contended is a separate legal entity.

5. Unable to make progress with execution proceedings in the subordinate court, the appellant moved to the High Court at Bungoma by Miscellaneous Application No. 267 of 2001 invoking Sections 31, 33, 107, 111, 125 and 130 of the now repealed Companies Act seeking, as already mentioned, an order to "crack the corporate shell and lift the veil of incorporation" of the 1st respondent with a view to holding the 2nd respondent liable for the judgment debt against the 1st respondent.

6. That motion was based on the grounds appearing on the face of the application and was supported by the appellant's affidavit. The grounds were that the 1st respondent is not a going concern having failed to satisfy the decree in favour of the appellant; that the 1st respondent is "an alias agent" with no separate business from that of the 2nd respondent; that the 2nd respondent contracted personally with the appellant without disclosing his capacity as an agent of the 1st respondent; that the 1st respondent does not have official residence or actual existence as no taxes or annual returns were filed by the 1st respondent; that investigations with a view to executing the decree revealed that all properties were registered in the name of the 2nd respondent "leaving the [1st respondent] a mere trustee of the [2nd respondent]; and that the 1st respondent is a sham.

7. The respondents do not appear to have filed any affidavits in opposition and if they did, the same are not contained in the record of appeal. Written submissions were filed in support and in opposition to the motion following directions of the court to that effect. After considering the motion and the written submissions the High Court delivered the impugned ruling on 4th December 2012. The court ruled that the 1st and the 2nd respondents are separate legal entities; that the 1st respondent existed prior to the transaction on the basis of which the judgment debt was incurred; that it could not be said that the 1st respondent was formed in order to escape liability. Referring to the English decision in **Jones v Lipman [1962] 1 W. L. R. 832,** the Judge concluded that there was no evidence before him to show that the 1st respondent is "a device and a sham, a mask which [the 2nd respondent] holds before his face in an attempt to avoid recognition by the eye of equity." With that, the Judge dismissed the appellant's motion precipitating the present appeal.

The appeal and submissions by counsel

8. Learned counsel Mr. Joseph Sichangi appearing for the appellant urged the grounds contained in the memorandum of appeal and submitted that the learned Judge should have allowed the appellant's motion because there was overwhelming evidence to show that the 1st respondent is a sham; that in the circumstances the Judge should have 'cracked the corporate shell and lifted the veil of the 1st respondent'; that when the 2nd respondent entered into the contract for the hire of the vibrator machine with the appellant, he knew or ought to have known that the 1st respondent was not in a position to meet the liability for the hire; that the appellant demonstrated that the 1st respondent has no attachable assets and its director, the 2nd respondent registered all the properties in his name.

9. Mr. Makokha Simiyu, learned counsel for the respondents, opposed the appeal. He argued that by the time the appellant applied to the High Court in 2001, the decree of the subordinate court issued in 1995 had lapsed and the application was time barred by reason of Section 4 of the Limitation of Actions Act. On the substance of the application itself, Mr. Simiyu submitted that the learned Judge was right in dismissing the appellant's application, considering that the appellant's contract for the hire of the vibrator machine was with the 1st respondent, a separate a legal entity distinct from its members; that there was material before the trial court showing that the appellant should have been paid by the school and no evidence was presented to show that the school had not settled the payment; that by the time the appellant presented his application before the High Court, he had not exhausted all means of enforcing the decree

against the 1st respondent and the motion was therefore premature. Counsel concluded by saying that this appeal is an abuse of the process of the court.

Analysis and determination

10. Two issues call for determination in this appeal. The first is whether the motion before the High Court was barred under Section 4 of the Limitation of Actions Act. The second issue is whether the learned Judge erred in refusing to lift the corporate veil of the 1strespondent and in declining to hold the 2nd respondent liable for the judgment debt of the 1st respondent.

11. In our view, the respondents' complaint that the appellant's motion before the High Court was incompetent by reason Section 4 of the Limitation ofActions Act is not well founded. Firstly, that complaint was not taken up before the High Court. That court did not, therefore, have occasion to address that issue.The complaint has been taken up for the first time before this Court. Secondly, even if the complaint was properly before us, the appellant's motion before the High Court, in our view, was a motion premised on the judgment or decree of the subordinate court issued in 1995. According to the application for execution of decree filed by the appellant in the subordinate court, the date of the decree is given as 31st January 1995. Section 4(4) of the Limitation of Actions Act provides for a limitation period of 12 years for actions brought upon a judgment. It provides that:

> "**An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due**."

12. The decree forming the basis of the appellant's motion before the High Court was, as already indicated, issued on 31st January 1995. By the time the appellant's motion was presented to the High Court on 5th December 2001, the 12-year time limit under Section 4(4) had obviously not lapsed. There is therefore no merit in that complaint.

13. We now turn to the question whether the learned Judge erred in refusing to lift the corporate veil of the 1st respondent and in declining to hold the 2nd respondent liable for the judgment debt of the 1st respondent. As already mentioned, the appellant based his application before the High Court on Sections 31, 33, 107, 111, 125 and 130 of the now repealed Companies Act. Section 31 deals with consequence of default in complying with conditions constituting a company a private company. Section 33 provides for liability of members if the number of members is reduced, in the case of a private company, below two. Section 107 requires a company to have a registered office. Section 111 deals with restriction on commencement of business. Section 125 requires every company having a share capital to at least once in every year to make returns with respect to registered office, register of members and debenture holders,indebtedness, among other things, and stipulates that every officer in default is liable to a fine. Section 130 requires holding of general meetings.

14. Clearly none of those statutory provisions of the Companies Act on which the appellant relied can be said, to use the words of Devlin, J. in **Bank voor Handel en Scheepvaart N.V. v Slatford [1953] 1 Q.B. 248 at 278**, to be legislative "sledgehammer capable of cracking open the corporate shell". It is no wonder therefore that in his submissions before the High Court the appellant did not substantially rely on those statutory provisions but relied on common law as established in case law as a basis for asking the court to crack the corporate shell of the 1st respondent.

15. It is a long-standing legal principle that a company is in law a separate person distinct from its members. [See **Salomon v Salomon [1897] AC 78**.] In **Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR**, the Court held that a company "as a body corporate, is a persona jurisdica, with separate independent identity in law, distinct from its shareholders, directors and

agents unless there are factors warranting a lifting of the veil.” For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lifting of the veil is a question of fact in each case.

16. In this case, the substratum of the appellant’s motion in asking the court to lift the veil of the 1st respondent was that the 2nd respondent had effectively used the 1st respondent as a vessel of fraud. Sympathetic as we are to the plight of the appellant to whom the 2nd respondent is truly indebted as decreed by the subordinate court, the material placed before the High Court fell short of establishing, in our view, that the 1st respondent was “a device, a stratagem” or a “mere cloak or sham”[1] by the 2nd respondent to defraud the appellant. Based on our own review of the material before the High Court, we agree with the learned Judge that:

> “**From the evidence on record, the Applicant sued the 1st Respondent which is a limited liability company. That means he knew he was transacting with the company. The fact that the 2nd Respondent was the managing director of the company was beside the point. The two were separate legal entities. The company was apparently in existence prior to the transactions that led to the suit, and therefore it cannot be said that the Respondent formed it so as to escape liability or to transfer his property to the company to avoid the property being attached in execution. Further, the Applicant has not placed evidence on record to show that at the time of the transactions that led to the suit the company was continuing to carry on business and incur debts at a time when the directors knew that there was no-reasonable prospects of the creditors ever receiving payment of those debts** (Re **William c. Leitch Bros Ltd [1932] 2 CH. 71**).”

17. The material before the High Court included the certificate of incorporation of the 1st respondent. On the basis of that certificate, the 1st respondent was incorporated in 1981. That was many years before the appellant contracted with the 1st respondent in 1989 to hire the vibrator machine. It cannot therefore be said that the 1st respondent was a vehicle contrived by the 2nd respondent for purposes of the transaction that gave rise to the judgment debt.

18. There is perhaps merit in the argument by respondents’ counsel that the appellant may have rushed in seeking the lifting of the veil of incorporation of the 1st respondent. Rule 35 of Order 22 of the Civil Procedure Rules has an avenue under which the appellant would have interrogated the 1st respondent on its assets. That rule provides that where, as in this case, a decree is for the payment of money:

> “… **the decree-holder may apply to the court for an order that:-**
>
> **(a) the judgment-debtor;**
>
> **(b) in the case of a corporation, any officer thereof; or**
>
> **(c) any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents**.”

19.For those reasons, we are not persuaded that we have any basis for interfering with the decision of the High Court. The appeal therefore fails and is dismissed. Considering however that the appellant was in its motion before the High Court effectively seeking enforcement of a judgment in his favour, we think the appropriate order on costs is that each party shall bear its own costs of the appeal and of the proceedings in the High Court.

Orders accordingly.

Dated and delivered at Eldoret this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR

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[1] Gilford Motor Co. v Horne [1933] Ch. 935