IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 174 OF 2004

BETWEEN

PRADEEP PATANI …….......………………………………1ST APPELLANT

MAHENDRA PATANI …………...…………………………2ND APPELLANT

AND

SHOBNABEN PANKAJ PATANI ……………………..1ST RESPONDENT

CROWN MATCH COMPANY LIMITED.…...…...……..2ND RESPONDENT

(*An appeal from judgment and decree of the High Court of Kenya at Nairobi Milimani Commercial Courts* (***Mr. Justice Osiemo***) *dated the 30th day of April, 2003*

in

Civil Case No. 1663 of 2001

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JUDGMENT OF THE COURT

This appeal is by the brothers **PRADEEP PATANI** and **MAHENDRA PATANI** (the appellants) against the judgment of the High Court (Osiemo J) delivered on 30th April 2003. By that judgment the learned judge awarded the sum of Kshs. 4 million to **SHUBNABEN PANKAJ PATANI**, (the respondent), the appellant's sister in law. The judgment was against the appellants jointly and severally.

That judgment and decree was the learned Judge's determination of a suit filed by the respondent against the appellants. By her plaint dated 30th October 2001 and filed on 24th February 2003 the respondent averred that she was a director and one-third shareholder of **Crown Metal Company Limited** (the company) which, she sued as the 1st Defendant. The appellants were also directors and one third shareholders each of the company. The gist of her claim against the appellants was captured in paragraph 4 and 5 of the plaint as follows;

> "4. At a meeting held on 11th August 1997 it was agreed by way of a resolution ratified by the plaintiff and the 2nd and 3rd Defendants in their capacity as Directors of the 1st Defendant, that the assets of the 1st Defendant Company be sold and the proceeds thereof be divided between the Plaintiff and the 2nd and 3rd Defendants in equal shares.

5. The Assets of the First Defendant were then sold to a third party for the sum of KShs. 12,000,000.00 only."

The respondent claimed interest on the KShs.4 million at ruling overdraft rates and also made a claim of KShs. 533,333 on account of unpaid director's fees as against the company. These additional claims are not subject of this appeal and we say no more on them.

The appellants resisted the respondent's suit by way of a written defence in which they pleaded *inter alia,* that they were wrongly enjoined in the suit as whatever claims the respondent had, lay, if at all, against the company and not against themselves in their individual capacities. They also averred that whatever monies would have fallen due to be paid to the respondent as well as themselves would have been out of the net assets of the company after its debts and outgoings outstanding at the time of the sale had been settled. They did not, however, deny the existence of the resolution alluded to by the respondent. Nor did they deny that the assets of the company were in fact sold for KSh.12 million.

At the trial, the respondent testified on her own behalf as did **MAHINDRA PATANI** and both sides produced documents in support of their rival contentions. After submissions by the counsel for the respective parties, the learned judge found in favour of the respondent in respect of the KShs.4 million, provoking this appeal.

Even though the Memorandum of appeal contains some fifteen grounds, **Mr. Servia,** the appellant's learned counsel abandoned grounds 8, 9, 14 and 15 when he argued the appeal before us. Counsel interweaved the remaining grounds with his submissions, which were to the effect that the learned judge fell into error by;

- Treating the Board of Directors' resolution of 11th August 1997 that the directors were to be paid from the sale of the company's assets as a legally binding agreement yet it did not bear the elements of a contract.

- Holding that the respondent was entitled to one third of the KShs.12 million by wrongly and justifiably presuming equality.

- Entering the KShs.4 million judgment against the appellants instead of against the company which was a juristic person separate and distinct from its directors especially considering the proceeds of the sale of its assets were not credited to the appellants' accounts.

Opposing the appeal, **Ms. Malik**, learned counsel for the respondent submitted that the resolution was not a contract, in the strict sense of the **word** but it was an agreement by way of resolution. She went on to state that the distinction was otiose, anyway, as the appellants had in their defence categorically stated that it had been agreed that the directors be paid from the realization of the company's assets.

A court cannot re-write a party's pleading, counsel contended, and the appellants stood bound. They were equally taken to admit the proportion of a third claimed by the respondent in her plaint which they did not controvert in their defence so that the learned judge was right in using that proportion in holding in favour of the respondent.

Ms. Malik next addressed the issue of the company and the appellants being separate entities by invoking the doctrine of the piercing or lifting of the corporate veil. According to counsel, when a company acts oppressively, its directors may be personally sued. She submitted that the appellants acted unfairly and prejudicially towards the respondent by appropriating to themselves the proceeds of the sale of the company's assets but shutting her out of the same despite the aforesaid resolution. She cited in aid a passage from

PALMERS COMPANY LAW Vol. 1 and the case of **IBRAHIM –VS- WESTBOURNE GALLERIES LTD [1973] All ER,360.**

This being an appeal from the decision of the High Court exercising its original jurisdiction, our duty as set out in **Rule 29** of the **Court** of **Appeal Rules**, is to re-appraise the evidence and to draw inferences of fact. We proceed by way of re-hearing only that we are limited to what is on record and do not have the

benefit the trial court had of hearing and observing the witnesses as they testified. The practical effect of so proceeding and the attitude we must adopt towards the factual findings of the trial court have been pronounced on in a long line of cases. In **SUSAN MUNYI –VS- KESHAR SHIANI, [2013] eKLR (NRB CIV. APPEAL NO. 38 OF 2002]** the Court expressed it thus;

> ***"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at our own independent conclusions.***
>
> ***In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."***

This is not to suggest that the Court cannot, in appropriate cases, arrive at conclusions, totally at variance with those of the trial court. That is the essence of appeals and **Rule 30** of the **Court of Appeal Rules** expressly states the several powers of the court including, within jurisdiction, the power to reverse or vary the decision of the Court appealed from. Expressing itself on the approach it takes, the Court in **NZOIA SUGAR CO. LTD. –VS- CAPITAL INSURANCE BROKERS LTD 2014 e KLR (Civil Appeal 86 of 2009)**

stated;

> ***"We are enjoined to be slow to disturb the finding and conclusion of the trial court. These findings are not sacrosanct however, and we will not hesitate to disagree and reverse such findings in appropriate cases or, as was stated in MAKUBE –VS- NYAMIRO [1983] KLR 403,***
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> *… a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."*

This appeal, as was pointed out by **Mr. Sarvia**, turns on one central issue, namely the meaning and legal effect of the resolution reached by the parties herein, *qua* directors of the company, in the meeting of the company held at Kikuyu Factory at 6.00 p.m. on 11th August 1997. The Minutes of the meeting, attended by the trio who also signed it, read as follows;

> ***"The general progress of the company was discussed for last seven years (Sic). It was resolved to sell the company as running concern if not, secondly, the land and buildings should be sold and machinery to be sold separately, at a later stage as the buyers show interest. All directors to be paid for the assets realized. There being no other business the meeting ended at 6.30 p.m.***
>
> ***Signed Mahindra Patani. Pradeep Patani***
>
> ***Shobnaben Patani."***
>
> ***(Our emphasis)***.

It is common ground that the assets of the company were in fact thereafter sold to **Mr. Kushal Shah** and **Aron Shah** of Nairobi for KShs.12 million. The proceeds of sale were banked in the company's account. What followed thereafter provided further grounding for the respondent's claim for Kshs. 4 million against the appellants personally. In her testimony before the trial court the respondent stated as follows;

> ***"Pursuant to that meeting the assets of the company were sold. I am informed of this by my brothers in law. This was around October 1988. They told me the assets realized KShs.12,000,000 and that my share would be 1/3 (one third) of that. I authorized them to deposit the cheque of my share at Barclays Bank…. That cheque of KShs.4 million was never deposited. I came back to Kenya in 1999 and asked my brothers-in-law to hand over to me my cheque but they refused to do so."***

That narrative was not at all controverted. In fact, what emerged from the testimony of **MAHINDRA PATANI**, the 2nd appellant, was that after the KSh.12 million was received into the company account, he and his co-appellant withdrew a large proportion of it. He explained that the withdrawals were their entitlements although it is clear that they had already made other drawings and had also been paid directors' fees. It is not therefore clear what the basis was for this other entitlement. During cross-examination the 2nd appellant conceded to having withdrawn KShs.3 million on his own, and also that **PRADEEP PATANI** withdrew KShs. 7 million. His categorical admission on this aspect was ***"Yes [we] withdrew the money received from the sale of assets me and my brother but not the widow."***

It is telling that notwithstanding the admitted withdrawals by the appellants out of the KShs.12 million received, to the exclusion of the respondent, the second appellant maintained that they would still not pay the respondent's claim notwithstanding that there was a sum of KShs. 4,056,415 available in the company's accounts, which they had access to and control of. His contention that the same could not be distributed because there could be some liabilities was easily falsified by his own admission during cross-examination that the creditors had in fact been taken care of already.

That being the evidence that was before the learned Judge, we do not find justified the criticism leveled against his determination in favour of the respondent. Our own reading of the minutes of the meeting held on 11th August 1997 leaves no doubt that the parties herein expressly agreed that the sum realized from the sale of the company's assets would be shared between them. That resolution, signed by all three of them was definitely binding *inter se* and it is not necessary for it to be measured against the elements of contract as the appellants urge. At any rate, it is undisputed that the appellants did derive benefit from the agreement and it would be unconscionable for them to resort to fine distinctions in an effort to extinguish the respondent's equal claim. The learned Judge did not unilaterally and without basis arrive at the proportion of one third. That proportion was stated by the respondent as what was agreed between the parties and, absent any challenge or controvert of that assertion, the learned judge was entitled to accept it. In that he did not err.

The final question we have to determine is whether the learned judge erred in holding the appellants personally liable to pay the Kshs. 4 million to the respondent. The appellants had argued before the learned judge, as they have maintained before us, that on the basis of the corporate character of the company as a separate and distinct entity, they should not have been personally liable. The learned Judge dealt with the issue by adverting to the law on the lifting of the corporate veil as treated by the learned authors of **PALMERS COMPANY LAW** (Supra). We think he was right in so doing. It would be in our opinion inequitable and unconscionable for the appellants to rely on a technical aspect of company law to perpetrate and perpetuate oppression against the respondent. We affirm as good law the learned authors' expression one of the instances when the courts would look behind the company's legal persona;

> "***9. Where a private company is formed on a personal relationship between the members … if a member commits a breach of good faith which the members owe each other as the result of the personal relationship and thereby acts in equitably".***

This accords with the decision of the former **House** of **Lords** in **RE WESTBOURNE GALLERIES** (Supra) where it was held that:-

> ***"…a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it inter se were not necessarily merged in its structure … the 'just and equitable' provision … enabled the court to subject the exercise of legal rights to equitable consideration of a personal character arising between individuals which might make it inequitable to exercise legal rights or to exercise them in a particular way. …"***

The learned Judge bore the just and equitable principle in mind in refusing to be drawn into the fine distinction that would have worked injustice against the respondent and he was entitled to do so.

In all the circumstances of this case therefore, we find that the learned Judge did arrive at the correct and just decision consistent with the express agreement between the parties. We have no basis upon which we can interfere with that decision and this appeal therefore fails.

The appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of November 2014.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR