



Mungai & 4 others v Bon Motors Limited & 2 others (Employment and Labour Relations Cause 548 of 2016) [2024] KEELRC 737 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 737 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 548 OF 2016**

AN MWAURE, J

APRIL 5, 2024

BETWEEN

**PATRICK MAINA MUNGAI 1ST CLAIMANT
GEORGE GITANGU MBUGUA 2ND CLAIMANT
JOHN NJUGUNA IRUNGU 3RD CLAIMANT
BENARD KARANJA THIONGO 4TH CLAIMANT
JACKSON NDEGWA MUGWE 5TH CLAIMANT**

AND

**BON MOTORS LIMITED 1ST RESPONDENT
BONFACE PETER NDEGWA 2ND RESPONDENT
MARY GATHONI NDEGWA 3RD RESPONDENT**

JUDGMENT

1. The Claimants filed a Memorandum of Claim dated 1st April 2016.

Claimant's Case

2. The Claimants aver that they were working for the Respondent in various capacities until 25.08.2011.
3. The Claimants aver that vide a letter dated 25.08.2011 addressed to the District Labour Officer, the 1st Respondent notified the District Labour Officer that it was declaring the Claimants and other employees redundant.
4. The 1st Respondent stated in the letter that it would pay the employees dues amounting to Kshs 9,000,000 by quarterly payments of Kshs 1,000,000 till payment in full. And should the 1st



Respondent's resources be insufficient, the 1st Respondent's directors would personally pay the dues in full from alternative sources.

5. The Claimants aver that between November 2011 and 30.04.2014, the Respondents have paid Kshs 3,792,781 in settlement of their terminal dues, the last payment of Kshs 90,000 being made on 30.04.2014 leaving a balance of Kshs 5,207,219 due and owing from the Respondent.
6. The Claimants aver that despite demand and notice of intention to sue, the Respondent have failed, refused and neglected to pay to the Claimants the sum hence this claim.

3rd Respondent's Case

7. In opposition to the Memorandum of Claim, the 3rd Respondent filed a Memorandum of Response dated 16th February 2023.
8. The 3rd Respondent avers that the Claimants were employees of the 1st Respondent but denies the content of the letter dated 25.08.2011 purportedly signed by the 2nd Respondent, whilst the said signature is not that of the 2nd Respondent.
9. The 3rd Respondent denies the contents of the Claimant's Statement of Claim in its entirety and puts the Claimants to strict proof.

Evidence in Court

10. The Claimants' witness (CW1), Patrick Maina Mungai adopted his witness statement dated 22.04.2021 and documents attached 1-7 therein as his evidence in chief and exhibits.
11. CW1 testified that he prays together with his colleagues to be paid their dues as well as cost for their claims.
12. During cross-examination, CW1 testified that he was employed by the Respondent from 1979. He was employed by Mary Gathoni Ndegwa as she was a Director of the 1st Respondent.
13. The 3rd Respondent, RW1, adopted her witness statement dated 17.11.2022 and further affidavit dated 07.03.2023 as her evidence in chief.
14. RW1 testified that she is not and has never been a director of Bon Motors Limited.
15. RW1 testified that she knew her late husband, B.P. Ndegwa was the owner of Bon Motors Limited and she does know if he was the only owner.
16. RW1 testified that the letter dated 25.11.2011 was written on the letterhead of Bon Motors which is a forgery as the signature did not belong to her late husband.
17. RW1 testified that she was B.P Ndegwa's wife for 50 years and was not involved with the affairs of Bon Motors.
18. RW1 testified that she did not report to the police the alleged forgery of her husband's signature.
19. RW1 testified that Bon Motors closed down many years back. When it closed down, she is not aware if her husband paid his workers as he used to run the company.
20. RW1 testified that she was not taking any money to the labour office for them to pay their workers.
21. RW1 testified that she has seen Mr Mungai and he used to work with her husband. She does not know if he was paid his dues.



22. RW1 testified that she used to run a petrol station and some her husband's workers used to come to the petrol station.
23. RW1 testified that she knows her late husband's signature and this was not his signature and she does not know if his son, Edwin was employed by Bon Motors.

Claimant's Submissions

24. The Claimants submitted that it is not in doubt that the 1st Respondent owed the Claimants the sums claimed in the Statement of Claim at the time they were declared redundant in 2011. The fact in issue is whether the 3rd Respondent as a Director of the 1st Respondent is liable to pay the Claimants their dues.
25. The Claimants submitted that the letter was written by Boniface Ndegwa with his left hand as his right hand is lame; the 3rd Respondent merely states that it is a forgery but does not show how it is a forgery. It was incumbent for the 3rd Respondent to demonstrate how it is a forgery in accordance with Section 112 of the Evidence Act.
26. The Claimants submitted that the Companies Act, 2015 provides under Section 133(2) that the acts of a Director are valid even if the resolution of Directors appointment is void under Section 133(2) or companies act.
27. The Claimant submitted that even if B.P. Ndegwa, the 1st Respondent's Managing Director is not validly authorised to write the letter, his actions binds the company. The Claimants who were 3rd parties to the internal management of the company would not know if B.P Ndegwa has or had authority to write the letter dated 25.08.2011, in accordance with the rule in Turquand's case as expounded in *Mahoney v East Holyford Mining Co* (1875) LR 7 HL 869.
28. The Claimants submitted that Mr B.P Ndegwa promised that the 1st Respondent's directors would pay the Claimants dues if the 1st Respondent failed to do so and the 3rd Respondent as Director of the 1st Respondent was bound by the promise.

3rd Respondent's Submissions

29. The 3rd Respondent submitted that the Claimants were employees of the 1st Respondent, a limited liability Company, and not employees of the 2nd or 3rd Respondents. However, while instituting the Claim, the 2nd and 3rd Respondents were directly sued allegedly as Directors of the 1st Respondent company. It is trite law that a limited liability company is separate and distinct from its Directors, shareholders and subscribers thereof as was observed by the Court in High Court Suit No. 29 of 2015 - Joseph Kobia Nguthari -vs- Kiegoi Tea Factory Company Ltd & 2 Others, the Court quoted with approval the holding in *Salomon vs Salomon* (1897) AC 78.
30. The 3rd Respondent submitted that for the directors of a limited liability company to be called to account, the corporate veil of the company must be lifted. Therefore, the 3rd Respondent was wrongfully sued, and the claim against her ought to be dismissed with costs.
31. The 3rd Respondent submitted that there is no evidence presented in court to show that the 3rd Respondent was a director and shareholder of the 1st Respondent to warrant her being called upon to settle a claim for and on behalf of the 1st Respondent, a separate and distinct legal entity.



Analysis and Determination

32. Having considered the pleadings, witness statements, submissions and the evidence of record, the main issues for determination is whether the 3rd Respondent is personally liable to pay the Claimants' dues in accordance with the letter dated 25/11/2011.
33. On the second issue, the 3rd Respondent testified that she is not a director of the 1st Respondent and she has never been a director of the company. The owner of the company was her late husband and she is not aware if he was the only owner.
34. Section 107 of the [Evidence Act](#) requires the one who alleges to prove what he alleges as it states:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
35. Further in the Court of Appeal case [Mbutia Macharia vs Annab Mutua Ndwiga & Another](#) (2017) eKLR it was stated:-
- “The judge alluded to the provisions of section 107 of the [Evidence Act](#), which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading text book:- The [Halsbury's Laws of England, 4th Edition, Volume 17](#), at paras 13 and 14: describes it thus:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
- The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”(emphasis added)
- The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
36. It is trite law that a company is a separate legal entity and different from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it



was before and the same persons and manager and same hands receive the profit the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form except to the extent and manner provided in the act and this is holdings from *Salomon vs Salomon* (1897) AC 78 by High Court Kenya in *Joseph Kobia Nguthari vs Kiegoi Tea Factory Company Ltd & 2 Others suit* 29 of 2015.

37. In the present case there is even in the first place no CR12 form from the Kenyan Registry to establish the 3rd respondent was a director of the Bon Motors Ltd.
38. Secondly, the claimants in order to prove that the 3rd respondent was a director of Bon Motors Ltd they had to lift the corporate veil of the company with the support of factors warranting the lifting of the corporate veil.
39. Thirdly, the service of summons by Tom Kayere of P O Box 53857 Nairobi were not proper as deponed by the aforesaid process server since they were not served on the company directors and that was demonstrated in this court's ruling dated on 22nd September 2023.
40. The court having considered the pleadings, the evidence and the submissions is persuaded the claimants did not prove they had a case against the 3rd respondent considering the 2nd respondent is deceased and Bon Motors company ceased to operate and there is no proof that the 3rd respondent was a director of Bon motors.
41. The claimants suit therefore fails and is dismissed accordingly.
42. Each party will meet the costs of their suit.

Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

