Kahawa Sukari Limited & 2 others v Nkonge (Environment and Land Appeal E002 of 2024) [2024] KEELC 13418 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13418 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E002 OF 2024

JG KEMEI, J

NOVEMBER 18, 2024

BETWEEN

KAHAWA SUKARI LIMITED ..... 1ST APPELLANT

ALICE WACHEKE MUIRURI ..... 2ND APPELLANT

SB MBUGUA ..... 3RD APPELLANT

AND

TIMOTHY NJAGI NKONGE ..... RESPONDENT

JUDGMENT

1. This appeal arises from the decision and Judgment of the Hon C K Kisiangani, PM in MCECL NO 69 of 2022, Ruiru delivered on 14/10/2023.

2. The Appellants were the Defendants and the Respondent was the Plaintiff respectively in the trial Court.

3. Vide the Plaint dated the 11/4/22, the Plaintiff's case was that he purchased plot No 2193 from the Defendants but on completion he was informed that the said plot had been allocated to another party. To remedy the situation, he was allocated another plot No 1885 but as fate would have it the said plot had earlier been allotted to one Purity Watetu Muthama who had hitherto taken possession. The latter sued the Defendants for specific performance in THIKA MCLE No 3 of 2018 where the Plaintiff was an Interested Party culminating into a Judgement in her favour on the 24/2/2021. He pleaded fraud, trespass illegality against the Defendants. That despite promises to allocate him alternative land, the Defendants have failed to honour their commitments hence the suit seeking the following orders;

    a. A declaration that the Defendant's Directors namely Alice Wacheke Muiruri and S.B. Mbugua breached their duty of reasonable care, skill and diligence of Section 145 of the *Companies Act*, No. 17 of 2015 by double allocating the suit premises and by failing to give the Plaintiff title

and vacant possession of land premises known as Plot No. 2193 at Kahawa Sukari Scheme – Mwihoko and ought to be liable for the Judgment hereof jointly and severally.

b. A mandatory and perpetual injunction compelling the Defendant whether by itself, its servants, agents, employees or anybody else whatsoever acting on its behalf to forthwith remove themselves from the Plaintiff's said land premises known as land premises known as Plot No. 2193 at Kahawa Sukari Scheme – Mwihoko.

c. An order compelling the Defendant to either compensate the Plaintiff with an alternative plot of equivalent value and size and or to compensate and pay the Plaintiff at the prevailing the current market value of land premises known as land premises known as Plot No. 2193 at Kahawa Sukari Scheme – Mwihoko.

d. General damages for breach of the suit agreement hereof.

e. Costs and interest with effect from the date of filing this Court.

4. The Defendants denied the Plaintiff's claim vide their Statement of Defence dated the 6/6/2022. They contended that the Plaintiff dealt with an entity called Uzima Investments Limited and its non-joinder in the suit renders the suit fatal. The 2nd and 3rd Defendants denied personal responsibility and urged the Court to find that they acted in good faith in their official capacity and at no time did they act in their personal capacities. They denied allegations of fraud, irregularity and trespass and sought to put the Plaintiff into strict proof. They contended that they are neither in occupation or trespassers in the suit lands and that injunctive and general damages cannot be legally granted in the suit.

5. Upon hearing the case the trial Court entered Judgement as follows;

> " I therefore allow prayer (a) and (c) of the plaint as prayed and order the Defendant to refund the plaintiff Kshs. 5 Million together with interest at Court rates from 18/3/2017 when the final payment was made until payment in full and Kshs. 200,000/- as general damages. Prayer b of the Plaint is declined. The plaintiff will also have the costs of the suit".

6. It is the above decision that has triggered this appeal on the following grounds;

a. That the trial Court erred in law and in fact by not finding that the non-joinder of Uzima Investments Limited was fatal to the suit.

b. That the trial Court erred in law and in fact by relying heavily on a letter dated 4th February 2022, which was "without prejudice" communication notwithstanding that "without prejudice" communication is privileged.

c. That the trial Court erred in law and in fact by finding the 2nd and 3rd Defendants liable, in essence by lifting the corporate veil, without the same having been pleaded or evidence led to support the lifting of the corporate veil.

d. That the trial Court erred in law and in fact by finding the 2nd and 3rd Defendants liable notwithstanding that the standard of proof required of beyond reasonable doubt had not been established.

e. That the trial Court erred in law and in fact and misdirected itself on the principles of Company law that a Company acts through natural persons being its Directors and shareholders.

f. That the trial Court erred in law and in fact and misdirected itself on Section 3(3) of the *Law of Contract Act*.

g. That the trial Court erred in law by awarding interest, if any, on special damages of KES 5,000,000.00 from 18th March 2017 as opposed to from the date of filing the suit.

h. That the Court erred in law and in fact by ultimately finding in favour of the Plaintiff.

7. The Appellants seek the following reliefs;

a. The Appeal be allowed.

b. The Judgment and/or Order and/or decree and all sub-sequential orders of the Senior Principal Magistrates Courts at Ruiru in MCL & E No. E069 of 2022 dated 14th December 2023 be set aside and/or varied and/or vacated.

c. Costs of this Appeal be borne by the Respondent.

8. On the 24/9/24 parties elected to canvass the appeal by way of written submissions, the deadline being the 24/10/24. By the time of writing the Judgement, only the Appellant had complied.

9. Counsel for the Appellants submitted that the Respondent testified that he entered into an agreement with Uzima Investment Limited and that non-joinder of the said entity was fatal to the suit.

10. Counsel further faulted the Court for relying on a letter dated the 4/2/2022 which letter was marked on a without prejudice basis. Quoting the decision of the Court in Guardian Bank Limited Vs. Jambo Biscuits Kenya Limited (2014)eKLR where the Court stated that such communication either made in writing or inferred from the communication between the parties is inadmissible in evidence.

11. The Court was further faulted for finding the 2nd and 3rd Defendants liable hence lifting the corporate veil without the same having been pleaded or evidence led to support the lifting of the corporate veil. That lifting of the Company veil is a principle of Company law that a Company acts through natural persons being its directors and shareholders and that the same applied to this case. That the 2nd and 3rd Appellants are directors of the 1st Appellant and their dealings with the Respondent were in their capacity as directors and not in their personal capacity. Counsel relied on the classical decision in Solomon Vs Solomon 1897 AC where the Court held that the Company is separate and distinct from its directors and shareholders. Quoting extensively from the decision of the Court in Ukwala Supermarket Vs. Jaideep Shah & Anor (2022) eKLR Counsel concluded that there was no evidence before the trial Court that the 1st Appellant is a mere instrumentality or the alter ego of the 2nd and 3rd Appellants nor that there was unity of interest and ownership that is inseparable from the other. The Court was faulted for holding the 2nd and 3rd Appellants liable in the circumstances.

12. In addition, it was submitted that the Respondent failed to proof that the 2nd and 3rd Appellants were in breach of their duties in double allocating the suit premises.

13. With respect to general damages it was submitted that no general damages are payable for breach of contract. See Kenya Breweries Limited Vs Kiambu General Transport Agency Limited (2000)eKLR. Counsel therefore submitted that there was no justification for the award of Kshs 200,000/- being general damages for breach of contract.

14. It was further submitted that the plot allocation form alleged to be a sale agreement fell short of the provisions of Section 3(3) of the *Law of Contract Act* and that the suit therefore is an abuse of the process of the Court and ought to be struck out.

15. With respect to interest awarded on the Kshs 5 Million, Counsel stated that interest on special damages ought to run from the date of filing suit and not the date of payment. See the case of Lei Masaku Vs. Kalpama Builders Limited (2014)eKLR.

Analysis and determination

16. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial Court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses.(See: Peter Vs. Sunday Post (1958) at pg. 429).

17. The issues that commend themselves for determination are;

    a. Whether the suit was fatal for non-joinder of Uzima Investments Limited (Uzima)

    b. Whether there was a valid contract for the purchase of the suit land

    c. Whether the Court erred in holding the 2nd and 3rd Appellants personally liable

    d. Whether the letter dated the 4/2/2022 was admissible in evidence

    e. Whether the Court erred in awarding general damages to the Respondent

    f. Costs of the appeal.

18. I will answer issue No a) and b) together. It is the Respondent's evidence that he entered into a sale agreement with Uzima Investments Limited (Uzima) dated the January 2015. That he was taking over plot No 2193 that had earlier been sold to the said entity. It is not clear why the said plot was being resold to the Respondent save to presume that there was default of payment of the purchase price. He led evidence that he paid the 1st Appellant the sum of Kshs 25,000/- to be allowed to transfer the plot earlier allotted to Uzima to him. This is corroborated by the receipts dated the 29/4/2010 and 27/10/2010 in the name of Uzima for plot No 2193.

19. Order 1 Rule 9 of the Civil Procedure Rules states that no suit shall be defeated by reason of misjoinder or non-joinder of parties. The Respondent led unchallenged evidence that the agreement with the 1st Appellant was that he would pay the plot that Uzima had not completed paying for and hence the fee of Kshs 25,000/-. The Court finds that non joinder of Uzima was not fatal to the suit. It will become clearer shortly.

20. Was there a valid contract with the 1st Appellant? It is trite that a contract in law ought to be in writing, signed by all the parties and the signatures attested accordingly. In this case it is commonly agreed that there was no express agreement between the 1st Appellant and the Respondent. That said the conduct of the parties shows that the parties conducted themselves as though there was a valid agreement. For instance the plot allocation form signed by the 1st Appellant was issued to the Respondent; the said plot refers to plot No 2193 purchased by the Respondent; receipts from previous buyer; receipts for payment of the purchase price showing monies were received by 1st Appellant ; allotment advice dated the 25/4/214 in the name of the Respondent; letter dated the 19/5/2017 allowing the Respondent to take possession of the alternate plot No 1885 and fencing; all these correspondences show that there was a valid contract between the 1st Appellant and the Respondent.

21. The Court finds that even though Uzima was not enjoined the claim of the Respondent can still be maintained. I say so because the 1st Appellant and the Respondent performed the contract between themselves. The Respondent paid the purchase price and the 1st Appellant accepted and issued receipts and went ahead to allocate land to the Respondent and when it was found that the land had a previous

allottee, another plot 1885 was issued to the Respondent. The Court finds that there was a valid contract between the parties which contract was accordingly performed.

22. It is not in dispute that the 2nd and 3rd Appellants are directors of the 1st Appellant. I have considered the unchallenged evidence led in the trial Court together with correspondences and agree with the Appellants that their role was as directors of the 1st Appellant and absent any evidence in support of acting in personal capacities, the Court determines issue no c in the negative. In addition, the Court did not find any plea of removing the veil of the Company so as to hold the 2nd and 3rd Appellants personally liable. The jurisdiction of the Court to pierce the corporate veil has not been invoked.

23. It is trite that correspondences marked as 'on a without prejudice' cannot be admissible in evidence. I rely on the decision of the Court in Guardian Bank Limited Vs. Jambo Biscuits Kenya Ltd (2014)eKLR where the Court stated as follows;

> "There is ample judicial authorities on this subject of ''without prejudice''. The string of those judicial authorities confirm that, the practice of ''without prejudice'' is a matter of public policy aimed at encouraging parties to resolve civil disputes amicably and to engage into such negotiations, compromises and admissions without the fear of the admissions being used against them in formal Court proceedings should they fail to fasten a settlement. However, for communication to receive the privilege and the protection of the practice of without prejudice, it must be one which is made during an amicable negotiation of a dispute with the intention of yielding a settlement or compromise of the dispute. The communication may be expressly signed to be on without prejudice basis or it may be inferred from the circumstances in which it was made that the parties agreed or intended it should not be given in evidence. The communication may be oral or in writing. Such communication or letter is inadmissible in evidence. See Halsbury's Laws of England, 4th Edition Vol. 17."

24. Even without the above letter the Court finds that there was enough evidence in form of the letters dated the 30/6/2017 and 20/11/2021 where the 1st Appellant through the 2nd and 3rd Appellants committed itself to giving the Respondent an alternative plot in lieu of plot No 2193. I find that in the overall the Appellant cannot exonerate itself from liability using the without prejudice letter of 4/2/2022.

25. The Court has already determined that there was a valid agreement between the parties and that the same was breached by the 1st Appellant when it failed to avail the plot purchased to the Respondent. Breach of contract should not count for nothing.

26. It is trite that general damages are not awardable in contract. Halsbury's Laws of England Vol 12 at page 1183 expounds on the measure of damages recoverable by a purchaser upon breach by a seller of land. First the intention of the parties as captured in the agreement must be considered as damages must, as a matter of course, be a natural and direct result of repudiation. Two rules applicable to the measure of damages come to the fore in determining this question; firstly, whether the loss ordinarily and naturally is resulting from the breach of contract. In this instance, the Court will check the remoteness or otherwise of the loss to the breach; secondly, was the loss within the contemplation of the parties. That is to say, did the parties agree or expect the loss in the contract. See the case of Joseph Kangethe Irungu Vs. Peter Nganga Muchoki (2018) eKLR. Halsbury's goes on to state that where the vendor wrongfully refuses to complete, the measure of damages is similarly the loss incurred by the purchaser as the natural and direct result of repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser

27. The foregoing principle was affirmed by the Court of Appeal decision in Kenya Tourism Development Corporation Vs. Sundowner Lodge Ltd (2018) eKLR. The reason for such non-recovery is explained in the case of Consolata Anyango Ouma Vs. South Nyanza Sugar Co. Ltd (2015) eKLR held as follows:

> "The next question is whether the Appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitutio in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd Vs. Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

28. From the above jurisprudence the Court finds that the Court erred in awarding a sum of Kshs 200,000/- in form of general damages.

29. With respect to the interest payable the Court agrees with the Appellants that the same ought to start from the 11/4/2022, the date of filing suit.

30. Costs follow the event, I find no reason to deny the Respondent costs both on appeal and in the trial Court.

31. Final orders for disposal;

    a. The appeal is partially allowed with the consequence that the Judgment of the trial Court is modified as follows;

        i. Prayer a is partially allowed to the extent that the 2nd and 3rd Appellants are exonerated from personal liability.

        ii. Prayer b is declined.

        iii. Prayer c is allowed to the extent of payment of compensation to the Respondent in the sum of Kshs. 5 Million with interest at Court rates from the date of filing suit.

    b. Costs shall be in favour of the Respondent both in the trial Court and on appeal.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ngeesa for 1st, 2nd and 3rd Appellants

Kurauka for the Respondent

Court Assistant – Phyllis