



**Mandu, Chairman Mumias Cane Farmers Coopertive Union v Washiali & another
(Civil Appeal E056 of 2024) [2025] KEHC 2554 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E056 OF 2024**

AC BETT, J

JANUARY 30, 2025

BETWEEN

**MR ALLOYS G MANDU, CHAIRMAN MUMIAS CANE FARMERS
COOPERTIVE UNION APPELLANT**

AND

WASHINGTON SILVANUS WASHIALI 1ST RESPONDENT

MUMIAS CANE FARMERS COOPERATIVE UNION 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. B. Kimemiah, Hon. B. Sawe, Hon.
F Lutoiya, Hon. P Gichuki and Hon. M Chesikaw delivered on 7/3/2024
at Nairobi in Kakamega Cooperative Tribunal Case No. 12 B of 2018)*

JUDGMENT

Background

1. The 1st Respondent filed a claim at the Co-operative Tribunal against the Appellant and the 2nd Respondent being Kakamega Cooperative Tribunal Case No 12 B of 2018. He sought for a refund of his monies in the sum of Kshs. 200,000/= which was deposited into the 2nd Respondent's bank account through Mumias Sugar Company Limited as cane proceeds deductions from his shares and membership fee. The Tribunal allowed the claim with costs and interest.
2. Armed with the Judgement and decree of the Tribunal, the 1st Respondent proceeded to execute the decree by attaching the Appellant's property, a move which elicited objection proceedings vide the Appellant's application dated 3rd November 2022 in which the Appellant objected to the attachment



of his personal property to satisfy the decree. The Deputy Chairman of the Tribunal, in a ruling dated February 28, 2023, allowed the objection proceedings and stated as follows:-

“In the present case, the objector is objected to attachment of his goods for reasons they do not belong to the Society against where the decree was issued.

He is just but the Chairman of the Judgement Debtor and thus his personal items should not be attached on account of the Judgement Debtor.

.....

His personal property should not be, and is not part of the suit. I thus allow the application dated 3/11/2021 with costs to the Applicant.”

3. In regard to an application dated 25th January 2022 in which the 1st Respondent was seeking inter alia orders that the OCS, Shianda Police Station provide Auctioneers with security in the execution of the warrants of attachment, the Tribunal in a Ruling dated 2nd March 2023, held as follows:-

“We confirm the same in respect to the property proclaimed by the Auctioneers as the property is personal property of Mr. Alloys Mandi and as such cannot be used to settle the decretal sum.”

4. Having failed in the earlier bid to attach the Appellant’s property in satisfaction of the decree, the 1st Respondent then secured a Notice to show cause against the Appellant dated 13th June 2023 which required the Appellant to appear before the Tribunal to show cause why execution should not proceed against him in person.
5. In response to the Notice to show cause, the Appellant, through his Advocate submitted that the 2nd Respondent Society had gone under and was no longer in existence and the Tribunal ought to have lifted the corporate veil. The Appellant further urged the Tribunal to abide by its earlier holding that the Appellant was not personally liable for the debt that was owed by the 2nd Respondent.
6. In a departure from its two earlier rulings, and relying on Section 28 of the Cooperative *Societies Act*, the Tribunal held that the Appellant had not demonstrated why he should not be held responsible for the debt. It was the Tribunal’s finding that no records had been availed under Section 58 of the Cooperative *Societies Act* to show that information had been forwarded to the Commissioner of Cooperative Development for purposes of liquidation. It therefore held that the 2nd Respondent Society was deemed to still be in existence and its Board of Management responsible for all its business under Section 28 (5) of the Act. In the same breath, the Tribunal held that there was nothing to show that the Appellant was not responsible for the decretal sum owed to the 1st Respondent and directed him to settle the same with an order that he pays Kshs. 150,000/= immediately and in default, he be committed to civil jail for a period of fifteen (15) days or until compliance.
7. Being aggrieved by the said Ruling of the Tribunal, the Appellant lodged an appeal dated 27th March 2024 and set his grounds of appeal as follows:-
 - a. That the Learned Magistrate erred in law and in fact in finding that the Appellant was personally liable in settling of a decree issued against the 2nd Respondent.
 - b. That the Learned magistrate erred in law and fact in failing to differentiate between the appellant in personam and the 2nd Respondent whose liability was limited.



- c. That the Learned magistrate misdirected themselves on the role of the management committee, thus arriving at a wrong decision.
 - d. That the Honourable magistrate erred in law and fact in failing to conduct proceedings to lift the cooperative veil before holding the Appellant's liable.
 - e. That the Honourable Magistrate erred in law and facts in finding that the Appellant was currently the chair of the 2nd respondent.
 - f. That the Honourable magistrate misinterpreted the provision of the law thus arriving at the wrong decision.
8. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

9. In his submissions, the Appellant contested the claim for refund of the sum of Kshs. 200,000/= awarded to the 1st Respondent. He submitted that in the plaint filed at the Tribunal, the 1st Respondent sought for a refund specifically from the 2nd Respondent and not the Appellant. He further averred that the claim against the Appellant was for dissolution of his office and that of his entire team.
10. The Appellant argued that the claim for the refund squarely fell on the 2nd Respondent and the Tribunal proceeded to order as such. He further asserted that the monies deposited by the 1st Respondent were utilized by the 1st Respondent to pay the salaries of the 2nd Respondent's employees since the 2nd Respondent could not meet its financial obligations. The Appellant averred that he was not in the picture of those happenings as he was elected as chair of the 2nd Respondent in September 2011 way after the funds had been utilized by the 1st and 2nd Respondent.
11. The Appellant further denied the allegations that he had withdrawn the Kshs. 500,000/= from the 2nd Respondent's bank as alluded and stated that on 22nd June 2023, he had deposited Kshs. 1,200/= which was the bank's fee and that the 1st Respondent had misled the court with the said allegations.
12. He further averred that the proceedings before the Co-operative Tribunal had been heard *ex parte* and when he prayed that the same be set aside, his application was dismissed as was his Appeal No E 048 of 2021 which was dismissed for want of prosecution and not on merit of the case and therefore he was condemned unheard.
13. He further submitted that Appeal No E 048 of 2021 has no connection with the current appeal and hence the claim of *Res Judicata* does not arise.

1st Respondent's Submissions

14. In his submissions dated 10th October 2022, the 1st Respondent opposed the appeal and contended that it was *res judicata*. He submitted that the grounds raised in the instant appeal are the same grounds raised at Kakamega High Court in Civil Appeal No E048 of 2021 as well as in Kakamega Cooperative Tribunal Case No 12 B of 2018. He averred that the instant appeal has the same parties and similar prayers as those raised in the previous suits and thus the Appellant is trying to frustrate the efforts of the 1st Respondent and keep him from enjoying the fruits of his judgment. He asserted that the 5 bench Cooperative Tribunal Ruling was already appealed against and decided by the Judgement of Hon. P.J.O. Otieno.



15. On the grounds raised by the Appellant in his Memorandum of Appeal, he asserted that the Cooperative Tribunal did not err in finding the Appellant and the 2nd Respondent jointly and severally liable since the Appellant acted as the chairperson to the 2nd Respondent and cannot escape liability as a Judgement Debtor. He asserted that since the Appellant and 2nd Respondent were sued jointly and severally, each of them carries full liability for the payment of the decretal sum. It was averred that when guarantors are jointly and severally sued with the principal, the liability is construed to be joint and several and even if one ceases as the case of the 2nd Respondent, the debt devolves on the surviving judgement debtor.
16. On the ground that the learned Tribunal members misdirected themselves on the role of the management committee, the 1st Respondent submitted that they rightly interpreted Section 28 of the Cooperative *Societies Act* on the role of the management of a Cooperative Society. He further asserted that since there is no communication anywhere to demonstrate that the Appellant resigned, or that his term came to an end or handed over, the Appellant is still the chairman of the 2nd Respondent.
17. The 1st Respondent submitted that it was the Appellant's duty to move to the Tribunal to lift the corporate veil of the 2nd Respondent. The 1st Respondent prays that this court upholds the ruling of the Cooperative Tribunal dated 7th March 2024 and dismiss the Appellant's appeal with costs.

Analysis And Analysis

18. This being a first appeal, the duty of the court is to analyze and re-evaluate the evidence on record in order to reach its own dependent conclusion bearing in mind the fact that it did not have the benefit of seeing or hearing the witnesses testify. See *Selle & Another -vs- Associated Motor Boat Co. Limited & Others* [1968] EA 123.
19. Having considered the Memorandum of Appeal, the Record of Appeal, and the rival submissions made by the parties, I find that the following are the issues for determination in this appeal: -
 - a. Whether the issues raised in the appeal are res judicata.
 - b. Whether the Tribunal ruling erred in finding the Appellant jointly and severally liable for the refund of the claim.
 - c. Whether the Tribunal erred in failing to lift the corporate veil.

I. Whether the issues raised in the appeal are res judicata

20. It is the 1st Respondent's contention that the issues raised in the appeal are res judicata since the appeal and the application for stay of execution from the Tribunal had been handled at the High Court in Kakamega Civil Appeal No. E048 of 2021 and in Kakamega Cooperative Tribunal Case No 12 B of 2018.
21. Section 7 of the *Civil Procedure Act* states as follows: -

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."



22. In Black's Law Dictionary, ninth Edition *res judicata* is defined as:
- “(i) an issue that has been definitively settled by judicial decision;
 - (ii) An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit”.
23. In *Henderson -vs.- Henderson* (1843-60) ALL E.R. 378, the court held: -
- “...where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.
24. Order 12 Rule 6(1) & (2) of the Civil Procedure Rules provides as follows:
- “6 (1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this order, the plaintiff may bring a fresh suit.
- (2) When a suit has been dismissed under rule 3, no fresh suit may be brought in respect of the same cause of action.”
25. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. This was reiterated in the Court of Appeal case of *Nicholas Njeru Vs. the Attorney General and 8 Others* Civil Appeal No. 110 of 2011 [2013] eKLR.
26. It is trite that for the doctrine of *res judicata* to be effectively invoked, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive terms. The doctrine will apply only if it is proved that –
- i. The suit or issue raised was directly and substantially in issue in the former suit;
 - ii. That the former suit was between the same party or parties under whom they or any of them claim;
 - iii. That those parties were litigating under the same title;
 - iv. That the issue in question was heard and finally determined in the former suit; and
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
27. A perusal of the court's record indicates that the 1st Respondent, who was the claimant at the Cooperative Tribunal, filed a suit claiming a refund of Kshs. 200,000/= which he had used to pay off the 2nd Respondent's employees and the Tribunal gave judgement in his favour.



28. By dint of the provisions of Section 7 of the *Civil Procedure Act*, courts are prohibited from trying any suit or issue where the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally heard and determined.
29. The question raised in this case is whether the issues raised for determination by this court had already been heard and determined in the previous appeal and applications.
30. I have scrutinized the Memorandum of Appeal in Kakamega HCCA. No. 048 of 2021 which was dismissed on 6th December 2022 by P. J. O. Otieno J. The appeal is against the Tribunal's ruling dismissing the Appellant's application to set aside the ex parte judgement that the 1st Respondent had secured against the Appellant and the 2nd Respondent. The issues raised in the said appeal cannot therefore be said to be the same as the issues raised by this appeal.
31. The present appeal is against a subsequent ruling dated 7th March 2024 in which the Tribunal held that the Appellant was by virtue of his position as chairman of the 2nd Respondent liable for the debt owed to the 1st Respondent by dint of Section 28(6) of the Cooperative *Societies Act*.
32. That being the case, the contention that the appeal is res judicata does not hold. It is evident that the prayers sought in the present appeal have not been heard and determined by this Court or any other Court of competent jurisdiction on merits. It is therefore my finding that the doctrine of res judicata cannot be effectively raised and upheld in this case.

II. Whether the Tribunal ruling erred in finding the Appellant jointly and severally liable for the refund of the claim

33. The Appellant herein avers that he was sued in his capacity as the chairman of the 2nd Respondent and that the Tribunal erred in finding him jointly and severally liable for the claim since he was not present when the 1st Respondent, who was the chairperson at the time, voluntarily lent the 2nd Respondent, the sum of Kshs. 200,000/= to pay of its employees' salaries.
34. Section 12 of the Cooperative *Societies Act* provides:-“Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.”
35. The term joint and several liability is defined in Black's Law Dictionary 10th Edition as follows:-

“Liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary's discretion. Thus each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.”
36. Pursuant to Order 1 Rule 4 of the Civil Procedure Rules, the court may give judgement for or against one or more joint parties as follows:-

“...Judgement may be given without amendment—

 - (a) for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to;



- (b) against such one or more of the defendants as may be found to be liable according to their respective liabilities.”

37. I have perused the 1st Respondent’s Plaint and the ex parte Judgement dated 22nd April 2021 entered in his favour in Washington Silvanus Washiali Khwale V. Mumias Cane Farmers Co-Operative Union Limited & Another [2021] eKLR. In the Judgement, it was held:-

“The status of the 1st Respondent is not known at the Tribunal and the current officials and/or office bearers not known.

The constitution of the 1st Respondent’s office is unknown and thus the members of the Tribunal cannot be seen to disturb the status quo.

UPSHOT

The final analysis judgment is entered in favour of the Claimant as against the Respondent (sic) as follows:

1. Kshs.200, 000/= be refunded to the Claimant.
2. The prayer for the 2nd Respondent and officials (to stand dissolved is not granted) fails.
3. Interim office to be constituted with all primary society and audit fails.
4. A report be filed by the Commissioner of Co-operatives on the status of the 1st Respondent and thereafter an Annual General Meeting to be held.
5. Costs and interest at court rates from date of filing suit.”

38. From the aforesaid judgement, it is apparent that the Tribunal’s findings were that the current officials and/or office bearers of the 2nd Respondent was unknown at the time the 1st Respondent’s claim proceeded to hearing.

39. Further, the Tribunal did not make an express finding entering judgement against the Appellant and the 2nd Respondent jointly and severally. The 1st Respondent in his pleadings made the following prayers:-

“REASONS WHEREFORE the plaintiff prays for judgement against the Defendants;

- a. As per the paragraphs 5, 7, 8 and 9.
- b. Costs of the suit.”

40. The paragraphs 5, 7, 8 and 9 referred to state as follows:-

“5. The plaintiff has Kshs. 200,000 in cash deposited on the 1st Defendant/ Respondent bank account plus Kshs. 20,500 deposited to the 1st Defendant’s bank account through Mumias Sugar Co. Ltd as cane proceeds deductions for his shares and membership fee in his parent primary society – Mumias cane growers cooperative society. The plaintiff prays for the immediate refund of his family’s Kshs. 200,000 with interest as from the year 2011 at the current bank rates from the 1st Defendant.

6.



7. As per the Cooperative Act, the 2nd Defendant with his entire office stands dissolved and none could offer themselves for the office until after three years and the plaintiff prays you to find.
 8. That an interim office consisting of at least one member from every primary society of the 1st Defendant be put in place to cause books of account to be audited, assets recovered and reactivation of all the societies which have become dormant, within 12 months for the revival of the 1st Defendant.
 9. That all the monies and assets misappropriated in the 1st Defendant be charged to the individuals involved and recovered appropriately both at the 1st Defendant and the primary societies.”
41. It is clear from the judgement that the Tribunal did not envisage at the point of delivering the judgement, that liability would be joint and several. The 1st Respondent had prayed for refund from the 1st Defendant (now 2nd Respondent). In simply stating that judgement is entered against the Respondent (sic) and that Kshs. 200,000/= be refunded to the Claimant, the Tribunal confined liability for the debt to the 2nd Respondent.
42. Section 28(6) of the Cooperative *Societies Act* provides:-
- “(6) In the conduct of the affairs of a co-operative society the Committee shall exercise the prudence and diligence of ordinary men of business and the members shall be held, jointly and severally liable for any losses sustained through any of their acts which are contrary to the Act, rules, by-laws or the directions of any general meeting of the cooperative society.”
43. The import of this section is that the Committee members can be held jointly and severally liable for any losses which are occasioned from an act or acts that are contrary to the Act, rules, by-laws or the directions of any general meeting of the cooperative society. It therefore follows that there must be cogent evidence that the Committee members acted in contravention with the Act, rules, by-laws or the directions of any general meeting of the cooperative society for them to be found to be personally liable.
44. In this case, the Tribunal held that the Appellant and the 2nd Respondent were responsible for payment of the monies owed to the 1st Respondent. The 2nd Respondent, being the Cooperative Society, has since gone under and there was no asset or property hence the decree was issued against the Appellant who was the 2nd Respondent’s chairperson at the time.
45. An analysis of the Ruling being appealed against shows that the Tribunal invoked Section 28(6) of the Cooperative *Societies Act* to find the Appellant herein liable to settle the decretal sum. However, after perusing the Record of Appeal, I find that there was no evidence tendered by the 1st Respondent to the effect that the Appellant acted in violation of Section 28 (6) of the Act or in any fraudulent manner misappropriated the Cooperative funds for him to be held liable for the 2nd Respondent’s debts.

III. Whether the Tribunal erred in failing to lift the corporate veil

46. The by-laws of the 2nd Respondent show that the 2nd Respondent is a limited liability corporation. The doctrine of corporate personality was laid down in the case of *Salomon Co. Ltd v Salomon* [1897] AC 78 where the House of Lords held that a company is in law a separate person from its members. The



Court of Appeal in *Victor Mabachi & Another v Nurturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR, supported this position and held that: -

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

47. The case of *Salomon & Salomon & Co. Ltd v Salomon* (supra) established the principle that a company is a separate and distinct person from its shareholders and directors. It is however also true that, out of necessity and to prevent abuse of this principle, over time, the law has developed principles allowing for lifting or “piercing” of the corporate veil.

48. This “lifting of the veil” principle therefore opens the way for persons who control companies, in appropriate cases, to be held personally liable to pay the company’s debts. Courts therefore have the power, upon examination of the directors, where the circumstances warrant lifting the corporate veil of the Company, to order a director to personally discharge the debts of the company.

49. In the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR, Mabeja J held as follows: -

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* [1897] A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

50. Further, in the case of *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Ano* [2014] eKLR, the Court held as follows: -

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd V Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”

51. Based on the foregoing authorities, it is clear that for an agent of a body corporate to be held personally liable, there needs to be evidence that the actions of such persons were fraudulent or were committed in bad faith. The court in the case of *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others* (2024) eKLR held that: -

“It is therefore evident that in a case such as the instant one, the corporate veil will only be lifted where it is demonstrated that the actions of the directors or shareholders smacks of bad faith and that the corporate veil is being used as a mask to fraudulently shield such directors or shareholders from execution of the decree. The veil may therefore be pierced where it appears that the business of the company has for instance been carried on with intent to



defraud creditors of any other person or for any fraudulent purpose. Only where justice of the case demands should the corporate veil be disregarded and lifted.”

52. Additionally, even in the event that the 1st Respondent proved that the committee of the 2nd Respondent conducted its business in a manner that called for lifting of the cooperative veil to find them personally liable, the 1st Respondent should have sued the Committee of the Co-operative Society and not just the chairman of the Committee. The court in the case of Peter O. Ngoge T/A O P Ngoge & Associates V Ammu Investment Company Limited [2012] eKLR supported this view and held that: -

“In the premises I am not satisfied there exist, as of now, circumstances that would justify the lifting of the corporate veil of the Company in order to find the directors of the respondent liable. Further it is not alleged that Alan Cleophas Mulango, the director against whom the order of arrest is directed is the sole shareholder and/or director of the Company. Whereas it was submitted that it is this director who gave instructions, such an averment does not appear anywhere in the affidavit and even if it were, without seeking orders against all the shareholders and/or directors, it would not be possible for the Court even if it was so minded to lift the veil of incorporation and find only one shareholder and/or director liable in these circumstances. Such an action may be construed to amount to contravention of Article 27 of *the Constitution* which provides for freedom from discrimination.”

53. Flowing from the above analysis, it is my opinion that the position taken by the court in regard to the finding of an agent of a company liable for the acts of the company must follow a finding based on evidence that the actions of the agents were fraudulently or in bad faith, applies mutatis mutandis, to management committee members of a cooperative society.
54. In this regard, I am convinced that the Cooperative Tribunal erred in finding the Appellant personally liable for the 2nd Respondent’s debt.
55. In the premises, the appeal is well founded, and I allow the same as prayed.
56. Given the circumstances of this case, I direct that each party shall bear their own costs.
57. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Rauto for the Appellant

1st Respondent in person

Court Assistant: Polycap

