



REPUBLIC OF KENYA



KENYA LAW
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**Njenga v Nyambura & another (Civil Appeal E080 of 2023)
[2025] KEHC 11386 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E080 OF 2023
TW OUYA, J
JULY 31, 2025
FORMERLY KIAMBU HCCA E310 OF 2022**

BETWEEN

CHARLES MACHARIA NJENGA APPELLANT

AND

CATHERINE NYAMBURA 1ST RESPONDENT

GEOFFREY NGUNJIRI KARURI 2ND RESPONDENT

(Being an appeal against the judgment of Hon. O.J MUTHONI (Adjudicator/Resident magistrate), in Thika Small Claims court SCCOMM No. E702 of 2022 delivered on 27/7/2023)

JUDGMENT

1. The Memorandum of Appeal before the Court is dated 28th August 2023, the Appellant seeks for judgment to be entered as against the Respondents for the following orders that the appeal herein be allowed, that the judgment delivered on the 27th day of July 2023 be set aside, any other and such further relief as the Court may deem just ad fit to grant and that the costs of this application be borne by the respondent.
2. The Appellant challenges the decision of the trial Court delivered on 27th July 2023 in SCCOMM No. E702 of 2022 where he was the Claimant. The genesis of the subject dispute is that the appellant paid Kshs.350,000 to the Respondents towards the purchase of land parcel number Juja East Block 1/255. The Appellant produced a Certificate of ownership and a receipt showing a payment of Kshs.350,000 made in favor of Gemaca Investment Limited, a company whereby, the 1st and 2nd Respondents are listed as Directors as per the CR 12 Form presented before the trial Court.



3. The Appellant acknowledged reimbursement of Ksh.38,000 from the Respondents out of the entire payment of Kshs.350,000. Accordingly, his claim before the trial Court was limited to Kshs. 312,000 being the outstanding balance.
4. In the impugned decision, the trial Court recorded that the Respondents admitted to owing the Appellant Kshs. 312,000 and in turn proposed to settle the aforesaid amount in monthly instalments of Ksh.50,000 until payment in full.
5. The trial Court ruled that the Respondents were not acting their personal capacity at the time of executing the contract with the Appellant but, as Directors of Gemaca Investment Limited, a separate legal person from the Respondents. As such, the trial Court found the Respondents not liable legally for the amount owed by Gemaca Investment Limited, which company was not enjoined in the suit before it, and, proceeded to dismiss the Claimant's suit.
6. The subject appeal is premised on the grounds that the trial Court erred in law and fact in dismissing the Claimant's suit, in failing to appreciate and consider the pleadings and the evidence adduced in support thereof, by bypassing the admissions on record by the respondents and going ahead to misdirect herself on finding that the respondents were not liable on issues they had admitted to, by misdirected herself and based her findings on the wrong considerations, and in wholly disregarding or failing to accord proper consideration to the respondent's admissions in their response to the claim.
7. The suit was canvassed by way of written submissions.
8. The Appellant filed written submissions dated 1st October 2024 through his counsel and submitted that the Respondents' response to his Statement of Claim dated 30th September 2022 which was signed by both Respondents contained an admission that they received Ksh.350,000 from the Appellant out of which they had reimbursed Ksh.38,000 to the appellant and further proposed to settle the outstanding amount in monthly instalments of Kshs.50,000.
9. Furthermore, at the trial, the Respondents did not appear or offer any oral evidence controverting the Appellant's case. As such, they are bound by their pleadings, and in particular, the by their admission of the debt owed to the Appellant. Guidance was placed on the holding of the Court in the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* (2014) eKLR.
10. Relying on the holding of the Court in the cases of *Ogando v Watu Credit Limited & Another* (Civil Suit E098 of 2022) [2024] KEHC 3074 (KLR) (14 March 2024); and, *Ng'ang'a & Another v Owiti & Another* [2008] 1 KLR (EP) 749, he argued that submissions do not amount to evidence and that the trial Court wrongly relied on the Respondents submissions in dismissing the Appellant's claim yet, in their pleadings, the Respondents clearly and openly admitted owing the Appellant Ksh.312,000.
11. The 2nd Respondent filed written submissions dated 25th November 2024 through their counsel on record and submitted that the Appellant's claim is pegged on their acknowledgment of debt which acknowledgment they made on behalf of Gemaca Investment Limited. They argued that the Appellant's failure to enjoin Gemaca Investment Limited in the suit meant that his claim could not be sustained as against the Respondents in their personal capacities. Reliance was placed on the holding of the Court in the cases of *Salomon v Salomon & Co. Ltd* [1897] AC 22; and, *Victor Mabachi & Another v Nurturn Bates Ltd* Civil Appeal No. 247 of 2005 [2013] eKLR to buttress the foregoing submissions.
12. It was further submitted that the trial Court correctly interpreted and applied the doctrine of privity of contract in holding that the Respondents were not parties to the Contract with the Appellant in their personal capacities. Guidance was sought in the reasoning of the Court in the cases of: *William*



Muthee Muthami v Bank of Baroda [2014] eKLR; *Dunlop Pneumatic Tyre Co ltd v Selfridge & Co Ltd* [1915] AC 847; *City Council of Nairobi v Wilfred Kamau Githua Associates & Another* (2016) eKLR pg.10 and, *AFC v Lengetia*, 1982 – 88 1 KAR 722.

13. They argued further that the 2nd Respondent is a stranger in respect of Appellant’s suit as he was not party to the contract itself.
14. The Court has carefully considered the pleadings, totality of the evidence and rival submissions filed by the parties at the trial Court and in respect of the subject and has isolated the following issues for determination: Whether the appeal is merited and Who shall bear the costs of the appeal?
15. The Appellant’s main contention in the appeal is that trial Court ought to have allowed his claim because the Respondents admitted that the company where they are listed as the Directors is indebted to him. The Respondents, for their part, upheld the holding of the trial Court as reflective of a sound application of the doctrines of privity of contract and, separate legal personality of the company.
16. The doctrine of privity of contract was outlined in the case of Civil Appeal 206 of 2008 *City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates v Nairobi City Water & Sewerage Co Ltd* in the following terms:

“The doctrine of privity of contract is that, as a general rule, at Common Law, a contract cannot confer rights or impose obligations on strangers to it that is persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who these parties are, it may not be so obvious where there are several contracts, or several parties or both. For example, in the case of multilateral contracts; collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a Company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.”
17. In dismissing the suit giving rise to the current appeal, the trial Court ruled that the company where the 1st and 2nd Respondents are directors was not enjoined in the suit, which defect was fatal, as it is the company which received the amount claimed by the Appellant and not the Respondents in their individual capacities. Therefore, the trial Court’s decision was premised singly on the issue of the alleged non-joinder of Gemaca Investment Ltd to the suit before it.
18. Upon a perusal of the pleadings filed before the trial Court, it is evident from the Notice of First Mention Upon Filing issued on 15th September 2022 that the Appellant suit was brought against both Respondents Trading As (T/A) Gemaca Investment Ltd.
19. From the foregoing, the Court is persuaded that Gemaca Investment Ltd was named as a party to the suit before the trial Court upon filing of the statement on 15th September 2022. Accordingly, the Court finds the trial Court’s finding that Gemaca Investment Ltd was not enjoined in the Appellant’s suit to be devoid of merit. The Respondents were not sued in their individual capacities as held by the trial Court but as directors of Gemaca Investment Ltd.
20. While basing its decision on the doctrines of separate legal personality of the company and privity of contract, the trial Court failed to mention and apply the doctrine of “piercing/lifting the veil” which legal doctrine enjoins courts of law to pierce or lift the corporate veil in the interests of justice.



21. *Halsbury's Laws of England*, 4th Edition paragraph 90; addresses the issue of “piercing the veil of incorporation” as hereunder:

“Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted”.

22. In the case of *Ukwala Supermarket v Jaideep Shah & another* [2022] KEHC 2207 (KLR), the Court addressed the issue of piercing the corporate veil as follows:

“In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
- b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.”

23. It is noteworthy that the Respondents admitted receipt of Ksh. 350,000 from the Appellant as claimed, out of which they had reimbursed Ksh.38,000 leaving a balance of Ksh.312,000 which sum, the Respondents proposed to settle in monthly instalments of Ksh.50,000.

24. In the case of *Ogwari v Hersi* (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment), the Court understood the implications of Section 32 of the *Small Claims Court Act* as hereunder:

“Appraisal of the evidence or non-compliance of the Evidence Act is not a point of law since under section 32 of the *Small Claims Court Act*, the court is not bound by strict rules of evidence. This is not to say that the court then becomes a kangaroo court acting on rumors’ hyperbole and surmises. It is still a court of law bound by common sense and sense of justice according to the law.”

25. Bearing in mind, the objects informing the passage of the *Small Claims Court Act*, the Court is persuaded that by upholding the separate legal personality of Gemaca Investment Ltd, the trial Court occasioned an injustice by dismissing the Appellant’s claim, the end-result being to unjustly or unfairly enrich the Respondents with the money received from the Appellant.

26. In the case of *Fibrosa Spolka Akayina v Fairbairn Lawson Combe Barbour Ltd.* [1943] AC at page 61, the Court held as follows

“It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining



the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.”

27. The Court finds and holds that the trial Court misunderstood its role by resorting to legal doctrine to dismiss a claim for the settlement of a debt the existence of which was openly admitted by the debtor’s representatives, who proposed a re-payment plan thereto.
28. In light of the foregoing, the Court shall proceed to issue the following Final Orders:
 - i. The decision of the trial Court dated 27th day of July 2023 is hereby set aside.
 - ii. Judgement is hereby entered in favor of the Appellant as against the Respondent for Ksh.312,000 plus interest at Court rates from the date of filing of the suit before the trial Court.
 - iii. The Appellant is awarded the costs of the appeal and at the trial Court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Gatonye

For Respondent.....No appearance

Court Assistant.....brian

