



**Extreme Auto Center Limited & another v Jamal (Civil Appeal E637 of 2022)  
[2024] KEHC 5862 (KLR) (Appeals) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5862 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL E637 OF 2022**

**HI ONG'UDI, J**

**MAY 24, 2024**

**BETWEEN**

**EXTREME AUTO CENTER LIMITED ..... 1<sup>ST</sup> APPELLANT**

**SHONU DHANJAL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SHAABAN ABDALLAH JAMAL ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Mr. H.M. Nyaberi Chief Magistrate  
in Nairobi Chief Magistrate's MCCC No. E6185 of 2020, delivered on 28th July 2022)*

**JUDGMENT**

1. This appeal arises from a Ruling and Order issued in Nairobi Chief Magistrate's Suit No. MCCC E6185 of 2020. In the said suit, the respondent (who was the plaintiff) prayed for judgment against the appellants (who were the defendants) for several orders including:
  - i. A declaration that the respondent is the rightful legal owner of motor vehicle CE 300 H Toyota Land Cruiser Prado.
  - ii. A declaration that the appellant's actions of failing to deliver to the Plaintiff motor vehicle CE 300 H Toyota Land Cruiser Prado is a blatant breach of contract.
  - iii. Recovery of motor vehicle CE 300 H Toyota Land Cruiser Prado or payment equivalent to its value of Ksh 3,000,000.
  - iv. An order do issue for the payment of Kshs 475,000 (Kenya Shillings Four Hundred and seventy five Thousand Only) being a refund of part payment made for repair of Motor Vehicle Registration Number CE 300 Toyota Land Cruiser Prado.



- v. Interest on (a) at court rates.
  - vi. Any other relief the court may deem just and expedient to grant.
2. Subsequently, vide an application dated 17<sup>th</sup> January, 2022 the 2<sup>nd</sup> appellant sought for orders that his name be struck out as he had been improperly enjoined in the suit. Additionally, that the costs of the application be provided for. The trial court on 28<sup>th</sup> July, 2022 rendered its ruling whereby it dismissed the said application with costs.
  3. Being aggrieved with that Ruling the appellants lodged the appeal dated 16<sup>th</sup> August, 2022 on the following grounds:
    - i. The learned magistrate erred in law in failing to uphold the legal principle of separate corporate personality.
    - ii. The learned magistrate erred in fact and law in finding that 2<sup>nd</sup> appellant is a necessary party in the suit despite the respondent pleading that the 2<sup>nd</sup> appellant was the managing director of the 1<sup>st</sup> appellant and that he dealt with him as such.
    - iii. The learned magistrate erred in fact and law in finding that the 2<sup>nd</sup> appellant is not a director of the 1<sup>st</sup> appellant despite evidence to the contrary as pleaded and provided by the respondent.
    - iv. The learned magistrate erred in law in failing to uphold the legal principle that where a principal has been disclosed, the agent cannot be sued.
    - v. The learned magistrate erred in fact and law in finding that the 2<sup>nd</sup> appellant acted as an agent of the 1<sup>st</sup> appellant but still found him to be a necessary party in the suit.
    - vi. The learned magistrate erred in law and in fact in finding that the 2<sup>nd</sup> appellant is a necessary party in the suit despite failing to pronounce himself on whether the respondent pleaded improper, illegal or fraudulent conduct on the part of the 2<sup>nd</sup> appellant during his engagement with him for 2<sup>nd</sup> appellant to be a necessary party in the suit.
    - vii. The learned magistrate erred in law and fact in finding that the 2<sup>TM</sup> Appellant received monies from the Respondent in his own personal capacity despite no pleading to that effect in the Respondent's plaint or witness statement or even attached documents.
    - viii. The learned magistrate erred in law and fact in departing from the pleadings as filed by the respondent and considering extraneous facts in making his decision.
    - ix. The learned magistrate erred in law and fact in failing to strike out the Respondent's replying affidavit despite the said replying affidavit being clearly in contravention of the *Oaths and Statutory Declarations Act*.
    - x. The learned magistrate erred in fact and law in totally misdirecting himself in the evaluation of the evidence produced before him and arrived at a wrong decision thereby occasioning a miscarriage of justice.
    - xi. The decision was against the weight of evidence tendered.
  4. The appellants urged the court to set aside the ruling delivered on 28<sup>th</sup> July 2022 and the 2<sup>nd</sup> appellant's name be struck out from the suit in Nairobi MCCC No. E6185 of 2020. They also prayed for costs of the appeal and the application.
  5. The Appeal was canvassed through written submissions.



## Appellants' submissions

6. The appellants' submissions were filed by Odindo & Company advocates and are dated 19<sup>th</sup> October 2023. Counsel identified three issues for determination.
7. On the first issue, on whether the learned magistrate erred in failing to correctly analyse the evidence in court in relation to the relevant laws in order to strike out the 2<sup>nd</sup> appellant's name from the suit. Counsel submitted that it was trite law that the directors/shareholders of a company and the company were two distinct and separate entities. He cited Order 1 Rule 10 *Civil Procedure, 2010* and the case of *Victor Mabachi & Another v Nurturn Bates Ltd* [2013] eKLR where the Court of Appeal in affirming the position in *Salomon v Salomon* held as follows;

“This being the case, Mediacom as body corporate is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”
8. He further relied on the case of *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another* (2014) eKLR where Gikonyo J rendered himself thus:

“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] AC. 22 HL that a company is a 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 of 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. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality,”
9. Counsel submitted further that despite the above clear provisions of law, the learned magistrate still went against it in his failure to strike out the 2<sup>nd</sup> appellant's name from the suit for being improperly enjoined.
10. On the second issue, on whether the learned magistrate erred in law and fact in failing to find that the replying affidavit sworn on 16<sup>th</sup> March 2022 was irregular and ought to have been struck out and/or expunged from the court. Counsel cited sections 5 of the *Oaths and Statutory Declaration Act*, Rule 7 of the *Oaths and Statutory Declarations Act* and the case of *Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission and 2 others* [2017] eKLR, where the court affirmed that non-compliance with the provisions of the *Oaths and Statutory Act* was so fatal that no cure can be found under article 159 of the *Constitution*. The said Court went ahead to state that Article 159 of *Constitution*, by no means derogates from the duty of parties to comply with the law of the land.
11. Counsel submitted that despite the above case law being binding on the learned magistrate, he chose to walk a different path by attempting to breathe life into a fatally incompetent replying affidavit by quoting Article 159 (d) of the *constitution*.



12. Lastly, on the issue of costs counsel submitted that the same was discretionary but always followed the event. He urged the court to allow the appeal.

### **Respondent's submission**

13. The respondent's submissions were filed by SKY Advocates LLP and are dated 23<sup>rd</sup> October 2023. Counsel identified two issues for determination.
14. On the first issue, on whether the orders to set-aside the ruling should be granted as prayed, he submitted that the learned magistrate's decision was arrived at based on extensive scrutiny of the pleadings on record. Further, that when the appellants filed the instant appeal the lower court matter was yet to be heard on merit. He added that doing the reverse before hearing the case on merit would translate to prejudicing the respondent and denying him a chance to prosecute his case.
15. In support of this position he placed reliance on the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1 wherein the Learned Judge stated that;
- “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”
16. On the second issue, on whether the costs of the appeal and the appellants' application dated January 2022 should be provided for, counsel cited section 27 of the *Civil Procedure Rules* and submitted that costs followed the event. He urged the court to dismiss the appeal with costs and the same to be paid by the appellants.

### **Analysis and Determination**

17. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See
- i. *Selle & another v Associated Motors Boat & Others* 1968 EA 123
  - ii. *Peters v Sunday Post Limited* [1958] EA 424.
18. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law. I have identified one issue for determination which is whether there was any merit in the Notice of Motion dated 17<sup>th</sup> January, 2022.
19. The appellants argued that it was trite law that the directors/shareholders of a company and the company were two distinct and separate entities. Further, that the learned magistrate erred in law and fact in failing to find that the replying affidavit sworn on 16<sup>th</sup> March 2022 was irregular. They added that the signatures on the respondent's verifying affidavits and witness statement were fundamentally different.
20. The respondent on his part argued that the learned magistrate's decision was arrived at, based on extensive scrutiny of the pleadings on record. Further, that the appellants had filed the instant appeal yet the lower court suit had not been heard on merit.
21. The learned trial magistrate in his ruling observed that the respondent herein had annexed in his replying affidavit a copy of records from the Registrar of Companies dated 22<sup>nd</sup> November 2022



- indicating that the 2<sup>nd</sup> appellant was no longer a director of the 1<sup>st</sup> appellant. He therefore found that the 2<sup>nd</sup> appellant was a necessary party and that the issue of the replying affidavit not being properly attested was a mere technicality.
22. I have upon perusal of the original record noted that the application dated 17/01/2022 plus the replying affidavit by the respondent are not contained therein. The same are however found in the record of appeal at pgs 97-100 and 101-103 respectively.
  23. The trial Magistrate found the 2<sup>nd</sup> appellant to be a necessary party to the suit based on the letter from the Registrar of Companies dated 22/11/2021 which indicated that he was no longer a director of the 1<sup>st</sup> respondent.
  24. In the plaint at paragraph 3 the respondent describes the appellant as follows:  
Paragraph 3 – The 2<sup>nd</sup> defendant is the managing director of the 1<sup>st</sup> defendant  
At paragraph 7 he pleads as follows:  

“The 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant undertook to convert the steering wheel at a fee of Kshs 550,000/= (Kenya shillings five hundred and fifty thousand only) and the plaintiff made a deposit of Kshs 475,000/= (Kenya shillings four hundred and seventy-five thousand only) and the balance of Ksh 75,000/= (Kenya shillings seventy-five thousand only) was mutually agreed to be paid at the time of collection of the motor vehicle from the garage”.
  25. In the pleadings (plaint) the plaintiff at paragraph 2 identifies the 1<sup>st</sup> respondent as the company principal. The 2<sup>nd</sup> respondent was an agent serving the 1<sup>st</sup> respondent. Secondly from the trial court’s finding that from the Registrar’s letter the 2<sup>nd</sup> respondent was no longer a director, the Registrar should have stated the period the 2<sup>nd</sup> respondent was a director and when he ceased being one.
  26. I raise this issue because the 2<sup>nd</sup> respondent has sworn saying he is still a director and secondly, he has been sued in his nickname (Shomu Dhanjal) but his name is Gobina Singh Dhanjal whose name appears in the Registrar’s document dated 22/11/2021 and found at pg 103 of the record of appeal.
  27. The scenario revealed in this matter should not have been taken lightly by the trial court in view of the facts stated. In the case of *Salomon v Salomom* [1897] AC 78 and affirmed in several other cases. See: (i) *Victor Mabachi & Another v Nurtun Bates Ltd* [2013] eKLR (ii) *Antony Francis Wareham t/ a A F Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR among others, where the courts have held that a body corporate is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.
  28. I find that the Principal having been disclosed the 2<sup>nd</sup> respondent who is an agent should not have been sued. On the issue of the signatures on the affidavit and verifying affidavit that is a matter of evidence from an expert. The court could not make a determination on that without expert evidence.
  29. All in all I find merit in the Appeal which I hereby allow with costs in both the High court and Lower court. The lower court ruling and order delivered on 28/7/2022 is hereby set aside and substituted with an order allowing the application dated 17/01/2022. The appellant’s name is hereby struck out from the plaint dated 29/10/2020 in CM’s Court Nairobi CMCC No. E6185 of 2020.
  30. Orders accordingly.



**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

