



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Nairobi Quick Fix Garage (Civil Appeal E385 of 2020)
[2022] KEHC 16350 (KLR) (Civ) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16350 (KLR)

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

CIVIL

CIVIL APPEAL E385 OF 2020

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

JOSEPH CHEGE APPELLANT

AND

NAIROBI QUICK FIX GARAGE RESPONDENT

(Being an appeal against the ruling and order of Honourable M.W. Murage (Ms.) (Senior Resident Magistrate) delivered on 2nd December, 2020 in Nairobi CMCC no. 3000 of 2018)

JUDGMENT

1. The appellant in this instance instituted the suit before the Chief Magistrate's Court at Milimani Commercial Courts vide the plaint dated 5th March, 2018 and sought for the sum of Kshs.230,375/= from one Peter M. Mwicigi ("the defendant") plus costs of the suit and interest thereon, for loss/damage incurred as a result of undertaking repairs on the motor vehicle registration number KBP XXXU belonging to the appellant at all material times.
2. Upon the request of the appellant, an interlocutory judgment was entered against the defendant for failing to enter appearance and/or file his statement of defence. Consequently, the matter proceeded for formal proof during which time the appellant testified.
3. Upon close of submissions, the trial court delivered final judgment on September 10, 2019 in favour of the appellant and against the defendant in the sum prayed in the plaint. A decree was consequently issued.
4. Thereafter, the respondent who is the Objector in the trial court proceedings filed the application dated July 10, 2020 and sought an order to the effect that all the goods proclaimed by the appellant in the respondent's restaurant belong to the respondent, and further sought an order lifting the attachment/



proclamation of the said goods. The respondent also sought an order directing that the decree cannot be executed against the respondent's goods.

5. The respondent also filed the notice of objection to attachment of like date.
6. The application was opposed by the appellant.
7. Upon hearing the parties on the aforementioned application, the trial court granted the orders sought in the aforementioned application.
8. Being aggrieved by the above decision, the appellant sought to challenge the same by way of an appeal. Through the memorandum of appeal dated December 30, 2020 the appellant has put in the following grounds:
 - i. That the learned trial magistrate erred in law and fact by not giving a reasoned ruling basing on the party's pleadings and submissions.
 - ii. That the learned trial magistrate erred in law and fact by not considering that the objector's notice of motion was backdated to July 10, 2020 to feign the 7 days' compliance with notice of objection.
 - iii. That the learned trial magistrate erred in law and fact by not finding that the defendant/judgment debtor owns the objector company and trades from the business premises intermittently to hide its indebtedness.
 - iv. That the learned trial magistrate erred in law and fact by not finding that the goods proclaimed do not belong to the objector and there was no specific evidence to warrant upholding the objection.
 - v. That the learned trial magistrate erred in law and fact by not finding that the principle in *Salomon v Salomon* cannot be invoked to run away from fraud and/or indebtedness where the same business entities are controlled by the same person.
9. This court issued directions to the parties to file written submissions on the appeal. On its part, the respondent chose to rely on its written submissions filed before the trial court.
10. The appellant submits that the trial court did not consider the authorities cited in his submissions before it, including the case of *Kolaba Enterprises Limited v Shamsbudin Hussein Varvani & another* [2014] eKLR where the court held that:

“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 proceeding 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. 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.”

11. The appellant also submits that the respondent herein backdated the application which resulted in the impugned ruling, thereby causing it to be unprocedural.
12. Finally, it is the contention by the appellant that the defendant was notorious for interchanging the names associated with the respondent by using names such as “Nairobi Quick Fix Garage Limited”, “Kwik Fix” and “Kwik Fix Garage” as a means to escape liability and confuse members of the public.
13. For the above reasons, the appellant urges this court to allow the appeal and to set aside the impugned ruling.
14. I have considered the submissions and the authorities cited therein in respect to the appeal. I have also re-evaluated the relevant material and evidence which was placed before the trial court. It is noteworthy that the appeal is essentially against the trial court’s decision to allow the objection proceedings brought by the respondent. I will therefore tackle the five (5) grounds of appeal together under the following limbs.
15. The first limb of the appeal touches on whether the learned trial magistrate considered the issue concerning the backdating of the application dated July 10, 2020.
16. At the hearing of the objection proceedings before the trial court, the appellant swore a replying affidavit and stated that no notice of objection was issued in accordance with the law, thereby making the application by the respondent premature.
17. In his submissions filed before the trial court, the appellant argued that the application was backdated to read July 10, 2020 in order to feign compliance with the seven (7) day statutory notice period required for raising objections to the execution process, pursuant to the proclamation of attachment dated July 3, 2020.
18. The appellant further submitted that the respondent did not file and serve the notice of objection until July 23, 2020.
19. In response, the respondent argued that service of the objection proceedings was effected upon the appellant.
20. The subject on whether the application and notice of objection were backdated was not addressed by the learned trial magistrate in her ruling.
21. Suffice it to say that upon my perusal of the record, I did not come across any credible evidence to indicate that the application and/or notice of objection to execution were backdated in order to fit into the statutory timelines for challenging the execution process and which would in turn invalidate the objection proceedings.
22. The second limb of the appeal concerns itself with whether the learned trial magistrate arrived at a correct finding on the application dated July 10, 2020.
23. In support of the aforementioned application which as earlier mentioned sought an order to the effect that all the goods proclaimed by the appellant in the respondent’s restaurant belong to the respondent; an order lifting the attachment/proclamation of the said goods; and an order directing that the decree cannot be executed against the respondent’s goods, the respondent through its Director Christopher Kimani Gikonyo stated that the property/goods proclaimed by the appellant in execution do not belong to the defendant; rather, they belong to the respondent and its clients.



24. The deponent further stated that consequently, the respondent who was not a party to the suit would suffer irreparable loss if the proclaimed goods were attached and sold in execution of the decree.
25. In reply, the appellant stated that the defendant is a director and shareholder in the respondent company and that he, together with the abovementioned Christopher Kimani Gikonyo were conspiring to defeat justice through the respondent.
26. The appellant also stated that no evidence was tendered to show that the proclaimed goods belonged to the respondent and that the said goods were differentiated from those owned by its directors, and hence the proclaimed goods were lawfully attached in execution.
27. Christopher Kimani Gikonyo rejoined by stating that the assets in the respondent's premises do not belong to the defendant and hence the proclaimed goods cannot be attached for sale.
28. In her ruling, the learned trial magistrate reasoned that the defendant who is the judgment debtor in the suit is a separate legal entity from the respondent and hence liability on the part of the defendant cannot extend to the respondent.
29. Upon my re-examination of the pleadings and material, it is not in dispute that the respondent is a limited liability company and that the defendant in the suit was at all material times a director of the respondent.
30. Upon my further re-examination of the pleadings and material on record, it is apparent from the proclamation of attachment notice dated 3rd July, 2020 that the properties listed therein would ideally be found on the respondent's premises. It is also more plausible than not that the listed properties belong to the respondent, in the absence of any contrary credible evidence.
31. From the record, it is also apparent that the defendant was sued in his personal capacity and not in any other capacity. It is also apparent that the respondent was not made a party to the suit and hence had no correlation to the parties therein.
32. From the foregoing circumstances, I concur with the reasoning by the learned trial magistrate that the proclaimed goods would therefore not be available for sale in execution of the decree since the defendant and the respondent are distinct legal entities and therefore liability on the part of the defendant would not in the ordinary sense be extended to the respondent.
33. Moreover, the law is clear that a company is a separate legal entity from its shareholders and/or directors. This position was reaffirmed by the court in the case of *Nextgen Office Suites Ltd & another v Netcom Investments Ltd & another; Shab Minakshi Navinchandra (Interested Party)* [2021] eKLR thus:

“Hoexter JA gave the following exposition of the derivative action in *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A), at 97B-G:
“It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors.”
34. In addressing the subject of fraud which was raised by the appellant, upon my study of the record I did not come across any credible evidence to support the appellant's averments that the defendant and/or any other directors of the respondent had used the respondent as a disguise at all material times, in order to conceal their fraudulent actions.



35. It is trite law that he who alleges must prove. In the present instance, upon my re-examination of the pleadings and material on record, I find that the appellant was required to bring forth credible evidence to support his averments that there was fraud on the part of the defendant and/or the respondent through its directors but did not.
36. Consequently, and as earlier mentioned, the allegations of fraud were therefore not proved. In my finding, I am supported by the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR in which the Court of Appeal succinctly stated that:
- “In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
37. Under the issue on whether the learned trial magistrate considered the submissions and authorities cited by the appellant before her, upon my study of the record and especially the impugned ruling, I have not come across anything to indicate that the learned trial magistrate overlooked any of the evidence and/or material in order to amount to an injustice on the part of the appellant.
38. In view of all the foregoing circumstances, I am satisfied that the learned trial magistrate correctly applied herself to the material which was placed before her and arrived at a reasonable finding. I therefore see no reason to disturb her ruling.
39. Accordingly, the appeal is hereby dismissed for lack of merit, with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
16TH DAY OF DECEMBER, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

