IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MWILU & GATEMBU, JJ.A)

CIVIL APPEAL NO. 247 OF 2005

BETWEEN

VICTOR MABACHI …….. 1ST APPELLANT

DAVID OLIWA …….. 2ND APPELLANT

AND

NURTUN BATES LIMITED …….. RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kasango, J.) dated 16th December, 2004

in

H. C. C. C. No. 149 of 2004)

****

JUDGMENT OF THE COURT

(1) This is an appeal from the ruling of the High Court (*Kasango J.*) delivered on 16th December, 2004 in which the learned Judge dismissed the appellants' application seeking to dismiss the respondent's suit on the basis that it was vexatious, frivolous and an abuse of the court process. The application was brought under ***Order 6 Rule 13 (1) (b)*** and ***(d), Order 1 Rule 1*** and ***10 (2)*** of the Civil Procedure Rules and ***Section 3A*** of the Civil Procedure Act. This is an interlocutory appeal as the suit in the High Court is still alive.

(2) The application arose out of a civil suit in the High Court in which the respondent herein brought a claim against Mediacom East Africa Limited (hereinafter Mediacom) and the appellants jointly and severally for Kshs.1,789,529.00, being monies allegedly owing on account of agency commissions. The prayer in the application before the High Court was that the appellants had been improperly joined as parties, and that their joinder in the suit before the High Court breached the principle of law that an agent may not be sued where there is a disclosed principal.

(3) The relevant facts of the suit in the High Court, borne out of the record are as follows. The respondent herein acted as a brand agency for advertisement in respect of various brands of Kenya Breweries Limited drinks. Further, according to the plaint, it was a term of the contract between Kenya Breweries Ltd and Mediacom, negotiated and signed by its agents, the appellants herein on one part and the respondent on the other part that Mediacom would keep 3% of the normal media commission whereas 15% would be paid to the respondent.

(4) The plaint further states that pursuant to the terms of the said contracts, such monies had been paid previously by the Kenya Breweries Ltd to Mediacom and the appellants jointly, who were to pay the respondent 15% creative agency commission. However, according to the plaint, the respondents were not paid the monies having rendered services thus precipitating the suit.

(5) In its claim in the plaint, the respondent maintained that the contract or agreement giving rise to the cause of action was negotiated and signed by the appellants on their behalf and that of Mediacom and hence the appellants are personally, jointly and severally liable to indemnify the respondent.

(6) In their defence, the appellants denied that they could be sued in their personal capacities or under joint and several liability. The appellants further stated that the respondent had dealt with Mediacom as a corporate entity and that no legal basis had been advanced to support claims against them in their personal capacities. The appellants further stated that they had been at no time parties to any contract between Kenya Breweries Limited and the respondent as alleged or implied in the claim.

(7) The appellants then made an application supported by affidavit before the High Court that the suit be struck out for being vexatious, frivolous and an abuse of the Court process on the grounds that (among others):

(i) The appellants had been improperly joined as parties to the suit.

(ii) The respondent acknowledged expressly that the alleged contract in question was between the respondent and among others Mediacom.

(iii) The respondent had admitted that the appellants were disclosed agents of Mediacom in the alleged contract.

(8) In his submissions before the High Court, counsel for the appellants contended that the appellants had been improperly joined as parties. Mr. Mohammed Nyaoga stated that the joinder of the appellants contravened the principle that an agent cannot be sued where such is acting for a disclosed principal. He averred that the appellants were disclosed agents of Mediacom, citing paragraph 7 of the plaint, which acknowledged that the cause of action arose from a contract between the respondent and Mediacom. He relied on a letter from Kenya Breweries Limited, addressed to the 1st appellant, alluding that the respondent acknowledged Mediacom Limited as the party obliged to make payment for the sums of money it sought under the suit. Counsel further advanced the appellants' claims by citing a letter of intent between Kenya Breweries Limited and Mediacom, signed by the 2nd appellant on behalf of the latter company. He maintained that no evidence had been adduced to show that the appellants acted in their personal capacities so to become parties to the contract. In such circumstances, where there is a disclosed principal, counsel averred, no action may be maintained for acts or omissions of the agent acting in that capacity. He relied on ***Civil Application Nos. Nai 5 and 48 of 2002 (consolidated) Anthony Francis Wareheim t/a A. F. Wareheim & 2 Others vs Kenya Post Office Savings Bank***, in which it was stated that:

"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."

(9) Finally, it was the appellants' argument on the basis of the legal principle that a company is separate from its directors and shareholders, that the suit against the appellants was incompetent.

(10) In opposing the application, counsel for the respondent submitted that the appellants together with Mediacom were liable to pay the respondent the said sum of monies under the said contract. Mr. A. Omino further argued that it was the contractual arrangement between Mediacom and Kenya Breweries Limited that constituted an agency, stating that there was no agent–principal relationship between the appellants and Mediacom. Finally, counsel urged the High Court to exercise its discretion judiciously, stating that a misjoinder of a party does not support the striking out of the party to a suit before full trial. He stated that the pleadings and supporting documents had not demonstrated that the appellants were directors of Mediacom and therefore insulated against personal liability. Counsel drew the court's attention to the contents of paragraphs 6, 10 and 11 of the respondent's plaint in the High Court, which allude to verbal and written understandings between the respondent and the appellants, and make reference to documents giving rise to the cause of action, having been negotiated between the respondent and the appellants.

(11) In its ruling on the application, the High Court found that the evidence before it did not support the appellant's claim that they were agents of Mediacom. The Court relied on the text of the agreement dated 30th July, 1999 in which the said principal was not referred to as a limited liability company, the supporting affidavits, and a letter written by Kenya Breweries Limited addressed to the 1st appellant as Chairman of Century Advertising, which was not referred to as a limited liability company. Moreover, in considering the submissions, the High Court noted that the power to strike out pleadings under ***Order 6 Rule 13*** is drastic and must therefore be exercised only judiciously and sparingly. The court therefore concluded that the application for striking out was not merited at that stage, dismissing the application.

(12) Having been aggrieved by the High Court's ruling above, the appellants filed a notice of appeal dated 11th January, 2005. The appellants filed the record of appeal on 7th October, 2005 and put forth the following grounds in the memorandum of appeal in support of the appeal namely:

"(i) The learned Judge erred in law and in fact in failing to find that the appellants were sued purely as agents of the 1st defendant in the suit.

(ii) The learned Judge erred in law in failing to find that any money purportedly received by the defendant's jointly was received by the appellants as agents of the 1st defendant in the suit and not otherwise.

(iii) The learned Judge erred in law by placing reliance on purported oral agreements between the appellants and the respondent in the suit contrary to well established principles of parole evidence.

(iv) The learned Judge erred in law in failing to appreciate that the 1st defendant had a separate and distinct personality from the appellants.

(v) The learned Judge erred in law in dismissing the appellant's application."

(13) The appellants sought orders that:

(a) This appeal against the ruling and order delivered on 16th December, 2004 in the High Court Civil Case No. 149 of 2004 be allowed.

(b) The said ruling and order be set aside and the same be substituted by an order dismissing the suit against the appellants; and

(c) Costs of this appeal be awarded to the appellants.

(14) The respondent filed a notice of grounds for affirming the decision on 17th October, 2005. On the 10th June, 2013, the appellants filed a list of authorities. This appeal was set down for hearing before us on the 11th June, 2013. Mr. Mohammed Nyaoga appeared for the appellants whereas Mr. A. Omino appeared for the respondent.

(15) In his submissions, counsel for the appellants argued that the issue for determination was whether the appellants were agents acting in their own capacity or on behalf of a disclosed principal. Mr. Nyaoga referred the Court to the plaint filed in the High Court, in which Mediacom was sued as a limited liability company, and the appellants were acknowledged as agents of Mediacom as the principal. On liability as agents, he submitted that there had been no claims nor evidence that the appellants had exceeded their authority as to attract liability. He further submitted that as a general principle of law, directors of a limited liability company may not be sued in their personal capacity, particularly when the plaint does not plead the lifting of the corporate veil.

(16) In his submissions, counsel for the respondents opposed the appeal. Mr. Omino stated that the appellants had denied having been agents of Mediacom. He referred to a letter written by Kenya Breweries Limited addressed to the 1st appellant as Chairman of Century Advertising. He stated that in the circumstances, Mediacom was not a limited liability company, and as such there was no corporate veil to be lifted. Counsel further submitted that the appellants had not adduced evidence to demonstrate that they were directors of Mediacom.

(17) This Court has considered the appellants' case and the respondent's positions as advanced in the submissions. We have distilled the issues for our determination as follows:

a. ***Whether the appellants herein were disclosed agents of Mediacom East Africa Ltd,***

b. ***Whether the presence of the appellants in the High Court suit breached the principal of law that an agent cannot be sued where there is a disclosed principal.***

a. ***Whether the appellants herein were disclosed agents of Mediacom East Africa Ltd***

(18) The issue of whether the appellants were disclosed agents of the 1st defendant in the suit before the High Court was contested. We begin with noting that in paragraph 7 of the respondent's plaint dated 19th March, 2004, the respondent admits that the appellants herein were disclosed agents of Mediacom as follows:

"The plaintiff states that it was a term of the contract between Kenya Breweries, Mediacom East Africa through his agent the 2nd and 3rd defendant on one part and the plaintiff on the other part that the defendants would keep 3% of the normal media commission whereas 15% be paid to the Creative Agent which was the plaintiff."

(19) It was the contention of the respondent that it was not its assertion by the above statement that the appellants were agents for Mediacom. Instead, the respondent argued that it was the contractual arrangement between Mediacom and Kenya Breweries Limited that constituted an agency, stating that there was no agent– principal relationship between the appellants and Mediacom.

(20) In our view, the plaint and the record are dispositive of the question whether the appellants herein were agents of a disclosed principal, Mediacom East Africa Ltd. The appellants negotiated and signed the said agreements relied upon by the respondents on behalf of Mediacom. Based on the record before us, we agree with the appellants' submissions that there had been disclosure by the appellants to the respondent, of the principal on whose behalf their actions were undertaken. It is therefore our finding that the appellants were agents of Mediacom East Africa Ltd, being the disclosed principal.

b. *Whether the presence of the appellants in the High Court suit breached the principle of law that an agent cannot be sued where there is a disclosed principal.*

(21) It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal. In ***Anthony Francis Wareheim t/a Wareheim& 2 Others vs. Kenya Post Office Savings Bank, Civil Application Nos. Nai 5 & 48 of 2002***, at page 10, this Court unanimously held as follows:

"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."

(22) The principle established in the above case still holds good. In the absence of factors vitiating the liability of the principal, we consider that the enjoinment of the appellants in the case is unwarranted. Although it was argued before us on behalf of the respondent that Mediacom was not a limited liability company at the time of institution of the suit, the plaint lodged in the High Court by the respondent avers that Mediacom is a limited liability company duly incorporated under Cap 486 Laws of Kenya.

(23) In our view, moreover, the corporate status of Mediacom was not in question in the pleadings in the suit. This much is confirmed by the plaint, drawn and filed on behalf of the respondent, and supported by an affidavit sworn by the respondent's representative. This being the case, Mediacom, as a body corporate, is *a persona jurisdica*, with a separate independent identity in law, distinct from its shareholders, director sand agents unless there are factors warranting a lifting of the veil. Thus in the case of ***Jones & Another vs. Lipman & Another (1962) 1 W.L.R 833, Russel, J*** held that if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgment even against the person behind that company.

(24) In view of the above, we find and hold that the appellants herein ought not to have been joined in the suit before the High Court and as such the appeal succeeds.

(25) This appeal is therefore, allowed and the suit as against the appellants in the High Court is struck out with costs.

Dated and delivered at Nairobi this 4th day of October, 2013.

P. KIHARA KARIUKI

……

PRESIDENT,

COURT OF APPEAL

P. M. MWILU

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR