

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO 195 OF 2012**

**DFCU BANK LIMITED}.....PLAINTIFF**

**VERSUS**

- 1. MUKIIBI YUDAYA}**
- 2. MAWANDA FARIDAH T/A YUMUK TRADERS}**
- 3. CB RICHARD ELLIC (U) LIMITED}**
- 4. BAINGANA PAUL} .....DEFENDANTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The 4th Defendant filed written objections to the plaintiff's action against him on the ground that the plaintiff's action against him is incompetent and barred in law. The submissions are that the plaintiffs sued the fourth defendant in his personal capacity as a director. The fourth defendant is represented by Messieurs Sekabanja and Co Advocates while the plaintiff is represented by Messieurs AF Mpanga Advocates.

**4<sup>th</sup> Defendant's Objection to the suit against him**

The fourth defendant's submissions are that it is trite law that an incorporated company is a separate legal entity whose liability does not extend to the members of the shareholders. Counsel relied on the case of **Nsangiranabo Erasmus t/a Nsangira Auctioneers and Court Bailiffs versus Messieurs Associated Properties Ltd, Jagdshchangra Jashibhai Patel and Bhupendera Jashibai HCMA No 953** of 2001, where he submitted that the court held inter alia that where a company is incorporated, it becomes a legal person/entity separate from its directors, shareholders and other members. Furthermore the corporate veil of the third defendant has not yet been lifted and neither have the grounds for lifting the corporate veil of the third defendant been proved.

The power to lift the corporate veil is entirely vested on the court and not on any other person and that power has to be exercised at the discretion of the court. The plaintiffs actions of suing the fourth defendant without an order lifting the corporate veil is illegal and this honourable court cannot sanction such an illegality which has been brought to its attention. The fourth defendant's counsel relies on the case of **Makula International Hotel versus Cardinal Nsubuga** that an illegality once brought to the attention of court, could not be sanctioned by the

court. According to the fourth defendant's counsel, the legality is the suing of the fourth defendant in his personal capacity without lifting of the corporate veil by court. The plaintiff assumed the responsibility and vested itself within jurisdiction and authority of the court to lift the corporate veil of the third defendant and sue the fourth defendant in his personal capacity.

The defendants counsel submits that the plaintiff ought to have applied to court under Order 38 rule 5 (d) of the Civil Procedure Rules, seeking for the lifting of the corporate veil before suing the fourth defendant. Allowing the plaintiff to Sue the fourth defendant would be prejudicial to him because it is accompanied matter and is protected by the corporate personality of the company. Consequently the suit against the fourth defendant is barred in law, incompetent and violates the principles of separate legal personality. The fourth defendant cannot be held personally liable for any loss suffered by the plaintiff as a result of the third defendant's acts. Counsel relied on the case of **Williams and Another versus Natural Life Health Foods Ltd and Another [1998] 2 All ER 577**. In that case the hands of Lords held inter alia that a director of the company would only be personally liable to the plaintiffs for loss which they suffered as a result of the negligent advice given to them by the company if he had assumed personal responsibility for that advice and the plaintiffs had relied on the assumption of responsibility. Internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The defendants counsel contends that the fourth defendant must have assumed personal responsibility for the advice it gives which is not the case where the 4th defendant was all the time acting for the third defendant.

According to Gower's Principles of Modern Company Law, 4th edition page 616 and paragraph 3 thereof, in certain circumstances directors shall incur personal responsibility notwithstanding that they had expressly contracted as agents only especially where they have signed or authorised the signature on behalf of the company and the company's name is not mentioned in legible characters. According to Halsbury's laws of England volume 7 paragraph 621 the mere fact that directors are sole directors and shareholders will not automatically render them liable for the Torts committed by the company. In the case of **Nanam Aviation Ltd versus Captain George Mike Mukula and another HCCS number 309 of 2008**, it was held that the contractual liabilities of the company cannot be imputed on its director. In this particular case the 4th defendant's counsel submits that at all material times the managing director of the third defendant was the 4th defendant and this is averred in the plaintiffs plaint paragraph 2 (iii). The defendant's written statement of defence avers that he signed various valuation reports as manager but various staff of the third defendant carry out property valuations and site visits. The contract for valuation with the plaintiff was signed between the third defendant and the plaintiff. The third defendant had employees who would go to the field to carry out valuations on behalf of the third defendant. In the premises the 4th defendant's case is that being a managing director of the third defendant, he cannot be held personally liable for the acts of the company. It is further not disputed that the plaintiff and the third defendant executed written agreements for providing services of valuation and the third defendant on several occasions provided its best services to

the plaintiff. The 4th defendant has never used the third defendant to benefit from fraudulent transactions as alleged by the plaintiff. Consequently the 4th Defendant's prayer is that the court upholds the objections to the suit against the 4<sup>th</sup> Defendant with costs.

### **Reply of the plaintiff**

In reply, the plaintiff's counsel submits that the gist of the plaintiffs claim against the 4th defendant lies in the fraudulent representation of the third defendant as a registered surveyor and gross professional negligence as the 4th defendant owed the plaintiff a professional duty as a registered surveyor to sign and issue an accurate valuation report. Before signing the valuation report, the fourth defendant ought to have exercised ordinary skill and care of a reasonable and competent registered surveyor to ensure that the contents of the valuation report against which the fourth defendant signed in his personal and professional capacity were verified to be authentic and accurate.

There was gross negligence of the fourth defendant in signing of a written report which contained falsehoods thereby misleading the plaintiff who relied on it to grant a loan facility to the first and second defendants which caused financial loss to the plaintiff. The fourth defendant knew that the third defendant was not a registered surveyor and therefore not licensed to conduct valuation business but continuously passed it off as a registered surveyor. The fourth defendant must have known or reasonably foreseen that the plaintiff was going to rely on the valuation report to grant a loan facility and that if it was not accurate, the plaintiff would make a loss. This gave a special relationship of proximity between the plaintiff and the defendant under which the gross negligence on the part of the fourth defendant gave rise to the breach of his professional duty owed to the plaintiff. Counsel relied on the case of **Headley Byrne Company Ltd versus Heller (1961) 2 All ER 575** for the holding of the House of Lords that a duty independent of contract may exist if the person making enquiry is relying on the bank to exercise its special knowledge of the customer to give a true and faithful reply. The law of professional negligence was substantially extended to include cases where the professional has been held to owe a duty of care to an increasingly wide range of persons who are not his or her clients.

On the submissions related to lifting of the corporate veil by order of court, counsel for the plaintiff maintains that the plaintiff is not trying to lift the corporate veil against the fourth defendant. In any case the power to lift the veil is discretionary. The plaintiff's cause of action against the fourth defendant is based on fraudulent misrepresentation of the third defendant as a registered surveyor and gross professional negligence. The fourth defendant as the registered surveyor was negligent in the discharge of his professional duty owed to the plaintiff in signing of a of valuation report that contained falsehoods.

The plaintiff's counsel further relies on the case of **Caparo Industries Plc versus Dickman [1990] 2 AC 605**. In that case the plaintiff owned shares in a public company called Fidelity Plc and was interested in making a takeover bid. As shareholders the plaintiff was entitled to receive

the audited accounts of Fidelity Plc and after receipt of the accounts for the year 31st of March 1984, they purchased more shares in the company and later that year, they made a successful takeover bid. Following takeover, the plaintiff brought an action against the auditors of Fidelity Plc on the ground that he relied on audited accounts, which showed a profit of £1.3 million when there was in fact a loss of £0.46 million. It was held that the auditor of a public company owed a duty of care to the individual shareholder or carry out audit of the company using reasonable care and skill. For a duty of care to arise, there must be foreseeability and proximity. Economic loss to the plaintiff as a shareholder was foreseeable by the auditors as a fact that can result from failure to exercise reasonable care in conducting the audit and reporting to shareholders.

The court also discussed the principle of proximity to the cause and the duty of care.

The argument that the plaintiff ought to have brought an application under Order 38 rule 5 (d) of the Civil Procedure Rules for lifting the veil does not apply and neither is there any illegality by the plaintiff suing the fourth defendant without a court order lifting the veil. The plaintiff does not seek to lift the veil but has rather sued the fourth defendant in his personal capacity for fraudulently misrepresenting the third defendant to be a registered surveyor, an act which is illegal and gross professional negligence and as a registered surveyor in signing of valuation report which contains falsehoods. The fourth defendant is a registered surveyor licensed to practice under the Surveyors Registration Act Cap 275 registration number 102. The third defendant on the other hand does not have authority under the Act to practice as a registered surveyor. The fourth defendant at all material times and for several years fraudulently and illegally held out and misrepresented to the plaintiff and the public at large that the third defendant was a professional registered valuation surveyor whereas the third defendant is not registered as a surveyor, is not licensed, does not hold a practising certificate and is incapable of been registered as a surveyor under the law. Section 12 of the Surveyors Registration Act requires the registrar to maintain a register in which the name, address and date of entry plus qualifications of valuation surveyors are entered. Section 15 of the Surveyors Registration Act gives the qualifications for registration. Section 19 (3) forbids the practice of something by whatever name called unless the person practising is the holder of a valid practising certificate granted to him or her under the Act. Counsel further relied on section 26 which gives entitlement to a valuation surveyor to use the title "Registered Surveyor of Uganda" or R.S.U after his or her name and subject to having a valid practising certificate.

The inference from the above provisions is that the fourth defendant is personally liable as the registered surveyor for all the actions and omissions amounting to professional negligence as a result of signing a valuation report that contains material falsehoods. Furthermore the Surveyors Registration Act by using the terms his/her does not intend to include a company as a likely candidate for registration as a registered surveyor and therefore the 3rd defendant is not a registered surveyor. A limited liability company cannot acquire the requisite qualifications for obtaining a practising certificate. The registered surveyor that the plaintiff contracted is the fourth defendant and it is out of the gross professional negligence of the fourth defendant that the

plaintiff has a cause of action against him personally. Furthermore in the valuation report, the fourth defendant made some undertakings at page 40 thereof under the heading "Executive Summary". It shows that the plaintiff instructed the fourth defendant.

Furthermore under the heading "Scope of Work and Sources of Information", the fourth defendant made another undertaking that the property has been valued by a registered valuer who is qualified for the purposes of the valuation in accordance with the requirements of the Surveyors Registration Boards and the Institution of Surveyors of Uganda. The plaintiff instructed a fit and proper person in the person of the fourth defendant and not the third defendant company to perform the valuation in accordance with the (rules and ethics) of the Surveyors Registration Board and the Institution of Surveyors. Furthermore another undertaking in the report under the title/heading "Scope of Work and Sources of Information" and "Reliance".

The plaintiff gave instructions the fourth defendant who is the same person that signed the valuation report. Therefore the assertion of the fourth defendant that the plaintiff signed the contract with the defendant but not with the fourth defendant is not tenable. Notwithstanding, in special circumstances and in the absence of a written or oral contract, an implied contract can be inferred to have existed because of the special relationship between the parties as discussed in the case of **Hedley Byrne and Co Ltd versus Heller** (supra). In the circumstances the plaintiff has a cause of action against the fourth defendant for fraudulent misrepresentation by passing of the third defendant as the registered surveyor as well as breach of his professional duty as a registered surveyor owed to the plaintiff. The plaintiff has suffered due to the fourth defendant's gross negligence. The fourth defendant owed the plaintiff a duty to sign an issue valuation report which ought to have been verified to be authentic and accurate. The fourth defendant as the author of the valuation report owed the plaintiff a duty of care to establish the truthfulness of the valuation report and its authenticity before signing it and issuing him to the plaintiff. Consequently it is the prayer of the fourth defendant's counsel that the points of law raised by the fourth defendant are overruled with costs.

## **Ruling**

I have carefully considered the fourth defendants objection to the suit as currently framed against him, the written submissions in support and opposition to the objection, the pleadings and authorities cited.

The fourth defendant's objection is founded on the doctrine that an incorporated limited liability company is a separate legal entity whose liability does not extend to its members or shareholders. Secondly the defendant contends that an action cannot be commenced in a court of law against a member of the company for acts attributed to the company without lifting the corporate veil. Thirdly the power to lift the corporate veil is vested in the court and not on any other person. Fourthly an application to lift the veil of incorporation has to be made under Order 38 rule 5 (d) of the Civil Procedure Rules and the veil of incorporation lifted before an action can be

commenced against the director or member of the company. Counsel contends that failure to obtain an order lifting the veil of incorporation renders the suit against the fourth defendant void for illegality. Directors of the company can only be held liable under specific circumstances.

In reply the plaintiff's counsel submitted that it was not necessary to lift the corporate veil. The report the subject matter of the suit was signed by the fourth defendant who undertook to carry out a valuation survey of Kibuga block 3 plot 787 at Nakulabye (the property the subject matter of the valuation report for which the plaintiff sued the defendants). The suit against the fourth defendant is for gross professional negligence and that the fourth defendant owed the plaintiff a professional duty as a registered surveyor to sign and issue an accurate valuation report. Therefore the 4<sup>th</sup> defendant held out the 3<sup>rd</sup> defendant company as a professional valuation surveyor. The other submissions are that a company cannot be a licensed valuation surveyor under the Surveyors Registration Act cap 275. Secondly the plaintiff specifically instructed the fourth defendant. The fourth defendant undertook to carry out the professional valuation in many respects. The fourth defendant as a registered valuation surveyor owed a duty of care to the plaintiff to issue an accurate valuation survey without falsehoods. The loss to the plaintiff was foreseeable and as arising directly from the misrepresentations in the valuation report which the plaintiff was expected to rely on. The sum total of the submissions are that the suit is against the fourth defendant personally and in his capacity as the professional valuation surveyor, registered and licensed under the Surveyors Registration Act.

The plaint in paragraph 3 (ii) is the claim against the third and fourth defendants for damages for breach of contract and negligent/fraudulent misrepresentation for loss incurred in making a survey and valuation report that was manifestly inaccurate. In paragraph 4 (e) the plaintiff avers that it had retained the defendant for payment as valuation surveyors to survey and value the suit property (Kibuga Block 3 plot 787 at Nakulabye in Kampala). The plaint avers in paragraph 4 (g) - (h) that the third and fourth defendants warranted or alternatively knowing that the plaintiff would rely on the valuation report were under a duty of care to exercise all reasonable care and scale in carrying out the survey and valuation and in making the report. The duty included the digital visit the site, but boundaries, report on the development of the land, verify proprietorship and encumbrances etc. The third and fourth defendants in the purported performance of the retained provided the plaintiff with the valuation report dated 14th of February 2011 which showed that the property comprised three newly completed residential one-bedroom houses each with an en suite bedroom, and other particulars with an open market value of Uganda shillings 400,000,000/= and the depreciated value of Uganda shillings 280,000,000/= plus the forced sale value of Uganda shillings 280,000,000/=. The fourth defendant in his professional capacity as the registered value and surveyor endorsed the report. Paragraph 4 (m) the plaintiff gives particulars of negligence of the third and fourth defendants jointly. Again particulars of misrepresentation, fraud and conspiracy to defraud are alleged against all the defendants.

I have carefully considered the objections and the response of the plaintiff to the objections. The question is whether the plaint discloses a cause of action against the fourth defendant in his

personal capacity. As to whether the plaintiff is right to sue the fourth defendant cannot be handled as a preliminary point of law. This is premised on the assertion that the plaintiff sued the fourth defendant in his personal capacity. It is a defence of the fourth defendant that he cannot be sued in his personal capacity for the acts alleged in the suit. In my opinion the submissions of the counsels are on the merits of the suit and ought to be handled as a point of law.

Nonetheless because the fourth defendant alleges that the suit against him is illegal, I will address specifically that issue. What is illegal is contrary to law or public policy. The fourth defendant quoted Order 38 rule 5 (d) of the Civil Procedure Rules for the assertion that the corporate veil has first to be lifted before the plaintiff could proceed against the fourth defendant in this action. His contention is that without lifting the corporate veil, the suit would be an illegality against him.

The provisions of order 38 of the Civil Procedure Rules and specifically rule 1 thereof provides that an application under that order means an application to the court made in pursuance of the “Act” or of the Order. “Act” means the Companies Act. Order 38 rule 2 of the CPR provides as follows:

“This order and, subject to it, the other provisions of these rules shall apply to all applications except those to which the Companies (Winding Up) Rules apply.”

Consequently Order 38 applies to applications made under the Companies Act. With specific reference to Order 38 rule 5 (d) of the Civil Procedure Rules, it provides that applications not otherwise provided for under order 38 shall be by notice of motion. The heading of Order 38 is that it deals with “Company Matters”. The question is therefore whether failure to apply for the lifting of the veil of incorporation is an illegality. Alternatively whether suing the 4th defendant without obtaining an order of the court lifting the veil of incorporation is an illegality? In fact it can be argued that the provisions of Order 38 of the Civil Procedure Rules merely deal with the procedure for lifting the veil. The first and obvious question is whether the plaintiff’s action is a company matter or cause?

The nature of company matters under order 38 of the Civil Procedure Rules can be discerned from order 38 rules 3 and 6. They do not include an action against the company for breach of contract or tortious acts such as negligence. An action by a third party against a company for breach of contract or for a tort is not a company matter or cause.

The plaintiff’s suit against the 3<sup>rd</sup> defendant and specifically against the 4<sup>th</sup> defendant is for negligence and professional misconduct. It is for fraudulent misrepresentation and gross professional negligence. It cannot be a company action or cause under order 38 of the Civil Procedure Rules. Consequently the crux of the fourth defendant’s objection relates to whether he can be held liable for the causes of action in the plaintiff’s plaint when he acted or purported to act on behalf of the company, namely the third defendant company. In other words it is whether the plaint discloses a cause of action against him. Alternatively it is whether on a point

of law, the action could succeed against him, on the ground that the corporate veil cannot be pierced so as to proceed against him on the basis of the transaction for which the plaintiff sues the third defendant.

The words “illegal or illegality” were used in the case of **Makula International Ltd. Versus His Eminence Cardinal Nsubuga and Rev. Dr. Father Kyeyune by Court Of Appeal Civil Appeal number 4 of 1981**, in the sense of contravention of Schedule VI of the Advocates (Remuneration and Taxation of Costs) Regulations. In other words contravention of a statutory provision is illegal. The court of appeal said as follows:

"Secondly, there is no doubt that the award contravenes Schedule VI, and as such it is illegal." (See page 21)

According to Oxfords Dictionary of Law 5<sup>th</sup> Edition at page 240 an "illegal contract" is:

"A contract that is prohibited by statute (e.g. one between traders providing for minimum resale prices) or is illegal at common law on the grounds of public policy. An illegal contract is totally void, but neither party (unless innocent of the illegality) can recover back any money paid or property transferred under It."

The word is used in the sense of contravention of statute or a recognised illegality at common law on grounds of public policy. In the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another** (supra) the Court of Appeal agreed with the judge on the question of illegality brought to the attention of the court without the requisite pleadings as held in the case of **Belvoir Finance Co Ltd v Harold G Cole & Co Ltd [1969] 2 All ER 904**. In that case, the hire-purchase agreements were held to be illegal under art 1(1) of the Hire-Purchase and Credit Sale Agreements (Control) Order 1964 of the UK.

Therefore the defendants counsel has not submitted on any contravention of a statute and which statute penalises or forbids the action of filing a suit against the fourth defendant in his personal capacity without lifting the veil.

In the case of **Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575**, Lord Reid at page 583 held that the question of liability of a defendant would depend on whether he owed a duty of care. The question of whether someone owes a duty of care is both a question of law and fact. As for questions of fact it would depend on the circumstances of each case which ought to be established or disproved at the trial of the action. Lord Reid in the above case held as follows at page 583:

“A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that



reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.”

The question of whether the 4<sup>th</sup> defendant owed a duty of care to the plaintiff in endorsing the valuation report cannot be established from the question of who is the right party based on the names of the contracting parties alone. The valuation is a professional undertaking and who is responsible for it has to be tried. For instance who was trusted to carry out the valuation?

From the pleadings alone, the plaintiff's action against the fourth defendant is for professional negligence or misconduct by endorsing a report upon which the plaintiff relied allegedly to its detriment. I have not been shown any statute that forbids anybody from filing an action against a director of a company. The Companies Act cap 110 in fact section 206 of the Companies Act makes void any contract either in the memorandum and articles of Association of the company or a contract by the company with the third-party which shields any auditor or officer of the company against any liability by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company. It further provides that the section shall not operate to deprive any person of any exemption or right to be indemnified in respect of anything done by him or her by the company in defending any proceedings in which he or she is acquitted. The section reads as follows:

“206. Provisions as to liability of officers and auditors.

Subject as hereafter provided, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him or her against, any liability which by virtue of any rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company shall be void; except that—

(a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him or her while any such provision was in force; and

(b) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such officer or auditor against any liability incurred by him or her in defending any proceedings, whether civil or criminal, in which judgment is given in his or her favour or in which he or she is acquitted or in connection with any application under section 405 in which relief is granted to him or her by the court.”

Furthermore section 405 of the Companies Act makes it clear that an action can be brought against an official of the company in his or her personal capacity for negligence, default, breach of duty or breach of trust and official may seek indemnity from the company. It provides as follows:

“405. Power of court to grant relief in certain cases.

(1) If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he or she is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he or she has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him or her either wholly or partly from his or her liability on such terms as the court may think fit.

(2) Where any such officer or person aforesaid has reason to apprehend that any claim will or might be made against him or her in respect of any negligence, default, breach of duty or breach of trust, he or she may apply to the court for relief, and the court on any such application shall have the same power to relieve him or her as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.”

According to Gower's Principles of Modern Company Law Fourth Edition at page 612, where directors successfully defend the proceedings brought against them they may be entitled to require the company to indemnify them against the costs either under common law principles or by virtue of an express indemnity clause. He goes on to say as follows:

"The common law right will apply only if the proceedings arose out of lawful activities by them as directors, and hence they are not entitled to be reimbursed the expense of successfully defending themselves against allegations that they had done something which they had not done, and which it was not their duty to do.... A clause which purported to entitle them to an indemnity if their defence was unsuccessful would, of course, be void under section 205."

In other words if they are found liable, the company is not obliged to indemnify them. Underlying this statutory provision is the obvious right of any third party to sue the directors in their own personal capacity. In fact a director would be entitled to raise the defence such as the one raised by the fourth defendant that he is not personally liable. The conclusion is that a director or officials of the company can be sued for negligence and he or she may or may not have a right to apply for indemnity from his or her company.

Before taking leave of the matter, the subject matter of the suit involves valuation of property. In the joint scheduling memorandum endorsed by both counsels for the parties, it is agreed that the third defendant is a limited liability company carrying on business of valuation surveyors. Secondly that the fourth defendant is a registered surveyor licenced to practice in Uganda and was at all material times the managing director of the third defendant. The plaintiff sought the services of the third defendant and retained it as valuation surveyors to obtain professional valuation of land the subject matter of the suit. The third defendant issued a valuation report that was signed by the fourth defendant. The third defendant issued the plaintiff with the valuation report dated 14th of February 2011 signed by the fourth defendant. The suit land was mortgaged to the other defendants who defaulted. The valuation report is entitled as issued by CBRE CB Richard Ellis, International Property Consultants, Valuers and Asset Management Consultants. The report is signed by the fourth defendant for and on behalf of the third defendant company.

The plaintiff's counsel raises very important points about whether a limited liability company can be a professional valuation surveyor. I will not go into the merits of that submission. It is sufficient to make a reference to the Surveyors Registration Act cap 275 section 19 (3) thereof which provide as follows:

"Subject to this Act, no person shall engaged in or carry out the practice of surveying, by whatever name called, unless he or she is the holder of a valid practising certificate granted to him or her in that behalf under this Act."

The conduct of a valuation surveyor is also governed by Schedule 2 of the Surveyors Registration Act cap 275 which gives the grounds for professional misconduct. It provides as follows:

“Acts or omissions constituting professional misconduct

Each of the following acts or omissions on the part of a registered surveyor shall constitute professional misconduct—

- (a) allowing any other person to practise in his or her name as a registered surveyor unless that person is also a registered surveyor and is in partnership with or employed by him or her;
- (b) entering into partnership with any person other than a registered surveyor or securing, either through the services of a person not qualified to be a registered surveyor or by means which are not open to a registered surveyor, any professional business;
- (c) disclosing information acquired in the course of professional engagement to any person other than the client, without the consent or authority of the client, or otherwise than as required by any law for the time being in force;

- (d) failing to disclose a material fact known to him or her which is not disclosed in any statement made by him or her but disclosure of which is necessary to make the statement not misleading;
- (e) failing to report a material misstatement known to him or her to appear in any statement with which he or she is concerned in a professional capacity;
- (f) failing to obtain sufficient information to warrant the expression of a professional opinion;
- (g) intentionally or through recklessness making an incorrect survey or delivering an incorrect diagram or plan of any land or building or a diagram or plan which does not conform to the requirements of any written law for the time being in force;
- (h) gross negligence, carelessness or incompetence in the conduct of professional duties."

The question is who owed the professional duty to the plaintiff under the Act? I further would highlight a few points. Firstly the Surveyors Registration Act forbids the practice of surveying by whatever name called without a valid licence. Under whose licence was the valuation report survey conducted? In other words surveying may be done under another name other than that of the holder of a valid practising certificate. Secondly a surveyor must be the holder of a valid practising certificate. Last but not least it is unlawful for an unlicensed person or someone without a practising certificate to carry out the practice of surveying. The word "surveyor" is defined by section 1 (h) to include:

"land surveyors, quantity surveyors, building surveyors, mining and hydrological surveyors and valuation surveyors, as well as land agents and other professionals responsible for the management of land or buildings."

Section 15 of the Surveyors Registration Act provides for the qualifications for registration as a surveyor. The qualifications only relates to a real person who may obtained qualifications from an Institute of learning and be awarded a degree, diploma or certificate by a University or School of Surveying etc. In other words the surveyor can only be a real person and not a legal fiction no personality such as a company. I have not seen any evidence to conclude whether the third defendant is a limited liability company, unlimited liability company or any other entity. Suffice it to note that whatever is important in an association of professionals is that they are personally liable for their professional work for purpose of assurance of professional quality and ethical conduct. Consequently an unlimited liability company can indeed be incorporated for purposes of doing professional work because it does not limit the liability of the professionals operating under it from being sued for negligence. However, the limitation of liability would be contrary to the law. It would be strange indeed if a doctor had limited liability for carrying out surgeries and his liability for negligence limited. To uphold the professional standards of any profession in which people rely for doing their other businesses, such professionals cannot limit their liability

to the extent that they are not liable for negligence. According to Gower's Principles of Modern Company Law (supra) at page 298, one of the disadvantages of an unlimited liability company is that its members would be personally liable for its debts and for that reason the members are likely to be careful if the company intends to trade. In other words, they are more likely not to be careless in what they do. In case of a limited liability company, they are only liable to contribute their unpaid shares in money. If they have paid up-to-date shares, they are not liable but the doctrine exclude negligence. The rationale I see is that personal liability ensures a high level of integrity and professional responsibility. In light of the above, the issues raised by the fourth defendant's counsel are not preliminary but on the merits of the suit.

In the premises, that is no need to consider the authorities cited by the counsels as sections 206 and 405 of the Companies Act, enable any party to sue a director of the company in his own personal capacity for negligence or default or breach of duty/breach of trust. The remedy of the director is to raise the defence that he or she is not personally liable or to seek indemnity from the company, if the grounds stated in sections 206 and 405 of the Companies Act cap 110 referred to above exist.

In the premises, let the fourth defendant defend himself on the merits inclusive of raising the defence that he is not personally liable for the valuation report. In the premises, the suit against the fourth defendant would proceed without prejudice to any defence to the effect that it is not him but the company namely the third defendant which is liable. However the suit against him is competent and will be heard on the merits. The fourth defendant's objection to the effect that the suit against him is barred is accordingly overruled with costs.

Ruling delivered in open court 8 November 2013

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Nyombi Sophie holding brief for Frederick Mpanga for the plaintiff

Titus Kamya for the 3<sup>rd</sup> and 4<sup>th</sup> defendant no present.

No representative of 3<sup>rd</sup> and 4<sup>th</sup> defendant present

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**8<sup>th</sup> November 2013**