

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 644 OF 2000

1. D.K. CONSTRUCTION CO. LTD]

::: PLAINTIFFS

2. JAMETEX INTRA SALES LTD]

VERSUS

BARCLAYS BANK OF UGANDA LIMITED: ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE LADY JUSTICE C.K. BYAMUGISHA

JUDGMENT

The Plaintiffs are limited liability companies incorporated under the provisions of the companies Act and carrying on business in Uganda. They filed this suit against the Defendant seeking a declaration that the latter is a legal or constructive trustee of the monies to the tune of Shs.24, 852,500/= previously held by the first Plaintiff on its Account No. 2863 at Uganda Commercial Bank Kawempe Branch and the sum of *Shs.17, 604,990/=* also previously held by the second Plaintiff on Account No. 1822 at Uganda Commercial Bank Mukono Branch. The suit is also seeking a declaration that the Plaintiff are the beneficial owners of these monies, interest at the rate of 36% Per Annum from the date the money was wrongly held by the Defendant in 1997 till payment in full. The Plaintiffs are also seeking costs of the suit.

The facts which led to the institution of these proceedings and which were agreed upon at the scheduling conference held before the trial are as follows:-The first Plaintiff Company was incorporated on the 13th June, 1991 with Lawrence Kasasa Kasekese (P.W1) as one of its subscribers and Managing Director. On the 17th June, 1991 it opened a Bank Account No. 2863 at Uganda Commercial Bank Kawempe Branch P.W 1 was one of the signatories to the Account. The second Plaintiff Company was incorporated on the 14th day November 1990. On the 26th June 1991 it opened Account No. 1822 at Uganda Commercial Bank Mukono Branch. Again P.W 1 was one of the signatories and Managing Director. On 18th June Total (U) Ltd issued cheque No. 750504 in the sum of Shs.100,000,000/= drawn on its Account with the Defendant Bank, in favour of Uganda customs and Excise Department. The Department did not receive the proceeds of the cheque but the Account of Total was debited with the amount. On the 28th June 1991 Caltex Oil issued cheque No. 1093341 for Shs.70, 849,000/= in favour of Uganda Customs and Excise Department drawn on its Account with the Defendant. The cheque and the money was never received by the payee but the Total Account with the Defendant was debited with the amount.

The Defendant Bank had a customer called Mapinto Enterprises who had Account No. 1397480 and the proceeds of the two cheques ended up on that Account. On 20th June 1991 the first Plaintiff banked cheque No. 050/583704 for Shs.100,000,000/= drawn on the Mapinto Account. The cheque was banked on the first Plaintiff's Account at UCB Branch. On the 27/06/91 the second Plaintiff banked a cheque No. 050/583706 for Shs.70, 849,990/= again drawn on the Mapinto Account. It was banked with UCB Mukono Branch on the second Plaintiff's Account No. 1822.

Other facts relevant to this case and which were admitted are the following:

Total (U) Ltd had an employee one Christopher Mufutumukiza in the Accounts Department which handled Uganda Revenue Authority cheques. He also had a company canaries Ltd and on 3rd July, 1991 it was paid a sum of Shs.5m by the first Plaintiff. Again on 09 July, 1991 it was paid another sum of Shs.4.5m. Both amounts were paid by cheques. On 17th July, 1991 one Antony Oroga an employee of Caltex Oil Ltd was paid Uganda Shs.5m by the first Plaintiff. He too was working in the Accounts Department dealing with outgoing cheques of

Uganda Revenue Authority.

The activities involving the above transactions became a subject of police investigations which led to the prosecution of eleven people including P.W1 among others. They were tried and convicted of various offences. The convictions were quashed and a retrial was ordered on the 5th June 1998. In the meantime the trial Chief Magistrate had ordered the transfer of the money still outstanding on the Plaintiff's Accounts to the Defendant. This was done in 1997. However there was no trial of the accused persons, as the Director of Public Prosecutions withdrew the charges against them. P.W1 made an unsuccessful attempt to have the money the subject - matter of the suit refunded to him - hence this suit by the companies.

At the commencement of the trial, the following were the agreed issues:-

1. Whether the money Shs.24,857,500/= belongs in law or equity to the first Plaintiff or the Defendant.
2. Whether Ug. Shs.17, 606,402/= belongs in law or equity to the second Plaintiff or the Defendant.
3. Whether the veil of incorporation should be lifted in respect of the Plaintiffs and Lawrence Kasasa Kasekese.
4. Reliefs if any.

I shall deal with the third issue because it's the answer to the lifting of the veil will more or less dispose of the whole case. It was averred in paragraph 10 of the Defence and counter - claim as follows:

“The Defendant repeats the contents of paragraph 6 (a) to (b) a bore and shall add that at all material times the said Lawrence Kasasa Kasekese was using

the 1st and 2d Plaintiff companies as his alter ego for grand and as a device and sham to avoid recognition while perpetrating fraudulent activities.”

In paragraph 11 it was alleged that:

“The Defendant shall pray that the veil of incorporation of the 1st and 2nd Defendant be lifted and a declaration that the monies in question are the traceable proceeds of the monies fraudulently debited from the Accounts of Total (U) Ltd and Caltex (U) Ltd.”

In reply, the Plaintiff companies denied the allegations that Lawrence Kasasa Kasekese used the companies as his alter ego for fraud as a device and sham to avoid recognition while perpetuating his fraudulent activities is baseless and it does not necessitate lifting the veil of incorporation.

The principle of the independent corporate existence of a company from its promoters and subscribers was enunciated and emphasized in the case of Solomon Vs Solomon (1897) A.C. 22. Therefore the magic of corporate personality enjoyed by companies has hamstrung the efforts of Courts to lift the veil.

Gower’s Principles of Modern Company Law 6th Edition (page 173) (Sweet and Maxwell) lists three instances under which the Court can pierce the veil of incorporation. These are: -

1. When the Court is construing a statute, contract or other documents.
2. When the Court is satisfied that a company is a “mere facade” concealing the true facts;
3. When it can be established that the company is an authorised agent of its controllers or its members corporate or human.

There are no comprehensive principles which can guide Court when lifting the veil. However, the Court is entitled to look at the reality of the situation, the motive for the transactions and other relevant facts must be considered before coming to the conclusion that the company is a mere façade concealing the true facts.

Turning to the matter now before Court, it was submitted by counsel for the Defendant Bank that if a company is used as a vehicle for fraud the Court shall pierce the veil of incorporation and look at the perpetrator of the fraud and fix him with liability. He pointed out that the money from the cheques of Total and Caltex were diverted to the accounts of the Plaintiffs through a fraudulent design engineered by their sole Managing Director Lawrence Kasasa Kasekese. He enumerated facts to support this assertion. These are: -

1. Kasasa Kasekese was the promoter of both companies and almost the sole signatory of both accounts.
2. The first Plaintiff was incorporated on 13th June, 1991 and an account was opened with Uganda Commercial Bank Kawempe Branch on 17/06/91. The Total cheque was issued on 18/06/91.
3. Christopher Mufutumukiza an employee of Total employed in the accounts section and who was involved in the handling of the outgoing cheques payable to Uganda Revenue Authority was charged, tried and convicted jointly with P.W1 in relation to the receipt and handling of the proceeds of the Total cheque although the conviction was quashed on technical grounds.
4. The payment of up to Uganda Shs.9, 500,000/= to Mufutumukiza's company of Canaries Ltd with two separate cheques by the first Plaintiff.

5. The Caltex cheque was also handled in the same manner.
6. Anthony Ologa an employee of Caltex was paid the sum of Shs.5m.
7. Two cheques banked by the Plaintiffs were drawn on the account of Mapinto Enterprises which had been blocked or frozen for fraud three months before the dates of the frauds.

Counsel pointed out that the circumstantial evidence shows that Lawrence Kasasa Kasekese was responsible for and was the direct beneficiary of the fraud and that the payments he made to the two employees of Total and Caltex respectively was because of their role in the fraud.

Counsel concluded his submissions by stating that the fraud perpetrated by Lawrence Kasasa Kasekese was the diversion of the proceeds of the two cheques. He contended that the suit monies are the balances which were found on the accounts of the 1st and 2nd Plaintiffs and are part of these proceeds from the Total and Caltex accounts and therefore the Defendant is entitled in equity to retain it.

On the other hand counsel for the Plaintiff companies submitted that no evidence was led by the Defendant to show that Lawrence Kasasa Kasekese or any Director/Shareholder of the companies stole or received the proceeds of the above mentioned cheques drawn by the Oil companies. He also pointed out that no evidence was led to show that P.W1 or any other employee of the companies altered the cheques and made them payable to Mapinto Enterprises. He further pointed out that there was no evidence to show that P.W1 connived with employees of the Oil companies to fraudulently divert the two cheques to the Plaintiffs. It was also his contention that no inference of fraud on the part of P.W1 can be drawn from the fact that the value of the cheques issued by Mapinto Enterprises to the Plaintiffs were similar to the amounts of the cheques from the Oil companies. On the confessions by P.W1 that he was a smuggler of goods, evaded payment of taxes, had no bank accounts, counsel stated that no inference can be drawn from these confessions that he conspired or connived

with Mapinto Enterprises to defraud the Bank.

Are there facts in this case which the Court can use to lift the veil? In order to do so, the Court has to look at the reality of the situation and see whether the Plaintiff companies were being used by P.W1 as a façade at the time of the transaction. First and foremost, there is the proximity in time of the incorporation of the first Plaintiff Company, the opening of the accounts for both companies and the issuance of the cheques by two Oil companies.

The second factor is that Mapinto Enterprises Ltd whose account with the Defendant had been blocked issued two cheques in favour of the Plaintiffs in the exact amount as the two cheques from the Oil companies.

The third factor is that two employees of the Oil companies were paid. I do not believe the evidence of P.W1 that the payment to Canaries Ltd was for goods purchased from the company. In my view, it was payment to its proprietor Mufutumukiza who had handled the cheque of Total. He however never satisfactorily explained why he paid Anthony Oroga an employee of Caltex the sum of Shs.5m.

The fourth factor, is that the companies had no previous Bank accounts, no trading licence, etc which could have showed their source of trading funds. I am satisfied that the Plaintiff companies were merely used as conduits by P.W1 to negotiate the ill-fated cheques of the Oil companies. I consider this to be one of those cases in which the Court can safely pierce or lift the corporate veil. This finding more or less disposes of the whole case with the results that the first and second issues will be answered in the negative against the Plaintiffs and in the affirmative in favour of the Defendant. In the result the suit will be dismissed with costs and Judgment entered for the Defendant on the counter-claim with a declaration that it is entitled to retain the money. It will also have the costs of the counter-claim.

09/3/2002

C.K. Byamugisha

JUDGE

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