

UGANDA / JUDGMENT

Dabule v Golden Leaves (U) Limited and 2 Others (Civil Suit 215 of 2020) [2024] UGHCCD 178 (31 October 2024) [2024] UGHCCD 178

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

Civil Suit 215 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

CIVIL SUIT NO.0215 OF 2020

ISMAIL DABULE:.....PLAINTIFF

VERSUS

- 1. GOLDEN LEAVES (U) LIMITED
- 2. MRS. ZHANG NAN :.....DEFENDANTS
- 3. MR. ZHANG NAN

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff brought this suit (summary) against the defendants jointly and severally for payment of Ug shs 60,000,000/= being rent arrears, payment of interest at commercial rate of 25% per annum from the date of cause action till payment in full and costs of this suit.

The plaintiff entered into a tenancy agreement with the defendants wherein the defendants operated a Restaurant; Great Chinese Wall under Golden Leaves (U) Ltd. The defendant was to pay a monthly rent of 5,000,000/=. The 2 nd and 3rd defendants operating under the 1st defendant did not pay rent for a period of over 12 months from May 2018 to April 2019 making the accumulated rent arrears to a tune of 60,000,000/=.

The defendants kept promising to pay the rent to no avail and vacated the premises without the knowledge of the plaintiff. The plaintiff averred that the property was commercial and has lost income for which he sought interest.

The defendants made an application for leave to file a defence/ appear and defend the suit. The same was granted and the defendant filed a defence and counterclaim to account and pay for the value obtained by the counterdefendant/plaintiff from taking over the good will (\\$60,000), reputation and clientele built by the 1st defendant/counterclaimant for the restaurant, its furniture, cooking equipment, utensils, cutlery, well trained staff and good location. They also sought general damages, interest at 25% and costs of the suit.

The defendant contended that the plaintiff cannot seek to recover the sum of 60,000,000/= without a written contract and therefore the suit is barred in law.

The defendants in defence averred that, the 1st defendant operated the Great Chinese Wall Restaurant at the plaintiff's premises since 2007 having bought the same from another Chinese company at over US\\$ 40,000. Throughout the tenancy, the parties maintained an informal and cordial relationship and in fact at no time did they ever execute a written tenancy agreement and no dispute ever arose over rent arrears.

That all payments of rent were made in cash to the plaintiff's agents a one Osman who would always pick it from the premises. In February 2019, the 3 rd defendant who was managing the restaurant decided to hand over the Restaurant to the plaintiff upon deciding to go back to China.

That upon making the decision to go back to China, it was resolved by the 1 st defendant that instead of selling the said restaurant, its good will and assets to a third party, the same was given to the plaintiff as a reward for the good relationship enjoyed by the parties over the years which offer was accepted by the plaintiff.

The 3rd defendant convened a meeting between the plaintiff and 1st defendant's restaurant staff at the time and informed them of the change of management and urged the staff to work with the plaintiff. The restaurant was managed for and on behalf of the plaintiff and the money was remitted to him by the manager called Livingstone and therefore the defendants owe the plaintiff nothing.

The plaintiff/counter-defendant in reply to counterclaim denied ever being handed over the restaurant and he denied any reward of good will and assets of the restaurant being handed to him. The plaintiff denied any meeting being held to inform the staff about the change of management and he has never instructed a one Livingstone to manage the restaurant on his behalf.

The plaintiff all along had known that the 2nd and 3rd defendants were still operating the business as they kept on promising to pay the rent arrears when their other case is concluded.

The parties filed a joint scheduling memorandum and disagreed in everything, but agreed on one issue for determination.

The main issues for determination are

- 1. *Whether the plaintiff is entitled to the rent arrears claimed?*
- *2. Whether the directors of the 1st defendant can be personally liable for acts of the 1st defendant.*
- *3. What remedies are available to the parties?*

The plaintiff was represented by *Counsel Massajjage Steven* holding brief for *Counsel Lillian Omurangi* for the plaintiff, while the defendant was represented by *Counsel Abio Patience Teddy* and *Counsel Damalie Tibugwisa*

The plaintiff led evidence of himself as the sole witness. The defendants failed to lead any evidence and the court proceeded to determine suit under Order 17 rule 4 of the Civil Procedure rules.

The parties filed their respective submissions which I have considered in this matter.

DETERMINATION

Whether the plaintiff is entitled to the rent arrears claimed?

The plaintiff's counsel submitted that the plaintiff testified that he entered into a tenancy agreement with the defendants in 2007 to rent the premises situate at Slow Boat, Plot 21, Kampala Road in which the defendants operated and ran a restaurant under the names of Golden Leaves at a monthly rent of 5,000,000/= and the same was remitted for the initial 2 years.

The plaintiff further contended that the defendants continued paying rent until May 2018 when they failed and started defaulting. It was submitted that the defendants indeed defaulted in the payment of the rent arrears and that the plaintiffs evidence was not challenged and or contradicted.

It was part of the plaintiff's evidence that the defendants failed to pay rent for the period between May 2018 and April 2019 totaling for 12 months.

Counsel for the plaintiff further submitted that there are receipts issued by the plaintiff which to him satisfy the requirement of the contract to be in writing as envisaged under the Contract Act. Citing the case of **Musoke Kitenda v Roko Construction Ltd Misc. Civil Application No. 1240 of 2020**

cited in **Roko Construction Ltd v Isa Male Misc. Application No. 37 of 2021**, **Justice Stephen Mubiru** stated that;

"The writing envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that; reasonably identifies the subject matter of the contract; is sufficient to indicate that a contract exists, and states with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter."

The defendant in their submissions raised an issue of **whether the suit is competent against the 2nd defendant?**

The defence counsel submitted that the plaintiff sued a non-existing party, named as Mrs Zhang Nan (2nd defendant) and it was contended that no claim can be sustained against such a party. The plaintiff recognized the mistake although he never took active steps to rectify the grave error.

The defendant's counsel submitted that the plaintiff did not adduce a certificate of title to prove that he owned the premises which would entitle him to claim as a Landlord and that he never furnished the purported tenancy agreement in court. During cross-examination, the plaintiff testified that he was not the one who received the cash paid by the tenants since he was sick from 2015 onwards and last stepped in office in 2015. It was counsel's contention that he had no clue whatsoever of what his claim is, if any.

It was further submitted that it was the plaintiff's sons Osman and Doka who received cash from his tenants during the pendency of the tenancy and the receipts were signed by Osman. These key witnesses did not testify and yet they were authorized to collect and receive rent from the defendant.

The receipts that were adduced by the plaintiff as PEx 1 and PEx 2 were not numbered consecutively. They were dated in the months of August and

September in the year 2018, and yet in cross examination, testified that no payments were made in 2018. The receipts contradict his assertions that the defendants last made any payments in April 2018.

The defendant's counsel submitted that the evidence of the plaintiff was full of contradictions which point to deliberate falsehoods. The receipts were in the names of Lui Fang who is not named as a defendant and issued by a person who never testified in court. The demand note written in November 2019 demanded for rent arrears as of November 2019 to be one year. This would be contradictory to the period alluded to in evidence of May 2018 to April 2019.

Analysis

The plaintiff sued the 2nd defendant known as Mrs Zhang Nan and there is no such person and he assumed that it was the wife known by those names. The person does not exist and the plaintiff ought to have established the proper names before coming to court. The court would issue orders against unknown person in law which cannot be enforced. In the case of **The Trustees of Rubaga Miracle Centre v Mulangira Ssimbwa & Anor HCMA's No. 576 & 655 of 2006** the court held that a suit in the names of a non-existent plaintiff or defendant cannot be cured by amendment and that the plainti ought to be rejected under Order 7 rule 11 of the civil procedure rules as the defendant did not exist as a real or legal person capable of suing or being sued.

The name of a competent party to a suit must be the real name by which he is known, in the case of a natural person and its corporate name, in the case of a non-natural entity. Where a person commences an action in court, such a party must be a person known to the law, i.e a legal person, and if a party to an action is not a legal person, the party should be struck out of the suit.

See **IDEA Uganda Limited v Okello Stephen & 2 Others HCMC No. 316 of 2021;**

The plaintiff in his evidence availed exhibits which indicated the proper name if at all he wanted this court to believe that she was the person intended to be sued. Mr. Zhang Nan could have several wives and each would carry the 'baptized name' of Mrs Zhang Nan.

The defendant raised this issue in the pleading that indeed the 2nd defendant does not exist but the plaintiff ignored or never bothered to address the changes or make amendments. An amendment of a genuine misnomer will be allowed where the other party is not misled or prejudiced and the guilty party shows reasonable ground for the misnomer.

The plaintiff's suit against the 2nd defendant is struck off being she was a wrong party.

The plaintiff led evidence to prove that there existed a tenancy agreement but the same was not tendered in court to know the terms of the tenancy. The plaintiff's claim is for unpaid rent for a period of 12 months at the rate of 5,000,000/= to make a total sum of 60,000,000/=. In the plaint it was averred that the 1st defendant did not pay rent for a period of 12 months from May 2018 to April 2019.

The plaintiff in exhibit P2 demanded for rent in November 2019 contending that it was over 12 months in arrears. The plaintiff in his testimony does not explain how he got the cut off of April 2019 and not November 2019 as period of rent arrears.

The plaintiff in his testimony and cross examination stated that he was sick for 3 years and it was his sons who were collecting rent and indeed the signatures on the receipt were for the son. The evidence on record does not show how much was due and from which period. The plaintiff tendered two

receipts to show the payment and both were issued 17th /08/2018 and 15th/09/2018. The person whom issued a receipt of 17th August 2018 indicated that the defendant was paying for the period June to October and they paid 5,000,000/= and were left with a balance of 36,400,000/=.

The plaintiff in his witness statement testified that the defendants continued paying rent until May 2018 but the receipts exhibited in court shows that the defendants continued paying rent in August and September. The receipt for September does not show any balance outstanding which contradicts his witness statement that the defendant never paid any money since May 2018.

It is trite law that where witnesses of a party gave inconsistent and/ or contradictory evidence on material facts, their evidence on a point must be regarded as unreliable and must also be rejected. Contradictions of a minor detail in evidence, adduced on behalf of a party, which do not affect the substance of the issue to be adduced, are irrelevant and do not vitiate the case of a party. The relevant contradiction is that which amounts to a disparagement of other evidence adduced, thereby making it unsafe for the court to rely on either.

In the case of **Oryem David v Omory Phillip, HCCS No. 100 of 2018,** cited in the case of *Bintubizibu v Sekibamu (Civil Appeal) No. 9 of 2019* it was held that;

**"It is trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored....what constitutes a major contradiction will vary from case to case.*"*

**The question always is whether or not the contradictory elements are material, i.e "essential" to the determination of the case. Material aspects of evidence vary from case to case, but generally, in a trial materiality is determined on the basis of the* *relative importance the point being offered by the contradictory evidence and its consequences to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case.*"*

The plaintiff is demanding for a period ascertained of May 2018 to April 2019 which totals 60,000,000/=. The evidence as noted earlier contains several contradictions and is quite unreliable to be prove the plaintiff's case. The plaintiff who denies knowledge of the whereabouts of the 1st defendant's directors from 2018 or contends that they left mysteriously and left the restaurant to their worker. He left them to continue to operate the restaurant for a period of 12 months which is quite unbelievable.

The plaintiff was mean with his evidence and avoided giving this court sufficient evidence to determine the period of unpaid rent if any, by not allowing his sons who were conversant rent arrears since they were responsible for collecting rent for the period of 3 years when he was sick and never appeared at his office. Why didn't the plaintiff present these key witnesses who were in charge of collecting the rent? Why didn't the plaintiff adduce more evidence in form of receipts for payment of rent for the period of the tenancy or why did he only produce 2 receipts for the entire tenancy?

The plaintiff's testimony contradicted the pleadings when he claimed that the defendant never paid any rent since May 2018 and yet the receipts tendered were issued in August and September 2018. This was a major contradiction in his evidence to show that the plaintiff was not aware of the actual rent arrears if any or the facts surrounding the case. He further contended that the receipts had a mistake in them and yet they were authored by his sons responsible for the rent collection for the 3 years he was unwell.

When the evidence of a witness in court is different from the facts pleaded, or is contradictory to the facts pleaded, such evidence should be rejected. In the exercise of assessing such evidence, the court will not consider it improbable simply because there some minor inconsistencies in it via-a-vis the facts pleaded. It is any evidence so materially at variance with the pleadings in the sense that they both cannot be reconciled (or which has notable internal conflicts) that the court will unjustifiably reject. See **Makinde v Akinwale (2000) 2 NWLR (pt 645) 435 at 450**

The plaintiff's evidence is contradictory, and the contradictions are material and would result in a miscarriage of justice that would warrant such a rejection. It is not for this court to endeavor to find explanations for the contradictions in the evidence of the plaintiff.

The plaintiff's counsel contended that the evidence of the plaintiff was unchallenged simply because the defence did not call it is evidence. The plaintiff will not be entitled to judgment merely because the defendant abandoned its defence by failing to lead evidence in support therefore. The court would only be bound to accept unchallenged, uncontroverted and un rebutted evidence of the plaintiff, if it were cogent and credible. The evidence of the plaintiff in this matter is not credible since he was not conversant with rent arrears because he was sick for 3 years and it was his sons who were collecting the rent.

Credible evidence in this connection means the evidence worthy of belief and for the evidence to be worthy of belief or credit, it must not only proceed from a credible source, it must be credible in itself in the sense that it should be natural, reasonable and probable in view of the entire circumstances. The evidence of the plaintiff on the claims of rent arrears for 12 months from May 2018 to April 2019 and yet the demand letter was written in November 2019 was so exaggerated. This exaggeration entered into the realm of flamboyance or recklessness and petulance or appears to be an affront to reason and intelligence, no credibility ought to be accorded to it. See **Agbi v Audu Ogbah (2006) 11 NWLR (pt 990) pg 65 at 116; Fatunbi v Olanloye (2004) 12 NWLR (pt 887) 229 at 247**

The evidence called by the plaintiff to prove the averments in his pleadings is in sharp contradiction to those averments which are very material to the plaintiff's case, the result is that the plaintiff has failed to prove his case for rent arrears and the proper order is a dismissal of the case.

Whether the directors of the 1st defendant can be personally sued for acts of the 1st defendant.

The defendants' counsel submitted that the plaintiff describes the 2nd and 3rd defendants as directors and purports to seek relief from the directors of the 1st defendant. However, he did not specifically plead or prove fraud or any circumstances to warrant the lifting of the corporate veil.

The plaintiff in his evidence clearly shows that the tenancy was with the 1st defendant and all his demand letters-PEx3 was clearly addressed to the 1st defendant.

The plaintiff witness in his testimony tried to change his case to defendants instead of 1st defendants, the claim is against the 1st defendant as company as per the pleadings.

Analysis

The plaintiff has not lead any evidence or made any justification to lift the corporate veil. Litigants have always unlawfully and illegally lifted the corporate veil in matters involving companies duly registered. This practice must not be encouraged and defeats the basic principle of corporate personality under company law and especially without a proper application.

It needs to be appreciated that the *alter ego doctrine* is not invoked arbitrarily. The separate personality of the company is a statutory protection accorded to among, other things, maximize the potential of the company as a business entity. This privilege is important for the efficient and effective operation of businesses and the court will be slow to take it away in the absence of cogent evidence pointing to its abuse or perversion.

I do not think the idea should be encouraged that the alter ego doctrine exists primarily for the removal of procedural obstacles that may be faced by an aggrieved person. It is also erroneous to consider that the doctrine exists to produce a defence for an aggrieved person, as a matter of necessity.

What the doctrine does, from my understanding, is to afford protection where some conduct amounting to bad faith, wrongdoing, or inequitable conduct makes it unfair for the shareholders of the company to hide behind the corporate veil. Then in such circumstances the courts in exercise of its equity jurisdiction, lift the veil so that the person or persons abusing the corporate capacity of the company may be discovered and fixed with personal liability. See *Nipun Bhatia & Anor v Boutique Shazim Ltd & 4 Ors HCMA No. 0123 of 2023*

A universal benefit of incorporation is the separate entity doctrine which shields the shareholders, directors and other operators from liability for corporate omissions. By the doctrine, the company's debts are limited to the amount shareholders have paid or have agreed to pay to the company for its shares, in case of insolvency.

Section 20 of the Companies Act provides for;

Lifting the corporate veil.

"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, have for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil."

The plaintiff has failed to make any justification why he added the director(s) as a party to a suit without leave of court to lift the veil. The plaintiff ought to have proved fraud or dishonesty dealings against the 1 st defendant.

The 2 nd and 3rd defendant were not liable for the actions of the 1st defendant in their personal capacity.

This suit fails and is dismissed with no order as to costs.

It is so ordered.

SSEKAANA MUSA JUDGE 31st October 2024

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