

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 578 OF 2004

JOHN MAGALA ::: PLAINTIFF
(T/a Masajja Modern Primary School)

VERSUS

DAVID MUKASA ::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff claims from the defendant the recovery of the sum of Ug.Shs.12,325,000/= and costs of the suit. The suit was originally filed under order 33 of the CPR as a summary suit on a specially endorsed plaint. The defendant on the 29th September 2004 was granted leave to file a defence.

The case for the plaintiff that he trading as Masajja Modern Primary School entered on the 29th January 2004, into a Memorandum of Understanding (MOU) with the defendants trading as Children's Vision Uganda (CVU) to provide a financial subsidy for orphaned children studying at Masajja Modern Primary School.

According to the Memorandum of Understanding it was agreed that the defendant would send students to the plaintiff's school and pay as a school fees a subsidy (being 50% of the school fees) of Ug.Shs.25,000/= for each day attending student and Ug.Shs.65,00/= for each boarder.

The plaintiff then admitted the said students into the school and taught and fed them. The implementation of the Memorandum of Understanding started well as the first term fees (subsidiary) was paid in full. However, the second term fees were not paid leaving a balance of Ug.Shs.12,350,000/=. Despite various demands the defendants have not paid the money.

Apart from attending the application for leave to defend and filing a defence the defendant's lawyers did not attend the main trial despite the service on them of the hearing notice several times. The defence filed on the 15th October 2004 is largely a general denial of liability. However Para 4 of the defence states;

"4. The alleged Memorandum of Understanding was made between the plaintiff and the Children's Vision Uganda, a limited company..."

Though the name Serunjongi Frank is shown as a defendant in the defence he was dropped as defendant by the consent of the parties.

Three issues were agreed at scheduling as follows:-

1. Whether the defendant is liable without the company Children Vision Uganda being sued.
2. If the defendant is liable whether he is to pay the whole sum claimed as prayed.
3. Remedies.

Mr. A. Mukwatanise appeared for the plaintiff's

Mr. J.F. Kityo appeared and is on record for the defendant's.

Issue No. 1: Whether the defendant is liable without the company Children Vision Uganda (CVU) being sued?

Counsel for the plaintiff submits that the defendant are merely trying to hide and shield themselves from liability by raising this defence of a corporate existence. He prayed that Court lift any alleged corporate veil for the defendant to face up to their improper conduct. He argued that where the device of incorporation is used for some illegal or improper purpose then the Court is to disregard the principle and lift the veil of corporate identity so that if it is proved that a person used a company he controls as a "cloak" for an improper transaction for which he should be personally held to be liable. In this regard I was referred to the Nigerian case of;

Dunlop Nigeria Industries Ltd. –Vs- Forward Nigeria Enterprises Ltd. and Farore (1976) NCLR 243.

Secondly it is further submitted that counsel for the defendant on the 5th August 2004 wrote to counsel to the plaintiff Exb. P4 where it was stated;

"...There are some arrangements made between our client and yours regarding the payment of school fees; however, last Sunday on 1st August, 2004 during the parents meeting your client's representative one John Magala advised the parents to pay fees to your client direct. This was contrary to the previous arrangement agreed upon by both parties".

Be that as it may, our clients are willing to start paying what they have so far received but before this could be done, our client would like to know how much money your client has collected from the parents. Please give us this information and we shall advise our client to take action.

Yours faithfully

for: Kityo & Company. "

Counsel for the plaintiff states that this letter amounts to an admission of liability.

I have perused the pleadings, and record of proceedings in this matter. It would appear to me that the defendant and his counsel sought to put in a technical

defence in this matter. The defence of separate corporate existence of Children Vision Uganda was never proved to Court at all. A perusal of the Memorandum of Understanding does not immediately show that Children Vision Uganda is a body corporate. The onus is on the defendants to prove under Section 58 of the Evidence Act (Cap) that Children Vision Uganda is a body corporate before it can expect Court to rely on such a defence. If the fact of incorporation is not proved then it cannot be relied on. In this case I find that incorporation as far as Children Vision Uganda is concerned was not proved. The effect in reality is that the defendant can be sued directly.

However what is more interesting is what appears to be an attempt by the defendant to settle the matter. Whereas I am not inclined to see Exh.P5 from M/S Kityo & Company Advocates as an admission there is another letter filed as a copy in this Court on the 27th May 2005 by the same defence lawyer that may explain the absence of the defendants in Court. This letter is dated 27th May 2005 and is addressed to Counsel for the plaintiff and reads;

"...We refer to the above suit.

We have discussed with our client the issue involved in the above suit and advised our client and he has agreed. We suggest that both parties meet and settle the matter and sign a consent judgment.

Yours faithfully

for: Kityo & Company "

It is not clear why this letter was not raised at trial. It is not clear if this settlement proposal was taken up or not or it just failed. Be that as it may the Court will take note of the letter as it was copied to it. Again I find that the onus is on the defendant to actively pursue the settlement proposal with the plaintiff before trial begins, if he is serious.

In response to issue No. 1, I find that the defendant is liable without Children Vision Uganda being sued.

Issue No. 2: If the defendant is liable whether he is to pay the whole sum claimed as prayed?

I have reviewed the evidence Obol Santos (PW1) who was the Head teacher of Masajja Primary at the time and John Magala (PW2) the Managing Director of the school. I find that looking at the payment schedules presented to Court and the Memorandum of Understanding that the defendants are indeed jointly and severally indebted to the plaintiff in the sum of Ug.Shs.12,325,000/=.

Issue No. 3: Remedies.

In light of my findings on the evidence and issues I hereby grant the plaintiff the following remedies against the defendant;

1. Unpaid fees of Ug.Shs.12,325,000/=
2. Interest of 24% p.a. from date of judgment until payment in full.
3. Costs of the suit.

Geoffrey Kiryabwire

JUDGE

Date: 29/11/05