

COURT OF APPEAL ENUGU DIVISION
THURSDAY 30TH JUNE, 1988. CA/E/247/86
CORAM:- A. I. KATSINA-ALU, W. R. T. MACAULAY,
S. O. UWAIFO, JJCA

1. CYRIL MBANEFO OKOYE
2. FRANK NNOLI APPELLANTS
(both Trading under the name and
style of Cyril and Frank Enterprises)
AND
AFRICAN CONTINENTAL BANK LTD RESPONDENT

COMPANY LAW - Legal personality - Status - Meaning - Status is a legal issue upon which evidence is required - Once there is dispute in respect thereof (H1)

COMPANY LAW - Incorporation - Proof - By virtue of s.17(1) of Companies Act - Certificate of incorporation shall be conclusive evidence that - An association is registered as a company (H2)

COMPANY LAW - Legal personality - Proof - Since appellants contend that they run a limited liability company - They have to show when the incorporation was done (H3)

ACTIONS - Undefended suit - Hearing - High Court Rules of Eastern Nigera O. 3 r. 14 - Since the issues involved have not been looked into - The action demands trial on pleadings (H4)

FACTS

Plaintiff/respondent alleged that sometime in 1977, defendants/appellants trading in the name and style of Cyril and Frank Enterprises approached them for a loan. The sum of N2,000 was thus given to appellants by respondent. This was backed by a Guarantee to which two guarantors subscribed (Exhibit A). Later on, a further loan of N10,000 was added. However, appellants failed to pay their indebtedness as and when due despite repeated demands from respondent. Consequently, respondent instituted this action against appellants in the High Court of Anambra State, Onitsha. The bailiff's

affidavit of service shows that appellants were duly served, but did nothing to indicate that they would wish to defend the claim.

The action was thus conducted under “undefended list” by virtue of Order 3 rules 9 and 11 of the High Court Rules of Eastern Nigeria 1963. In his judgment, the learned trial Judge found in favour of respondent for the sum of N26,665.36 with costs of N1,250. The judgment debt was to bear interest of 5% per annum until it was liquidated. Dissatisfied, appellants filed appeal at the Court of Appeal, Enugu Division, contending that it was an error to have proceeded against them when the borrower of the loans was a limited liability company and that there was no privity of contract between them and respondent. Appellants further alleged that the writ was not personally served on them.

ISSUES FOR DETERMINATION

(a) whether the trial Judge was right to have relied on exhibits A, B, C, D and F to find them liable;

(b) whether it was right to enter judgment for the bank when the mode of service was allegedly improper.

HELD (Unanimously ordering a retrial per **UWAIFO JCA**)

Legal personality - Status - Meaning

1. The appellants argue that Cyril and Frank Enterprises Limited is a different entity from Cyril Mbanefo Okoye and Frank Obiora Nnoli. In law that will be correct. But that seems to assume that Cyril and Frank Enterprises Limited is a legal personality, duly incorporated. In the circumstances of this case that has to be ascertained. Status is a legal issue upon which evidence is required once there is dispute in respect thereof. (p. 2026 H)

Incorporation - Proof

2. As rightly pointed out by Chief Ezebilor for the Bank, the mere use of the word “limited” against a name does not prove incorporation under the Companies Act 1968. In fact section 389 of the Act envisages a possible abuse of that appellation

hence it provides that:

“If any persons trade on carry on business under any name or title of which ‘Limited’ is the last word, they shall, unless duly incorporated with limited liability, be liable to a fine of five pounds (ten naira) for every day upon which that name or title is used.”

What can prove incorporation in case of dispute or inquiry, is the certificate of incorporation. In this regard, section 17(1) of the Act says:

“A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and matters precedent and incidental thereto have been complied with and that the association is a company authorised to be registered and duly registered under this Act.” (p. 2027 A)

Legal personality - Proof

3. I do not think that there is evidence that Cyril and Frank Enterprises Limited is or is not a limited liability company. The bank seems to have dealt with the appellants on the basis that they were managing a business under a business name. That is what at least the opening paragraph of the Guarantee (exhibit A) suggests. But the appellants contend that they were running a limited liability company and that it was that company which took the loans. It seems to me therefore that it has become an issue as to whether the appellants have a duly incorporated company. Arising from that, it has to be shown when the incorporation was done, that is, whether it was anterior or posterior to the loan transaction. (p. 2027 E)

ACTIONS - Undefended suit - Hearing

4. From the circumstances of this case, it appears this was not a matter to be tried as undefended cause. The learned Judge should have acted under Order 3 rule 14 of the Rules to require oral evidence as soon as he found the state of the exhibits the way they are. The issues truly involved have not been looked into so that neither injustice to the appellants nor a possibility that they may wish to defraud the bank may be al-

lowed. In my view, therefore, this is an action, which demands trial on pleadings. The appeal is accordingly allowed. The judgment of the lower Court is set aside. It is ordered that the case be remitted to the Onitsha High Court for trial upon pleadings. (p. 2028 A)

B

REPRESENTATION

Chief Chidube Ezebilo, for the appellants

S.O.P Okeke Esq., for the respondent

C

CASE REFERRED TO

Laibru Ltd. v. Building & Civil Engrn Contractors (1962) 1 All NLR

STATUTE & RULES REFERRED TO

D Companies Act, ss. 17(1), 389

High Court Rules of Eastern Nigeria 1963, O. 3 rr. 9, 11, 14

LEAD JUDGMENT BY UWAIFO JCA

E This matter appears to have been founded upon a double
comedy of errors. The first relates to the facts as to: Who applied for
loan facilities from the respondent bank? Who applied for loan
facilities from the respondent bank? Who were the clients the
respondent felt they were dealing with? Did the defendants/appellants
F present a dual personality in the course of dealing with the bank in
order to provide an escape route from liability? The second is that of
law: Is the bank right to sue appellants rather than the company they
action? Is the company incorporated? If not can the appellants rely
on the mere fact that the incorporated company hear the word
G “limited” in the circumstances? Should the matter have been decided
as undefended cause in the face of the documents tendered?

The respondent bank (hereinafter called “the bank”) alleges
that sometime in 1977 the appellants trading in the name and style of
Cyril and Frank Enterprises approached them for a loan. In the month
H of February that year, at Onitsha, the sum of N2,000 was given to
them by the bank, backed by a Guarantee to which two guarantors
subscribed; see exhibit A. later that same month a further loan of
N10,000 was added. As at 31st July 1985 the total indebtedness stood
at N26,665.36 including interest. The appellants paid no part of the

debt despite repeated demands.

The bank took out a writ for that amount against the appellants on 30 August 1985 at the Onitsha High Court. The bailiff's affidavit of service shows that the appellants were duly served. But they did nothing to indicate that they would wish to defend the claim as provided by Order 3 Rule 11 of the High Court Rules, Eastern Nigeria Laws 1963. The proceedings were eventually conducted under "undefended list" by virtue of order 3 rules 9 and 11 of the said Rules. Rules 9 and 11 provide as follows:

"9. Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the ground upon which the claim is based and stating that in the deponent's belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the 'Undefended List', and mark the writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case.

11. If the party served with the writ of summons and affidavit delivers to the Registrar, not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit setting out the grounds of his defence, then and in such case the suit shall be entered in the general list for hearing."

On 3 October 1985, Olike J. gave judgment in favour of the bank for the sum of N26,665.36 with costs of N1,250. The judgment debt was to bear interest of 5% per annum until it was liquidated. The action in compliance with the rules was determined on affidavit evidence. Six exhibits were also tendered, namely: the Guarantee for the N2,000 (exhibit A); letter dated 25 February 1977 for an additional N10,000 (exhibit B); statement of account as at 1st August 1985 (exhibit C); letter of demand dated 29 July 1983 (exhibit D); final letter of demand dated 30 September, 1984 (exhibit E); and a copy of the claim under O. 3 r. 9 of the High Court Rules (exhibit F).

The appellants in their complaint against the judgment against them say that it was an error to have proceeded against them when the borrower of the loans was a limited liability company and that there was no privity of contract between them and the bank. They also

say that they were not served personally and that it was their servant who was served on 27 September 1985. The issues in the main now turn on

(a) whether the trial Judge was right to have relied on exhibits A, B, C, D and F to find them liable;

B (b) whether it was right to enter judgment for the bank when the mode of service was allegedly improper.

The bank contend that they gave the loans to the appellants in their personal capacity trading as Cyril and Frank Enterprises since their inquiries at that time which were prompted by the deed of conveyance in respect of a parcel of land in Benin purportedly acquired by Cyril and Frank Enterprises forwarded to the bank as intended collateral for the proposed loan revealed that Cyril and Frank Enterprises not being a limited liability company had no legal C D personality. It was because of this the loan of 2,000 was given out on the personal guarantee of two guarantors as per exhibit.

The errors appear to have started right from the Guarantee (exhibit A). it begins with, *"In consideration of your giving time credit and/or Banking facilities and accommodation to Mr. Francis Obiora E Nnoli (Director) and Mr. Cyril Mbanefo Okoye (Managing Director) carrying on business as Cyril and Frank Enterprises Ltd, 28 Bright Street, Onitsha..."* The column intended for the borrower(s) bears one signature, which is appended on the name: *"CYRIL & FRANK ENTERPRISES LTD P.O. BOX 1016 ONITSHA."* There is the obvious F question whether the loan was to Mr. Francis Obiora Nnoli and Mr. Cyril Mbanefo Okoye.

Later on, exhibits B, C and D were addressed to Cyril and Frank Nigeria Ltd; Cyril & Frank Enterprises Limited; and Cyril Frank Ent. G Ltd., respectively, all of 28 Bright Street, Onitsha. Exhibit E was addressed to Mr. Cyril M. Okoye, Cyril & Frank Enterprises, No. 2 Johnson Street, P. O. Box 1563, Onitsha. It seems that the borrowers were addressed by the bank as either Cyril & Frank Nigeria Ltd., Cyril & Frank Enterprises at different stages without realizing the implications and perhaps the real difference. That leaves the question open H for a definite decision. ***The appellants argue that Cyril and Frank Enterprises Limited is a different entity from Cyril Mbanefo Okoye and Frank Obiora Nnoli. In law that will be correct. But that seems to assume that Cyril and Frank Enterprises Limited***

is a legal personality, duly incorporated. In the circumstances of this case that has to be ascertained. Status is a legal issue upon which evidence is required once there is dispute in respect thereof.

As rightly pointed out by Chief Ezebilo for the Bank, the mere use of the word “limited” against a name does not prove incorporation under the Companies Act 1968. In fact section 389 of the Act envisages a possible abuse of that appellation hence it provides that:

“If any persons trade on carry on business under any name or title of which ‘Limited’ is the last word, they shall, unless duly incorporated with limited liability, be liable to a fine of five pounds (ten naira) for every day upon which that name or title is used.”

What can prove incorporation in case of dispute or inquiry, is the certificate of incorporation. In this regard, section 17(1) of the Act says:

“A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and matters precedent and incidental thereto have been complied with and that the association is a company authorised to be registered and duly registered under this Act.”

I do not think that there is evidence that Cyril and Frank Enterprises Limited is or is not a limited liability company. The bank seems to have dealt with the appellants on the basis that they were managing a business under a business name. That is what at least the opening paragraph of the Guarantee (exhibit A) suggests. But the appellants contend that they were running a limited liability company and that it was that company which took the loans. It seems to me therefore that it has become an issue as to whether the appellants have a duly incorporated company. Arising from that, it has to be shown when the incorporation was done, that is, whether it was anterior or posterior to the loan transaction. If it was posterior, it also has to be established if there was assignment of the contract of loan the way it should be done as laid down in *Laibru Ltd. v. Building and Civil Engineering Contractors* (1962) 1 All N.L.R. 387 by the Federal

Supreme Court in order that liability may shift from the present appellants.

From the circumstances of this case, it appears this was not a matter to be tried as undefended cause. The learned Judge should have acted under Order 3 rule 14 of the Rules to require oral evidence as soon as he found the state of the exhibits the way they are. The issues truly involved have not been looked into so that neither injustice to the appellants nor a possibility that they may wish to defraud the bank may be allowed. In my view, therefore, this is an action, which demands trial on pleadings. The appeal is accordingly allowed. The judgment of the lower Court is set aside. It is ordered that the case be remitted to the Onitsha High Court for trial upon pleadings. The parties shall be at liberty to seek all necessary amendments, particularly as to the proper parties and the status of Cyril and Frank Enterprises. There shall be no order as to costs.

KATSINA-ALU JCA

I have had the advantage of reading in advance judgment just delivered by my learned brother Uwaifo JCA. I agree with his reasoning and conclusions. I also adopt order for costs made by him.

MACAULAY JCA

I have had the advantage of reading the draft judgment of my brother Uwaifo JCA and I agree with him that the case should be sent back for a full dress trial to find out the true identity of the appellants and/or their real bone of contention. Having said that, I think I cannot too strongly impress on counsel in advising their clients that Salomon Vs. Salomon aimed at defining the limits of liability of incorporated Companies was not intended to be interpreted as a Charter for Crooks or Charlatans because even in that case all of the subscribers were paid out in full. The court may not at this stage be in a position to answer many of the questions pending in the absence of the pleadings. The case should now be transferred to regular Cause List before another Judge for the hearing to be conducted and determined on its merits.