**Meridian Acceptances Limited & 2 others v Cargil Enterprises Limited (Civil Appeal E376 of 2022) [2024] KEHC 9777 (KLR) (Civ) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9777 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E376 OF 2022**

**WM MUSYOKA, J**

**JULY 31, 2024**

**BETWEEN**

**MERIDIAN ACCEPTANCES LIMITED ..... 1ST APPELLANT**

**SPANKEN LIMITED ..... 2ND APPELLANT**

**GERALD M THUITA T/A STARTUCK AUCTIONEERS ..... 3RD APPELLANT**

**AND**

**CARGIL ENTERPRISES LIMITED ..... RESPONDENT**

***(An appeal arising from the judgment of Hon. S. Muchungi, Senior Resident Magistrate, SRM, delivered on 6th May 2022, in Milimani CMCCC No. 3335 of 2016)***

## JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellants, for a permanent injunction, and a sum of Kshs. 1,787,500.00, being special damages. The case by the respondent was that its motor-vehicle had been negligently and recklessly impounded by the appellants, which act had exposed it to loss and damage. The appellants filed a joint defence, in which they denied liability, arguing that the respondent had conspired with one of its directors, Mr. Meshack Nyakundi, to defraud them, by allowing that director to use a registration book for its vehicle to secure a loan. A trial was conducted, where 2 witnesses testified, 1 for the appellants, and the other for the respondent. Judgment was delivered on 6th May 2022, in favour of the respondent.

2. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 14th May 2022, revolve around the trial court failing to properly scrutinise and evaluate the pleadings and submissions by the appellants; failing to find that the conduct by the respondent of making loan repayments implied that it had authorised the use of its vehicle as collateral; the agreement

between the respondent and the 1st appellant was invalid as it was not listed as an issue for determination in the pleadings; erring in awarding the special damages pleaded; the decision of the court not being supported by evidence; and failing to consider the allegations of fraud raised in the defence.

3. Directions were given on 5th December 2022, for disposal of the appeal, by way of written submissions. Both sides have filed written submissions.

4. The appellant has collapsed all its 6 grounds into 2: whether the respondent acquiesced to its vehicle being used as collateral for a loan by one of its directors, and the award of special damages. On the first issue, it is submitted that, while applying for the subject loan, Mr. Nyakundi had represented himself as a director of the respondent, represented himself as borrowing the moneys on behalf of the respondent, used the registration book for the vehicle belonging to the respondent as collateral, presented other documents from the respondent to support the loan application, part of the repayments of the loans were through accounts of the respondent, and the respondent never objected to the use of those accounts in that respect. *Bagamoyo Limited v. Imperial Bank Limited & another* [2020] eKLR (Muigai, J) is cited.

5. It is submitted further that limited liability companies ought not be allowed to walk away from their obligations, by merely citing invalidity of agreements, and *Mrao Limited v. First American Bank of Kenya Limited & 2 others* [2003] eKLR (Kwach, Bosire & O'Kubasu, JJA) and *Anfakari Limited & 3 others v. SBM Bank Kenya Limited( formerly Fidelity Commercial Bank Limited)* [2021] eKLR (Nyakundi, J) are cited. It is argued further that the 1st appellant had acquired a legitimate interest in the vehicle, having offered loan facilities to the director of the respondent, and *Anfakari Limited & 3 others v. SBM Bank Kenya Limited formerly Fidelity Commercial Bank Limited)* [2021] eKLR (Nyakundi, J) is cited.

6. The second ground rides on the back of the first one, that as the respondent had not protested the use of its vehicle as collateral, there was no justification for award of the special damages, and it is argued that parties should not be allowed to benefit from their own negligence. *China Wu Yi Limited & another v. Irene Leah Musau* [2022] eKLR (Odunga, J), *Jogoo Kimakia Bus Services Limited v. Electrocom International Limited* [1992] KLR 177 [1992] eKLR (Gicheru, Cockar & Muli, JJA), *PN Gichoho Ngugi v. County Government of Laikipia & another* [2017] eKLR (Kasango, J) and *Hahn v. Singh* [1985] KLR 716 (Kneller, Nyarangi JJA, & Chesoni Ag JA) are relied upon.

7. The respondent supports the decision of the trial court, and cites no authority.

8. I agree with the appellants, that there are only 2 issues for me to determine, around the respondent being privy to the moneylending arrangement between its alleged director and the 1st appellant, and the award of special damages.

9. On the first issue, the question of the respondent being bound, contractually, by its directors, would depend largely on the nature of the dealings between the individual directors and third parties, and on whether those dealings were carried out in the name of the company. The pertinent question then would be, what was the nature of the dealings between the 1st respondent and Mr. Nyakundi? I have perused through the record, and of particular interest would be the testimony of DW1 and the documents relied upon by the appellants, as it is them who claim that the acts of Mr. Nyakundi bound the respondent. In his testimony, DW1 stated that the loan transaction was with Mr. Nyakundi, and the moneys were paid to him.

10. I have seen the loan agreement, dated 15th March 2013. The borrower was a Meshack Nyakundi. I note that it is not purported, in the application form, that the said Mr. Nyakundi was borrowing the money on behalf of the respondent. From the execution clause, in the loan agreement, I do note that he did

not purport to execute the loan agreement on behalf of the respondent. That would mean that, for all practical purposes, the borrowing was personal to Mr. Nyakundi. There is nothing, on the face of the loan application, which indicates Mr, Nyakundi was a director of the respondent. The only mention of the respondent is with respect to the collateral given, where the vehicle offered is indicated as registered to the respondent.

11. The question that begs asking is whether the mere listing of a vehicle registered to the respondent, as collateral, made the vehicle a collateral or security for that personal loan. The 1st appellant was dealing with an application for a loan by Mr. Nyakundi, and not the respondent. The expectation would have been that, if collateral was required, then it had to be offered by Mr. Nyakundi personally, in terms of offering property registered in his name. If he had to offer property registered in the name of another, prudence required that the registered owner of that asset execute a document of one sort or other to bind himself, and thereby authenticate the security. It would be a mistake, and indeed, foolhardy for a lender to accept as property which is not in the name of the borrower. To accept the offer to use the property of another as collateral, without the consent or leave or permission of the owner, would be to perpetuate a fraud. The 1st appellant ought not have accepted the security offered by Mr. Nyakundi, so long as it belonged to another, unless there was express authority of the owner, or unless the owner was party to the loan agreement, evidenced by execution of instruments by that owner.

12. Authority from a limited liability company takes the form of a resolution of the company, and execution of documents on behalf of a company is authenticated by the seal of the company. I have not seen evidence that the seal of the respondent was embossed or affixed on the loan agreement, and I have not even seen an impression of a purported official stamp, if not the seal, of the respondent. The 1st appellant did not demonstrate that it required Mr. Nyakundi to avail to it evidence of a resolution of the respondent, authorising the use of the company vehicle to secure the personal loan sought by Mr. Nyakundi. Without such a resolution, there was no legal possibility of an asset of the respondent being legitimately used, by a director of the respondent, to secure a personal loan that such director was pursuing. See *Bagamoyo Limited v. Imperial Bank Limited & another* [2020] eKLR (Muigai, J).

13. A board resolution, for a guarantee or security being provided in connection with a loan made to a director, by a third party, is a statutory requirement, under section 164(1)(b) of the *Companies Act*, Cap, 486, Laws of Kenya, which states as follows:

> "164. Loans to directors to be approved by members
>
> (1) A company may not—
>
> (a) ...
>
> (b) give a guarantee or provide security in connection with a loan made by any person to such a director, unless the transaction has been approved by a resolution of the members of the company."

14. Section 164(4) of the *Companies Act* goes on to state the matters that ought to be disclosed in that resolution. The said provision states:

> " The matters to be disclosed are—
>
> (a) the nature of the transaction;
>
> (b) the amount of the loan and the purpose for which it is required; and

(c) the extent of the company's liability under any transaction connected with the loan."

15. Section 255 of the *Companies Act* provides for requirements for passage of company resolutions, and I shall only cite subsection (1) of that provision, which relates to private companies, as that is what is of application here, and it states as follows:

"255. Requirements for passing company resolutions

(1) A resolution of the members, or of a class of members of a private company may be passed either—

(a) as a written resolution; or

(b) at a meeting of the members.

(2) ..."

16. The appellants have argued that Mr. Nyakundi was a director of the respondent, that might well have been so, but the transaction in question, based on the loan agreement in question, was not between the respondent and the 1st appellant. It was not executed by Mr. Nyakundi in his capacity as a director of the respondent, and, therefore, Mr. Nyakundi being a director of the respondent was a fact of no moment, so far as the loan agreement in question was concerned.

17. The other argument is that part of the moneys that the 1st appellant received in repayment of the loan, was through cheques issued from accounts of the respondent, and I have seen copies of such cheques. Again, that could be true. It could also be that the signature on the said cheques was that of Mr. Nyakundi, and it could be that he signed them in his capacity as director of the respondent. However, that of itself would not make the respondent privy to the loan agreement of 15th March 2013, for the reasons that I have discussed above. The fact that moneys from the respondent were spent to settle part of that loan did not make it a loan advanced to the respondent, and it did not justify pursuit of assets belonging to the respondent to settle a personal loan signed for personally by Mr. Nyakundi, and paid directly to him as an individual.

18. The basis of that loan was the agreement executed on 15th March 2013, and, I reiterate, there is nothing on its face to demonstrate that the respondent was privy to that arrangement. No evidence was placed before the trial court to support a conclusion that the respondent acquiesced in any manner to the dealings between the 1st appellant and the borrower, Mr. Nyakundi. There was no evidence of any conspiracy between Mr. Nyakundi and the respondent, nor of any fraud perpetrated by the 2. In any case, allegations of fraud are grave, for fraudulent conduct has elements of criminality. It is trite that the standard of proof, with regard to fraud, in civil cases, is higher than balance of probability, fraud being by its very nature criminal, and, for that reason, it is a requirement that the alleged acts of fraud must be particularised. I have not seen any itemised particulars of fraud in the defence on record. I am not persuaded that any of the evidence tendered to support the allegation of fraud, if any was tendered, at all, in that behalf, came anywhere near the standard of proof required. See *Francis Muthui Mathangani v. Alice Gathigia Menja* [2021] eKLR (Angima, J), *In re Estate of David William Kigumi Kimemia (Deceased)* [2021] eKLR (HA Omondi, J), and *Pakaja Limited v. Trustees of Mombasa Simba Sports Club & 3 others; Singh Sabha Community (Interested Party)* [2022] eKLR (Naikuni, J).

19. Did the 1st appellant acquire an interest in the vehicle belonging to the respondent, offered by Mr. Nyakundi as collateral? I do not think so. The respondent was the registered owner of that vehicle. It could not be offered as security for a loan by anyone, except itself. I have not seen any document

signed and sealed on behalf of the respondent offering the said motor vehicle as such. It could be that Mr. Nyakundi was a director of the respondent, but he could not legally offer a motor-vehicle of the respondent as collateral, without executing the appropriate instruments, to bind the respondent to the loan agreement. That was not done.

20. The 1st appellant accuses the respondent of being party to a fraud or conspiracy. This is a case of a pot calling a kettle black. If anyone were to be accused of being party to fraud, it would be the 1st appellant, for accepting, as collateral, property belonging to a non-party to the loan agreement, without getting the appropriate authority or consent of that registered owner. The mere mention of the vehicle of the respondent, as collateral, in that loan agreement, was of no consequence, for it did not make it a valid security, for as long as no authority or consent had been obtained from the respondent, for it to be used as such.

21. It follows, from what I have discussed above, that the subsequent acts of the 2nd and 3rd appellants were totally without foundation. The vehicle in question was not validly made a collateral for the purpose of the loan advanced to Mr. Nyakundi, and there was no legal basis for the appellants to pursue it in an effort to recover that loan. Consequently, any loss or damage suffered by the respondent, during the period when the vehicle was impounded, would be recoverable. The respondent produced invoices and receipts from the entity that provided services to it, and they totalled the amount claimed in the plaint.

22. Overall, I find and hold that the appeal herein has no merit, I hereby disallow it, with the consequence that the same is dismissed, with costs. It is so ordered.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 31ST DAY OF JULY 2024**

**W MUSYOKA**

**JUDGE**

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Obura, instructed by Seko & Company, Advocates for the appellants.

Mr. Nyabena, instructed by Nyabena Nyakundi & Company, Advocates for the respondent.