Guard Force Group Limited & another v Total Kenya Limited (Civil Appeal 66 of 2020) [2023] KEHC 22258 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 22258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 66 OF 2020

F WANGARI, J

FEBRUARY 23, 2023

BETWEEN

GUARD FORCE GROUP LIMITED ..... 1ST APPELLANT

SMART ASSETS PROPERTIES LIMITED ..... 2ND APPELLANT

AND

TOTAL KENYA LIMITED ..... RESPONDENT

(Being an appeal against the Ruling/Order dated 5th May, 2020 of the Honourable M.L. Nabibya, Principal Magistrate delivered on 19th May, 2019 in Mombasa CMCC No. 1844 of 2009)

JUDGMENT

1. This is an appeal against the ruling delivered by Honourable M.L. Nabibya, Principal Magistrate on 5th May, 2020. The appellants being dissatisfied with the said ruling has preferred this appeal. I note that the face of the record of appeal indicates that the ruling was delivered on 19th May, 2019. However, I note that the ruling subject of this appeal was delivered on 5th May, 2020. I believe that was a clerical error on the part of the appellants but does not in any event affect the substance of the appeal.

2. The appellants preferred the following grounds of appeal in urging this court to set aside the ruling and order made on 5th May, 2020: -

    a. The learned magistrate erred in fact and in law by failing to consider the written submissions and the authorities filed by the appellants thereby determining the objection proceedings and arriving at a ruling that is against the weight of evidence and submissions before her.

    b. The learned magistrate erred in fact and in law by failing to consider that the objectors proved legal and/or equitable interest to the said proclaimed goods.

c. The learned magistrate erred in fact and in law by allowing only part of the objection proceedings when in fact there was sufficient evidence to show proof of ownership by the objectors to all attached goods under contention.

d. The learned magistrate erred in fact and in law by failing to consider that the companies Guard Force Security (K) Limited and Guard Force Group Limited are different entities with different business names.

e. The learned magistrate erred in fact and in law by failing to consider the supporting affidavit sworn by the 1st objector especially annexure "KDOO-6" annexing copies of the logbook to show proof of ownership of motor vehicle registration numbers KAT 095N or KBG 229D and KAX 436C proclaimed by the auctioneer and that the same did not belong to the judgement debtor.

f. The learned magistrate erred in fact and in law by failing to consider the further affidavit sworn by the 1st objector especially annexure "KDOO-3" annexed in a bundle to proof of ownership of all the proclaimed motor vehicles.

g. The learned magistrate erred in fact and in law by failing to consider the supporting affidavit sworn by the 2nd objector especially annexure "MOO-6" annexing receipts showing ownership of the computers, television and furniture proclaimed by the auctioneer which proved the said ownership on the part of the 2nd objector and would have raised the attachment of all those items.

h. The learned magistrate erred in fact and in law and failed to make a proper evaluation of the affidavit evidence before her but proceeded to make a contradictory ruling which occasioned a miscarriage of justice.

i. The learned magistrate erred in fact and in law in acting on the wrong principles of the law relating to objection proceedings hence arriving at wrong decision.

3. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied and relied on various decisions in support of their rival positions.

4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).

5. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.

6. The respondent vide an amended plaint dated 23rd July, 2013 and filed on 29th July, 2013 sought for judgement against five (5) defendants. The matter was heard and through a judgement delivered on 26th April, 2019, the court found in favour of the respondent. The respondent having obtained a decree, it proceeded to execute the same. It is at the juncture of execution that the appellants vide an application dated 18th July, 2019 and filed on 19th July, 2019 sought to stop the execution. The application was in

the nature of objection proceedings wherein the appellants contended that the goods proclaimed did not belong to the judgement debtor but to themselves.

7. The court having heard the application rendered its ruling on 5th May, 2020 wherein it partially allowed the application. It is this ruling that precipitated the present appeal.

Appellants' submissions

8. The appellants while citing the case of *Salomon v Salomon* [1897] A.C. 22 H.L cited with approval by the Court of Appeal in *Mohamed Adan Molly v Linksoft (K) Ltd & Another* [2013] eKLR, submitted that a company in law is a different person altogether from the subscribers to the memorandum. The appellants contended that the lower court erred in not upholding the principles of company law that the 1st objector and the 5th defendant are separate legal entities. They therefore urged that the appeal be allowed with costs.

Respondents' submissions

9. For the Respondent, it was submitted that the objectors and the appellants are one and the same person who only change names to evade meeting their financial obligations. They submitted that the objectors and the appellant are one and the same person. That the incorporation and the lease agreement of the proclaimed assets by the appellant and the objectors after the debt became due was a scheme choreographed to steal a match from the respondent. It was further submitted that Guardforce Group Limited incorporated on 16/2/2009 and Guardforce Security (K) Ltd are one and the same entity as per the search at the company registry dated 17/7/2009. That the directors for the 1st appellant and the 5th Defendant in Mombasa CMCC No. 1844 of 2009 are the same persons as the signatures of Douglas Kenneth Ochola of Guardforce Group Limited is the same Kenneth Douglas Otieno Ochola.

10. Citing the case of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others* [1993] eKLR, the respondent submitted that the burden was upon the objector to prove and establish to have the attached property released from attachment. It submitted that the entire documentation and conduct of the appellants are tainted with fraud. The directors are the same, the postal addresses are the same between Witerose Security Systems (K) Ltd and Guardforce Group Limited. The letter head from Guardforce Group Limited bears same address as that of Smart Assets Properties Limited.

11. Citing the case of *Chotbhai M, Patel v Chaturbhai M. Patel and Another* HCCC No. 544 of 1957 (Lewis J. on 8/12/1958 (HCU) (1958) E.A. 743 and *Michael A. Mashere v Samson Asatsa*, Civil Appeal No. 76 of 1987, the Respondent argued that the onus of proof of legal or equitable interest rests with the appellants on a balance of probabilities. On what constitutes legal and equitable interest, the respondent cited the case of *Arun C. Sharma v Ashana Raikundalia T/a A. Raikundalia & Co. Advocates & 4 Others* [2014] eKLR. The respondent argued that there was no proof of legal or equitable interest on the proclaimed assets that was shown and that the appellants and the judgement debtors are the same entities holding the proclaimed goods in their own names. Citing the case of *Malindi Air Service Ltd v Prestige Air Service* [2000] eKLR, the respondent urged the court to dismiss the appeal and allow the attachment to proceed.

Analysis and Determination

12. After considering the pleadings, proceedings, submissions and the law, I find that the following are the issues for determination: -

    a. Whether the appellants and the judgement debtors are one and the same entity;

b. If (a) above is in the affirmative, what orders to be made;

c. Who bears the costs.

13. The application subject of the appeal was in the nature of objection proceedings. Order 22 rule 51 and 52 of the *Civil Procedure Rules* forms the basis of objection proceedings. Order 22 rule 51 (1) provides as follows;

> Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.

14. In *Arun C. Sharma v Ashana Raikundalia* (*supra*), it was held thus; "...The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property..."

15. On the first issue, the appellant contended that the lower court made an error by holding that the appellants and the 5th judgment debtor were one and the same. The respondent argued otherwise that indeed the appellants and the 5th judgement debtor were one and the same entity. Having gone through the entire record, it is not in dispute that the appellants and the 5th defendant share the same postal address, that is, P.O. Box 41229 – 80100.

16. It is a legal requirement for companies or corporations to have a postal address. Section 12 (2) of the *Companies Act*, No. 17 of 2015 requires among others that the application for registration must include the proposed location of the registered office of the company. Without it, the registrar of companies is entitled under section 17 of the *Companies Act* to refuse to register a company for having not complied with the requirements of the Act. Similarly, Order 5 rule 3 (b) (ii) of the *Civil Procedure Rules* recognizes service of summons upon a company or corporation through its registered postal address. Is it a coincidence that the three entities share the same postal address?

17. It is settled that one company cannot be said to be the same as another as each has its own separate personality as well captured in the case of *Salmon v Salmon* cited by the appellants. However, in the present case, if summons or any other documents were to be served on either of the three (3) entities by registered post and an affidavit of service attaching the certificate of postage, which of the three (3) entities would be said to have been served? This is the reason that each company ought to have its distinct postal address and the only exception is when one of the companies is a holding company or a subsidiary of another. It has not been stated in the affidavits that the three entities have a holding or subsidiary relationship with each other to warrant sharing of the same postal address.

18. Similarly, having considered the annexures in the respondent's affidavit more so the one "RW1", it is not in doubt that the letter bears both the 1st appellant's and the 5th Defendant's names. I say so because even though the word "limited" is missing on the part where the name Guardforce group appears, my doubts are allayed by the annexure marked "KDOO-2" in the further affidavit of Kenneth Douglas Otieno Ochola dated 9th August, 2019. Both "RW1" and "KDOO-2" carries the following words; "Incorporating Sentry Security."

19. I thus agree with the respondent that the 1st appellant and the 5th judgement debtor are one and the same person who are merely changing names with a view of avoiding its obligations to third parties at the guise of hiding under separate legal personality. These are actions which ought to be deprecated

and condemned. In *Malindi Air Services Ltd v Prestige Air Service Ltd* [2000] eKLR cited by the respondent, P.N. Waki, J (as he then was) held as follows: -

> " ...One thing is clear to me on the evidence on record. The judgement debtor has attempted to evade settlement of the decree in this matter and one of the strategems employed was the change of name at the company's registry which does avail the judgment debtor as the legal position on its property remained the same. The judgement debtor and M/S Prestige Air Ltd are one and the same..."

20. On the first issue, it is thus my finding that the 1st appellant and the 5th defendant are one and the same based on the reasons highlighted above. Though there is equally material to suggest that the 2nd appellant is related to the 1st appellant and the 5th defendant, it was never a party to the original claim to warrant a blanket condemnation without being accorded a hearing. (see the case of *Tawakal Airbus Limited v Irene Muthoni Njirati & Another* [2020] eKLR).

21. On the second issue, having found that the 1st appellant and the 5th defendant are one and the same, I do affirm the orders issued by the Lower Court. Though the respondent in its submissions proposed that the order that motor vehicles registration numbers KCR 877G, KCM 871N and KCM 493E belong to the 2nd appellant be set aside and substituted with a decision that the vehicles belong to the 1st appellant, it never cross appealed and that issue only arose during submissions.

22. It is trite that submissions do not constitute evidence. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, the Court of Appeal held as follows;

> " ...Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented..."

23. Based on the foregoing, I will not interfere with the Lower Court's decision on lifting attachment on the three (3) motor vehicles. For the computer and office furniture, I agree with the Learned Magistrate that there was no evidence that the same belonged to the appellants since a lease agreement is not an ownership document to evidence such items. Receipts for their purchase would have sufficed but that was never done.

24. On the issue of costs, the same follows the event as decreed by section 27 of the *Civil Procedure Act*.

25. In conclusion thus, the trial court arrived at the right decision. Based on the law and the evidence on record I do not see how the court can be flouted. The appeal therefore fails.

26. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

    a) The Appeal is hereby dismissed accordingly;

    b) The Respondent is awarded the costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY, 2023.

.....

F. WANGARI

JUDGE.