



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 142 OF 2016**

**SAFARI IMAGE LIMITED.....APPELLANT**

**VERSUS**

**FREIGHT IN TIME LIMITED.....1<sup>ST</sup> RESPONDENT**

**IMAGE APPARELS LIMITED.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the ruling/order of Senior Principal Magistrate's Court, Milimani Nairobi, L. M. Wachira (Mrs.) delivered on 18<sup>th</sup> day of March 2016 in CMCC no. 8966 of 2004)*

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 185 OF 2015**

**IMAGE APPARELS LTD.....APPELLANT**

**VERSUS**

**FREIGHT IN TIME LTD.....RESPONDENT**

*(An appeal from the judgment/decree of the Principal Magistrate's court at Nairobi Hon. Mr. D. Ole Keiwua delivered on 10<sup>th</sup> April 2015 in Civil case no. 8966 of 2004)*

**JUDGMENT**

1) On 10<sup>th</sup> April 2015, Hon. Ole Keiwua, learned Principal Magistrate, entered judgment in the sum of ksh.2,507,013/= plus costs in favour of **Freight In Time Ltd**, the respondent herein and against **Image Apparels Ltd**. The appellant being dissatisfied with the aforesaid decision, filed Civil Appeal no. 185 of 2015 to challenge the decision and put forward the following grounds of appeal;

- i. THAT the learned magistrate erred in law and fact by delivering an ambiguous, hurriedly made, short judgment that was irreconcilable and had no valid justifiable reasoning to correspond with the reliefs granted in favour of the respondent.*
- ii. THAT the learned magistrate erred in law and fact by admitting the postdated cheques produced by the respondent and issued by one Mr. Ramesh Shah in the name of a separate company, Safari Image Ltd, not a party to the suit, in entering judgment against a different legal entity that is the appellant.*
- iii. THAT the learned magistrate erred in law and fact by disregarding the overwhelming evidence adduced by the appellant together with the glaring fact that the said cheques were drawn by the said Mr. Ramesh Shah at a time when the appellant's goods had been attached and carried away by the respondent sand tis factory and employees grounded for which the respondent exercised undue pressure and influence on the said Ramesh Shah as a condition proceeding the release of the said attached items. The cheques were drawn on 3<sup>rd</sup> December 2004 soon after the attachment of the appellant's items and equipments on 1<sup>st</sup> December 2004.*
- iv. THAT the learned magistrate erred in law and fact by failing to consider that the said postdated cheques issued by Mr. RameshShah were issued in the belief that there was a valid decree from the honourable court foe which payment was being effected and for which there was an attachment on the appellant's goods and equipment in execution. The learned magistrate failed to consider the fact that the decree was subsequently found to have been obtained fraudulently vide the court's ruling on 9<sup>th</sup> March 2005 for which the court file even disappeared. The court record confirmed the nonexistence of the said judgment*

and/or decree so that with the finding made thereof, and to the extent that the cheques were drawn in the belief that there was a decree which was subsequently found to have been fraudulently obtained, the honourable magistrate could not, in his judgment, again make a contradictory finding that, the cheques drawn by Mr. Ramesh Shah were for value for services rendered.

v. THAT the learned magistrate erred in law and fact in relying on invoices raised by the respondent to enter judgment against the appellant when for all purposes there was clear evidence that the appellant had never, at any given time dealt with the respondent in any way whatsoever but came to know of the respondent through Sudahsahn Exports Ltd, and Indian company that had contracted it to do last touches to garments/fabrics for itself. There wasn't any contractual document between the appellant and respondent to justify the raising of the invoices relied on by the learned magistrate which invoices could in any case be generated by anyone from even a computer. There wasn't a basis laid by the respondent in its evidence to justify the raising of the invoices.

vi. THAT the learned magistrate erred in law and fact by failing to consider that the instruction client to both the appellant and respondent was Sudarshan Exports Ltd who gave clear instructions on how freighting of fabric/ garments would be done, having made prior arrangements with the respondent and the respondent having subsequently found it difficult to pursue Sudarshan Exports Ltd for its freight charges out of jurisdiction in India turned on the appellant who is locally based.

vii. THAT the learned magistrate erred in law and fact by making the appellant by virtue of the judgment delivered herein in to suffer double jeopardy as it was actually owed 45000 US dollars not paid for the fabric/garments worked on by itself as instructed by Sudarshan Exports Ltd so that ordering the appellant to again pay freight charges for the goods that were not for itself and for which it had no business with, was too punitive and a miscarriage of justice.

viii. THAT the learned magistrate erred in law and fact by failing to analyze and consider the evidence adduced in court which made it quite clear that the respondent had not only failed to prove its case on a balance of probability as expected but indeed had totally no case against the respondent. The honourable magistrate in the process delivered a judgment that left more questions and answers. There was no sound decision delivered by the learned magistrate in the matter.

2) On 18<sup>th</sup> March 2016, Hon. L. M. Wachira learned Senior Principal Magistrate delivered a ruling whereof she dismissed the objection filed by Safari Image Ltd, the appellant herein. The appellant being unhappy with the dismissal order, preferred H.C.C.A no. 142 of 2016 in which it put forward the following grounds:

i. THAT the learned magistrate erred in law and fact by disregarding and not considering all the evidence placed before her to confirm the ownership of the items in the proclamation dated 24<sup>th</sup> September 2015 as belonging to the appellant.

ii. THAT the learned magistrate erred in law and fact by failing to find that the allegedly proclaimed items pursuant to the proclamation dated 24<sup>th</sup> September 2015 were items proclaimed in the appellant's rental premises which indeed should have presumably confirmed the items in the rental premises as belonging to the appellant.

iii. THAT the learned magistrate erred in law and fact by delving into irrelevant, extraneous issues that had no bearing to the objection proceedings before it, by alluding to the fact that the appellant and the 2<sup>nd</sup> respondent company had same directors who were husband and wife when the issue for consideration was whether the items proclaimed by the 1<sup>st</sup> respondent were items owned by the appellant which ordinarily is a distinct, independent person in its own right, regardless of whether its directors are husband and wife and regardless of whether the 2<sup>nd</sup> respondent's directors are the same directors of the appellant.

iv. THAT the learned magistrate erred in law and fact by considering irrelevant issues in her decision when she finds that by virtue of the cheques issued by the appellant to the 1<sup>st</sup> respondent (which cheques were in any case stopped and unpaid, as the same were issued under duress pursuant to a fraudulent order), the appellant had no basis in stopping the attachment when the single issue for consideration and determination before her was simply whether the goods proclaimed were owned by the appellant or not since the appellant was never a party to the matter neither was judgment entered against it.

v. THAT the learned magistrate erred in law and fact by having a prefixed mind by virtue of the extraneous, irrelevant considerations made by herself on the aid ruling as highlighted hereinabove which made her completely close her eyes and fail to look at and consider the overwhelming evidence laced before her by the appellants proof of ownership of the attached, proclaimed items.

vi. THAT the learned magistrate erred in law and fact by making a false finding that the documents provided in evidence by the appellant in its objection proceedings were not specific enough to demonstrate that the proclaimed items belonged to the appellant, a totally misplaced finding, in contrast to the evidence on record.

vii. THAT the learned magistrate erred in law and fact in holding that an attempt to assist and pay debt of a third party would be tantamount to being liable for the claim arising therefrom even in circumstances where a suit has been filed and judgment has been entered against the separate, liable third party.

viii. THAT the learned magistrate consequently therefore erred in law and fact by misinterpreting the law as it is supposed to be, in the process of which she referred to the case of Miema Enterprises Ltd vs Njoka Tanners Ltd (2007) whose facts and circumstances had totally no bearing to the matter before her.

ix. THAT the learned magistrate erred in law and fact by failing to analyze, consider and weigh the evidence placed before her both in the supporting affidavit to the application dated 8<sup>th</sup> October 2015 and the further affidavit sworn by Sarita R. M. Shanon

**11<sup>th</sup> November 2015. She, in the process delivered a ruling that left more questions than answers, in the circumstances of which no sound decision was arrived at by the learned magistrate.**

- 3) By an order of this court issued on 21<sup>st</sup> February 2020, the two appeals were ordered consolidated. When the appeals came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeals disposed of by written submissions.
- 4) I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. It is important at this juncture to set out in brief the background of this appeal. It is apparent that the cause of action arose out of a contract for shipment of goods and services in which Freight In Time Ltd (plaintiff) was engaged by Image Apparels Ltd (defendant) on account of freight charges and costs and or incidentals incurred by the plaintiff at the defendant's request and or instance.
- 5) The suit was heard and determined in favour of the plaintiff. Freight In time Ltd, the respondent herein demanded for payment to settle the decree. One Ramesh Shah being a director to both Image Apparels Ltd and Sari Image Ltd, issued postdated cheques of Safari Image Ltd, the objector/respondent.
- 6) The aforesaid cheques were dishonoured when presented for payment for lack of funds in the respective accounts operated by the objector. The objector/respondent filed before the trial court a motion dated 8<sup>th</sup> October 2015 in which it stated that the goods proclaimed by the auctioneers in execution of the decree belonged to the objector which is not a party to the suit and therefore the proclamation should be lifted. In the end the court dismissed the objection proceedings and held that the goods were properly proclaimed. This finding provoked the filing of Civil Appeal no. 142 of 2016.
- 7) I think it is prudent to first consider the substantive appeal challenging the judgment. Though the appellant put forward a total of eight grounds of appeal, I think those grounds can be determined by one main ground which is to the effect that the learned Principal Magistrate erred in entering judgment in favour of the respondent yet the respondent had failed to establish its claim on a balance of probabilities.
- 8) The appellant argued that it has never been paid the equivalent of USD45000/= by Sudarshan Exports Ltd for the service it offered in making final touches to the said garments to date such that both the appellant and the respondent have claims against Sudarshan Exports Ltd.
- 9) The appellant pointed out that other than the invoices produced by the respondent's witness which evidence can be generated by anyone it has no formal contractual engagement between itself and the appellant in respect to the claim.
- 10) It is said that the respondent's witness who testified had no knowledge of the contract since he was not an employee of the respondent at the time the freighting of the items in question were done. The appellant also pointed out that the respondent produced as evidence cheques issued by Safari Image Ltd, an entity which was distinct and separate from the respondent.
- 11) The appellant further argued that one Ramesh Shah had stated that he issued the cheques under duress after the objector/ respondent's goods were attached. The appellant is quite empathic that there is no evidence that there was any contractual freighting/agreement between the respondent and the appellant save for the invoices raised by the respondent. It said that no basis was laid for the invoices produced in evidence.
- 12) It is the submission of the respondent that it was established that Ramesh Shah being the appellant's director was also a director of the objector whose other director is his wife Sarita Shah. The respondent pointed out that the appellant's claim of USD 45,000/= was not pleaded. It is also pointed out that the allegation that the invoices produced by the respondent would be generated by anyone and the averment that there was no formal contractual engagement were not raised in the appellant's defence or during cross-examination.
- 13) The respondent stated that the aforesaid documents were produced with no objections. It is also pointed out that in arriving at his decision the learned Principal Magistrate relied on the post-dated cheques and the deed of acknowledgement drawn by Ramesh Shah and Safari Image Ltd. It is argued that the allegations of coercion by the appellant were not proved nor formally before court. The respondent stated that it proved its case on a balance of probabilities.
- 14) Having re-evaluated the evidence presented before the trial court and having taken into account the rival submission I have come to the following conclusions in this appeal.
- 15) **First**, that there is no dispute that the trial court in arriving at its judgment relied on the post dated cheques issued by the Safari Image Ltd through its director Ramesh Shah. The record does not show that the appellant its defence alleged that the same were issued by duress.
- 16) **Secondly**, that the trial court also relied on the fact that the appellant's director, Mr. Ramesh Shah executed a deed of acknowledgement. It is clear from the record that there was no evidence of fraud nor coercion visited upon the directors of Safari Image Ltd.
- 17) **Thirdly**, that the goods in question were meant to be consigned by the appellant and not Sudarshan Exports Ltd as shown in the letter dated 7<sup>th</sup> June 2002.
- 18) In the end, I am satisfied that the respondent proved its case on a balance of probabilities. Consequently the appeal (i.e H.C.C.A no. 185 of 2015) is found to be without merit. The same is dismissed with costs being awarded to the respondent.
- 19) Having disposed of the substantive appeal, I now turn my attention to the appeal (i.e. H.C.C.A no. 142 of 2016) by Safari Image Ltd (appellant). I have already set out the grounds put forward by the appellant. Though the appellant put forward a total of nine (9) grounds of appeal, those grounds may be disposed of by one main ground which is to the effect that the learned Senior Principal Magistrate erred in

dismissing the appellant’s objection proceedings yet it had established its objection.

20) It is the submission of the appellant that the learned Senior Principal magistrate considered irrelevant factors and failed to find that the goods attached belonged to the appellant who was not a party in the suit. The appellant also pointed out that the trial magistrate failed to take into account that documents were presented showing the attached goods belonged to the appellant.

21) The record shows that Hon. L. M. Wachira, learned Senior Principal stated in her ruling in part as follows:

**“The court is of the view that the directors are trying to hide behind a company to avoid a responsibility and avoid the debt .....the objector cannot be allowed to hide behind the Company’s Act as an instrument to run away from its obligations to creditors.”**

22) I have re-evaluated the arguments and the affidavit evidence presented before the trial court and it is clear that the objector (now appellant) presented evidence showing the goods proclaimed belonged to the objector. It is clear from the affidavit evidence that the objector is a company which is separate and distinct from Image Apparels Ltd. It is also not in dispute Safari Image Ltd was not a party to the suit. The fact that companies share the same directors does not mean that the companies are distinct from each other.

23) I am convinced that the objector’s application was wrongly dismissed. The appeal is allowed. Consequently, the order dismissing the motion dated 8<sup>th</sup> October 2015 is set aside and is substituted with an order allowing the motion with costs.

24) In the end, this court issues the following orders in the consolidated appeal.

**i. The appeal (i.e H.C.C.A no. 185 of 2015) is ordered dismissed with costs to the respondent.**

**ii. The appeal (i.e H.C.C.A no. 142 of 2016) is allowed, thus giving rise to issuance of the following orders:**

**a) The order dismissing the motion dated 8<sup>th</sup> October 2015 is set aside and is substituted with an order allowing the motion in terms of prayers 3 and 4.**

**b) Costs of the appeal is awarded to the appellant(Objector)**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 26<sup>th</sup> day of August, 2021.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent