



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 236 OF 2014

LALJI MEGHJI PATEL & CO. LTD.....APPELLANT

VERSUS

FREDRICK KAMAU KIARIE.....RESPONDENT

(Being an Appeal against the ruling/order of Hon. Nchoe (Ag SRM) delivered

on 21st May, 2014 In Chief Magistrate's Court case No. 2288 of 2011 at Nairobi)

J U D G M E N T

The Respondent sued Lalji Mgehji Patel in the lower court who was named as the Defendant.

Summons to enter appearance was served and acknowledged by way of endorsement of a stamp in the name of Lalji Mgehji Patel Co. Ltd on 10th October, 2011. Other than the signature of the receipt, there was no other endorsement. There was no appearance entered following the service of the summons and therefore, the Respondent proceeded to prosecute his suit by way of formal proof. Subsequently, the court gave judgment in favour of the respondent in the sum of ksh.500,000/- general damages and Kshs.1,000/- special damages plus costs and interest.

What followed was an application by way of objection lodged by and on behalf of Lalji Mgehji Patel & Company Limited. The basis of that application was that, they were objecting to the attachment of motor vehicle Registration KBR 514S because they were not party to the suit. In particular it was pleaded in the application that the ex parte judgment was never entered against the objector and therefore, the objector was not a judgment debtor, yet their motor vehicle had been attached. The said judgment was therefore, erroneous and irregular in law. Further, the respondent's cause of action was against a natural person not the company. The lower court heard that application and in a ruling delivered on 21st May, 2014 dismissed the same with costs, holding that it was an abuse of the court process. It is that ruling that triggered the present appeal.

In the lengthy Memorandum of Appeal dated 13th June, 2014, the appellant complained that no suit had been instituted against the company, but against Lalji Mgehji Patel an individual, and that the trial magistrate failed to appreciate the difference between a limited liability company and an individual. The lower court was also faulted for ignoring the authorities cited by the appellant.

In the ruling dismissing the appellant's application the lower court stated as follows: -

“I have considered the response and submissions on record plus authorities cited. Clearly paragraph 2 of the statement of claim clearly indicates that the defendant is a company duly incorporated in Kenya. I have looked at paragraph 5 which describes the incident; the issue is not between individuals but the plaintiff and a company.”

I have considered the rival submissions filed by the parties herein. There is no doubt in law that an individual vis a vis a limited liability company are distinct legal entities. The original plaint named Lalji Mgehji Patel as the defendant in the suit. What was lacking was the words “& Company Limited”. Paragraph 2 of the plaint starts with the words “*the defendant is a company duly incorporated in Kenya under the relevant laws. Service of summons upon it shall be effected through the plaintiff's advocate's Office*”.

It has not been disputed that indeed summons to enter appearance were served upon the appellant, and acknowledgment made by endorsement of its stamp at the back of the summons. The receipt of the summons in acknowledgment of the respondent's claim and/or plaint has not been denied.

The reference to the limited liability company in this case, the appellant, at paragraph 5 though not specifically named discounts the

submissions by the appellant that it was not a party to this suit. The omission in the title of the plaint though material, could not discharge the appellant herein in terms of the description in the pleadings. It was more probable than not that the appellant knew of the plaintiff's claim, received summons relating thereto, and took the risk of staying away from the seat of justice on the hope that, the non-description of its name will give them a window out of the claim. That was a dangerous step to take.

Having received the summons, the easiest option to take was to file a defence and deny that they are the defendants in the suit. The risk they took has resulted in adverse consequences. The person named as the plaintiff and the appellant herein, in literal interpretation is one and the same person. This is the case whereby the distinction between an individual and a limited liability company cannot be drawn.

The Respondent proved his case against the right person. In this case the limited liability company. The magistrate was right in her ruling refusing to lift the attachment of the appellant's motor vehicle. The appeal is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 27th day of June, 2019.

A. MBOGHOLI MSAGHA

JUDGE