



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.69 OF 2016

WESLEY KENTEL CHEMJOR.....APPELLANT

-VERSUS-

NADEEM IQBAL MOHAMMED.....RESPONDENT

(Being an appeal from the ruling delivered by Hon. Kelly, Resident

Magistrate on the 20th May, 2016 in Nakuru CMCC No. 767 of 2013)

JUDGMENT

INTRODUCTION

1. The Appellant who was Plaintiff in the trial court, filed suit claiming kshs.470,000 from the respondent/defendant, being money paid for motor vehicle registration number KAU 924X which was repossessed by the defendant/respondent. The Appellant also claimed interest on the amount at commercial.
2. The Defendant filed preliminary objection dated 28th August 2015. The basis of the preliminary objection is that, the company sued by the plaintiff did not exist. The trial magistrate upheld the preliminary objection by delivered a ruling on 20th May 2016 and dismissed the suit on ground that the company sued does not exist.
3. The Appellant being dissatisfied with the ruling on preliminary objection filed this appeal on the following grounds:-
 - i. The learned trial Magistrate erred in fact and in law in finding that, the appellant sued a limited liability company when it had not.
 - ii. The learned trial Magistrate erred in law and in fact in failing to hold that the defendant was a human individual and not a limited liability company and could therefore not be dissolved.
 - iii. The learned trial Magistrate erred in law and in fact in striking out the suit on grounds of facts that were disputed.

APPELLANT'S SUBMISSIONS

4. The Appellant/Plaintiff submitted that the appeal arose from a determination in a dispute involving the sale of a motor vehicle, registration number KAU 924X, by the Defendant to the plaintiff in the year 2005 at a purchase price of kshs.1,200,000. That, the purchase price was payable by instalments and that by March 2006; the plaintiff had paid kshs.470,000. That, the defendant unlawfully repossessed the vehicle leading to the filing of a suit in the lower court for claim of money paid and interest accrued.
5. The Appellant/Plaintiff submitted that the Respondent filed preliminary objection on ground that the defendant's company was dissolved; that it was irregular for the Plaintiff to sue the directors of the company before lifting the corporate veil.
6. The Appellant/Plaintiff further submitted that the Respondent/Defendant in his defence, admits entering into an agreement with him, but contend that the plaintiff breached the terms of the agreement.
7. The plaintiff submitted that he sued Nadeem Iqbal Mohammed and not Afric Pac International limited which the Defendant/Respondent alleges to have since been dissolved; and that the trial magistrate erred in finding that a party could not file a suit against a non-existent legal entity and that he should have filed suit against defendant in person.
8. He further submitted that at the time of making payments defendant/respondent issued receipts in the name Afric Pac International Limited

and prior to filing this suit, he did a search and found that the company was not registered. This prompted him to sue defendant in his name for trading in the unregistered company's name; that had the plaintiff intended to sue the company it would have done so. He concluded that description of the parties is clear as set out in the plaint.

RESPONDENT'S SUBMISSIONS

9. In response, Respondent submitted that the contract herein was between Plaintiff and Afric Pak Limited; and that, the plaintiff herein, was not sure of whom to sue and went on a fishing expedition. Further, that the company has been long unregistered.

10. Respondent submitted that a non-existent corporate body cannot sue or be sued. As held in the case of **Housing Finance Company of Kenya Ltd Vs Embakasi Youth Development Project, HCCC No.1068 of 2001**, where the court held that only a juristic person can sue or be sued: that a non-existent person cannot maintain a court action; that once this fact is brought before the attention of the court, it cannot allow action to proceed but must strike it out.

11. Respondent/ Defendant further submitted that, the trial magistrate did not err in striking out the suit as it was brought against a legal entity, which does not exist, and that the claim could not therefore be enforced.

ANALYSIS AND DETERMINATION

12. From my perusal of the plaint, I note that the defendant was sued in his name and that he was trading in the business name. Paragraph 2 of the plaint is worded as follows:-

“a male adult of sound mind and a businessman trading as Afric Pak International Limited.”

13. From description in the plaint, it is quite clear that the defendant was clear in his mind that he was suing an individual who was trading in a name of company not registered. Being unregistered, Afric Pak International could not therefore be described as a legal entity which could be sued on its own.

14. From the foregoing, it is therefore not correct to say a non-existent company was sued. The defendant person sued is Nadeem Igbal Mohammed trading in a company name that was not registered.

15. The respondent in the submissions, indicated that Afric Pak International Limited was long unregistered. The issue as to whether the company name was registered at the time of contract and issuance of receipts is a matter of evidence. The clear position can be established after giving both parties opportunity to adduce evidence

16. In the case of **Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd [1969] EA 696** the court held as follows:-

“A Preliminary Objection ...cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. If the point of law raised is argued sufficiently, it may dispose of a suit.”

17. In the instant case, legal status of Afric Pac International required proof in the trial and was not therefore proper to strike out the suit. I see merit in the appeal herein.

FINAL ORDERS

1. Appeal is hereby allowed
2. Order striking out Nakuru CMCC No.767 of 2013 is hereby set aside. The suit to proceed for hearing on priority basis.
3. Costs of this appeal to the appellant.

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

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Ms. Alwala holding brief for Kibet Counsel for Appellant

