



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO.3 OF 2015
(FORMERLY HCCA NO. 53 OF 2009)

BETWEEN

THOMAS OTIENO MBEWAAPPELLANT

AND

WILLIAM OKOTH ABATHA suing as legal representative

of the estate of ABATHA AWUOR1STRESPONDENT

HOMA BAY TEACHERS CHILDREN SCHEME 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C.A.SMUTAI, SRM in Homa Bay Chief Magistrates Court Civil Case No. 23 of 2005 dated 13th March 2009)

JUDGMENT

1. The 1st respondent, the plaintiff in the original claim, is the judgment creditor. He seeks to recover the judgment debt from the appellant. The issue in this appeal is whether the appellant should be held liable for the judgment against the 2nd respondent. I shall refer to the parties in their respective capacities in the subordinate court for convenience.
2. According to the plaint filed in the subordinate court, the plaintiff sued the Homa Bay Teachers Children Education Scheme for the share of Kshs.35,000/= being the amount of shares contributed by Valentine Abatha Awuor (deceased). In the plaint, the defendant was described as, “*a non-political organisation, incorporated by Kenya National Union of Teachers (KNUT) South Nyanza Branch.....*”
3. The defendant, in its statement of defence denied the claim. It denied that the plaintiff had locus standi to sue, that the suit breached the provisions of the ***Societies Act*** and that there was no proper cause of action.
4. After the close of the plaintiff’s case, the matter was adjourned for hearing of the defence case. When the matter came up for the defence hearing, neither the defendant nor its counsel attended court. The court entered judgment as prayed in the plaint upon the plaintiff’s application. The defendant attempted to set aside judgment but the effort was unsuccessful. Ultimately what led to this appeal are execution proceedings against the appellant.
5. By an application filed on 30th September 2008, the decree-holder filed an application for

execution against Thomas Mbewa for execution by way of Notice to Show Cause why he should not be committed to civil jail. After several adjournments, the Notice to Show Cause came up for hearing and on 13th March 2008 the appellant to civil jail.

6. The appellant's case is that the learned magistrate erred by allowing the respondent to proceed with the execution of the decree by condemning the appellant to civil jail for the 2nd respondent's debts whereas he was not party to the suit and was not capable of suing or being sued and the decree obtained was a nullity.

7. The 1st respondent contends that the appellant was attempting to raise matters which would have been canvassed on appeal against the judgment. The 1st respondent submits that the issue of whether the defendant is capable of suing or being sued was dealt with when the main suit was amended to include the words "*Chairman Homa Bay Teachers Children Education Scheme*" during the proceedings.

8. After hearing the arguments the learned magistrate held as follows:

[I] will however wish to note that the defendant is the Homa Bay Teachers Children's Scheme. This is an artificial person and its operation is through agents. It is therefore not in dispute that Mr. Mbewa is an official of the said organisation. Judgment has already been entered in favour of the plaintiff and for there is no order which has been issued setting aside orders for judgment. I will therefore find that Mr. Mbewa be committed to civil jail as an agent of the defendant.

9. I have analysed the proceedings herein and as I stated earlier, the only issue before the court is whether the appellant could be ordered to satisfy the judgment debt. The very purpose of showing cause is to put forth reasons why the debt should not be paid.

10. It is not in dispute that Thomas Otieno Mbewa was not a party to the proceedings nor was he sued for the debts of the 2nd respondent. In an earlier ruling upon objection proceedings lodged by Kenya national Union of Teachers, the learned magistrate allowed the objection based on the ground that KNUT was not a party and the Scheme was a different entity.

11. In the ruling, whose contents I have reproduced at paragraph 8 above, the learned magistrate held that the judgment debtor is a corporate body upon whose agents must answer for its debts. This is far from the legal position which is that officers of a corporate body cannot be liable for debts of the corporation unless the corporate veil is lifted (*Corporate Insurance Company Ltd v Savemax Insurance Brokers Ltd (2002) 1 EA 41*).

12. It is clear therefore that nothing in the proceedings implicates Thomas Mbewa to enable him answer to the Notice to show cause. Had the learned considered this issue, he would have come to the conclusion that attachment could not issue particularly in light of the earlier ruling I have alluded to.

13. Before I make my final order, I must state that it is important for plaintiff to be clear and certain about the capacity of the person it sues at any rate before the judgment is entered in order to avoid the possibility of a paper judgment.

14. The appeal is therefore allowed and the Notice to Show Cause against the appellant dismissed.

15. There shall be no order as to costs.

DATED and DELIVERED at HOMA BAY this 20th day of March 2015.

D.S. MAJANJA

JUDGE