Akaba Investments Limited v Finishline Automotive Limited aka Mayhem Motors Limited (Environment and Land Appeal E068 of 2021) [2022] KEELC 2431 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2431 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E068 OF 2021

EK WABWOTO, J

MAY 5, 2022

BETWEEN

AKABA INVESTMENTS LIMITED .... APPELLANT

AND

FINISHLINE AUTOMOTIVE LIMITED AKA MAYHEM MOTORS LIMITED .... RESPONDENT

(Being an Appeal against the Ruling and Order of Hon. A. Muma (Vice Chairperson) Business Premises Rent Tribunal delivered on the 3rd day of September 2021, in the Tribunal Case No. E135 of 2021)

JUDGMENT

1. The appellant being aggrieved by the ruling and order of Hon. A.Muma Vice Chairman of the Business Premises Rent Tribunal delivered on 3rd September 2021 puts forth the following grounds of appeal.

   i) That the learned Vice Chairman erred in law and in fact by not only proceeding to grant locus standi to the Respondent herein, an entity unknown in law, but also proceeded to issue orders for the benefit of such entity.

   ii) That the learned Vice Chairman erred in law and in fact by failing to appreciate that the orders issued for the benefit of an entity unknown in law, such as the Respondent herein, cannot be implemented or enforced as the same are not only illegal but untenable.

   iii) That the learned Vice Chairman totally failed to appreciate the well settled legal principle that a limited company has a legal existence independent of its members and that a company is not an agent of its members.

iv) That the learned Vice Chairman erred in law and in fact by unprocedurally lifting the veil of incorporation of both Finishline Automotive Limited and Mayhem Motors Limited when there were no circumstances or legal justification as known in our jurisdiction, for such lifting and subsequently drawing a wrong inference as to the similarity of directors and based on that alleged similarity, erroneously held that the Respondent had the requisite locus standi to institute the suit.

v) That despite the learned Vice Chairman appreciating that locus was indeed fundamental issue, erred in law and in fact by failing to appreciate that the provisions of Article 49 of *the Constitution* of Kenya, 2010 cannot cure a substantive/fatal defect such as lack of locus to file or continue a suit.

vi) That the learned Vice Chairman erred in law and in fact by failing to address himself to the obvious and glaring fact that the Respondent herein was not at any time whatsoever privy to the Tenancy Agreement between the Appellant and Mayhem Motors Limited and therefore could neither sue upon, nor seek benefit from such Tenancy Agreement.

vii) That the learned Vice Chairman erred in law and in fact by failing to appreciate that due to the aforementioned, the entire proceedings before the Business Premises Rent Tribunal were a nullity and void ab-initio and no orders could emanate therefrom.

viii) That in view of the aforementioned, the learned Vice Chairman erred in law and in fact by totally failing to appreciate the crux of the Appellant's Preliminary Objection dated 17th June 2021.

2. It is proposed the said ruling and orders be set aside and the Appeal be allowed with costs on the account of being aggrieved by the ruling and order rendered on the 3rd September in the suit aforementioned, where the appellant's preliminary objection was dismissed.

3. The appellant filed submissions dated 18th January 2022. The bone of contention being that the learned trial magistrate grossly erred in law and fact by failing to appreciate and find that the Respondent had no locus standi to institute Nairobi BPRT NO. E135 of 2021.

4. It was submitted that the Respondent is an amorphous entity unknown in law that was not privy to the tenancy agreement dated 20th August 2020.

5. It was argued that Finishline Automotive Limitedaka Mayhem Motors Limitedwere two distinct entities and it did not matter whether Edward Mukunga Gichukiwas a director to both companies. According to the Appellant it was a fundamental error on the part of the Tribunal to hold that the mere fact that companies had the same director who had executed the tenancy agreement dated 20th August 2020 then the Respondent had the prerequisite locus standi to institute the reference at the Tribunal.

6. The Appellant also argued that the Tribunal erred in lifting the corporate veil since there was no special circumstances or evidence necessitating the lifting of the corporate veil and the Tribunal erred in doing so.

7. It was also submitted that the Appellant entered into an agreement with only Mayhem Motors Limited and therefore Finishline Automotive Limited aka Mayhem Motors Limited could not institute the reference in that capacity since they were not a party to the said agreement. Counsel relied on the case of *Agricultural Finance Corporation v Lengetia Limited & Jane Mwangi* [1985] eKLR.

8. Counsel for the Appellant also submitted that Article 159 of *the Constitution*, could not be relied upon to justify the decision to grant the Respondent the locus standi. In support of this position, Counsel

referred separately to the cases of *Law Society of Kenya v Centre for Human Rights and Democracy & 12 Others* [2014] eKLR and *McFoy v United Africa Co. Ltd* (1961) 3 All E.R 1169.

9. Hence, the appellant prays that the appeal be allowed as prayed and the ruling of the Tribunal on dismissal of the preliminary objection and all consequential orders set aside with an order giving ruling to the appellant as prayed in the preliminary objection with an order for costs both in this Appeal and Tribunal.

10. The Respondent filed submissions dated 31st January 2022. The Respondent submitted that the Appeal was misplaced since it was hinged on the ground that the Respondent did not have locus to institute the suit before the Tribunal.

11. Counsel submitted that the arguments by the Appellant on that aspect was tenuous and academic on the following reason: -

 i) The party before the Tribunal and before this court is Finishline Automotive Limited which also goes by the name aka Mayhem Motors Limited. The Appellant wants to paint a picture which is flawed that there is an entity known as Finishline Automotive Limited without having regard to the acronym a.k.a.

 ii) The Appellant has acknowledged that indeed at all material times, it dealt with the Respondent wearing either of these hats. The Tenancy agreement at page 12 and 33 of the Record of Appeal is in the name of Finishline Automotive Limited. On the other hand, the Termination Notice at page 19 of the Record of Appeal is addressed to Mayhem Motors Limited, so are the series of correspondences exchanged between the parties.

 iii) All this while, the Appellant never took issue with these alterative reference to the Respondent by either of these names. Only to now at this late stage raise this rather ingenious and purely academic argument upon being served with the suit papers.

12. The Respondent concluded their submissions by stating that the line of argument advanced by the Appellant in their submissions does not serve to advance the settlement of the real matters in controversy and that even the Tribunal in its ruling delivered on 3rd September 2021 had stated that some of those matters were to be determined during the hearing. The Respondent prayed for dismissal of the Appeal with costs.

13. From the memorandum of appeal and the parties' written submissions, it is my view that this Court will have to decide on the main issue being; Whether the Tribunal correctly applied the law and principles relating to a Preliminary Objection.

14. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean:-

> " So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

Further Sir Charles Nebbold, JA stated that: -

> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other

side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop".

Similarly, the Court in *Oraro v Mbaja* (2005) 1KLR 141 held that;

> 'Anything that purports to be a preliminary objection must no deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.'

15. Given the features and/or nature of a preliminary objection as espoused in the above Court pronouncements, I think it is prudent for any Court which has to decide on the merits of a notice of preliminary objection to first satisfy itself that what has been raised by the parties satisfy the ingredients of a preliminary objection. This was held by the Court in *Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties)* [2020]

16. I have looked at the ruling of the Tribunal which is at pages 317 to 324 of the Record of Appeal. I am convinced that the Tribunal did examine the points raised by the Appellants in their preliminary objection with a view to finding out whether the points raised therein satisfy the requirements of a preliminary objection. The Hon. Vice Chair started by determining the merits of the points raised by the Appellant. It is my view that the objections raised by the Appellant at the Tribunal did not constitute a pure point of law but rather facts that needed to be ascertained during trial.

17. In the case of *David Karobia Kiiru v Charles Nderitu Gitoi & another* (2018) eKLR the court held that;

> " For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit."

18. I have once again keenly perused the preliminary objection at page 45 of the Record of Appeal and note also that the issue of the Respondent filing the reference under the names of Finishline Automotive Limited aka Mayhem Motors Limited is one which cannot be defeated by the objection as was raised by the Appellant. It is not disputed that the Tenancy agreement dated 20th August 2020 was between the Appellant and Finishline Automotive Limited. It is also not disputed that as per the pleadings that were filed at the Tribunal, Finishline Automotive Limited was listed as the Tenant albeit with Mayhem Motors Limited under the abbreviation "aka". This to me appears to have been an issue of misjoinder of a party which did affect the dispute that was pending for determination before the Tribunal. Indeed, Order 1 Rule 9 of the *Civil Procedure Rules* (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. I wish reproduce the same hereunder: -

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it".

19. In the Court of Appeal case of *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR, the court stated that:-

> " Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the respondent's pleadings in this regard cannot be vouched for in the absence of a trial"

20. Being guided by Order 1 rule 9 of the Civil Procedure Rules and the above authority, I find that the Tribunal did not err in its Ruling when it held that the Tenant had indeed the locus standi to institute the reference. The objections advanced by the Appellant could not have been in any way cogent grounds for striking out and or dismissal of the reference.

21. In the end, I find this appeal is not merited and the same is dismissed. On the issue of costs, costs are in the discretion of the court and in any event, to a party who is successful. However, in this case, I note that the matter is still pending before the Tribunal and in the circumstances, the appropriate order which I hereby issue is that each party to bear their own costs of this appeal.

    Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Tebino for the Appellant.

Mr. Odera for the Respondent.

Court Assistant; Caroline Nafuna.