



Family Bank Limited & another v Mumias Phones & Electronic Limited (Civil Appeal E053 of 2024) [2025] KEHC 3240 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E053 OF 2024
S MBUNGI, J
FEBRUARY 5, 2025**

BETWEEN

FAMILY BANK LIMITED 1ST APPELLANT

PAWABA AUCTIONEERS 2ND APPELLANT

AND

MUMIAS PHONES & ELECTRONIC LIMITED RESPONDENT

(Being an Appeal from the judgment of Hon. W.K Cheruiyot – PM dated 15.11.2023 and delivered virtually on 21.02.2024 by Hon. Omondi in Civil Suit No. 40 of 2019)

JUDGMENT

1. What is before this court is an appeal against a decision by the trial court in Mumias PMCC No. 40 of 2019 dated 15th November, 2023.
2. The trial court plaintiff was filed on 28/04/2019 where the plaintiff (Respondent herein), Mumias Phones & Electronic Limited, filed a suit against the defendants (appellants herein) when the 2nd defendant, through instructions of the 1st defendant went to its business premises and proclaimed goods in the said premises on allegations of default in payment of a loan by one Julius Chitechi Chimwene. The items proclaimed were itemized as Sony TV, Ramtons fridge, Dell Computer acer and HP, Seven seater leather seat brown, assorted TV sets and radios, mobile phones and accessories, solar panels and speakers and decoders and laptops.
3. The matter proceeded to full hearing and the trial court, after considering the evidence tendered by both parties and witnesses, held that the proclamation was unlawful and judgment was entered against the defendants and in favor of the plaintiff (Respondent herein).
4. The appellants being dissatisfied with the decision filed the present appeal vide a memorandum of appeal dated 18.03.2024 on the following grounds:



- a. That the learned Trial Magistrate erred in law and in fact for failing to appreciate that the Respondent did not establish its case on a balance of probability as per the requirement of the Law and was also not entitled to any costs leading to miscarriage of justice.
 - b. That the learned Trial Magistrate erred in law and in fact when he stated that Julius Chitechi Chimwene was never a director of the plaintiff company when CR-12 document produced by the Appellants as exhibit 7 proved that he was the major shareholder in the Company holding 500 shares and it was also an error for the court to believe that he was the manager of the plaintiff company leading to miscarriage of justice.
 - c. That the learned Trial Magistrate erred in law and in fact in failing to consider the pleadings, evidence, documents and submissions tendered by the appellants leading to miscarriage of justice.
 - d. That the learned Trial Magistrate erred in law and in fact for failing to consider that Julius Chitechi Chimwene was operating a business Trading as Mumias phones and Electronics and also had a company registered as Mumias phones and electronics limited, that both the business and company operated under the same premises, same commodities and under the same management leading to miscarriage of justice.
 - e. That the learned Trial Magistrate misconceived the evidence on record as well as the issues for determination.
 - f. That the learned Trial Magistrate erred in Law and in fact for failing to consider that the 1st Appellant advanced a loan facility to one Julius Chitechi Chimwene who was by then trading as Mumias phones and electronics and the 2nd appellant proclaimed the pledged goods, leading to miscarriage of justice.
5. The appellants prayed that the decision of the lower Court in civil suit No. 40 of 2019 be set aside and a proper finding be made by this Honourable Court, that this Honourable court do make such further Orders as may be just and expedient and the Appeal be allowed with costs.
 6. The appeal was canvassed by way of written submissions.

Appellants' Case.

7. The appellants averred that the 1st respondent advanced a loan facility to Julius Chitechi who was by then trading as Mumias Phones and Electronics, and the goods proclaimed by the 2nd respondent were offered as security by the said Julius Chitechi.
8. The appellants submitted that the issue of whether Julius Chitechi took a loan on behalf of the respondent company was a non-issue for determination since neither of the parties had alleged so.
9. It was their submission that despite the testimony by PW1 that Julius Chitechi was no longer a director in the respondent's company, it was unexplained as to why he held a majority of shares as per the CR dated 15.05.2019.
10. The appellants further submitted that the trial magistrate erred in law and fact by failing to find that Julius Chitechi was operating a business trading as Mumias Phones and Electronics, and also had a company registered as Mumias Phones and Electronics Limited, and that both were operated under the same premises, same commodities and management.



11. The appellants averred that the proclaimed goods were given as security that is stock in trade of Julius Chitechi's business operating under Mumias Phones and Electronics. Further, DW1 told the court that the place of business (which was one and the same business as the company) was visited and goods were verified.
12. Lastly, the appellants submitted that there were contradictions in the trial court's judgment, and prayed that it be set aside since the respondent did not establish their case on a balance of probabilities.

Respondent's Case.

13. Vide submissions dated 18.11.2024, the respondent submitted that it was unlawful for the respondent's goods to be attached in respect of the loan, since PW1 who was one of the directors of the respondent told the court that Julius Chitechi was previous director of the company but resigned and had taken the loan as an individual, and not as a director of the company.
14. To add on this, the respondent submitted that the proclamation dated 24.04.2019 clearly showed that the debtor was Julius Chitechi and not the respondent company which are two separate entities.
15. Further, the respondent averred that Julius Chitechi took a loan in his capacity as the proprietor of Mumias Phones & Electronics which was incorporated on 07.02.2023 and as such, the appellants ought to have attached his personal property only, instead of attaching the respondent's property.
16. The respondent further averred that Julius Chitechi being a director of the respondent, had never had authority to take out loans on behalf of the respondent, and doing so would be acting in excess authority.
17. The respondent urged that the appeal be dismissed with costs to the respondent.

Analysis and Determination.

18. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“...This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”

19. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”



20. I have carefully looked at the memorandum of appeal, the submissions by both parties, the trial court proceedings and judgment.
21. The main issue for determination is whether the appellants herein proved on a balance of probability that the proclamation and attachment of the goods at the respondent's premises was lawful.
22. It is trite law that he who alleges must prove. The legal burden of proof in the trial court fell on the plaintiff (respondent herein) in the trial court. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya, provides that: -

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
23. The moment the respondent in the lower court asserted that the proclamation was unlawful and proved that it had no contractual relationship with the appellants, the evidential burden shifted to the appellants.
24. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held /that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
25. From the evidence on record, it is not disputed that Julius Chitechi was at some point associated with the respondent company as a director and shareholder. The appellants herein, submitted that a loan was advanced to Julius Chitechi T/A Mumias Phones & Electronics and that the goods were lawfully proclaimed since they were listed as security for the loan. The respondent's director testified that despite Julius Chitechi being a director and shareholder in Mumias Phones & Electronics Limited, he had resigned as a director and that he took the loan in his individual capacity.
26. The appellants contended that Julius Chitechi was a major shareholder in the respondent company and that the goods proclaimed were offered as security for the loan he took. However, the proclamation notice dated 24.04.2019 specifically indicated that the debtor was Julius Chitechi T/A Mumias Phones & Electronics and not the respondent company which is Mumias Phones & Electronics Limited.
27. And also, the loan application forms indicate the borrower was Julius Chitechi T/A Mumias Phones & Electronics but not the respondent.
28. The appellants also argued that the trial magistrate erred in failing to appreciate that both the business and the company were operating under the same premises. This is neither here nor there. It is possible and legal, for two separate companies, or business entities to operate in the same premises or building etc. Further, the application loan forms did not show the exact physical address of the borrower. Therefore, the attachment of goods belonging to Mumias Phones & Electronics Limited to satisfy the debt of an individual cannot be legally justified.
29. The loan application form shows the following items were offered as security: Motor vehicles Reg. no. KBE 901R and Chassis No. AZR60-0008772, KBR 271F and Chassis No. KGC10-0026680, KBT 301H and Chassis NO. NCP50-0045537, KBT 463G and Chassis No. Y12-019018, Television set 42” Sony Flat screen, Fridge Ramtons serial number 0001678P, Dining table and six chairs wooden



- brown, 7-seater leather seats brown, electronics, mobile phones and mobile accessories, DELL, ACER and HP computers serial numbers: 3400L69828, T612-020874, T523-022536, T535-039099, T619-028923, 3400DL69886, 6523YH2B0ML, ECHI54870 HP 17". CZC627 CHQC ACER 17", 8152KM9203KV, 6531NK9Z322Y, 6328KN9ZL3XS, 6521JYHZP273, 6522JYHZJ4Y4, CZC6380NXC.
30. Some of the items' identification numbers like serial numbers were given. Stock in trade items did not have.
 31. The attached goods were listed as follows: one Motor Vehicle Reg. KBT 301H, Motor Vehicle Reg. No. KBT 463G, Motor Vehicle Reg. No. KBR 271F, Sony TV 42", Ramtons Fridge, DELL Computer, Acer and HP, Seven Seater leather seats brown, Assorted TV Sets and Radios, assorted mobile phones and accessories, assorted solar panels and speakers, assorted decoders and laptops.
 32. They did not have identification numbers. Therefore, it is hard to tell whether the auctioned goods were the same goods which were pledged as security. Therefore, the appellant failed to discharge the evidential burden to rebut the respondent's assertions.
 33. In the case of Kenya Commercial Bank Ltd v Osebe [1982] KLR 296, the court emphasized the importance of clearly identifying secured assets in loan agreements. The court held that vague descriptions of collateral can lead to disputes and render the security unenforceable. In the present case, the absence of serial numbers in the attached stock in trade goods and in some of the items stated in the loan agreement undermines the appellants' claim that the attached goods were the same as those pledged by Julius Chitechi.
 34. This failure to give proper description of the items pledged as security and the items proclaimed meant that the appellant failed to successfully rebut the respondent's assertions. Thus enabling the respondent to prove her case on a balance of probability in the lower court.
 35. In William Kabogo Gitau -vs- George Thuo & 2 Others [201011 KLE 526 it was stated that:

"In ordinary civil cases a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."
 36. It is worth noting that the said Julius Chimwene was not enjoined in the proceedings before the trial court by the appellants herein. Would they have done so, perhaps depending on his evidence, the trial magistrate would have arrived at a different finding. The only recourse for the appellants herein, is to pursue Julius Chimwene.
 37. The appellants submitted that the trial court misdirected itself on the issues for determination being whether the 1st appellant extended a loan facility to the respondent, and whether Julius Chitechi Chimwene took a loan on behalf of the plaintiff company. I do not fault the trial magistrate for that. In my view, these two issues were relevant and well determined. It is only through their determination that the proclamation would be deemed lawful or unlawful by the trial court.
 38. The above analysis makes me find that the respondent proved its case on a balance of probability and the trial court did not err in determining that the attachment was unlawful.



39. On the issue of costs, the lower court was right to award costs to the respondent, for it is the appellant who made the respondent file the suit and the suit was successful.
40. The Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR held as follows: –

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....

“ Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

41. The only issue I have with costs, is that the lower court also condemned PAWABA Auctioneers (the 2nd defendant) to also pay costs. This was erroneous for the 2nd defendant was only carrying instructions given by the 1st defendant/appellant.
42. Therefore, I order the 1st appellant to pay the costs of the appeal and the lower court to the respondent.
43. In light of the foregoing, I find that the appeal lacks merit and is hereby dismissed.
44. It is so ordered.
45. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Appellants – absent

Ms. Juma holding brief for Omanyi for the Respondent present online

Court Assistant – Elizabeth Angong’a

