



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muthi & 2 others v Seyoum & 3 others (Civil Appeal 75 of 2020)
[2025] KEHC 1539 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 75 OF 2020
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

MICHAEL MURIITHI MUTHI 1ST APPELLANT

JOWAKA SUPERLINKS LIMITED 2ND APPELLANT

FRANCIS MACHARIA T/A PLATINUM AUCTIONEERS 3RD APPELLANT

AND

ALEM SEYOUM 1ST RESPONDENT

ABDULLATIFF IBRAHIM ABDALLA 2ND RESPONDENT

JOSEPH MURIUKI MIKWA T/A JMK ENTERPRISES 3RD RESPONDENT

PENINAH GATURI NJERI 4TH RESPONDENT

*(Being an appeal against the Judgment of Hon. F. Kyambia (SPM) delivered
on 5th June 2020 in Mombasa Chief Magistrate's Court Civil Suit No.
1273 of 2017, Alem Seyoum v Abdullatiff Ibrahim Abdalla & 4 Others)*

JUDGMENT

1. The background of the appeal is that the Plaintiff/1st Respondent vide plaint dated 7th August 2017 averred that he imported four units of motor vehicles from Australia which were contained in container number CAIU81966397 which was shipped to the port of Mombasa some time in June 2016. That the Bill of Lading indicated Tsega Shuferaw as the consignee and Genet A. Kabeto as the shipper. That the consignment arrived in Mombasa on 24th August 2016 and the Plaintiff retained the 1st Defendant to clear the consignment from the port of Mombasa but the 1st Defendant did not have the requisite licenses to clear the consignment and independently sourced for services from the 2nd, 3rd and 4th Defendants to clear the container from the port.



2. The Plaintiff averred that he paid all the import duties, shipping charges, port charges and the registration fees for the four units which were released to the consignee and/or consignee's representative in Mombasa on 24th August 2016. That one unit, motor vehicle which had already been registered as KCJ 834V was retained by the 1st, 2nd, 3rd and 4th Defendants on false allegations that there were incurred demurrage charges in respect of the consignment. That the Plaintiff later learnt that the Defendants had conspired and fraudulently transferred the said motor vehicle registration number KCJ 834V to the 6th Defendant.
3. The Plaintiff/1st Respondent prayed for damages against the Defendants jointly and severally for: a declaration that the Defendants actions were illegal, null and void ab initio; an order directing the Defendants to release and hand over motor vehicle registration number KCJ 834V to the Plaintiff in its original condition; and an order for payment of damage for the loss of use at the rate of Kshs. 5,000 per day with effect from 24th August 2016 until the date of handover of the motor vehicle registration number KCJ 834V to the Plaintiff or payment of the sum of Kshs. 3,300,000 to the Plaintiff. The Plaintiff prayed that in the alternative, payment of Kshs. 3,300,000 being the value of the motor vehicle registration number KCJ 834V; Payment of Kshs. 300,000 being the costs incurred by the Plaintiff in tracing the vehicle; and any other and/or further order that the court may deem fit and just to grant.
4. This suit was heard in the trial court and judgment delivered on 5th June 2020 where the court found that the 1st Defendant did not have authority from the Plaintiff to engage the services of the 4th Defendant who then engaged the 3rd Defendants through the 2nd Defendant, that the 1st Defendant having engaged the 2nd, 3rd and 4th Defendants without authority of the Plaintiff and the delays occasioned in returning the container, resulted to accumulation of demurrage charges and that the Plaintiff could therefore not be blamed for the demurrage charges, that the entire transaction was surrounded in fraudulent collusions between the 1st, 2nd, 3rd, 4th and 5th Defendants who were found to have jointly and severally acted fraudulently, and that the 6th Defendant was sued because she was the one who took the vehicle to the auction, that the Plaintiff did not raise any substantive case against her and she could therefore not be held liable. In the end, the trial court entered judgment for the Plaintiff against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and severally in the sum of Kshs. 3,300,000 with interest at court rates from the date of the plaint. The Plaintiff was also granted costs of the suit.
5. Being dissatisfied, the Appellant appealed the judgment through the Memorandum of Appeal dated 16th June 2020 on grounds that the learned magistrate erred in law and in fact by failing to establish ownership of the shipment, 1x40 feet container, number CAIU81966397, containing four (4) units of motor vehicles from Melbourne Australia to the Port of Mombasa, and motor vehicle registration number KCJ 834V. That the learned magistrate erred in law and in fact by failing to establish the nexus between the shipper, Genet A. Kabeto, and the Plaintiff Alem Seyoum, the consignee, Tsega Shiferau and the Plaintiff Alem Seyoum, and the Bill of Lading No. 160000013 and the Plaintiff, Alem Seyoum. That the learned magistrate erred in fact and in law by finding that the Plaintiff had locus standi. That the learned magistrate erred in law and in fact by conjecturing that the Plaintiff was the owner of motor vehicle registration number KCJ 834V and had authority over the same.
6. The Appellants in the Memorandum of Appeal further stated that the learned magistrate erred in law and in fact by finding the actions of the of the 2nd, 3rd and 5th Defendants fraudulent. That the learned magistrate erred in law by failing to specify the 2nd, 3rd and 5th Defendants actions that were found to be fraudulent. That the learned magistrate erred in law and in fact by finding the 2nd Defendant personally liable despite only being a director of the 3rd Defendant company. That the learned magistrate erred in both fact and law in failing to rely on and/or accord due weight to the 2nd, 3rd and 5th Defendants'



- witness testimony and documents. That the honourable magistrate erred in fact and in law by failing to take into account the issue of accrued demurrage of motor vehicle registration number KCJ 834V.
7. The Appellant prayed for orders that this court allows the appeal and set aside the judgment of 5th June 2020 in Civil Suit No. 1273 of 2017-Mombasa, and any decree issued thereto and replace it with an order dismissing the Plaintiff's suit, that the cost of this appeal and the suit in the subordinate court be borne by the Respondents, and such other orders and reliefs that this court may deem fit to grant.
 8. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 31st October 2023 submitted on grounds 1, 3 and 4 of the appeal that the trial court failed to establish ownership of the subject shipment and motor vehicle registration number KCJ 834V. That the trial court made a finding to the effect that the person named in the Bill of Lading was not the actual owner of the consignee. That the trial court failed to establish the owner of the motor vehicle to determine to whom the benefits, obligations and liabilities could accrue in favour of or against. That from the judgment, it was evident that the relationship of the party named in the Bill of Lading was short lived and was restricted to delivery. That the case relied on by the trial court being *Mason v Lickbarrow* IBI.H 395, there was an admission that that the endorsement in the Bill of Lading was restricted to merely directions on the delivery of the goods and it never meant to confer ownership or any proprietary rights.
 9. The Appellants submitted that it is then evident that the Appellant's submissions in respect of the fact that the Plaintiff was never the owner of the consignment was merited and needed to be determined. That since no proprietary rights were vested in the Plaintiff, he lacked the locus to institute the instant proceedings either on his own behalf or that of the actual owner who was never determined in the trial court's judgment. That the issue of ownership extends to proprietary rights in respect of motor vehicle registration number KCJ 834V. That it is also evident from cross examination of the Plaintiff that that the relationship between the Plaintiff and the actual owner was never established and the Plaintiff actually admitted that he did not have any evidence to the effect that he purchased the said motor vehicles or even own them. That in the absence of proprietary rights, the Plaintiff lacked capacity to institute the proceedings or even claim for damages for the value of a subject matter he did not own or prove its value.
 10. The Appellants submitted on ground 2 that failing to establish the actual owner of the shipment, the trial court erred in establishing the nexus between the shipper and the Plaintiff. That since the position of the Plaintiff was never established or proved, no rights accrued in favour of the Plaintiff so as to give rise to any claim for damages in the event the rights are violated.
 11. The Appellants submitted on grounds 5, 6, 8, and 9 that the Appellants assisted in clearance of the subject shipment and therefore incurred costs in the process. That the Appellants cannot be faulted for acting on instructions of the party who had authority to clear the subject shipment. That the Plaintiff filed documents to the effect that he was fully aware of the involvement of the Appellants in respect of clearance of the subject shipment. That upon being notified of the same, he never objected to their involvement and as such ratified actions of the Appellants who continued incurring costs for the sake of executing instructions issued to them. That the Plaintiff admitted that he was notified that there were demurrage charges against the shipment which extends to the fact that the accrual was not occasioned by the Appellants. That the 1st Defendant admitted that the Appellants paid demurrage charges and that the value of the motor vehicle was 1,400,000. That he also admitted that the accrual of the extra demurrage and storage charges were on his own account and the trial court therefore erred in finding that the Appellant's actions were unlawful. That the Plaintiff admitted that he was aware the motor vehicle would not be released unless he paid demurrage which payment was not made to the Appellants.



12. The Appellants submitted on ground 7 that the 2nd Defendant was sued in his personal capacity in a transaction where the company in which he is a director was the recipient of the instructions. That it has not been proved that there was any prayer for lifting of the corporate veil or any proceeding for piercing of the corporate veil were ever instituted. That it is well settled that a director is separate from the company and each carries distinct personalities. Reliance was placed in the case of *Joseph Kobia Nguthari v Kiegoi Tea Factory Company Limited & 2 Others* (2016) eKLR.
13. The Respondent in their submissions dated 24th May 2024 that on 25th October 2023, parties appeared before this court pursuant to directions issued by the court on 3rd April 2023 directing the Appellants to file and serve the Record of Appeal together with submissions before 8th November 2023 failing which the appeal herein would stand dismissed. That the Appellants filed the Record of Appeal on 31st October 2023 and served the same on 8th December 2023 but failed to file and serve written submissions as directed. That the Appellants filed their submissions on 12th May 2024 without leave of court and having failed to comply with the order issued on 25th October 2023, which order has not been set aside, that the appeal herein stands dismissed with costs.
14. The 1st Respondent submitted that in respect to grounds 1, 3 and 4 of the Memorandum of Appeal, the trial court correctly analysed the law regarding the place of the Bill of Lading and identification of an owner of the consignment, and that the Appellant's contention that the Plaintiff's name did not appear on the Bill of Lading was misconceived and without substance. The 1st Respondent submitted on ground 2 that having established that the Plaintiff had locus standi, the issue of ownership was moot. On grounds 5, 6, 8, and 9, the 1st Respondent stated that the Defendants admitted that they were not appointed or contracted by the Plaintiff and the demurrage charges could not therefore be paid by the Plaintiff. That the Appellants failed to produce any evidence that indeed there were accrued demurrage and/or storage charges or that the same were paid either before or after the unlawful auction of the Plaintiff's vehicle which confirmed the Plaintiff's claim that the Appellant/Defendants had colluded to fraudulently convert his property.
15. The 1st Respondent submitted on ground 7 that the 2nd Defendant testified that he was a director of the 3rd Defendant company and that he wrote the letter dated 3rd September 2016 stopping the release of the motor vehicle from Interpel CFS. That he also stated that he spoke to the shipper Shiferow over the phone and demanded payment and that he also saw the vehicle that was auctioned. That he stated he gave instructions to an advocate to write the demand but he did not produce any company resolution authorizing him to act in the manner that he did. That it is clear the 1st Appellant who was the 2nd Defendant in the suit was the architect of the fraud leading to auction of the 1st Respondent's vehicle, and that he was a necessary party to the proceedings.
16. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“ ... 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 ...”
17. I have considered the Record of Appeal dated 31st October 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether failure to comply with directions of the court on filing and service of the Record of Appeal and submissions was fatal to the appeal



- b. Whether the 1st Respondent was the owner of the shipment which amounted to locus standi for instituting the proceedings herein
 - c. Whether there was nexus between the shipper and the 1st Respondent, the consignee and the 1st Respondent, and the Bill of Lading No. 160000013 and the 1st Respondent
 - d. Whether involvement of the Appellants in the shipment amounted to fraudulent actions, whether the trial court considered the evidence of the Appellants in its determination, and whether accrual of demurrage of motor vehicle registration number KCJ 834Y was conclusively dealt with
 - e. Whether the 1st Appellant was personally liable despite being a director of the 2nd Appellant
18. On whether failure to comply with directions of the court on filing and service of the Record of Appeal and submissions was fatal to the appeal, the 1st Respondent submitted that failure of the Appellant to file and serve the record of appeal and submissions before 8th November 2023 but 12th May 2024 without leave of the court amounted to dismissal of the appeal with costs.
19. This court places reliance on the holding of the Court of Appeal in *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others* (2011) eKLR that: -
- “The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...
- The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”
20. This court in exercising its discretion has to weigh the prejudice likely to be suffered by the Respondents against the prejudice to be suffered by the Appellant. Dismissing the Appellants’ appeal on the basis of delay in filing and service of the Record of Appeal and submissions would arbitrarily take away the Appellants’ right to be heard. I therefore find that the ground herein fails for the interest of justice.
21. On whether the 1st Respondent was the owner of the shipment which amounted to locus standi for instituting the proceedings herein, the Appellants submitted that the trial court failed to establish ownership of the subject shipment and motor vehicle registration number KCJ 834V. That the trial court made a finding that the person named in the bill of lading is not the actual owner of the consignee as the bill of lading was short lived and only restricted to delivery. That since no proprietary rights were vested in the 1st Respondent, he lacked locus to institute the instant proceedings. That the 1st Respondent also admitted that he did not have evidence to the effect that he purchased the motor vehicles or even owned them.



22. The 1st Respondent submitted that the trial court correctly analysed the law on the bill of lading and identification of the owner of the consignment.

23. This court has perused holding of the trial court which stated as follows: -

“From the above authorities, it is clear that the consignee named in a bill of lading need not be the owner of the goods neither does the owner of the goods need to be named on the bill of lading. As such the consignee need not be the owner of the goods.

Therefore the plaintiff need not be named as the consignee to have locus standi to bring this suit. In any case the 1st defendant told the court he was instructed by the plaintiff to clear the consignments. There was no contrary evidence that the plaintiff was not the lawful owner of the said vehicle.”

24. In *Societe Miniere Delet v Afrika Invest Limited & 2 others* (2015) eKLR, the court held as follows: -

“A bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of contract of carriage under which the goods have been delivered to and received by the ship.

The signed Bill of Lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of Lading under the law merchant is considered the symbol of goods described in it, and the endorsement and delivery of the Bill of Lading operates as a symbolic delivery of the goods. This person may be named in the Bill of Lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of Lading, he is usually known as the holder or endorsee of the Bill of Lading.

The holder of the Bill of Lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A Bill of Lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.”

25. The court in *Law Society of Kenya v Commissioner of Lands & 2 Others* (2001) eKLR defined locus standi as follows: -

“... Locus-standi signifies a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law ...”

26. In consideration of the above, this court is inclined to agree with the holding of the trial court. The 1st Respondent therefore had standing to institute the suit.

27. On whether there was nexus between the shipper and the 1st Respondent, the consignee and the 1st Respondent, and the Bill of Lading No. 16000013 and the 1st Respondent, the Appellants stated that since the position of the 1st Respondent was never established or proved, no rights accrued in favour of the Plaintiff to give rise to any claim for damages in the event the rights are violated.

28. The 1st Respondent argued that having established that the 1st Respondent had locus standi, the issue of ownership was moot.



29. It has been established in the preceding issue that the 1st Respondent had interest in the consignment and therefore locus to institute the suit herein. Evidence in the contrary has also not been availed to this court. Nexus between the shipper, the consignee and the Bill of Lading No. 160000013, and the 1st Respondent is therefore of no relevance. This ground fails.
30. On whether involvement of the Appellants in the shipment amounted to fraudulent actions, whether the trial court considered the evidence of the Appellants in its determination, and whether accrual of demurrage of motor vehicle registration number KCJ 834V was conclusively dealt with, the Appellants argued that they assisted in clearance of the shipment as a result of which they incurred costs. That the Appellants cannot be faulted for acting on instructions of the party who had authority to clear the subject shipment. That the 1st Respondent was fully aware of involvement of the Appellants and upon being notified of the same, he never objected. That the Appellants continued incurring costs for the sake of executing instructions issued to them. That the 2nd Respondent admitted that the Appellants paid demurrage charges and that the value of the motor vehicle was Kshs. 1,400,000. That the 1st Respondent was also aware the motor vehicle could not be released unless he paid demurrage.
31. The 1st Respondent stated that the Appellants admitted that they were not appointed or contracted by the 1st Respondent and the demurrage charges could not therefore be paid by the 1st Respondent. That the Appellants also failed to produce any evidence that indeed there was accrued demurrage and/or storage charges or that the same were paid either before or after the unlawful auction of the 1st Respondent's vehicle.
32. This court has perused proceedings of the trial court and established that the 2nd Respondent, a clearing and forwarding agent, was contacted by the 1st Respondent to clear a container. That the container came under the status of house to house which meant after clearance the goods had to go with the container. That after payment of custom duty it was discovered that the units were accident vehicles. That the container had to be stripped and goods removed to be taken to the Ministry of Works for inspection. That this exercise took a long time and the container accrued demurrage charges. That after payment of duties and storage charges, they were allowed to remove the units from CFS except the fourth one which had been stopped by a letter from the 2nd Appellant.
33. The 3rd Respondent in his evidence stated that he was contacted by the 2nd Respondent to assist in clearing the consignment because he did not have container deposit. That the 3rd Respondent got further assistance of the 1st and 2nd Appellants who had holding accounts with the shipping line. That however, the 2nd Appellant instructed CFS not to release the container and the vehicle to the 3rd Respondent.
34. The 1st Appellant stated that he acted in capacity of director of the 2nd Appellant that had been approached by the 3rd Respondent. That the container was supposed to be returned on 27th July 2017 failure to which the shipping line would start charging demurrage charges. However, the container was never returned. That the 3rd Respondent admitted that they were unable to meet their obligation and requested the 2nd Appellant to assist in payment of KRA, shipping, CFS, and port charges. That when everything was done and the 2nd Appellant demanded their dues, the 1st Respondent informed them to deal with his lawyer. That two demand letters were sent and by then the total charges had accrued to Kshs. 2,704,610. That the motor vehicle was then sold in an auction to recover the charges.
35. The trial court in its judgment held that the 1st Defendant having engaged the 1st Appellant, 2nd Appellant and the 3rd Respondent without authority of the 1st Respondent and the delays occasioned in returning the container resulted to accumulation of demurrage charges that the 1st Respondent could not be blamed for.



36. I find that the 2nd Respondent admitted that when it was discovered that the units were accident vehicles, that the container had to be stripped and goods removed to be taken to the Ministry of Works for inspection which exercise took a long time and the container accrued demurrage charges. This position is supported by the Inspection Report Form by Kenya Bureau of Standards dated 11th August 2016. The condition of the car prior to shipment is according to this court within the 1st Respondents knowledge. He therefore ought to have been responsible for the demurrage charges whose effect snowballed and looped in the other parties. The trial court therefore erred in holding that the 1st Respondent could not be blamed for the demurrage charges. The 1st Respondent was not entitled to the award of Kshs. 3,300,000 with the interest. I therefore set it aside.
37. On whether the 1st Appellant was personally liable despite being a director of the 2nd Appellant, the Appellants submitted that the 1st Appellant was sued in his personal capacity in a transaction where the company in which he is a director was the recipient of the instructions. That there was neither a prayer for lifting the corporate veil nor proceedings for piercing of the corporate veil.
38. The 1st Respondent contended that the 1st Appellant did not produce any company resolution authorizing his actions. That it is clear the 1st Respondent was the architect of the fraud leading to auction of the 1st Respondent's vehicle.
39. The court in Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company Limited (2012) eKLR observed that: -
- “The general law, however, is that a corporation is an artificial legal entity. It follows that the mere fact that one is a director or shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted.”
40. Further, it was held in Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 (2013) eKLR that: -
- “...a company as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”
41. Circumstances in the case herein had not escalated to the level requiring lifting of the corporate veil to directly deal with persons behind the company. I find that the trial court erred in holding the 1st Appellant liable for transactions of the company.
42. In the upshot, this court finds that the appeal is partly merited. Each party to bear their own costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellants

..... Advocate for the Respondents

Court Assistant – Shitemi

