



REPUBLIC OF KENYA



**Equity Bank Limited v Tata Africa Holdings (Kenya) Ltd & 2 others (Civil Appeal E008 of 2022) [2023] KEHC 22337 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E008 OF 2022  
F GIKONYO, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**EQUITY BANK LIMITED ..... APPELLANT**

**AND**

**TATA AFRICA HOLDINGS (KENYA) LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOHN SARUNI OLE LEPARAKUO ..... 2<sup>ND</sup> RESPONDENT**

**NTEEI KEKYIAN LYDIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon A.N. Sisenda (RM) delivered on 27.06.2022 in NAROK CMCC No. 288 of 2018))*

**JUDGMENT**

**Impugned judgment**

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 288 of 2018 delivered on the 27.06.2022. The trial court entered judgment for the 1<sup>st</sup> respondent against the appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally for Kes 2,556,640/= being the purchase price of a tractor.
2. The memorandum of appeal dated July 25, 2022 cited three (3) grounds of appeal as follows;
  - i. That the learned trial magistrate erred in law and in fact by finding that the defendants are jointly and severally liable for Kes 2,556, 640/= being the purchase price of the tractor, yet the 3<sup>rd</sup> defendant was a beneficial owner.
  - ii. That the learned trial magistrate erred in law and evidence by relying on an invoice to the first defendant for a sum of Kes 2,556, 640/= to find that the plaintiff has proven its case.



- iii. That the learned trial magistrate erred both in law and in fact in by finding that the plaintiff discharged its evidentiary burden as required by the law.

## **Background**

3. The- 1<sup>st</sup> respondent vide plaint dated November 16, 2018 claimed against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally for payment of Kes 2,556, 640/= being the value of motor tractor registration number KCTB 308M. the 1<sup>st</sup> respondent also claimed interest at 14% from June 2014 till payment in full and costs of the suit.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered appearance and filed a joint statement of defence. They denied having any contractual obligation to the 1<sup>st</sup> respondent in regard to the sale and purchase of the said motor tractor.
5. The appellant entered appearance and filed a statement of defence but failed to attend court and / or adduced evidence.

## **1<sup>st</sup> respondent's case**

6. The 1<sup>st</sup> respondent called one witness.PW1- Edwin too.
7. According to PW1, sometime in the year 2014, the 2<sup>nd</sup> respondent approached the 1<sup>st</sup> respondent with the intention of purchasing John Deer 550E tractor whereupon a price was discussed and a vehicle sales invoice was issued.
8. It was PW1's evidence that the tractor was released to the 2<sup>nd</sup> respondent with an understanding that the 2<sup>nd</sup> respondent was to obtain a financing facility and pay for the same. Unknown to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent had the said tractor registered with National Transport and Safety Authority (NTSA) jointly together the appellant and the 3<sup>rd</sup> respondents. The 2<sup>nd</sup> respondent did not pay the price consideration to the 1<sup>st</sup> respondent.

## **The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case.**

9. The 2<sup>nd</sup> respondent averred that the said tractor was identified and sourced by the appellant who financed for its purchase. Thereafter, the 2<sup>nd</sup> respondent travelled to Nakuru to collect the tractor. He further stated that he had fully paid to the bank the installments required towards settling the loan facility for the tractor but has not been issued with a log book for the same.
10. The 3<sup>rd</sup> respondent asserted that the said tractor was identified and sourced by the appellant from a company known as Kenya tractors limited and subsequently, the 2<sup>nd</sup> respondent travelled to Nakuru to collect the same.

## **Appellant's Submissions**

11. The appellant submitted that the learned trial magistrate erred in law and fact in finding that the defendants are jointly and severally liable for Kes 2,556,640/= being the purchase price of the tractor, yet the appellant was the beneficial owner. The appellant argued that the 1<sup>st</sup> respondent's witness admitted that there is no relationship between the appellant and the 1<sup>st</sup> respondent. That PW1 confirmed that the invoice issued on July 22, 2014 was not dated nor signed but it was directed solely to the 2<sup>nd</sup> respondent. Further that the said witness admitted that there was no formal arrangement between the appellant and the 2<sup>nd</sup> respondent and that there was no formal communication whatsoever between the appellant and the 1<sup>st</sup> respondent. That this shows that the appellant had no direct



involvement in the matter at hand. Therefore, it would be unjust and unfair to hold the appellant jointly liable together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The appellant relied on *Halsbury's laws of England* 4<sup>th</sup> edition paragraph 329, the cases of *Savings & Loan (K) Ltd v Kanyenje Karangita Gakombe & another* Civil Appeal No. 271 of 2006, *Agriculture Finance Corporation v Lengetia Ltd* [1985] KLR76.

12. The appellant submitted that the learned trial magistrate erred in law and evidence by relying on the invoice alone to find the appellant together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally liable for the purchase price of the tractor. The appellant argued that the evidence presented during trial shows that the appellant was not a party to the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Further that the demand letter dated February 15, 2017 issued by the 1<sup>st</sup> respondent was addressed to the 2<sup>nd</sup> respondent and not the appellant. That the invoice PVINVSO5744 raised in the plaint was never tendered as evidence during trial. That instead PW1 stated that the invoice was addressed to the 2<sup>nd</sup> respondent. The appellant therefore urged this court to consider the evidence of PW1 and invoice PVINVSO5744 issued on July 22, 2014 was addressed to the 2<sup>nd</sup> respondent and not the appellant as pleaded.
13. The appellant submitted that from the evidence before the trial court, the 1<sup>st</sup> respondent had not established any contractual relationship with the appellant. The 1<sup>st</sup> respondent admitted that they invoiced the 2<sup>nd</sup> respondent whom they sold the tractor to. They only came to learn the said tractor was registered in the joint names of the appellant together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the appellant was not a party to the initial sale of the tractor upon its importation.
14. In the end, the appellant prayed that the judgement and decree in Narok CMCC No 288 of 2018 be set aside and the appeal herein be allowed with costs to the appellant.

### **The 1<sup>st</sup> Respondent's Submissions**

15. The 1<sup>st</sup> respondent submitted that without the court having extended time for filing the appeal out of time pursuant to the proviso under section 79G of the *Civil Procedure Act*, this court lacks jurisdiction to hear and determine this appeal. The 1<sup>st</sup> respondent argued that the trial court delivered its judgment on June 27, 2022 and the memorandum of appeal was filed and paid for on July 29, 2022 outside the prescribed 30 days. The 1<sup>st</sup> respondent relied on the cases of *Owners of Motor Vessel 'Lilian' v Caltex Oil Kenya Ltd* KLR 1, *Edith Wairimu Njoroge v Brooks Holdings Co Ltd & anor* [2018] eKLR.
16. The 1<sup>st</sup> respondent submitted that discharged its legal burden of proof. The 1<sup>st</sup> respondent argued that its claim was for recovery of a liquidated sum of Kes 2,556,640/= together with costs and interest jointly from the defendants being the value of motor tractor registration no. KCTB308M. that the evidence tendered by the 1<sup>st</sup> respondent proved on a balance of probability that the said tractor was imported by the 1<sup>st</sup> respondent who later had a verbal agreement of sale with the 2<sup>nd</sup> respondent. That upon default of the purchase price, the 1<sup>st</sup> respondent through a motor vehicle search discovered that unknown to them, the same had been registered and transferred jointly in the appellant's name with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as co-owners. That to this extent the evidential burden of proof lied upon the appellant to demonstrate the circumstances under which their name was registered as co-owners. That the appellant filed a statement of defence but failed to call any witness. The 1<sup>st</sup> respondent relied on section 109 and 112 of the *Evidence Act*, *Anne Wambui Ndiritu v Joseph Kiprono Rapkoi & another* [2005] 1EA 334, *CMC Aviation Ltd v Cruisair Ltd (001)* (1987) KLR 103, *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCC No 834 of 2002 Citing the Case of *Avtar Singh Babra & another v Raju Govindji*, HCCC No 548 of 1998.



17. The 1<sup>st</sup> respondent submitted that the appellant did not issue a notice to the co- defendants pursuant to order 1 rule 14 of the *Civil Procedure Rules*. That in the absence of such notice, the court’s finding and holding that the parties are jointly and severally liable to pay the 1<sup>st</sup> respondent the purchase price cannot be faulted. That the appellant if at all aggrieved is entitled to recover the sum from the other defendants by way of reimbursement once they have settled the entire decretal sum. The 1<sup>st</sup> respondent relied on the cases of *Republic v PS in Charge of Internal Security ex parte Joshua Paul* (2013) eKLR and *Sammy Mbugua Njuguna v Wakababa Agencies Ltd 7 3 others* [2019] eKLR.
18. In the end the 1<sup>st</sup> respondent urged this court to find that the appeal is incompetent and factually lacking in merits and dismiss the same with costs.

### **The 2<sup>nd</sup> And 3<sup>rd</sup> Respondents’ Submissions.**

19. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any written submissions.

### **Analysis And Determination**

#### **Duty of court**

20. Under section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the said Act on courts of original jurisdiction in respect of suits instituted herein.
21. The first appellate court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & anor v Associate Motor Boat Co Ltd* 1968 EA 123.

#### **Issues**

22. Arising from the appeal and submissions filed by the parties, are three issues arise for determination. One is of a preliminary nature. The other two are substantive. Accordingly: -
  - i. Does the court have jurisdiction to adjudicate upon this appeal?
  - ii. Should the appellant be excluded from liability?
  - iii. Who bears the costs of this appeal?

#### **Jurisdiction**

23. The objection on jurisdiction is made on the basis that the appeal was filed out of time and without leave of the court.
24. Under section 79G of the *Civil Procedure Act*: -

‘Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’



25. Therefore, the court has discretion to admit an appeal out of time if the appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time.
26. Judgment under challenge was rendered on June 27, 2022. The memorandum of appeal was filed on July 29, 2022 which was two days late. Although the appellant did not seek for enlargement of time or validation of the appeal, fairness, equity and the interest of justice will not condemn such a party to doom where the delay is not inordinate. This philosophy follows after the principle on substantive justice expressed in article 159 of the *Constitution*. See quite apt a comment in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015] eKLR, by the Court of Appeal that:

‘It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint’.
27. See also article 48 of the *Constitution* that guarantees every person access to justice, as well as article 50(1) of the *Constitution*, which commands that, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
28. For the above reasons, the court finds and holds that the appeal is properly before this court.

#### **Of exclusion from liability.**

29. DW1 testified that she bought the tractor from Kenya tractors company. She stated that she was not given a log book but she conducted a search and knew it belonged to Kenya tractors. She however, did not have any copies of a logbook or search to support her claim.
30. PW1 testified that the 1<sup>st</sup> respondent imported the tractor. He produced importation documents. He further stated that from their records the tractor was sold on 04.-8.2014 and released to the buyer the same day. However, there was no formal arrangement made between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. PW1 produced an invoice dated 07.22.2014. The chassis number indicated in the invoice matched that in the record of NTSA.
31. The 3<sup>rd</sup> respondent did not produce any evidence to show that she had bought the tractor as she alleged. She only produced a bank statement showing that the appellant loaned her Kes 2,658,900/= and the said money was forwarded to Kenya tractors and equipment ltd.
32. PW1 testified that although there was no formal agreement for the sale of the motor tractor for a consideration of Kes 2,556,640, there was a verbal agreement to that end which was supported by the invoice to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents- but they never paid the purchase price.
33. The invoice produced by the 1<sup>st</sup> respondent for a sum of Kes 2,556,640/= indicates the chassis number of the suit tractor which tallies with the chassis number of the copy of records.
34. From the record, there is no evidence by the appellant to explain their registration as co-owners of the suit tractor. This will be borne out of the analysis below.
35. The court finds this case to be one with intriguing facts and incidents. The motor vehicle copy of records from NTSA indicates the suit tractor’s chassis no. as PY5503E00xxxx which matches the chassis no. in the invoice no PVINVSO5xxx by TATA Africa holdings (Kenya) ltd- the 1<sup>st</sup> respondent herein. And, this is the vehicle that was registered as number KTCB 308M.
36. The appellant (Equity bank) in its letter of offer dated 10.10.2014 addressed to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated at paragraph 6 that the proposed facility will be secured by joint registration



and chattels mortgage over the proposed one new John Deere agricultural Tractor: model 5503-75HP-4WD with 16 row agro-master planter. serial number :xxx. Further the pro-forma invoice by Kenya Tractors & Equipment Limited dated 27.02.2014 makes a reference to John Deere agricultural tractors: model 5503-75HP-4WD. There is also the letter of notification by equity bank addressed to Kenya Tractors & Equipment Limited.

37. A motor vehicle is only specifically identifiable by the chassis number. The pro-forma invoice by Kenya Tractors & Equipment Limited, the correspondences and the chattels mortgage with equity bank do not bear this crucial information. Therefore, the appellant has not established the relationship among, the chattels mortgage herein, the pro-forma invoice by Kenya Tractors & Equipment Ltd and letter of notification, and the tractor in issue which is the tractor that was sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. But, Equity bank was nonetheless, registered as a beneficial owner of the said tractor. Although the appellant stated that it never had any relationship with the 1<sup>st</sup> respondent- which is true in the formal sense-, but, their registration in the tractor in issue- which has not been specifically and duly identified to be the security in the chattels mortgage- has created a nexus to the suit property on which a cause of action may be sustained by the 1<sup>st</sup> respondent.
38. Astonishingly, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent stated that the tractor in issue was sourced from Kenya Tractors & Equipment Limited and financed by the appellant. Documents produced by the appellant refer and relate to the said company. This was their allegation. Thus, one wonders why this company was never made a party or a witness in the suit, or called upon through a formal notice to indemnify or contribute to any liability that may arise in the suit.
39. These lapses on the part of equity are major obstacles to their quest in this appeal which justifies a course that they be left where the court found them.
40. On the basis of the evidence, the 1<sup>st</sup> respondent proved its case on balance of probabilities. There is also no justification to exclude the appellant from liability.
41. As a consequence, the appeal is dismissed. However, in light of the lapses noted on the part of parties herein, there is no order as to costs on the appeal. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

1. Mr. Ochieng for the appellant
2. M/s Murgor for the 1<sup>st</sup> Respondent
3. Mr. Muraguri - CA

