



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 696 OF 2016**

**PETER OCHIENG OWUOR.....APPELLANT**

**- V E R S U S -**

**HIGH PRESSURE PLUMBING LIMITED....1<sup>ST</sup> RESPONDENT**

**EUROPEAN FOODS AFRICA LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and decision of Hon. E. Wanjala (Miss) SRM delivered on the 4<sup>th</sup> day of November, 2016 in Milimani CMCC No. 5481 of 203 )*

**JUDGEMENT**

1) Peter Ochieng Owuor, the appellant herein, filed a compensatory suit before the Chief Magistrate's Court, Milimani against **High Pressure Plumbing Ltd**, the 1st respondent herein, for the injuries he sustained while working for the 1st respondent as a welder and fitter on 30.4.2013. The 1st respondent filed a defence to deny the appellant's claim. At the end of the trial, judgement was entered in favour of the appellant and against the 1st respondent in the sum of ksh.253,000/= for both general and special damages.

2) The decree was extracted and executed by way of attachment of the goods allegedly belonging to **European Foods Africa Ltd**, the 2nd respondent herein. The 2nd respondent filed objection proceedings vide the motion dated 25.4.2016. Hon. E. Wanjala, learned Senior Resident Magistrate heard the motion and lifted the attachment on the basis that the goods attached belonged to the 2nd respondent.

3) The appellant was aggrieved by the aforesaid decision, hence he preferred this appeal and put forward the following grounds:

*i. THAT the honourable Senior Resident Magistrate erred in law and fact by finding that the 2<sup>nd</sup> respondent was the legal owner of the proclaimed movable properties.*

*ii. THAT the honourable Senior Resident Magistrate erred in law and fact by finding that invoices produced by the 2<sup>nd</sup> respondent (objector) were proof of ownership of the proclaimed movable properties.*

*iii. THAT the honourable Senior Resident Magistrate erred in law and fact by finding that the appellant did not dispute the 2<sup>nd</sup> respondent's (objector's) alleged receipts (invoices) as proof of ownership contrary to express statements in the replying affidavit sworn and filed on 30<sup>th</sup> May, 2016 and written submissions filed on 24<sup>th</sup> August, 2016.*

*iv. THAT the honourable Senior Resident Magistrate erred in law and fact by failing to consider the appellant's written submissions dated and filed on 24<sup>th</sup> August, 2016 together with judicial authorities attached thereto.*

4) When the appeal came up for hearing, this court was prompted by the appellant's advocate to give directions which were to the effect that the appeal be disposed of by written submissions. At the time of writing this judgment, the appellant was the only party who had filed his submissions.

5) I have re-evaluated the arguments made before the trial court and considered the written submissions filed by the appellant. The record shows that, the 2nd respondent argued before the trial court stating that the properties proclaimed by Moran Auctioneers on 20th April 2016 belongs to it and that the 1st respondent does not have any legal or equitable interest over those properties. It was further argued by the 2nd respondent that it is a separate legal entity from the 1st respondent.

6) The 2<sup>nd</sup> respondent also stated that it was not a party nor privy to the suit filed against the 1st respondent.

7) In response to the 2<sup>nd</sup> respondent's arguments, the appellant stated that the 1st and 2nd respondent companies shared a common director by the name **Stephen Belzer** and that the two companies share the same premises and same postal addresses. The appellant argued that for the above reasons the 1st respondent has equitable interest in the movable properties proclaimed by the auctioneer.

8) The learned Senior Resident Magistrate took into account those arguments and came to the conclusion that the two companies are separate legal entities. She also came to the conclusion that the 2nd respondent presented documents proving that it owned the assorted air conditioners which were proclaimed by the auctioneer.

9) On appeal, the appellant urged this court to set aside the order which upheld the objection proceedings. The appellant pointed out that the 2nd respondent failed to show how and when it acquired the premises known as **Cape Business Park Godown** where the 1st respondent also operates.

10) The appellant also argued that the 2<sup>nd</sup> respondent merely tendered invoices instead of receipts to prove ownership of the air conditioning kits and the deep freezer. It was further pointed out that there was no proof of ownership of the generator attached.

11) Unfortunately the 2<sup>nd</sup> respondent did not file its written submissions in response to those filed by the appellant.

12) It is not in dispute that Moran Auctioneers proclaimed movable property to wit. **Assorted air conditioner, containers, generator, deep freezers** and tools from the premises occupied by the 2nd respondent known as **Cape Business Park Godown – D8, Thika Road**. The appellant has argued that the 2nd respondent has not shown when and how it acquired Cape Business Park Godown. With respect, I think such an argument cannot be entertained because the aforesaid premises were not attached, therefore the 2nd respondent was not bound to disclose how it acquired the same.

13) The appellant has also complained that the 2<sup>nd</sup> respondent only supplied invoices instead of receipts as evidence of ownership of the goods attached. It is apparent from the averments contained in paragraph 6 of the affidavit of Mercy Cheruto filed in support of the 2nd respondent's motion that the 2nd respondent attached invoices, a receipt and sales invoices as evidence of purchase and ownership of the goods attached by the auctioneer. None of those invoices or receipts is in the name of the 1st respondent.

14) The appellant failed to present any evidence to show that the 1<sup>st</sup> respondent is the owner or has a beneficial interest of the proclaimed goods. The appellant therefore failed to discharge the burden of proof.

15) In an attempt to discharge that burden, the appellant stated that the two companies share the same premises, address and directors. That in my view does not help the appellant's case. The fact that two companies share the same directors, offices or address does not in itself make them one and the same company. The two companies remain separate legal and distinct entities.

16) The learned Senior Resident Magistrate therefore came to the correct decision that the 1st and 2nd respondent are separate and distinct legal entities.

17) In the end, I find no merit in this appeal. It is dismissed in its entirety with costs being awarded to the 2nd respondent.

**Dated, Signed and Delivered in open court this 9<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents