



Akumu v Odhiambo (Appeal E025 of 2023) [2024] KEELRC 961 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 961 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E025 OF 2023**

CN BAARI, J

MAY 2, 2024

BETWEEN

SAMUEL ODHIAMBO AKUMU APPELLANT

AND

STEVEN OMONDI ODHIAMBO RESPONDENT

(Being an appeal from the Judgment of Hon W. K. Onkunya delivered on 22nd March, 2023 in Kisumu CMELRC CAUSE NO. E028 OF 2020)

JUDGMENT

1. Samuel Odhiambo Akumu, the Appellant herein, lodged this appeal dated 12th May, 2023, premised on his dissatisfaction with the decision of Hon. W. K. Onkunya delivered on 22nd March, 2023, arising from Kisumu Chief Magistrates Court Cause No. E028 of 2020.
2. The appeal is premised on the following grounds: -
 - i. That the trial Magistrate erred in fact and law by failing to appreciate that the objector failed to prove that the items attached belonged to him, whereas there were sufficient evidence that the items attached were in the premises of Metropak.
 - ii. That the Learned Magistrate erred in fact and law by allowing execution to proceed against personal properties of the objector, yet the decree is against a limited company and the corporate veil has not been lifted.
 - iii. That the Learned trial Magistrate failed to appreciate the evidence adduced by the objector thus arriving at an erroneous findings.
3. The Appellant prays that his appeal be allowed and the ruling of the Magistrates Court be set aside with costs to the Appellant.
4. The appeal was canvassed by way of written submissions, and submissions were filed for both parties.



The Appellant's Submissions

5. The Appellant submits that in entering judgment against him, the Trial Court ignored the evidence before her and that in her judgment of 1st July, 2022, the Learned Magistrate did not bother dwelling with the issues raised and therefore ignored vital evidence.
6. It is the Appellant's submission that a careful perusal of the judgment of 1st July, 2022, shows that the judgment does not meet the requirements of Order 21 Rules 4 & 5 of the Civil Procedure Rule.
7. He submits that the judgment dated 1st July, 2022 in the claim was against the Respondent named Metropak Hotels Limited and that execution can only be permitted against the directors of the Respondent (Metropak Hotels Limited) after lifting the corporate veil.
8. It is his assertion that by law a Company is a separate legal entity from its directors and shareholders as explained in the case of *Salomon v Salomon & Co. Limited*, (1897) AC 32, where the court stated thus: -

“A limited liability company enjoys separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence which means it can continue to exist despite demise of its owners- shareholders”
9. It is submitted that as a general principle in law, a company has a separate legal personality from personalities of its Shareholders and that Directors, and Shareholders are protected from being personally liable for the company's debts and other obligations. He submits that the judgment debtor is Metropak Hotel Limited, whereas he trades as Metropak Hotel.
10. It is the Appellant's submission that the Respondent has not followed any procedures for lifting the corporate veil, which would then allow the court to pierce the veil of incorporation and hold the Shareholders/Directors personally accountable.
11. The Appellant submits that the Respondent herein, has not moved the court to lift the corporate veil, and hence the execution against the shareholders should fail on the basis that a company is a separate legal entity.
12. It is his submission that the properties proclaimed by Pambo Auctioneers was an illegality and done unprocedurally. He submits further that among the items proclaimed, is a vehicle Registration No. KCQ 804H, belonging to one Antony Waweru Wambugu who is not party to the suit.
13. The Appellant submits further that the properties proclaimed on 8th December, 2022, were proclaimed without the Judgment debtor or the Auctioneer ascertaining the ownership of the properties, and ended up proclaiming goods belonging to third parties.
14. It is submitted that the evidence provided by the Appellant such as the letter of provisional appointment, contract of appointment, contract renewal, salary review letter, the Respondent's Bank statement show that the Appellant practiced in the name and style of Metropak Hotel which is a sole proprietorship and not Metropak Hotel Limited.
15. The appellant prays that this appeal be allowed and judgment entered in his favour.

The Respondent's Submissions

16. The submissions filed by the Respondent relate more to the motion filed before the lower court than they do the appeal herein. I will nonetheless proceed to pick out the points that are applicable to this appeal.



17. It is the Respondent's submission that the objector/Appellant has failed to meet the provisions of Order 22 Rule 55 and 54 of the *Civil Procedure Rule*. He placed reliance in the case of *Captain Harro Gandy v Caspar Air Charters Limited* (1956) EACA to support this position.
18. The Respondent further submits that the burden is on the Appellant to prove beneficial interest and/or establish his right to have the attached property released from the attachment. He submits that in this case, the Appellant did not adduce any evidence to establish the nexus between him and the proclaimed items.
19. It is his submission that the documents annexed by the Appellant are not proof of registration of a business, and in fact the Trading License that he annexed bears the same registration number (CPR/2013/101684) similar to that which is in the CR 12 that the decree holder annexed in his affidavit in which the Appellant is listed as one of the directors.
20. The Respondent further submits that though the objector purports to be a sole proprietor, the trading license he annexed in his supporting affidavit bears registration number of a company and not a business by a sole proprietor as he alleges, and further that there is no change of business registration that accompanied his application.
21. The Respondent submits that if the Honourable Court in exercising its wisdom deems fit that the corporate veil needs to be pierced in this instant, then we believe that the court has the discretion in ordering so suo moto.

Analysis and Determination

22. I have considered the Record of Appeal together with the rival submissions. The singular ground for determination is whether the lower court erred in allowing execution against the personal properties of the objector/Appellant.
23. The role of a first appellate Court was succinctly elucidated in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where it was stated:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse 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”
24. My role herein, as a first Appellate Court therefore, is to re-evaluate, re-assess and re-analyse the extracts on the record and so as to determine whether the conclusions reached by trial court are to stand or not.
25. The Appellant in his submissions stated that he produced documents such as the Respondent's letter of appointment, his contract of appointment, letter of contract renewal, salary review letter and the Respondent's Bank statement, which show that the Appellant practiced in the name and style of Metropak Hotel which is a sole proprietorship, and not Metropak Hotel Limited.
26. The evidence adduced and referred to under paragraph 25 above, was produced under the claim and not the application that resulted in the impugned ruling. The Judgment of 1st July, 2022 is not the subject of this appeal, hence the court does not have the opportunity of re-evaluating the evidence produced at the hearing so as to determine the issue raised herein.



27. It then turns out that the Appellant's major issue concerns the handling of the original claim and by extension the resultant Judgment of 1st July, 2022, which is not the subject of this appeal.
28. The Appellant should in my view, have appealed against the judgment of 1st July, 2022 for starters, so as to allow the court opportunity to determine who the right judgment debtor is for purposes of execution.
29. In the circumstances, the Appellant has not satisfactorily demonstrated that he is not the judgment debtor premised on the lower court's Judgment of 1st July, 2022, which remains unchallenged.
30. This court therefore, finds no basis to set aside the ruling of the Trial Court delivered on 22nd March, 2022.
31. The appeal fails and is dismissed with costs to the Respondent.
32. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF MAY, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Appellant

N/A for the Respondent

Arwin Ongor - C/A

