



**Tata Africa Holdings (Kenya) Ltd v Singh & another (Civil Appeal
190 of 2019) [2024] KECA 544 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KECA 544 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 190 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MAY 23, 2024**

BETWEEN

TATA AFRICA HOLDINGS (KENYA) LTD APPELLANT

AND

SURJIT SINGH & MALKIAT SINGH 1ST RESPONDENT

CANELAND LIMITED 2ND RESPONDENT

*(Being an appeal arising from the Judgment of the High Court of Kenya at
Kisumu (T. W. Cherere) dated 23rd May, 2019 in HCCC No. 10 of 2017)*

JUDGMENT

1. The proceedings leading to the judgment subject of this appeal was initiated by Tata Africa Holdings (Kenya) Limited (hereinafter referred to as Tata Africa), who is now the appellant before us. Tata Africa had sued Caneland Ltd (1st respondents herein) and Surjit Singh & Malkiat Singh (the 2nd respondents) hereinafter referred to collectively as respondents. The claim was against the respondents jointly and severally for payment of Kshs.40,397,984/ being the sum due and owing in respect of goods/machinery supplied and or services rendered.
2. In their joint defence, the respondents amongst other things, denied that there was any dealership agreement between it and Tata Africa or that it requested for or were supplied with any goods, machinery or equipment.
3. The respondents also denied having received any goods and services from Tata Africa through its subsidiaries Tata Motors Ltd and Integrated Construction Equipment Ltd; and challenged the legal capacity of Tata Africa to file suit on behalf of its subsidiary companies.
4. In proof of its case, Tata Africa testified through Dennis Musungu Ogolla, an employee of the company, whose testimony was that Caneland Limited was appointed dealers of the company within



- Western Kenya, and sold motor-vehicles, trucks, equipment and motor-vehicle accessories on behalf of Tata Africa, but did not remit payments. Under cross-examination the witness admitted that he had written authority only from Tata Africa to file suit and testify.
5. Tata Africa filed written submission in which it urged the Court to uphold the contractive sanctity between Tata Africa and the respondents and find the respondents liable. Tata Africa produced a bundle of local purchase orders issued to it and invoices issued to the respondents, which invoices, they contended, had not been settled.
 6. The respondents did not call any witnesses or file any written submissions in the trial court. In its judgment delivered on 23rd May, 2019, the High Court (Cherere, J) considered the issue which was raised in the defence regarding Tata Africa's legal capacity to sue on behalf of its subsidiary companies, and found that the subsidiary companies were separate legal entities, and absent Board resolutions from the subsidiary company, Tata Africa's claims on behalf of the subsidiary companies could not be sustained. The High Court, therefore, entered judgment for Tata Africa against Caneland Limited for the sum of Kshs.1,824,680/ which is the amount the court found due to it.
 7. In its memorandum of appeal, Tata Africa has raised seven grounds in which the issues raised include, the learned Judge having erred in treating Tata Africa's constituent Departments as legal entities; in holding that it was necessary for the Constituent Departments to file a resolution of its Board of Directors authorizing the filing of the suit; in failing to distinguish the decision in Bugere Coffee Growers Ltd –vs- Sebaduka & Another [1970] EA 147; and in holding that the pleadings in Tata Africa's claim were in the nature of special damages when the claim was based on a continuous sub-dealership contract between the parties.
 8. In support of the appeal, Tata Africa filed written submissions in which it submitted that its constituent departments were wrongly described and erroneously referred to as companies; that this was purely the result of an advocate's mistake in drawing up the pleadings. The mistake was cured by evidence which showed that the constituent departments were not limited companies by themselves, nor did the respondents deal with the constituent departments, but it had a sub-dealership contract with Tata Africa.
 9. Tata Africa referred the Court to Order 1 Rule 9 of the Civil Procedure Rules, and the High Court decision in Fubeco China Ltd –vs- Naiposha Company Ltd & others, ML HCCC No. 222 of 2012 [2014] eKLR, urging that the misdescription of its constituent departments as companies, was not fatal to its suit. Tata Africa maintained that the respondents did not adduce any evidence which showed that the Tata Africa's witness did not have the authority to testify, and that any defect in this regard was in any case curable under Article 159(2)(d) of *the Constitution* in order to serve the ends of justice.
 10. In addition, Tata Africa relied on Makupa Transit Shade Limited & another -vs- Kenya Ports Authority & another [2015] eKLR, together with Spire Bank Limited -vs- Land Registrar & 2 others [2019] eKLR, arguing that its failure to produce a letter of authority to sue was not fatal to its claim as there was an averment to this effect in the affidavit. In addition, it was upon the respondents to demonstrate by evidence that Tata Africa was not authorized to file suit nor was the officer authorized to testify.
 11. Tata Africa submitted that its claim was based on a contractual relationship between the parties; that the evidence showed that the parties had a running account for the supply of goods; that local purchase orders and invoices were produced that confirmed that at the request of Caneland Limited, Tata Africa supplied to it various goods, equipment and machineries; and that the respondents did not dispute the figures reflected in the statement. Tata Africa, therefore, urged the Court to allow the appeal with costs and give judgment in its favour for the sum of Kshs.37,158,382/ being the value of the goods and services supplied to the respondents for which payments were not made.



12. The respondents also filed written submissions, in which it urged the Court to dismiss the appeal. The respondents pointed out that it had filed written submissions in the High Court in which it raised the issue of Tata Africa's Board authorization, and or capacity to sue as a matter of law. The respondents noted that Tata Africa's witness, Dennis, only had authorization from Tata Africa, and none from the subsidiary companies.
13. The respondents relied on the Court's decision in *Bamburi Portland Cement Company Limited -vs- Imranali Chandbhai Abdulhussein* [1996] eKLR, for the proposition that a subsidiary company is a separate and distinct legal entity on its own, and the parent company cannot purport to act on its behalf, without its authority. The respondents urged the Court to uphold the finding of the High Court as the judgment of the High Court was founded on well established legal principles.
14. We have carefully considered this appeal, the contending submissions of the respective parties, and the law. As was stated by the Court in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (Civil Appeal No. 161 of 1999) eKLR [2013] the Court 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 reanalyse 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. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held inter alia that:

‘On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence’ “
15. In its plaint Tata Africa had pleaded at paragraph 1 that it was the holding company for its subsidiaries namely Tata Motors Limited and Intergraded Constructions Equipment Limited. At paragraph 6 of the plaint, Tata Africa claimed Kshs. 10,490,310/ for machinery/equipment supplied through its subsidiary company Tata Motors Limited, and at paragraph 7, Tata Africa similarly claimed for machinery/equipment worth Kshs. 37,312/ supplied to the respondents by its subsidiary company namely Integrated Constructions and Equipment Limited. Therefore, it was clear that that Tata Africa was claiming the amounts on behalf of its subsidiary companies for machinery and equipment supplied by the said subsidiary companies.
16. At paragraph 7 of the respondents' joint defence, the respondents raised an issue of law regarding the legal capacity of Tata Africa to file the suit on behalf of its subsidiary companies, Tata Motors Limited and Integrated Construction Limited, maintaining that the companies and Tata Africa were separate and distinct legal entities.
17. As there was no reply to the defence, Tata Africa and the respondents joined issue, with regard to Tata Africa's locus standi to lodge the claim on behalf of its subsidiary companies. Thus, the issue was a question of law that required to be settled, before the evidence regarding Tata Africa's claim could be addressed. Indeed, in its submissions before the trial court, Tata Africa had listed the issue of its locus standi as the first issue for determination by the trial court.
18. In its submissions before the trial court, Tata Africa argued that it produced Local Purchase Orders which were on the respondents' letter head, and invoices issued in the name of Tata Africa,



and therefore there was sufficient evidence upon which the Court should uphold the contractual relationship between the parties, and find the respondents liable to Tata Africa. Similarly, in their submissions before this Court, the focus of Tata Africa in regard to the issue of locus standi was the evidence which in their view confirmed that Tata Africa supplied machinery and equipment to the Caneland Limited, and therefore the Court should not be fettered by the issue of authorization which, in its view, was a mere technicality. In our view Tata Africa is putting the cart before the horse, as the evidence can only be considered if the court is satisfied that the suit is properly before it. It was therefore imperative that the issue of Tata Africa's locus standi be addressed first.

19. In *Galaxy Paints & Company Limited -vs- Falcon Guards Ltd* [2000] 2EA 385, this Court held that the issues for determination in a suit generally flow from the pleadings, and the trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings (*Gandy -vs- Caspai* [1956] EACA 139 and *Farnandes -vs- People Newspaper Ltd* [1972] EA 63)
20. Contrary to the pleadings by Tata Africa in which it referred to the subsidiary companies as "Tata Motors Limited and Integrated Construction Equipment Limited", Tata Africa seemed to have abandoned this position and argued in its submissions that the two companies were in fact "constituent departments". Tata Africa did not file any reply to the respondents' defence in which it was alleged that the two subsidiaries were separate legal entities. Moreover, in his affidavit sworn in support of the plaint and in his evidence, Dennis did not make any reference to the two subsidiaries. It is under cross-examination that he made reference to the two subsidiaries, but did not refer to them as "constituent departments". He explained under reexamination that under Tata Holdings, there were Tata Motors, John Deere, ICE and HCD, and Tata Chemicals. He did not, however, explain the legal relationship between these entities and Tata Africa.
21. Dennis admitted that he only had written authority from Tata Africa. This means that there was no evidence upon which the court could hold that the subsidiary companies referred to in the plaint were actually constituent departments of Tata Africa. The reference to constituent departments was in fact not in the pleadings and only came through the submissions that were made by Tata Africa.
22. Contrary to the submissions made by Tata Africa, a party is bound by its pleadings, and the Court cannot go by evidence which is not supported by pleadings. The pleadings were clear that Tata Africa was claiming the amount on behalf of its subsidiary companies. Since the respondents had questioned the legal capacity of Tata Africa to sue on behalf of the subsidiary companies, it was upon Tata Africa to plead its locus standi and prove that it had the authority to sue on behalf of the subsidiary companies. Failure to plead and produce the authority from the subsidiary companies to Tata Africa to file suit on behalf of the subsidiary companies, dealt a death blow to the claim. The learned Judge cannot therefore be faulted for rejecting part of Tata Africa's claim relating to the supply of machineries and equipment by the subsidiaries. As regards the judgment in regard to the sum of Kshs.1,824,680/ that was awarded to Tata Africa, the respondents have not cross appealed or challenged the judgment and we have no reason to interfere with it.
23. For the above reasons, we uphold the judgment of the High Court and dismiss the appeal by Tata Africa. We award costs of this appeal to the respondents. Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL



H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

