



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 105 OF 2009**

**BETWEEN**

**MOHAMED ADAN MOLLY .....APPELLANT**

**AND**

**LINKSOFT (K) LTD .....1<sup>st</sup> RESPONDENT**

**LINKSOFT COMMUNICATION SYSTEMS LTD .....2<sup>nd</sup> RESPONDENT**

***(Appeal from a Ruling of the High Court of Kenya at***

***Kisumu (Mwera, J) dated 21<sup>st</sup> March 2006***

**in**

**KISUMU HCCA No. 59 OF 2006)**

**\*\*\*\*\***

**JUDGEMENT OF THE COURT**

This is a second appeal from the original orders of the Senior Principal Magistrate (H. I. Ongudi) delivered on 21<sup>st</sup> March, 2006 where the learned Magistrate allowed objection proceedings taken by the 2<sup>nd</sup> respondent whose assets had been attached as a result of a judgement of that court. That Ruling led to an appeal which was heard by Mwera, J (as he then was) who in a judgement delivered on 16<sup>th</sup> March, 2009 dismissed the appeal. The appellant was dissatisfied with those findings and that provoked this appeal.

Seven grounds are taken in the Memorandum of Appeal and these are as:-

“1. THAT the Learned Judge erred in law in failing to find that from the facts of this case Linksoft (K) Limited and Linksoft Communication Systems Limited were one and the same entity only described in the suit as Linksoft (K) Limited.

2. THAT the Learned Judge erred in law in failing to find that the description of the defendant as Linksoft (K) Limited comprised the entity Linksoft Communication Systems (K) Limited.

3. THAT the Learned Judge erred in law in failing to find that the representation by counsel for

- Linksoft (K) Limited could only be representation for Linksoft Communication Systems Limited since Linksoft (K) Limited does not exist and thus counsel could not be representing a non-existent legal entity and could not be instructed by a non-existent person.
4. THAT the Learned Judge erred in law in failing to find that this was a case of misnomer and not that of a wrong entity being sued.
  5. THAT the Learned Judge erred in law in failing to find that the trial Magistrate in first accepting in the judgement that this was a case of misnomer made an error of law in reversing this finding at the Objection Proceedings.
  6. THAT the Learned Judge erred in law in failing to find that the purported objector had fully participated in the proceedings in the knowledge that it was the entity described as Linksoft (K) Limited and was thus estopped from denying this at the stage of satisfaction of the judgment or execution.
  7. THAT the Learned Judge erred in law in failing to allow the appeal from the Subordinate Court.”

It is therefore prayed that the Ruling of the trial magistrate be reversed and the appellant be allowed to proceed with execution against the 2<sup>nd</sup> respondent.

Being a second appeal our duty is not to re-evaluate the evidence but to consider whether the first Appellate Court properly carried out the functions of reappraisal of the evidence - See the judgement of the Court of Appeal of Uganda in **Mutazindwa v Agaba & Others [2008] 2 EA 265** and this courts' judgement in **Mwanasokoni v Kenya Bus Services Limited [1985] KLR 931**.

In the Plaintiff filed before the Chief Magistrates Court, Kisumu, on 28<sup>th</sup> March, 2003 the plaintiff, Mohamed Adan Moly sued the defendant, Linksoft (K) Limited, the cause of action being an accident that occurred on or about 19<sup>th</sup> February, 2002. It was alleged in the Plaintiff that on that day the plaintiff was travelling as a fare – paying passenger in the motor vehicle registration mark KAN 207 N owned by the defendant along Kisumu – Ahero road and that the defendants' authorized servant or agent managed the said motor vehicle with negligence causing it to collide with another named motor vehicle. Particulars attributed negligence on the defendant's driver and particulars of injuries show that the plaintiff suffered very serious injuries. It was therefore prayed that the plaintiff be compensated by the defendant through damages.

Summons to Enter Appearance were duly served and there being no appearance interlocutory judgement was entered for the plaintiff against the defendant. A formal proof took place and damages were duly awarded to the plaintiff in a judgement which is not relevant to this appeal. Execution proceedings were commenced and this is where the drama begins.

The defendant appointed a firm of Advocates who successfully applied for judgement to be set aside. Leave was granted to the defendant to file defence out of time. In the Statement of Defence that followed, the defendant pleaded at the material part:

**“The Defendant denies that it was at all times or at all the registered owner of motor vehicle registration number KAN 207N or that the same was under its care, management and control as alleged in paragraph 3 of the plaint and puts the Plaintiff to strict proof thereof”.**

Judgement having been set aside the matter proceeded for hearing where the plaintiff testified on occurrence of the accident and injuries suffered. One of the documents the plaintiff produced as part of evidence was a Copy of Records from the Commissioner of Motor Vehicles. This document dated 15<sup>th</sup> September, 2003 addressed to the plaintiffs' Advocates M/s Sila Munyao & Co Advocates showed that the motor vehicle KAN 207N was as at 19<sup>th</sup> February, 2002 owned by “Linksoft Communication System Ltd & CFC Bank Limited “ of Post Office Box 72833, Nairobi. The defendant did not call any evidence and in the judgement already adverted to the trial magistrate found the defendant fully liable for the accident and awarded damages to the plaintiff.

At the same time and because of proclamation that had taken place objection proceedings were filed by a company, Linksoft Communications Systems Limited (the 2<sup>nd</sup> respondent) which company claimed to be the owner of the property that had been proclaimed. The plaintiff gave notice that he intended to proceed with execution. This led to a formal application being filed where it was claimed that the properties attached belonged to the 2<sup>nd</sup> respondent and the attachment was wrongful and that the attachment be lifted. In the accompanying affidavit it was deponed inter alia that M/s Linksoft Communications Systems Limited was not a party to the suit; that the said company was a separate legal entity from the Defendant and that the attachment was therefore wrongful. Amongst documents exhibited as part of the evidence was a copy of Certificate of Incorporation No. C. 65108 issued to Linksoft Communications Systems Limited on 25<sup>th</sup> May, 1995. There were also documents to show ownership of the attached goods which belonged to the 2<sup>nd</sup> respondent (objector).

The plaintiff in a replying affidavit to the application stated inter alia that there was a misdescription of the defendant in the Plaint as “Linksoft (K) Limited” instead of “Linksoft Communications Systems Limited”. The plaintiff deponed further that Summons to Enter Appearance had been properly served and received by a Director of the objector and that the defendant and the objector shared a postal address. The plaintiff's case was therefore that the defendant and the objector were one and the same entity. In the Ruling that was subject of the first appeal the learned Magistrate after considering the materials placed before her and hearing submissions of the parties allowed objection proceedings and lifted the attachment. The magistrate delivered herself thus in part of the Ruling:

**“It has clearly come out now that there has been misdescription of parties. The party sued is Linksoft (K) Limited and not Linksoft Communications Systems Limited. And the parties Mis described (sic) are Limited Liability companies. What is the Legal position?. A Limited Company is a distinct legal entity capable of suing and being sued. They may be sister companies but each is distinct from the other. Does a company called Linksoft (K) Ltd exist? That is the company that was sued by the Plaintiff. There is no law that allows two separate legal entities to be one.**

**There is no denial that the property attached belongs to the objector. There is the issue of the objector herein stamping Documents, summonses etc. Whom was the Plaintiff suing? Was it the Defendant or Objector? A mistake may have been made but it will not be allowed by this court to be used to go against the law and laid down procedures. The attached properties (sic). The attached properties to be immediately released to the objector forthwith (sic).”**

In the first appeal the appellant took 3 grounds of appeal to the effect that the magistrate erred in finding the defendant and the objector to be separate legal entities; that the magistrate erred in ordering release of the attached property and that the magistrate erred in ordering the appellant to pay auctioneers fees.

Justice Mwera heard the appeal and dismissed it. The learned judge in the course of the judgement wondered why the appellant had not amended his pleadings. He also said:-

**“... The appellant nonetheless proceeded against a party he had knowledge did not own the offending motor vehicle, got an award and without properly proceeding against the 2<sup>nd</sup> respondent, proceeded to attach its goods on the basis that the 2<sup>nd</sup> respondent having acknowledged service of summons to enter appearance, it should be estopped from resisting attachment of its goods. There is nothing in law or practice to back ones stand on that basis . It was a faulty stand if not reckless....”**

The appeal came before us on 6<sup>th</sup> June, 2013 when learned counsel Mr. Ken Ochieng appeared for the appellant. In urging the appeal counsel combined all grounds of appeal into a single issue: whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were one and the same entity. The submissions in support were a recapitulation of the position taken by counsel throughout the trial and the first appeal to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were one and the same entity.

In opposing the appeal learned counsel for the 2<sup>nd</sup> respondent Mr. E. M. Nyamweya urged that the appeal be dismissed because the 1<sup>st</sup> and 2<sup>nd</sup> respondents were separate legal entities.

The learned judge in the first appeal considered all the material that had been placed before the learned magistrate. The judge re-evaluated the material and the evidence. Of particular interest to the judge was that the plaintiff was represented by counsel and the Plaintiff was indeed drawn by a firm of Advocates. A warning shot was fired in the defence when it was pleaded that the defendant was not the owner of the motor vehicle described in the Plaintiff as belonging to the defendant and had neither management nor control of it. A second warning shot, this with more consequences, was heard in the form of the Objection Proceedings that were taken by the 2<sup>nd</sup> respondent. The appellant did not take heed but ploughed on when it would have been wiser to take heed and back -pedal, reconsider the issues and re-strategise. It is trite law that a limited liability company is a legal entity separate even from its shareholders and directors. It has full capacity and ability to sue and be sued. It is a legal person. This position was restated as long ago as 1897 by Lord Macnaghten in the celebrated corporate case of **Salomon v Salomon & Co Limited [1897] A. C. 22 at 51** as follows:

**“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”**

It could not therefore be said as was maintained by the appellant all along from the trial court to this court that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were one and the same. They are different legal entities. The 2<sup>nd</sup> respondent was not sued and could not in law be responsible for the acts or omissions of another legal entity, the 1<sup>st</sup> respondent.

In the premises of the matters considered by the learned magistrate and which the learned judge re-evaluated and reconsidered in full there cannot be any reason for us to interfere with the findings reached by them. The appeal has no merit and it is dismissed with costs to the 2<sup>nd</sup> respondent.

***Dated and Delivered at Kisumu this 26<sup>th</sup> day of July 2013***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**