



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 2 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DELLOITE CONSULTING LIMITED.....APPELLANT

VERSUS

PATRICK MUSAU MUTUA.....1ST RESPONDENT

THE RECEIVER MANAGER,

AFRI PACKAGING AND PRINTING LIMITED.....2ND RESPONDENT

(Being an appeal arising from the ruling and order of Hon. Miss Ileri A., Resident Magistrate which was delivered on 19th June 2009 at the Chief Magistrate's Court at Milimani Commercial Court in Civil Case No. 12191 of 2004)

JUDGMENT

The Appellant, Deloitte Consulting Limited filed this appeal vide a Memorandum of Appeal dated 17th July 2009 in the High Court at Nairobi, being **Civil Appeal No. 379 of 2009**, against the Ruling and order of the learned Resident Magistrate Ileri A. (Miss.) in **Civil Case No. 12191 of 2004 in the Chief Magistrate's Court at Nairobi - Milimani Commercial Courts**, delivered on 19th of June 2009.

The 1st Respondent/Plaintiff, Patrick Musau Mutua was an employee of Afri Packaging and Printing Limited. When his services were terminated he initially sued the company claiming his terminal dues. The company went into receivership. The 1st Respondent/Plaintiff then amended the claim to enjoin the 2nd Respondent, The Receiver Manager Afri Packaging and Printing Limited.

On 15th August 2008, judgment was entered in favour of the 1st Respondent/Plaintiff at Kshs.125,189.20 plus costs and interest. Warrant of Attachment were thereafter issued. On 21st January 2009, the 1st Respondent in execution of the judgment aforesaid, instructed Galant Auctioneers who proclaimed the assets of Deloitte Consulting Limited, the Appellant herein. The Appellant then filed Objection Proceedings against the attachment of its assets. In her ruling, the Learned Resident Magistrate Ileri A. (Miss.) dismissed the application with costs to the decree holder.

The Appellant being aggrieved with the said Ruling filed the Appeal herein setting forth the grounds of appeal as follows:-

- 1) *The Learned Magistrate erred in law and in fact in failing to find that the Appellant and the 2nd Respondent were separate and distinct legal persons.*
- 2) *The Learned Magistrate erred in fact by finding that from the material before her it had not been shown that the goods that had been attached to enforce the courts judgment belonged to the Appellant who had objected to the attachment and not the 2nd Respondent who was the Judgment Debtor.*
- 3) *The Learned Magistrate fell in error by finding that the judgment in the matter had to be satisfied without finding that the resulting decree could only be enforced against the Judgment Debtor.*
- 4) *The Learned Magistrate misdirected herself on a point of law as she found that since there was no appeal from the decree the Appellant's objection to, execution of the decree against it was a without merit.*
- 5) *The Learned Magistrate ought to have found that whether or not the decree had been appealed against was of no consequence to the Appellant's objection proceedings.*

The Appellant prays that the Appeal be allowed and for the Order of the Subordinate Court dismissing the Appellant's Chamber Summons dated 20th February 2009 to be set aside and be replaced with an Order allowing that application. Further, that the costs of the Appeal and those of the Subordinate Court be awarded to the Appellant.

The matter came up for hearing on 10th February 2020. The Appellant's advocate confirmed having filed written submissions on 7th November 2019 and requested to rely on the written submissions and to take a date of judgment. This Court granted leave that the appeal proceeds by way of written submissions and reserved a judgment date since the 1st respondent had failed to appear in court or to submissions as directed on 11th January 2017.

Appellant's Submissions

The Appellant submits that it instituted objection proceedings against attachment of its assets as it was neither a party nor a judgment debtor in the suit whose decree was purportedly being executed.

It submits that the finding that it failed to demonstrate that it owned the proclaimed goods or that it has an interest in them, contradicted the evidence before the Learned Magistrate that the Proclamation of Asset was served on "*Deloitte Company*" and which was sufficient proof of ownership of the proclaimed goods.

That its director further swore on oath (*line 15-16 of page 35 on the Record of Appeal*) that the Appellant has the legal right and absolute interest in the proclaimed goods subject to attachment as the bona fide owner of the said goods and which averment the 1st Respondent did not controvert. That the principle enunciated in **Mohammed & Another v Haidara (1972) EA 166** is that facts made on oath without being controverted amount to an admission. That it thus follows that the court was obliged to hold that the proclaimed goods belonged to the Appellant exclusively and that failure to find so was an error of principle justifying and/or requiring this Court to depart from the decision of the Learned Magistrate (**Ensure Insurance Limited v Direct Line Insurance Pic 5 (CA) at paragraph 28**).

The Appellant submits that the appointment of the 2nd Respondent as a Receiver Manager of Afri Packaging and Printing Limited was personal as under **Section 345 of the Companies Act Cap 486 Laws of Kenya (repealed)** which prohibited the appointment of a body corporate as a Receiver Manager of a Company in the following terms:

"A body corporate shall not be qualified for appointment as receiver of the property of a company, and any body corporate which acts as such a receiver shall be liable to a fine not exceeding two thousand shillings."

That the Receiver Manager was at all times an Agent of the Afri-Packaging and Printing Limited and that any judgment against the Receiver and Manager of the aforesaid Afri-Packaging and Printing Limited ought to have been satisfied out of the assets of Afri-Packaging and Printing Limited, the Principal. That this position has received judicial approval in **Manuel Anidos v Kinangop Windpark Limited (In Receivership) & 2 others [2019] eKLR**, where Makau J. while citing the rendition of *Charlesworth and Cain Company Law, 12th Edition by Geoffrey Morse at page 599* held that:

"A receiver is deemed to be the agent of the company in relation to the property attached by the floating charge...Contracts entered into by or on behalf of the company before the receiver's appointment continue in force, subject to the terms of the contract, after the appointment, but the receiver does not merely by his appointment incur personal liability on such contracts"

It contends that the 2nd Respondent being the Receiver and Manager of Afri-Packaging and Printing Limited was also a director of a separate company "*Deloitte Company*", a limited liability company with separate legal personality. That save for legal obligations incurred on behalf of the appellant company by its directors, it is not liable to any legal obligations incurred by its directors as agents of different companies. That the Appellant was therefore not liable for the obligations of the Receiver Manager who was an agent of Afri-Packaging and Printing Limited to the 1st Respondent herein. It submits that the Learned Magistrate thus erred in failing to find that the 2nd Respondent was a separate entity from the Appellant herein.

It is submitted by the Appellant that having failed to find that as the Appellant it was not the judgment-debtor and could thus not be bound by the Decree against the 2nd Respondent herein, the Learned Magistrate erred in law. Further, that the failure to find that the proclamation of the Appellant's goods was unlawful and illegal was an error. It concludes that it has demonstrated that;

- (i) The failure by the Learned Magistrate to make the inevitable finding that the proclaimed goods belonged to the Appellant herein was an error of principle;
- (ii) The Learned Magistrate erred in law and in fact in failing to hold that the Appellant and the 2nd Respondent herein were separate and distinct entities;
- (iii) The Learned Magistrate erred in law and in fact in failing to hold that the Appellant was not under any legal obligation to satisfy the decretal amount; and
- (iv) The Learned Magistrate erred in failing to find that as the Appellant was not a party to the proceedings before the subordinate court nor was it the judgment debtor, proclamation of its goods was illegal and unlawful.

Analysis and Determination

The Learned Magistrate Ireri A. (Miss.) dismissed the Objection

Proceedings with costs to the decree holder for reasons that:

- a) The application was made well after judgment had been delivered.
- b) The judgment debtor/applicant did not say if there was any appeal lodged against the said judgment and neither was there a complaint about the cause of action.
- c) No good reason was being advanced as to why the objector should not satisfy the decree, as the company still exists and the employee's wages are preferential claims
- d) The objector has failed to demonstrate that he owns the proclaimed goods or has an interest in them. The Learned Magistrate bound herself to the holding by Njagi J. in **HCCC 200/03**.

I have considered the ruling by the Hon. Resident Magistrate. It appears from the ruling that the Learned Magistrate did not appreciate the nature of the proceedings before her. She did not appreciate that the objector was not party to the proceedings before her. No mention is made in the ruling about the averments in the affidavit supporting objection proceedings.

In the case of **Manuel Anidos v Kinangop Windpark Limited (In Receivership) & 2 others [2019] eKLR** the Makau J. cited the case of **Surya Holdings Limited & 2 others v Cfc Stanbic Bank Limited [2015] eKLR** where Gikonyo J. held that:

"... The receiver is the agent of the company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company... See also Halsbury's Laws of England, Volume 39, Fourth Edition, at paragraph 938, on Receivers and Managers' duty as agent of the company to account to the company and all parties interested including guarantors and that failure to so account may elicit an order being made directly to the Receivers and Managers... See also Medforth v Blake, [1999] 3 All ER 97 (supra) and Smiths Ltd vs. Middleton where it was held that a receiver and manager runs the company as its agent and so is answerable to the company for the conduct of its affairs as well as to keep or cause to be kept full accounts (i.e. fuller than the abstracts of receipts and payments required under s. 372(2) of the 1948 Act) and to produce those accounts to the company."

The Judge in the said case quoted with approval from **Charlesworth and Cain Company Law, 12th Edition by Geoffrey Morse at page 599** thus:

"A receiver is deemed to be the agent of the company in relation to the property attached by the floating charge... Contracts entered into by or on behalf of the company before the receiver's appointment continue in force, subject to the terms of the contract, after the appointment, but the receiver does not merely by his appointment incur personal liability on such contracts"

As submitted by the objector, the 2nd Respondent was at all times the Receiver Manager of Afri-Packaging and Printing Limited. The appointment of the 2nd Respondent as a Receiver Manager of the said Company was personal as provided under Section 345 of the Companies Act Cap 486 Laws of Kenya (repealed) which prohibited the appointment of a body corporate as a Receiver Manager of a Company in the following terms:

"A body corporate shall not be qualified for appointment as receiver of the property of a company, and anybody corporate which acts as such a receiver shall be liable to a fine not exceeding two thousand shillings."

The 1st respondent therefore had no basis to attach the property of the objector on the grounds that one of its Directors was the Receiver Manager of the judgment debtor. A receiver, being an agent, no personal liability vests in him except in cases of breach of his fiduciary relationship as a receiver as set down in law, which is not the case herein.

Further, the fact that one of its Directors was a Receiver Manager in Afri-Packaging and Printing Limited (In Receivership) did not transfer liability to the Objector who is a separate and distinct legal personality from its directors.

The Learned Magistrate stated in the ruling that it had not been proved that the objector was the owner of the proclaimed goods. With due respect to the Learned Magistrate, this was not a contested fact before her. The proclamation clearly stated that the proclamation was served at Westlands to Deloitte Company. Deloitte was not the judgment debtor, who was clearly stated as The Receiver Manager, Afri Packaging and Printing Limited in all the documents held by the auctioneer. If there was any default on the part of the Receiver Manager, the same could only be executed as against him in person and not against a company where he was a director.

For the foregoing reasons, I agree with the appellant that the Learned Magistrate made an error of principle and thereby arrived at a wrong decision.

I accordingly allow the appeal, set aside the decision of the Learned Magistrate and substitute thereof an order allowing the objection proceedings with costs to the appellant in both this appeal and in the subordinate court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE