



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**APPEAL NO. 7 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 3<sup>rd</sup> July, 2018)

**JAMES OBARE YINDA .....APPELLANT**

**VERSUS**

**SUN AFRICA HOTELS LIMITED .....1<sup>ST</sup> RESPONDENT**

**KENYA HOTELS LIMITED .....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**(Appeal from the ruling/order delivered on 17<sup>th</sup> September 2013 by Hon. Chief Magistrate Mr. C. Obulutsa in CMCC No. 589 of 2011 (Milimani Commercial Courts)).**

1. The Appellant herein filed this Appeal initially before the High Court in HCCA No. 514/2013 but vide a ruling of Hon. J. Aburili on 5/2/2015, this file was transferred to this Court.

2. The Appellant appeals the entire ruling/order of the Hon. Obulutsa on the following grounds:-

**1. THAT the learned presiding Magistrate erred in law and fact by disregarding the fact that the Respondent had completely no evidence to support the fact that it was the owner and/or had an interest in the items proclaimed by the Appellant through Direct 'O' Auctioneers at the 2<sup>nd</sup> Respondent's premises at Lake Naivasha County Club on 30<sup>th</sup> May 2013.**

**2. THAT the Honourable learned Magistrate erred in law and fact and indeed misdirected himself and in the process did not appreciate the law when he allowed the 1<sup>st</sup> Respondent's application dated 5<sup>th</sup> June 2013 that lifted the attachment on the 2<sup>nd</sup> Respondent's items at Lake Naivasha County Club.**

**3. THAT the Honourable Magistrate erred in law and fact to the extent that there were no valid grounds to support the finding made by the Honourable Court pursuant to the ruling/order made on the 17<sup>th</sup> September 2013.**

**4. THAT the Honourable Magistrate erred in law and fact by delivering a ruling that on the face of it, is not sustainable in law as there wasn't an iota of evidence in the 1<sup>st</sup> Respondent's application dated 5<sup>th</sup> June 2013 to assist the Court arrive at the decision it finally arrived at.**

**5. THAT the Honourable Magistrate erred in law and fact in arriving at a decision that in the process was evidently and openly biased against the Appellant in light of there being no evidence to sustain and support the finding arrived at which finding totally deprived the Appellant of his fruits of judgement, there being no other execution process it could undertake in light of the fact that the premises he proclaimed is where he worked and rightfully earned his unpaid salary which resulted into the judgement made in his favour.**

3. The Appellant therefore prays that:-

**a. The Ruling/Order of the Ag. Chief Magistrate's Court given on 17<sup>th</sup> September 2013 be vacated/set aside, varied and/or reviewed.**

**b. The Respondents be condemned to pay for the costs of the application dated 5<sup>th</sup> June 2013 together with the Preliminary Objection dated 5<sup>th</sup> July 2013 in CMCC No. 589/ 2011 plus costs of this appeal.**

4. The Appeal arises out of the objection raised by the Objector /Applicant filed in Court on 5/6/2013 where the Objector one Sun Africa Hotels Limited raised these objection proceedings following issuance of warrants of sale of property and warrants of attachment of movable property in execution of the decree for money against the Defendant herein and further moved to instruct a firm of Auctioneers to proclaim and take possession of and auction the proclaimed goods on the grounds that the property belong to the Objector herein.

5. The Application by the Objector was filed through a Notice of Motion brought on 5/6/2013 and was supported by the Supporting Affidavit of one Maduri Madhu Sudan who deponed that he took over the business from the Defendant on or about October 2010 and has been carrying on the business since then. He annexed hotel bookings dated 15/11/2010, 10/12/2010 and 30/11/2010 and their brochures as proof of his contention.

6. He therefore deponed that the attachment and subsequent proclamation done 30/5/2013 was improper as the attached goods belong to him and not the Defendant.

7. The Plaintiffs/Decree Holder in answer to the objection proceedings filed this Replying Affidavit on 10/7/2013 stating that the objection proceedings had no merit as he was employed by the Respondent. He exhibited his appointment letter as proof of the same and averred that he Objector was but only **cushioning the** Defendant from its obligation and sought that the Application be dismissed.

8. The Objector filed yet a Preliminary Objection on 8/7/2013 contenting that the Chief Magistrate's Court lacked jurisdiction to enter judgement or pass a decree in the subject matter herein on 31/10/2012 or to entertain this suit in any matter. They contended that the Industrial Court (as it then was) was the only Court with exclusive and illegal jurisdiction to hear and determine any dispute relating to or arising out of employment in Kenya.

9. The Learned Magistrate considered the submissions of the Parties and rendered a ruling on 17.9.2013 stating that according to the contract of service between the Plaintiff and Defendant, the Defendant is situated in Nairobi yet the proclamation was carried out in Naivasha at Lake Naivasha County Club.

10. He also made a finding that according to the judgement of the Court, Lake Naivasha County club is under the Objector as from 24.9.2010 yet the Plaintiff was dismissed in January 2010. A Certificate of Registration was also availed and brochures showing that Lake Naivasha County Club is under Sun Africa Hotels Limited.

11. On the issue of jurisdiction, the Hon. Magistrate made a finding that the issue could not be raised at that time as the Defendant had all along been party of the claim. The Hon. Magistrate made a finding that the proclamation was not properly done and lifted it with costs.

12. I have considered the initial record of the lower Court and even the ruling rendered accordingly plus the annexures filed. I have also considered submissions filed by the parties herein. The issues for determination by this Court are whether:-

**1. The appeal is properly before this Court.**

**2. Whether the Lower Court had jurisdiction to entertain the Application before Court.**

**3. Whether the appeal has merit.**

13. On the first issue, I note that this claim was initially filed before Chief Magistrate's Court Nairobi as case No. 589/2011 when the current Employment & Labour Relations Court (ELRC) had not been constituted as envisaged. Matters then could be filed in the then Industrial Court or before the Chief Magistrate's Court.

14. In view of this Lacuna, Parties chose where to file their claims. The Plaintiff chose to file in the Chief Magistrate's Court and the Respondent readily submitted to the jurisdiction of the Chief Magistrate's Court without reservation. The case was duly heard and a judgment rendered.

15. The Respondent cannot at this point raise a Preliminary Objection on the Chief Magistrate's Court jurisdiction. Any attempt to deny Court's jurisdiction at this point cannot be entertained and the same is dismissed.

16. On the issue of appeal being properly before Court, the Respondent submitted that the appeal is not properly before Court as the full record of the lower Court is missing and in particular the judgement.

17. What is being appealed against is a ruling of the lower Court following objector proceedings. The omission to file a page of the judgment of the Court does not in my view render the appeal to be improperly before Court as the appeal is against a ruling in objector proceedings which ruling was submitted before Court.

18. I therefore find that the appeal having been so admitted is properly before Court.

19. Now to the merits of the appeal, the Learned Magistrate made a finding that the Plaintiff had been employed by the Defendant and dismissed by the Respondent before the Objector came to the scene.

20. This position is true that from the appointment letter, the Plaintiff had been employed by the Respondent and dismissed by the Respondent in January 2010. The Judgement entered by Court on 3<sup>rd</sup> October 2012 is against the Respondent.

21. The Objector on their part exhibited documents showing they carry on business in Westlands in Nairobi whereas the Respondent carried out business in Nakuru and they aver that they were incorporated on 24<sup>th</sup> September 2010. They exhibited their certificate of incorporation to prove this.

22. The relationship between the Objector and the Respondent is not clear if any as the Objector proved that they are a stand-alone company duly incorporated in Kenya under the Companies Act Cap 486.

23. In their Supporting Affidavit, the Objector indicated that they took over the business from the Defendant on or about October 2010 and have been carrying on the business since. The take over is not very clear.

24. However, since the Objector is a stand-alone company, it is for this reason that the proclamation against the Respondent was unjustified in absence of proof that the Objector not only took over the business but also the liabilities. In the circumstances, I find the decision by the Learned Magistrate was sound and I have no valid reason to disturb it. In the circumstances, the appeal must fail.

25. Costs of this appeal shall be borne by the Appellant.

**Dated and delivered in open Court this 3<sup>rd</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Adala for Respondent - Present

Odhiambo holding brief for Sumba for Applicant – Present