



Coast Bus (Mombasa) Limited v Maseki & another (Civil Appeal E209 of 2022) [2024] KEHC 8234 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E209 OF 2022
DKN MAGARE, J
JUNE 27, 2024**

BETWEEN

COAST BUS (MOMBASA) LIMITED APPELLANT

AND

CATHERINE NJERI MASEKI 1ST RESPONDENT

COASTLINE SAFARIS 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 17th September 2021 by Hon. J.B Kalo, Chief Magistrate in Mombasa CMCC No. 37 of 2014.
2. The Memorandum of Appeal dated 9th December 2022 raised 4 grounds, that the learned magistrate erred in law and in fact in:
 - a. Failing to find that the 1st Respondent's failure to file a notice of intention to proceed contrived Order 22 Rule 54 of the Civil Procedure Rules.
 - b. Finding that the Appellant failed to prove that the proclaimed goods belonged to it.
 - c. Failing to give reasons for the finding that the evidence produced did not establish a legal and equitable interest by the Appellant in the proclaimed goods.
 - d. Disregarding the Appellant's evidence showing outright associated ownership of all proclaimed items.

Pleadings

3. It is the Appellant's contention that the goods proclaimed by the Auctioneers do not belong to the Judgement Debtor but the Appellant.



4. The proclamation was over a sum of Ksh. 4,614,974 in favour of the Decree holder in Mombasa CMCC No. 37 of 2014.
5. The suit involved a road traffic accident involving motor vehicle registration No. KAA 996U that occurred on 7/4/1996. The original decree is not in issue. It is between the 1st Respondent and the 2nd Respondent.
6. Judgement in the primary suit was delivered on 2/6/2022. An Application vide the Notice of Motion dated 25/8/2022 under certificate of urgency was filed on the same date. It was supported by the Affidavit of Mirza Mohamed Ajaz seeking to preclude the 1st Respondent and Ndutumi Auctioneers from attaching the goods per the proclamation notice. The said Mirza Mohamed Ajaz was stated to be one of the Directors of the Objector/Appellant. He annexed CR12 indicating the Directors as follows:
 - a. Zarar Anwar P.O Box 82xxx Mombasa- Director
 - b. Mohamed Ajaz Mirza -Director/Shareholder P.O Box 82xxx Mombasa- 99 shares
 - c. Shafina Ruhi Mirza Shareholder P.O Box 82xxx Mombasa- 1 share
7. The proclamation for attachment dated 22/8/2023 was for 3 motor vehicles namely:
 - a. KCF 103X
 - b. KCU 055X
 - c. KCC 554R
8. The Auctioneer also raised a fee note of Ksh. 500,000/-
9. The Appellant stated that there was also office furniture for a sister company. That the 2nd Respondent had no claim over the proclaimed goods. They annexed a resolution under their letterhead P.O Box 82xxx-80100 Mombasa. The Appellant was said to have been incorporated on 14/10/2004 and the log books indicated that motor vehicle registration No. KCF 103X was registered on 14/12/2015 in the name of the Appellant and Diamond Trust Bank Ltd as first owners.
10. Similarly, motor vehicle registration No. KCU 055X was registered in the name of Standard Chartered Bank Limited and the Appellant on 2/4/2019 with no previous owners.
11. The 1st Respondent filed an Affidavit in response stating that the Appellant and the 2nd Respondent were colluding. That they had filed a suit against Hajash Metsa T/a Coast Bus Services who they believed were the owner and the buses were known as Coast Bus (Mombasa) which is notorious fact and the ticket in 1997 showed Coastline Safari and the Police abstract, Coast Bus Service. That the tickets bore the Appellant's postal address as PO Box No. 82xxx Mombasa.
12. It was further averred that the 1st Respondent's Advocates established that the 2nd Respondent was the registered owner of the accident motor vehicle and amended the Plaint to reflect that position.
13. They annexed notice of appointment of advocates in the primary suit stating that the same followed correspondences leading to substitution of the said Hajash Metsa with the Appellant in 2006 as the Appellant's Director and Defendant in the suit.

Submissions

14. The Appellant submitted that the 1st Respondent did not comply with Order 22 Rule 54 of the Civil Procedure Rules. Reliance was placed on the case of Chai Trading Co. Limited v Muli Mwanzia & 2



- Others (2019) eKLR that the duty of the court to call upon the judgement creditor to intimate his options is mandatory.
15. It was also submitted that the Appellant proved that the Appellant had legal and equitable interest in the proclaimed goods and the learned magistrate erred in overruling this fact.
 16. They noted that there was no notice of intention to proceed by the decree holder and so the court had nothing to determine, they relied on *Stephen Kiprotich Koech v Edwin K. Barchilel; Joel Sitienei (Objector)* (2019) eKLR.
 17. It was the Appellant's submission that the learned magistrate erred in failing to find that the Appellant and the 2nd Respondent were not the same entity.
 18. On the part of the 1st Respondent, it was submitted that seeking to lift warrants of attachment in execution on the anchor of Order 22 Rule 54 for failure to serve a notice of intention to proceed is draconian and contrary to the overriding Objective of the Court. Reliance was placed on *Kamau Mwaniki Gitau & Co. Advocates v Esther Wambui Njoroge; Kambusu Ole Pakine (Objector)* (2020) eKLR.
 19. It was submitted that the Appellant had established no equitable or legal claim on the goods as proclaimed. They relied on *Jonathan Masila Mutia v Leo Investments Limited* (2016) eKLR.
 20. It was also submitted that the Appellant and 2nd Respondent were one and the same entities. Reliance was also placed inter alia on the case of *Zingo Investments Limited v Miema Enterprises Limited* (2015) eKLR to canvass the argument that the Appellant and the 2nd Respondent ought not to be allowed to hide in the corporate veil.

Analysis

21. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to their respective positions.
22. The issue that falls for this Court's determination is whether the trial court erred in dismissing the Appellant's Objection to execution.
23. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
 1. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
25. The duty of the first appellate Court was settled long ago by *Clement De Lestang, VP, Duffus and Law JJA*, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-
 - a. “.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow



the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

26. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as follows:-

“ Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

27. Therefore, the Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

28. In this case, it is clear that the question as to who Coast Bus Safaris is, is mind boggling. The Appellant was entitled to come to court but with clean hands. The question of notice of intention to proceed was not utilized in the court below. It is not one of the issues left for this court to determine. Parties proceeded on the context that there was execution. The court stayed the execution and they dueled. I shall thus refrain from making a decision that was not left to me to decide.

29. The pleadings show that it is Mohamed Ajaz Mirza who traded as Coast Bus Safaris. He has now incorporated Coast Bus (Mombasa) Services where he has 99 shares as the shell to hide from the creditors.

30. Whereas the accident subject to the proceedings in the primary suit occurred, the Appellant never left the premises or changed the accounts of the goods attached that is KCF 103X, KCU 055X and KCC 554R as the goods of Mohamed Ajaz Mirza are the properties of the Judgment Debtor. As was held in *Jonathan Masila Mutia v Leo Investments Limited* (2016) eKLR,

“ the Objector chose not to respond to the averments made by the Claimant that the Objector operates umbrella of a common group of companies known as Chatur...”

It is not enough for an Objector to demonstrate that it is a legal entity separate from the Judgment Debtor. Where the two entities share directors and an office. It would not be farfetched to conclude that the Objector of a faade for the judgment debtor.”

31. It is the court's considered view that Coast Safaris is a trade name of the 2nd Respondent. It has not changed. The court below was thus correct in dismissing the Objection. I therefore find no basis to disturb the finding of the lower court. I direct the auction to proceed.

32. There is no separate registration for the defendant and objector. From the history of the case, the defendant has always acted though the same director who now has changed to be an objector.

33. I find absolutely no material to differentiate the judgment debtor and the Objector.

Determination

34. In the upshot, I make the following Orders:-



- a. The Appeal has no merit and is accordingly dismissed.
- b. The 1st Respondent shall have the costs of the Appeal assessed at Kshs. 165,000/-.

**DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 27TH DAY OF JUNE, 2024.
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Umara for the 1st Respondent

Miss. Mulongo for the 2nd Respondent

No appearance for Appellants

Court Assistant - Jedidah

