

KENYA / JUDGMENT

Abdalla & another v Seyoum [2025] KEHC 2020 (KLR)

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COURT

High Court

BEFORE

JK Ng'arng'ar

CASE / FILE NUMBER

Civil Appeal 73 of 2020

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Abdalla & another v Seyoum (Civil Appeal 73 of 2020) [2025] KEHC 2020 (KLR) (20 February 2025)
(Judgment)

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[2025] KEHC 2020 (KLR)

Republic of Kenya

In the High Court at Mombasa

Civil Appeal 73 of 2020

JK Ng'arng'ar, J

February 20, 2025

Between

Abdulatif Ibrahim Abdalla

1st Appellant

Joseph Muriuki Mikwa t/a JMK Agency

2nd Appellant

and

Alem Seyoum

Respondent

(Being an appeal against the Judgment of Hon. F Kyambia (SPM) delivered on 5th June 2020 in Mombasa Chief Magistrate's Court Civil Suit No. 1273 of 2017, Alem Seyoum v Abdullatif Ibrahim Abdalla & 5 others)

Judgment

1. The background of the appeal is that the Plaintiff/Respondent vide plaint dated 7th August 2017 averred that he imported four units of motor vehicles from Australia in container number CAIU81966397 shipped to the port of Mombasa in June 2016. That the Bill of Lading indicated Tsega Shuferaw as the consignee and Genet A. Kabeto as the shipper. That the consignment arrived in Mombasa on 24th August 2016 and the Plaintiff retained the 1st Defendant/1st Appellant to clear the consignment from the port of Mombasa but the 1st Defendant did not have the requisite licenses to clear the consignment and independently sourced for services from the 2nd, 3rd and 4th Defendants to clear the container from the port.
2. The Plaintiff averred that he paid all the import duties, shipping charges, port charges and the registration fees for the four units which were released to the consignee and/or consignee's representative in Mombasa on 24th August 2016. That one unit, motor vehicle which had already been registered as KCJ 834V was retained by the 1st, 2nd, 3rd and 4th Defendants on false allegations that there were incurred demurrage charges in respect of the consignment. That the Plaintiff later learnt that the Defendants had conspired and fraudulently transferred the said motor vehicle registration number KCJ 834V to the 6th Defendant.
3. The Plaintiff/Respondent prayed for damages against the Defendants jointly and severally for: a declaration that the Defendants actions were illegal, null and void ab initio; an order directing the Defendants to release and hand over motor vehicle registration number KCJ 834V to the Plaintiff in its original condition; and an order for payment of damage for the loss of use at the rate of Kshs. 5,000 per day with effect from 24th August 2016 until the date of handover of the motor vehicle registration number KCJ 834V to the Plaintiff or payment of the sum of Kshs. 3,300,000 to the Plaintiff. The Plaintiff prayed that in the alternative, payment of Kshs. 3,300,000 being the value of the motor vehicle registration number KCJ 834V; Payment of Kshs. 300,000 being the costs incurred by the Plaintiff in tracing the vehicle; and any other and/or further order that the court may deem fit and just to grant.
4. This suit was heard in the trial court and judgment delivered on 5th June 2020 where the court found that the 1st Defendant did not have authority from the Plaintiff to engage the services of the 4th Defendant who then engaged the 3rd Defendants through the 2nd Defendant, that the 1st Defendant having engaged the 2nd, 3rd and 4th Defendants without authority of the Plaintiff and the delays occasioned in returning the container, resulted to accumulation of demurrage charges and that the Plaintiff could therefore not be blamed for

the demurrage charges, that the entire transaction was surrounded in fraudulent collusions between the 1st, 2nd, 3rd, 4th and 5th Defendants who were found to have jointly and severally acted fraudulently, and that the 6th Defendant was sued because she was the one who took the vehicle to the auction, that the Plaintiff did not raise any substantive case against her and she could therefore not be held liable. In the end, the trial court entered judgment for the Plaintiff against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and severally in the sum of Kshs. 3,300,000 with interest at court rates from the date of the plaint. The Plaintiff was also granted costs of the suit.

5. Being dissatisfied, the Appellants appealed the judgment through the Memorandum of Appeal dated 12th June 2020 on grounds that the learned magistrate erred in law and in fact by failing to take into consideration the separate agency relationship between the 1st and 4th Defendants, by prescribing liability jointly on all Defendants, by failing to consider that the 2nd and 3rd Defendants still have lien over the suit subject and assigning liability jointly, by failing to take into consideration the entire chain of events and failing to apply the principle of causation, and in failing to consider all the evidence and documents on record.
6. The Appellant prayed for orders that the judgment and order of Hon. Francis Kyambia (SPM) made on 5th June 2020 in Mombasa CMCC 1273 of 2017 be varied and/or set aside by this court, that the Appellants' appeal herein be allowed with costs, and such any other orders as this court may deem just and expedient.
7. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 25th November 2023 on grounds 1 and 4 submitted that the Respondent having contracted the 1st Appellant to clear his cargo, the 1st Appellant was to act as an agent of the Respondent. That the agency relation can be created in a number of ways, one of them being from the conduct of the parties. That instructions in an agency relationship can be limited or unlimited, in the scenario the Respondent gave the 1st Appellant instructions to clear his cargo and therefore the 1st Appellant as an agent had a duty to perform the task assigned. That in this case the instructions by the Respondent to the 1st Appellant were unlimited. The actions by the 1st Appellant in sourcing the 2nd Appellant, the 2nd and 3rd Defendants in the primary suit were subsequently ratified by the Respondent herein when he received the 3 units vehicles and did not question the same. That the 1st Appellant in the spirit of performing his duties and in best interest of the Respondent he engaged the 2nd Appellant since his (1st Appellant's) license was not active and the 2nd Appellant's license was. That the 2nd Appellant's engagement was later terminated through the letter dated 3rd September 2016 stopping the release of the subject vehicle to him which was further reaffirmed by the Affidavit of the 1st Appellant sworn on the 3rd November 2016 which confirmed release of the 3 units and documentation by the 2nd Appellant to the 1st Appellant.
8. The Appellants argued that the 1st Appellant further deponed therein to have released all the documentation to the 3rd Defendant in the primary suit to hold the same in lien until payment in full of the accrued demurrage charges. That the 2nd Appellant had ceased acting

for the 1st Appellant after he confirmed release of the 3 units and handed in all documentation in respect of the subject vehicle. The Appellants invited the court to note that there existed a separate agency relationship between the 1st and 2nd Appellants which had to this point been terminated. That the Respondent as a principal had a duty to provide such funds to enable the 1st Appellant perform the task assigned. That the Respondent refused to provide the funds as requested to enable quick clearance of the vehicles. That the demurrage charges also had accumulated due to the nature of the vehicle as they were ex-accident and therefore were to undergo inspection for that reason before being cleared. That the accrued charges were therefore due to the actions of the Respondent; refusing to give sufficient money and/or failure to indicate to the 1st Appellant the status of the vehicles as the 1st Appellant would have advised him accordingly. That the creation of the lien by the 1st Appellant to the 3rd Defendant in the primary suit was an agency by necessity as the 1st Appellant acted in good faith in order to stop further accrual of the demurrage charges after the Respondent failed to make the payments.

9. The Appellants submitted that the 1st Appellant was never liable for the demurrage charges as he never anticipated that the cargo would be subjected to stripping and verification arising the charges as the Respondent did not inform him of the nature of the vehicles. That the 1st Appellant was also not aware that the 3rd Defendant in the primary suit had bought the container which had the subject vehicle. That the 1st Appellant therefore expected that the Respondent would clear the outstanding charges for the subject vehicle to be released. That the 2nd Appellant had been released from the engagement by the letter dated 3rd September 2016 and the affidavit of the 1st Appellant of 3rd November 2016. That the 1st Appellant also due to necessity created the lien on the subject vehicle and all the documentation were in custody of the 3rd Defendant in the primary suit. The Appellants submitted that detention of the subject vehicle due to the alleged accrued demurrage was a creation by the 2nd and 3rd Defendants in the primary suit and that they did not conspire and/or colluded with them at all or whatsoever.
10. The Appellants submitted that relying on the principle of causation, actions by the 3rd Defendant in the primary suit on the narrative of demurrage charges which were unknown to both the 1st and 2nd Appellants led to the suit herein. That the 3rd Defendant in the primary suit also proceeded to sell the subject vehicle with neither communication to the Appellants nor advertising the sale. That the 2nd Appellant submitted that there existed a further agency relation with the 1st Appellant which was terminated by the letter stopping release of the subject motor vehicle and the Affidavit of the 1st Appellant. That the Appellants submitted that the engagement herein involved a number of chain of events and that the direct cause of the suit herein were actions of the 2nd, 3rd, 5th and 6th Defendants in the primary suit which the 1st and 2nd Appellants herein did not participate in at all.
11. The Appellants submitted on ground 2 and 3 that it is clear from the evidence on record that the subject vehicle was held in lien by the 3rd Defendant in the primary suit who also took all the documentation related thereto. That the 3rd Defendant was the only party that had

the authority to remove the subject vehicle from the container as per the delivery note. That however, the 3rd Defendant proceeded to sell the same without any reference or instructions from the Appellants. That there is no doubt from the evidence in court and particularly the affidavit by the 1st Appellant that the 2nd and 3rd Defendants held the subject vehicle in lien. However, the subject vehicle was illegally and fraudulently sold and eventually registered in the name of the 6th Defendant. This clearly shows that the 2nd, 3rd, 5th and 6th Defendants in the primary suit acted with ill intention to defraud the Respondent. That in the premises, the trial magistrate erred in law and fact by prescribing liability jointly.

12. The Appellants submitted on ground 5 that from the judgement of the trial Court, it is evident that the Learned Magistrate failed to consider all evidence on record, particularly evidence by the 1st and 2nd Appellants. That the letter of 3rd September 2016 by the 3rd Defendant in the primary suit to the Terminal Manager and the Affidavit by the 1st Appellant of 3rd November 2016 plus the statement by the Appellants is sufficient evidence to the effect the 2nd Appellant had been terminated from the engagement. That equally, the evidence on record for the Appellants attest to the fact that the 1st Appellant acted in necessity in creating the lien and handed over all the documentation in respect of the subject unit. That the subsequent actions leading to the proceeding herein are unknown to him and he submits that he did not conspire with the 2nd, 3rd, 5th and 6th Defendant in defrauding the Respondent. That in the circumstances only the 2nd, 3rd, 5th and 6th Defendants in the primary suit were liable for the prayers sought by the Respondent in the primary suit.
13. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -“... Briefly put they are that this court must 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 this respect ...”
14. I have considered the Record of Appeal dated 4th December 2023, Supplementary Record of Appeal dated 23rd May 2024 and submissions by the Appellants. The issues for determination are: -a.Whether there was separate agency relationship between the Appellants and whether the trial court considered the entire chain of events and applied the principle of causationb.Whether the 2nd and 3rd Defendants had lien over the suit property and whether liability ought to have been prescribed jointly on all the Defendantsc.Whether the trial court considered the evidence and documents on record in its determination
15. On the first issue, the Appellants submitted that the Respondent having contracted the 1st Appellant to clear his cargo, the 1st Appellant was to act as an agent of the Respondent. That instructions by the Respondent to the 1st Appellant were unlimited and the 1st Appellant in the spirit of performing his duties and in best interest of the Respondent engaged the 2nd Appellant since his license was not active, who in turn sourced for services of the 2nd and 3rd Defendants. That the 2nd Appellant’s engagement was later terminated through the letter dated 3rd September 2016 stopping release of the subject vehicle to him. That

termination of the engagement was further reaffirmed by the Affidavit of the 1st Appellant sworn on 3rd November 2016 confirming release of the 3 units and documentation by the 2nd Appellant to the 1st Appellant. That therefore, there existed a separate agency relationship between the 1st and 2nd Appellants which had to this point been terminated.

16. This court is guided by the quote in *Cheshire and Fifoot, the Law of Contract, 5th Edition* page 386-394 where Lord Cransworth stated as follows: -“No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him... this proposition, however, is not at variance with the doctrine that where one has acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that the other person is about to act on that behalf, then unless he interposes, he will in general be stopped from disputing the agency, though in fact no agency really existed ...”
17. This court is further guided by the holding in the case of *Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd and Bunge Corporation* (1967) 2 All E.R. 353 where it was held: -“The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct.”
18. It is clear to this court that there was an agency relationship created between the Respondent and the 1st Appellant for clearance of shipment. The 1st Appellant's inability to execute the task assigned led to engagement of the 2nd Appellant and subsequently the 2nd and 3rd Defendants. The 1st Appellant's action of bringing the 2nd Appellant on board created a separate agency relationship. However, as admitted by the 1st Appellant, the relationship was terminated through the letter dated 3rd September 2016 and the affidavit sworn by the 1st Appellant on 3rd November 2016. The 1st Appellant was therefore solely answerable to the Respondent on clearance of the shipment.
19. The Appellants in their submissions relied on the principle of causation and that actions of the 3rd Defendant in the primary suit on the narrative of demurrage charges, which were unknown to the Appellants, led to the suit herein. That the 3rd Defendant in the primary suit also proceeded to sell the subject vehicle with neither communication to the Appellant nor advertisement of the sale.
20. This court finds that the trial court considered the entire chain of events and applied the principle of causation. The court was right in holding that the 1st Appellant did not have authority from the Respondent to engage the other parties. Therefore, the 1st Appellant was answerable to the Respondent pursuant to the agency relationship.

21. On the second issue, the Appellants submitted that the subject vehicle was held in lien by the 3rd Defendant who also took all the documentation related thereto. That the 3rd Defendant was the only party that had the authority to remove the subject vehicle from the container as per the delivery note. That however, the 3rd Defendant proceeded to sell the same without any reference or instructions from the Appellants. That the subject vehicle which was illegally and fraudulently sold was then registered in the name of the 6th Defendant. That the 2nd, 3rd, 5th and 6th Defendants in the primary suit therefore acted with ill intention to defraud the Respondent. That the trial magistrate therefore erred in law and in fact by prescribing liability jointly.
22. The Black's Law Dictionary 10th Edition defines lien as follows: "A legal right or interest that a creditor has on another's property, lasting usu. until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained."
23. Upon perusal of the proceedings, this court establishes from the evidence on record that the container accrued demurrage charges and the 2nd Appellant admitted that they were unable to meet their obligations. They then requested the 3rd Defendant to assist in payment of KRA, shipping, CFS, and port charges. That when the 3rd Defendant demanded their dues, the Respondent informed them to deal with his lawyer. The 4th vehicle held in lien by the 3rd Defendant was then sold when the Respondent failed to comply with the demand letters sent in respect to payment of the total accrued charges. According to the Respondent, the demurrage charges could not be paid by him as there was no evidence of accrual of the said charges. While the 1st Appellant admitted that the 3rd Defendant paid demurrage charges, the Respondent was aware that the motor vehicle could not be released unless demurrage is paid.
24. The policy on liens is that it would be unfair for a party to enjoy results of certain services without paying for them then let the party that procured the services seek payment elsewhere when payment could easily be covered by the lien. This position was emphasized in Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates (2014) eKLR.
25. This court finds that the fact that the Respondent was aware that the subject vehicle could not be released without payment of demurrage, the fact that the 2nd Appellant admitted that the 3rd Defendant paid for demurrage and the fact that the 3rd Defendant sent demands for payment of the total accrued charges which were not honoured, this court concludes that the subject vehicle was converted into payment which led to waiver or abandonment of the lien. The trial court then erred in prescribing liability jointly on all the Defendants.
26. On the third issue, the Appellants submitted that the trial court failed to consider all evidence on record, particularly evidence by the 1st and 2nd Appellants. That the letter of 3rd September 2016 by the 3rd Defendant in the primary suit to the Terminal Manager and the Affidavit by the 1st Appellant of 3rd November 2016 plus the statement by the Appellants

is sufficient evidence to the effect the 2nd Appellant had been terminated from the engagement. That equally, the evidence on record for the Appellants attest to the fact that the 1st Appellant acted in necessity in creating the lien and handed over all the documentation in respect of the subject unit. That the subsequent actions leading to the proceeding herein are unknown to him and that he did not conspire with the 2nd, 3rd, 5th and 6th Defendants in defrauding the Respondent. That only the 2nd, 3rd, 5th and 6th Defendants were therefore liable.

27. It is not in dispute that engagement of the 2nd Appellant was terminated through the letter dated 3rd September 2016 and the affidavit sworn by the 1st Appellant on 3rd November 2016, it is not in dispute that the 1st Appellant acted in necessity in creating the lien and handed over all the documentation in respect of the subject unit, and it is not in dispute that the 1st Appellant did not conspire with the 2nd, 3rd, 5th and 6th Defendants. What is in dispute is that the 1st Appellant ought to have been absolved from liability. Existence of the agency relationship between the Respondent and the 1st Appellant for clearance of shipment meant that the 1st Appellant was solely answerable to the Respondent.
28. In the upshot, this appeal partly succeeds. Each party to bear its costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY,
2025.J.K. NG'ARNG'AR, HSCJUDGEIn the presence of: -..... Advocate
for the Appellants..... Advocate for the RespondentCourt Assistant – Shitemi

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