



**Southern Bell Limited v National Social Security Fund Board of Trustees & 4 others
(Civil Appeal 185 of 2018) [2023] KECA 1170 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1170 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 185 OF 2018
DK MUSINGA, J MOHAMMED & KI LAIBUTA, JJA
OCTOBER 6, 2023**

BETWEEN

SOUTHERN BELL LIMITED APPELLANT

AND

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 1ST
RESPONDENT**

CENTRAL BANK OF KENYA 2ND RESPONDENT

BEN MTUWETA 3RD RESPONDENT

SHAH MUNGE AND PARTNERS LTD 4TH RESPONDENT

EURO BANK OF KENYA (IN LIQUIDATION) 5TH RESPONDENT

(An appeal from the ruling and order of the High Court at Nairobi (J. Kamau, J.) dated 26th February, 2015 in HCCC NO. 1175 of 2002)

JUDGMENT

1. This is an interlocutory appeal against the ruling and order of the High Court, (J. Kamau, J.) dated February 26, 2015 in Nairobi High Court Civil Case Number 1175 of 2002.
2. The Application giving rise to the impugned ruling was a Notice of Motion dated September 12, 2014. It was expressed to be brought under sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, order 22 rule 51(2) of the *Civil Procedure Rules*, article 159 of the *Constitution* and the inherent powers of the Court. The Application sought, *inter alia*, the following orders:

“2) there be a stay of proceedings of the plaintiff’s application dated July 17, 2014 pending the hearing and determination of the application herein,



- 3) a finding be made that the objector (the appellant herein) is the lawful proprietor of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd;
 - 4) the attachment by way of a temporary prohibitory order of all shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd be partially discharged to the extent of releasing 1,575,000 ordinary shares owned by the objector;
 - 5) the objector be and is hereby allowed to register through Nairobi Securities Exchange the transfer of 1,575,000 ordinary shares held by shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd;
 - 6) the costs of this Application be borne by the plaintiff and the 2nd Defendant.”
3. The learned Judge dismissed the motion in her ruling dated February 26, 2015. Aggrieved by that ruling and order, Southern Bell Limited (the appellant) filed a notice of appeal against the same.

Background

4. A brief background will help place the appeal in perspective. The appellant had purchased a portion of the shares that Shah Munge and Partners Ltd (the 3rd Respondent) owned in Nairobi Securities Exchange Ltd. National Social Security Fund (the 1st Respondent) attached the shares before their transfer and sought to dispose of them in execution of its Decree against the 3rd Respondent. The appellant, having an interest in some of those shares, filed objection proceedings. The 1st Respondent obtained a decree against the 3rd Respondent before the High Court.
5. Aggrieved by the ruling, the appellant filed this appeal and through the Memorandum of Appeal raised twelve grounds of appeal to wit; that the learned Judge erred in law in finding that an attaching creditor could oppose the objection in any other way except by filing of intimation to proceed with attachment accompanied by a Replying Affidavit; misdirected herself when she applied the provisions of Order 51, rule 41 of the *Civil Procedure Rules* in circumstances that had adequately and exhaustively been covered by the provisions of Order 22, rule 54 of the *Civil Procedure Rules*; and contradicted herself when, on one, hand failed to find that the appellant was trying to defeat the course of justice, and on the other hand, found that the appellant had no interest whatsoever in the shares, beneficial or otherwise; and in finding that share ownership is exclusively demonstrated by registration.
6. Further, that the learned Judge erred: in failing to appreciate that the phrase “*prima facie* evidence of title” as used in section 83 of the *Companies Act* (repealed) meant that such evidence was rebuttable, and had indeed been rebutted by the appellant; by misdirecting herself when she found that there was no proof of payment of Kshs.13,000,000.00 on October 28, 2011, and yet the 1st Respondent had not only failed to challenge the purported lack of evidence of payment, but had in fact expressly admitted all the facts as laid out by the appellant; by placing too much weight on the remarks made by the Central Depository and Settlement Corporation (CDSC) Registrar, and whether amendments had been made yet it was not possible to proceed with the amendment owing to the existence of a prohibitory order registered against the subject shares.
7. In addition, the appellant contended that the learned Judge erred: in finding that the appellant had not demonstrated lawful proprietorship of the subject shares; in finding that the court could not make a finding of ownership of shares in an application; in failing to appreciate that under section 34(2) of the *Civil Procedure Act*, the court could not treat and proceed to hear the objection proceedings as



a suit; abdicating her responsibility when she refused to entertain and held that questions of lawful proprietorship of the shares could only be ventilated in a full trial; and in finding that the appellant had no equitable interest in the subject shares; and in dismissing the appellant's Notice of Motion dated September 12, 2014.

8. At the hearing of the appeal, Mr Guandaru Thuita appeared for the appellant. Ms Olendo appeared for the 1st Respondent, while Mr Kieti Ndolo held brief for Ms Kethi Kilonzo for the 3rd Respondent.
9. Mr Guandaru submitted that in the objection proceedings, the appellant relied on the provisions of Order 22, rule 51 of the [Civil Procedure Rules](#), which outlines the procedure to be followed in an objection for attachment. Counsel submitted that rule 54 of order 22 had an express condition which required a creditor to respond by way of a Replying Affidavit, but the 1st Respondent chose to file grounds of objection, which was contested by the appellant. Counsel submitted that the learned Judge in her finding referred to order 51 rule 14 of the [Civil Procedure Rules](#) which provides for general applications, and invoked the provisions of that order while ignoring the express provisions of order 22, which is specific to execution of orders and decrees.
10. Counsel further submitted that the learned Judge contradicted herself when she acknowledged that filing a Replying Affidavit is mandatory in objection proceedings, whilst filing grounds of opposition is an option granted by Order 51 rule 14 of the [Civil Procedure Rules](#). Counsel asserted that while an affidavit deals with matters of fact, grounds of opposition deal with matters of law and procedure. Reliance was placed on the decision of the Supreme Court in [Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others](#) [2018] eKLR.
11. Counsel asserted that the framers of order 22 rule 51-54 of the [Civil Procedure Rules](#) had a rationale for making it clear that any intimation that a decree holder had an intention to proceed with execution had to be accompanied by a Replying Affidavit in view of the fact that section 34(2) of the [Civil Procedure Act](#) provides that all questions in execution proceedings are to be determined conclusively, and no other proceedings are expected to be on the issues.
12. Counsel further asserted that order 51 rule 14 of the [Civil Procedure Rules](#), like those of section 3A of the [Civil Procedure Act](#), are saving provisions only used in circumstances where there are no other provisions guiding a certain matter or procedure.
13. Counsel submitted that the appellant presented a share subscription agreement between itself and the 3rd Respondent, a special resolution of Nairobi Securities Exchange passed on April 25, 2014, head of terms agreement, letter dated June 24, 2014 directing payment to the appellant, a cheque of Kshs.570,000.00 in favour of the appellant being dividends, purchase transfer form, sale transfer form, stamp duty declaration pay in slip and a letter for rectification from the CDSC registrars.
14. Counsel asserted that all these were presented as evidence of the appellant's interest to the shares in the dispute herein, but the only evidence that the learned Judge gave unusual consideration for was the letter from the CDSC registrar making remarks requiring amendments on the seller's transfer and stamp duty forms. Counsel emphasized that the High Court held undue interest in the letter, and that the reasons for rejecting the documents by the appellant submitted to the CDSC registrar, and failed to make adequate cognizance of paragraph 9 of CDSC's letter which was the last sentence stating that "Kindly make the amendments and forward the documents to us for further action". Counsel asserted that these remarks meant that once the amendments were done the documents would have been registered.
15. Counsel pointed out that the learned Judge relied on Section 112 of the [Companies Act](#) (repealed) and failed to acknowledge the circumstances in which the appellant could be entered in the register



- of members of the National Securities Exchange. Further, that the parties are judged by their conduct in a contract and that there was an acknowledgement of the sum of Kshs.13,000,000.00 in the share transfer agreement whose validity was not shaken.
16. Counsel submitted that the conduct of the parties to the contract for sale of shares was enough to prove that there was a transfer to be done. Further, that the appellant was paid dividends from the shares that it acquired from the 3rd Respondent. Counsel asserted that the conduct of the parties should have guided the court to determine the appellant's interest in the shares in question; that the conduct of the appellant and the 3rd Respondent indicated that their performance to the agreement was in 2012, and the same is reinforced by the head of terms agreement signed by the appellant and the 3rd Respondent, which the learned Judge failed to give attention to.
 17. Counsel further submitted that the said agreement gave a narrative of the acquired shares, payment of dividends to the appellant, and how the shares will be transferred to the appellant. Counsel relied on the High Court case of Mamta Peeush Mahajan [suing on behalf of the estate of the late Peeush Premlal Mahajan] vs. Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan [2017] eKLR.
 18. Counsel further asserted that another reason that the learned Judge rejected the appellant's Application was on the basis of the provisions of Section 120 of the *Companies Act* (repealed). That, this provision stated that a share certificate was *prima facie* evidence of the title to a member's share. This was equated to Section 8 of the *Traffic Act* which states that a person in whose name a motor vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.
 19. Counsel submitted that courts, including this Court, have stated that such provisions, especially when they use the term "prima facie", mean that what is created is a rebuttable presumption of ownership. Reliance was placed in *Thuranira Karauri v Agnes Mochache* [1997] eKLR and *Benard Muia Kilovoo vs Kenya Fresh Produce Exporters* [2020] eKLR. Counsel further submitted that from the analogy of these cases, the learned trial Judge erred and misdirected herself in treating the matter as if Section 120 of the *Companies Act* (repealed) directed that it was conclusive rather than a presumptive proof of ownership.
 20. On the question whether the learned Judge erred in finding that she could not make a finding on the ownership of the shares at the hearing of the application, it was submitted that in the impugned ruling the learned trial Judge stated that she could not make a finding that the objector was the owner of 1,575,000 shares. That these were issues of fact that could only be ventilated in a full trial, and that she could not make some determination based on affidavit evidence.
 21. Counsel asserted that by these findings, the court failed to investigate further all the facts presented before it by the appellant and restricted itself to issues raised by the 1st Respondent on the grounds of objection. Counsel asserted that the trial court failed in its obligation as a court of law by restricting itself to the issues of legal title. Further, that this finding led to the conflicting findings made by the court when on the other hand it declined to find that the appellant was trying to deflect the course of justice, on the one hand finding that the appellant had no interest whatsoever on the shares, beneficial or otherwise. Reliance was placed on the Ugandan Case of *Nakato vs. Nanyonga & Another* (Civil App. No. 412 of 2011) [2012] (10 February 2012).
 22. In conclusion, it was submitted that even if after the court declined the appellant's Application, execution took place and the subject shares were disposed of, this does not render the appeal nugatory as a finding declaring the appellant to have been the owner of the shares means that it can pursue the value of those shares against the 1st Respondent.



23. We have considered the record, the rival positions of the parties herein, the submissions by counsel, the authorities cited and the law in line with our duty to reappraise the evidence tendered and draw our own conclusions as outlined in the long line of authorities such as *Selle & Another vs. Associated Motor Boat Company & others* [1968] EA 123 where this Court stated:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. Upon our consideration of this matter, we discern the issue for determination to be whether the appellant failed and/or neglected to provide sufficient evidence to prove that the attached shares belonged to it.

25. Before we delve into the issue, it is notable that the appellant faults the trial court for applying the provisions of order 51, rule 41 instead of order 22, rule 53 of the *Civil Procedure Rules* that states that:-

“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

26. Order 22, rule 54 of the *Civil Procedure Rules* stipulates that:-

“If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a Replying Affidavit and the court shall proceed to hear the application expeditiously.”

27. As stated by this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2015] eKLR:

“We have no doubt that the provisions as contained in order 21 (now order 22) are so elaborate that they represent a complete code to address every conceivable scenario that might arise out of the process. They have in-built safeguards and conditions to ensure the protection of the interests of all persons concerned and they are couched in mandatory terms.”

28. By parity of reasoning, and fully cognizant of the court’s primary duty to do justice untrampled by procedural technicalities, we are also aware that litigation is a game with clear rules of engagement. It is not open to parties to pursue and for courts to allow, a path of circumventing the rules that are imposed



to aid in the attainment of justice. The overriding principle cannot save pleadings that are incompetent. In *Ramji Devji Vekaria v Joseph Oyula* [2011] eKLR, this Court stated, and it bears repeating:

“To invoke the provisions of section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of court ...”

29. Further, this Court in *City Chemist (Nbi) & Anor vs Oriental Commercial Bank*; Civil Application No. Nai 302 of 2008 stated:

“That, however, is not to say that the new thinking uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendments enrich those principles and embolden the court to be guided by a broad sense of justice and fairness as it applies those principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.” [Emphasis supplied].

30. On the merits of the issue that we have identified for determination, it is certain that in objection proceedings such as those before the trial court, the court does not and cannot make findings as to ownership of the suit property the subject of the objection proceedings. The court simply decides whether or not the objector has interest, legal or equitable, in the attached property.

31. In the persuasive High Court case of *Stephen Kiprotich Koeh v Edwin K. Barchilei; Joel Sitienei (Objector)* [2019] eKLR, the court held that:

“The core of objection proceedings, the objector must adduce evidence to show that at the date of the attachment there was a legal or equitable interest in the property(s) attached. For this purpose, he may raise an objection on the ground, inter alia, that he has some beneficial interest in the property. A beneficial interest is as much an interest within the meaning of the Rules as a legal interest in the property attached.”

32. To our mind the provisions of order 22, rule 51(1) of the *Civil Procedure Rules* are our starting point. The same provides as follows:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

33. Under the said provision, what the court is to determine is whether the Objector has an interest, legal or equitable in the attached property. In the persuasive High Court case of *Arun C. Sharma vs. Ashana Raikundalia T/A A. Raikundalia & Co Advocates & 4 others* [2014] eKLR, the court held as follows:

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”



34. Once the Objector proves that, then the Court makes an order raising the attachment as to the whole or a portion of the property subject to the attachment. However, in the instant appeal the appellant sought orders for:

“A finding be made that the Objector was the lawful proprietor of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd; The attachment by way of a temporary prohibitory order of all shares held by Shah & Munge Ltd in Nairobi Securities Exchange Ltd be partially discharged to the extent of releasing 1,575,000 ordinary shares owned by the Objector; the Objector be and is hereby allowed to register through the Nairobi Securities Exchange the transfer of 1,575,000 ordinary shares held by Shah Munge & Partners Ltd in Nairobi Securities Exchange Ltd.”

35. We find that the said reliefs are not what is contemplated under the said provisions. Under those provisions, all that the learned trial Judge was called upon to do was to determine whether or not the appellant proved that it had a beneficial interest in the attached shares. Accordingly, we find that the learned trial Judge did not therefore err in her holding that the prayers as sought could not be determined in the objection proceedings. It is paramount that parties ought to bring themselves within the parameters of the legal reliefs prescribed under the rules, and ought not to “tweak” the same to suit their circumstances as attempted by the appellant.

36. For a person to properly bring himself within the ambit of order 22 rule 51(1) of the *Civil Procedure Rules*, he has to meet certain conditions. First, he must prove that he is not the person against whom the decree was issued and therefore not liable in respect thereof. Secondly, he must prove that attachment of his property has been levied in execution of the said decree. Thirdly, he must prove that he is entitled to or has a legal or equitable interest in the whole or part of any property attached in execution of the decree.

37. In the instant appeal, the appellant claims that it is a stranger to the proceedings the subject of the execution proceedings, yet the shares that it had acquired from the 3rd Respondent have been attached in execution of the decree. In determining the objection proceedings before it, it was important for the trial court to make a finding that the appellant was the owner or had a beneficial interest in the 1,575,000 shares. In other words, it was important that the appellant sufficiently proved its ownership of the shares through a share certificate. In our view, the attempts by the appellant to prove ownership at the trial court through the exhibits left doubt that the appellant was indeed the owner of the shares.

38. As was appreciated by this Court in *Abdalla Ali Hussein Mohamed vs Clement A Ojiambo & others* [1998] eKLR that:

“Where the decree holder does not intimate his intention to proceed with the attachment the objector may request by way of a letter for the attachment to be lifted but where he instead files an application then the Court is obliged to investigate the title and make inferences from the material before her...Where an alleged transfer of a motor vehicle is made when the execution of the decree is about to be made the Court is entitled to assume that the sale was not genuine and was intended to avoid the due process of execution...It remains for the court to decide, in this instance, if the transfer to the objector was genuine or was done with a view to avoid the process of execution and as already stated, the court agrees with the learned Judge in regard to the inferences she drew. She could not have inferred otherwise...It is not for the objector to raise the issue that once a Judgment creditor has taken a particular step in execution he is barred from taking up any other mode of execution as he cannot speak for the Judgment debtor...Section 8 of the *Traffic Act* simply states that unless the contrary is



proved, the person in whose name the motor vehicle is registered is deemed to be the owner; in other words the fact of registration is only prima facie evidence of ownership and contrary facts can show otherwise and in this case there was sufficient material before the learned Judge to conclude that such registration was effected to avoid the execution of the decree.”

39. From the record, we note that the appellant exhibited a share subscription agreement, a sale transfer form, stamp duty declaration pay in slip, and a letter for rectification from the CDSC registrars as documents in proof of transfer and registration of the shares. The appellant has attempted to compare the same with section 8 of the Traffic Act and had relied on the same which provide that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”

40. The purport of section 8 of the Traffic Act is that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner. In other words, the fact of registration is only prima facie evidence of ownership, and contrary facts can show otherwise, and in this case there was sufficient material before the learned Judge to conclude that such an attempt for transfer of the shares was effected to avoid the execution of the decree, and therefore, we cannot therefore fault the learned Judge for so finding.

41. It is evident that, prima facie, the appellant is deemed as the owner of the said shares. However, that presumption is rebuttable. The burden of proving interest, legal or otherwise, in the shares, lies on the appellant and is not in doubt. This was clearly held in the persuasive High Court case of Arun C. Sharma versus Ashana Raikundalia t/a A. Raikundalia & Co Advocates & 4 others (*supra*).

42. In the persuasive High Court case of Precast Portal Structures vs. Kenya Pencil Company Ltd & 2 others [1993] eKLR, the court expressed itself thus:

“The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

1. that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or
2. that the objector holds that property on his own account.”

43. The Court continued to observe:

“But where the court is satisfied that the property was, at the time of attachment, held by the Judgment Debtor as his own and not on account of any other person, or that it was held by some other person in trust for the judgment- Debtor or that ownership has changed whereby the Judgement-Debtor has been divested of the property in order to evade execution on the change is tainted with fraud, the court shall dismiss the objection... The court takes into account the grounds of objections raised and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.”

44. In the circumstances of this appeal, it is our finding that the legal burden of proving ownership of the shares remained on the appellant who despite the *prima facie* evidence that showed that it owned the shares, it was still incumbent for it to prove that it did have an interest, legal or equitable in the same.



- 45. In the circumstances, we find that the trial court did not err in reaching the decision that it did. We find no fault in the finding that in the kind of proceedings before it, the Court does not and cannot make findings regarding the ownership of the shares the subject of the objection proceedings but simply decides whether or not the objector has an interest, legal or equitable, in the attached property.
- 46. In the result, the appeal fails and is hereby dismissed with no order as to costs.
- 47. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

