



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 13 OF 2020

BUBUL INVESTMENT COMPANY LIMITED.....APPELLANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and order of the learned Magistrate Honourable Frederick Nyakundi,

delivered on the 30th day of July, 2020 in the Principal magistrate court Civil suit No 318 of 2018 at Voi)

JUDGMENT

1. Vide a plaint dated 5th December, 2018 and filed on 7th December, 2018 in SPM's Court Voi civil suit No 318/2018, the plaintiff now the appellant in this appeal brought a claim against Kassam Hauliers Co. Ltd (defendant) now the respondent seeking;

(a) special damages in the sum of ksh 3,359,424

(b) costs of the suit and interest thereon

(c) interest on (a) above at court rates from the date of filing the suit until payment in full.

2. Apparently, the claim arose out of a traffic road accident in which the plaintiff's motor vehicle Reg No KCC848J/ZE9975 was involved in a road accident with the defendant's motor vehicle Reg No KBW861R/ZF1120 hence accusing the defendant and or his driver of negligence or carelessness thus occasioning the damage complained of.

3. Unfortunately, the defendant did not enter appearance nor file defence as required despite being served with the plaint and summons to enter appearance on 11th December, 2018. Consequently, on 7th February, 2019 the appellant (plaintiff) requested for entry of judgment under Order 10 rule 4 (interlocutory judgment) of the Civil Procedure Rules. The same was entered on 8th February, 2019. A decree was extracted and a certificate of costs issued on 18th March, 2019 reflecting the decretal sum of kshs3,203,150 plus costs assessed at kshs203,150.

4. On 26th March, 2019, the respondent (defendant) filed an application of even date seeking orders for stay of execution, setting aside the interlocutory judgment and then leave to file defence out of time.

5. Upon canvassing the application, the court delivered its ruling on 22nd August, 2019 thus setting aside the interlocutory judgment. The court granted leave to the respondent (defendant) to file and serve its statement of defence alongside all other documents necessary within 21 days of the date of the ruling. The court further ordered the respondent to pay the applicant (plaintiff) throw away costs of ksh 20,000 failure of which the interlocutory judgment entered on 7th February 2019, to remain in force. Lastly, the court directed parties to take a mutually convenient date for pre-trial directions.

6. However, it is not clear whether a defence was ever filed save for an undated and unsigned draft of defendant's alleged statement of defence which was attached to the application of 26th March, 2019. Nevertheless, the respondent having taken longer than 21 days before filing a defence and paying throw away costs of ksh20,000 as ordered, the applicant's advocates Gertrude Matata wrote a letter dated 14th October, 2019 to the court's Executive Officer seeking warrants of attachment and sale to Makini Auctioneers agencies. This was done allegedly on the automatic resumption of the interlocutory judgment on grounds that throw away costs had not been paid within 21 days nor was any defence filed.

7. On 23rd October, 2019, the court instructed/issued orders to Makini auctioneers to sell by auction the judgment debtor's property to recover the sum due and owing to the judgment creditor. Following the attachment of 3 motor vehicles belonging to the judgment debtor, on 19th November, 2019, the auctioneers placed an advertisement for the sale of motor vehicles KCB 430 PMB, KBA274R Probox and tractor ZD 3332 on 23rd November 2019.

8. After realizing that the appellant was about to realize his claim, the respondent moved to court on 21st November, 2019 contesting the said execution process hence seeking stay of execution orders and a declaration that the process of attachment was irregular. On 22nd November, 2019 the court granted stay of execution orders pending interpartes hearing.

9. In their affidavit in support of the application, the respondents argued that they had forwarded a cheque of Ksh 20,000 to the appellants on 9th October, 2019 and forwarded the same through a letter dated 14th October, 2019. That the same was declined by the respondent. They further argued that, by the time they sent the said cheque, an attachment proclamation had not been taken out.

10. Having heard the application dated 21st November, 2019, honorable Fredrick Nyakundi delivered his ruling on 30th July, 2020 thereby holding that the payment of ksh 20,000 throw away costs had no time limitation and that the court did not direct that execution was to proceed without seeking further directions from the court. He went further to state that the defendant should have sought clarification from the court if he was in doubt. He concluded that both parties failed to comply with the directions of the court and none of them fixed the matter for further directions.

11. Learned magistrate went further to find that the appellant frustrated payment of Kshs 20,000 despite being made out of time by refusing to acknowledge the cheque issued by the respondent. According to the Honorable magistrate, the appellant failed to approach the court to raise the issue of late payment.

12. He concluded by saying that the execution process was irregular as the directions of Honourable Onkoba issued on 22nd August, 2019 were not followed. He ordered release of the attached properties immediately after 30 days and that the costs of the application, auctioneers' and storage charges be settled by the appellant (plaintiff decree holder).

13. Aggrieved by the ruling, the appellant moved to this court vide a memorandum of appeal dated 13th August, 2020 and filed on 14th August, 2020 and then amended on 9th September, 2020 and filed on 7th December, 2020 citing 9 grounds of appeal as follows;

1. That the learned magistrate erred in fact and law by misdirecting himself on the clear import of the orders issued by honorable M. Onkoba (SRM) in the application dated 26th March, 2019.

2. The learned magistrate erred in fact and in law by holding that the order of Honourable M. Onkoba (SRM) required the parties to take a mention date for directions on when to pay the throw away costs, when the order clearly directed that a pre-trial date be taken after compliance with payment of the throw away costs and filing a statement of defence by the respondents.

3. That the honorable magistrate erred in law and in fact in failing to read the entire order together in line with the rules of construction of legal documents, thus missing out the requirement for the defendant /respondents to comply within 21 days clearly stipulated therein.

4. That the Honourable magistrate failed to properly direct his mind to the matter thus failing to come to the only correct conclusion that a statement of defence required within 21 days could only be filed once the setting aside has been done by paying thrown away costs.

5. That the learned magistrate erred in fact and law by disregarding the stipulation that the judgment would remain in force if there was failure to pay the throw away costs, which precludes any assumption of rights under the ruling including filing a defence within 21 days.

6. That the learned magistrate erred in fact and law by failing to address the issue of delay occasioned by the respondent that resulted into exorbitant auctioneer's charges.

7. That the learned magistrate erred in law and fact by condemning the appellant to pay the auctioneer's charges without analyzing the facts.

8. The learned magistrate erred in law and fact in failing to dismiss with costs the respondent's application which totally disregarded and abused the discretionary powers of Hon. Onkoba which were exercised to protect both parties in granting a conditional setting aside.

9. The learned magistrate erred in law and fact in applying wrong principles in allowing the respondent's application and condemning the appellant to suffer a wrong without a remedy.

14. In the said amended memorandum of appeal, the appellant sought for orders that;

(a) the appeal be allowed

(b) the ruling delivered on 30th July,2019 in Voi Civil Suit No 318/2010 be set aside.

(c) the honorable court does find that judgment in default was reinstated automatically upon the respondent's non-compliance with the orders by failing to file defence within 21 days and pay throw away costs.

(d) the respondent be held liable to pay the auctioneers' fees and /or to reimburse any amount that the applicant might be forced to pay in compliance with the orders being appealed.

(e) the respondent bears the costs of this appeal and costs of the proceedings in the lower court.

15. On 19th August,2020 summons of even date was filed before this court, seeking stay of execution of the orders of the honorable court made on 30th July, 2019. On 10th September,2020 the court granted the orders of stay of execution and all consequential orders pending interpartes hearing. The orders were confirmed on that day as the application was not opposed by the respondent.

16. On 11th December,2020, Justice Chepkwony directed parties to file their submissions in disposition of the appeal. The matter was then fixed for highlighting of submissions on 11th February,2012.

17. In compliance with the court's directions, the appellant filed their submissions on 17th December 2020. The respondent did not file any submissions nor appear for highlighting of submissions despite the hearing date having been taken by consent in open court.

Appellant's submissions.

18. Through the firm of Gertrude Matata, the appellant filed their submissions dated 16th December, 2020 basically giving a chronology of events and what happened before the High court as already highlighted in summary herein above. Learned counsel condensed the 9 grounds of appeal into two main issues for consideration as follows;

1. Whether the failure on the respondents' part in complying with orders issued on 22nd August, 2019 automatically resulted in the judgment being reinstated.

2. Whether the trial court misdirected itself on the clear import of the orders issued by Hon. M Onkoba (SRM).

19. According to the learned counsel, the orders of Hon Onkoba dated 22nd August, 2019 were absolutely clear and time bound in that, the respondent was given 21 days within which to file a statement of defence and all documents from the date of the ruling which lapsed on 12th September, 2019. Further, that the setting aside of the interlocutory judgment was subject to payment of Ksh 20,000 throw away costs in default interlocutory judgment was to remain in force.

20. Counsel argued that the interlocutory judgment reverted automatically after the lapse of 21 days hence any execution process after 21 days was legal and lawful as there was a lawful judgment in place. Counsel contended that parties are duty bound by time stipulated by courts in all fairness. In support of this position, counsel cited the case of **Chairman, Secretary and Treasurer suing as the officials/on behalf of House of Hope V Wotta House Limited (2018) Eklr** in which Majanja J while quoting **Raila Odinga & 5 Others V SCK Presidential petitions No 3, 4 and 5 of 2013 (2013) eKLR** emphasized on the importance of parties observing time lines and that the court must adhere to its own.

21. It was submitted that the respondent reluctantly forwarded a cheque of Ksh 20,000 two months after the time had lapsed without seeking for court's permission to pay outside the time lines.

22. Further, learned counsel submitted that equity aids the vigilant and delay defeats equity and that rules of procedure are there to serve a purpose. In this regard, reliance was placed In the case of **Enoch Sasia and Another Vs Attorney General & 2 others (2015) eKLR.**

23. Learned counsel faulted the trial court for failing to address himself on the reason for the respondent's failure to file defence and pay throw away costs within 21 days as directed by the court on 22nd August,2019.

24. Arguing on the second issue, counsel submitted that Hon. F. Nyakundi misdirected himself on the import of the orders of 22nd August, 2019 regarding the time lines set out by holding that parties were to take a mention for directions as to when to hold pre-trial conference yet the order clearly required pre-trial conference be held after complying with orders of filing defence and payment of throw away costs.

25. She therefore urged this court to use its discretion to interfere with the trial Hon. Magistrate's misdirection and application of discretion where he had none. In support of this proposition, the court was referred to the case of **Benja Properties Limited V Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR**

Analysis and Determination

26. I have considered the grounds of appeal herein, submissions by counsel for the appellant against proceedings before the trial court.

27. From the onset, I wish to state that the appeal herein was canvassed without any opposition from the respondent who failed to file any submissions nor appear to argue the appeal. However, that does not mean that the appeal will automatically succeed. The appellant is still

duty bound to prove on a prima facie basis that their appeal is merited. See Supreme Court decision in the case of **Gideon Sitelu Konchellah Vs Julius Lekakeny Ole Sunkul and 2 others (2018) e KLR** where the court held that the fact that a suit is not defended or challenged does not mean that the court will just automatically grant the orders sought without interrogating the veracity of the evidence placed before it and determine the same on merit.

28. This court's intervention as a first appellate court has been called upon to independently re-examine, re-analyze and re-evaluate the principles relied upon by the trial court in exercising its discretion before arriving at the impugned ruling. If the court finds that the learned magistrate wrongly exercised jurisdiction by applying wrong principles, then this court will intervene. See **Mbogo and another vs Shah (1968) E.A.93** where the court held;

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of discretion and that as a result there has been injustice”

29. In the instant case, there are clearly straight forward and undisputed facts. Firstly, there is no dispute that there was an interlocutory judgment entered on 7th February, 2019 against the respondent on grounds that they did not enter appearance nor file defence. Secondly, it is admitted that the said judgment was set aside on 22nd August, 2019 on condition that the respondent did file a statement of defence within 21 days and pay throw away costs in default interlocutory judgment entered on 7th February to remain in intact and in force.

30. Thirdly, it is a fact that the statement of defence was not filed within 21 days. Infact, from the record, a statement of defence dated 8th August, 2020 was filed on 28th August, 2020 one year down the line since the orders were made. Equally, an attempt to pay by cheque after two months i.e 16th October 2019 was made way beyond the disputed 21 days.

31. Fourthly, the attachment was undertaken by the appellant on account that interlocutory judgment had resumed automatically after 21 days expired without action. Fifth, it is admitted that the attachment orders were set aside on 30th July, 2020. Having set out the factual background of the case, the only issues that arise for determination are;

1. Whether the interlocutory judgment dated 7th July, 2019 was automatically reinstated due to non-compliance of the orders of 22nd August, 2019 by the respondent

2. Whether the attachment was procedurally and legally executed by the appellant.

32. As stated above, on the 22nd August, 2019 Hon. Onkoba heard the respondent's application to set aside the interlocutory judgment of 7th July, 2019 and directed as follows;

1. That the application dated 26th March, 2019 is allowed in terms of prayer 3 and the interlocutory judgment delivered on 7th February, 2019 is hereby set aside.

2. That the defendant/appellant is hereby granted leave to file and serve its statement of defence alongside all other documents necessary pursuant to order 11 of the Civil Procedure Rules within 21 days of the date of this ruling.

3. That the defendant/appellant to pay the plaintiff (respondent) throw away costs of Ksh 20,000 failure of which the judgment entered on 22nd August, 2019 to remain intact and in force.

4. That parties to take a mutually convenient date for pretrial directions.

33. In his ruling dated 30th July, 2020 Hon Fredrick Nyakundi declared the attachment irregular. He made various observations as follows; the order of 22nd August, 2019 did not fix the timeline within which the throw away costs was to be paid nor did the order direct automatic execution in default and that in case of doubt either party ought to have sought for mention to confirm compliance.

34. From the plain reading of the orders of Hon. Onkoba made on 22nd August, 2019, the setting aside of the interlocutory judgment was subject to clearly spelt out conditions. One such condition was for the respondent to file defence and any documents they intended to rely on within 21 days. This direction was not complied with until after one year. Secondly, the throw away costs was not paid within 21 days. The key question is, was the payment of throw away costs subject to 21 days?

35. The order of 22nd August, 2019 must be read conjunctively and not disjunctively. The import of that order can be discerned from the objective of the orders made. What was to happen if a statement of defence was not filed within 21 days? obviously, the interlocutory judgment was to remain intact and in force as per hon. Onkoba's orders. What was to happen if the order for payment of kshs 20,000 throw away costs was not honoured? I believe, judgment was to remain in force. The orders were not indefinite. They were time bound hence the essence of setting aside the interlocutory judgment upon fulfilling certain conditions.

36. To argue that there was no time line attached to the payment of ksh 20,000 throw away costs was in my opinion a misdirection by the learned magistrate. The orders setting aside the judgment could not make sense without conditions attached. Having held that the orders were subject to 21 days, what recourse did the appellant have in the circumstances of non-compliance?

37. The logical consequence of non-compliance as per order No. 3 of the ruling of 22nd August, 2019 was the reversion of the original status i.e resumption of the interlocutory judgment. Further, the natural consequence of the resumption of the judgment was execution process to follow. This is because the orders of 22nd August, 2019 were self-executing. The appellant was not duty bound to go persuading the respondent to honor the court order.

38. It was the respondent who should have sought leave to extend time to enable him comply. The burden therefore could not shift to the appellant. The date for mention for pre-trial directions was based on the assumption that all things remaining constant by the respondent having honoured the conditions, parties could be at liberty to move the court for pre-trial.

39. There could not be a pretrial before complying by filing a statement of defence. Equally, there could not be a pre-trial in a situation where a judgment is restored automatically due to non-compliance by the respondent.

40. It is trite law that rules of procedure and timelines fixed by the courts must be honored for certainty purpose and proper case management. In this regard, I am properly guided by the finding by Kiage J in the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 Others (2013) eKLR** in which the learned Judge stated that;

“I am not the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, which it may seem to aid one side, it unfairly harms the innocent party who stives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

41. The respondent did not attempt to explain why he did not file his defence within 21 days. No leave was sought to file defence out of time. As at the time of execution, there was no valid defence on record. The court was not expected to wait for another one year for the respondent to decide as to whether to participate in the proceedings.

42. Court orders are sacrosanct and must be obeyed at all times without excuse. Courts cannot be summoned to come into the aid of the indolent and that equity frowns the indolent. See **Hadkinson v Hadkison (1952) 2All ER 567 where the court stated that;**

“It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”

43. From the respondent's conduct, they do not care acting in a timely manner in responding to pleadings. In this case, the appeal was not at all challenged. Even in their application dated 26th March, 2019 which gave rise to the order of 30th July, 2019 the record shows they had to be pushed to prosecute it.

44. From the above holding, it is clear that, the respondent was to blame for what befell them. They are the authors of their own problems. I am convinced on a prima facie basis that the orders of 22nd August, 2019 were time bound and that the respondent did not comply with the orders of the court and therefore Hon. Nyakundi did exercise his discretion wrongly by holding that the orders were not time bound and that the attachment was irregular. To that extent, I do find and hold that the execution process was regularly executed and the respondent was responsible for the undertaking of the execution process. The only remedy the respondent had was to seek for extension of time to file defence and pay the amount ordered out of time.

45. Naturally, the respondents are responsible for the mess that occurred and therefore liable to meet the auctioneers' fees, storage charges and costs incurred in prosecuting the appeal herein and the application of 21st November, 2019.

46. Having held as above, it is my finding that the appeal herein is merited and the same is allowed with orders that.;

(a)The orders of Hon.Fredrick Nyakundi made and issued on 30th July, 2020 be and are hereby set aside and therefore substituted with the orders dismissing the application dated 21stNovember, 2019 with an order with costs awarded to the appellant/plaintiff

(b) It is hereby declared that the judgment in default was reinstated automatically upon the respondent's non-compliance with the orders of 22nd August 2019 directing them to file a defence and pay throw away costs within 21 days.

(c) It is here declared that the execution process was procedurally and regularly done.

(d) The respondent be and is hereby held liable (d) pay Auctioneer's fee or reimburse any amount that the applicant might have been forced to or has already paid in compliance with the orders appealed against.

(d)The respondent shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF MAY 2021

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J .N .ONYIEGO

JUDGE