



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 58 OF 2016

GEOBE LIMITED.....1ST APPELLANT

GEOFFREY GIKONYO MATHU.....2ND APPELLANT

VERSUS

NYATURIMA HOLDING LIMITED

T/A SATIMA SERVICES LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Subsequent Decree of

Honourable K. Onesmus Senior Resident Magistrate in Nyeri

CMCC No. 288 of 2011, delivered and dated 28th November 2016).

JUDGEMENT

Brief Facts

1. This appeal emanates from a ruling delivered by Nyeri Senior Resident Magistrate on 28/11/2016 on an application for stay of execution made orally before the court on the same day.
2. The trial court dismissed the application on grounds that it was premature because the applicant had at his disposal valid orders for stay for thirty(30) days running from 8/11/2016 to 8/12/2016.
3. Being aggrieved with the said ruling, the appellant lodged the instant appeal citing four(4) grounds which are hereby summarised thus:-
 - a) The trial magistrate erred in law and fact in failing to consider that the main suit had been dismissed on 8th November 2016 and the defendant was ordered to pay costs to the respondent.
 - b) The trial magistrate erred in law and in fact for not granting stay of execution leaving the respondent at liberty to execute the decree which was likely to cause the appellant to suffer.
4. Parties agreed to dispose of the appeal by way of filing written submissions.

2nd Appellant's Submissions

5. The 2nd appellant began by summarizing the facts of the case by stating that he received authority to act as a manager and agent of one Mr. Njeru Njeru Hezekiah who had an agreement with the respondent which was copied to the respondent. The 2nd appellant further submits that he gave the letter to Mr. Samuel Ndungu Wachira and forwarded it to Mr. Bartholomew Wanyeki who told Mr. Wachira to supply fuel to Mr. Njeru Njeru Hezekiah and he signed the invoice on behalf of Mr. Njeru Njeru as per the letter of authority. Mr. Njeru refused to pay the plaintiff claiming that the 2nd appellant signed the invoice however as per the letter of authority the 2nd appellant had no responsibility to make payments in respect of the fuel. As such it is the 2nd appellant's submission that the trial court misdirected itself when it declined to consider its authority letter that caused the supply of fuel.
6. The 2nd appellant submits that it is not true that the 1st appellant paid any money on his behalf or on an invoice signed by either of the appellants because it was not operational as it had no financial capacity to transact in business.

7. The 2nd appellant further summarised the issues that arise from the judgment dated 8th November 2016. He thereafter filed Further Supplementary Submissions dated 18th February 2020 stating that the respondent failed to prove how much fuel each appellant consumed, it did not produce any letters of requisition and thus arrived at the figure from nowhere. The 2nd appellant further submitted that the trial court erred by finding that the 2nd appellant ought to pay the purported amount of money despite the respondent not producing any agreement letters as between the parties herein and further not considering the letter of authority by the 2nd appellant. The 2nd appellant concludes his submissions by stating that the trial court erred by relying on an invoice signed by the 2nd appellant as an agent of Mr. Njeru Njiru despite the authority letter which prompted the supply of fuel to Mr. Njeru Njiru.

Respondent's Submissions

8. The respondent submits that the 2nd appellant's application for stay of execution was not allowed because it was filed during the period when the court had already granted stay of execution for 30 days. The court found the application premature and dismissed it with costs but it ruled that the 2nd appellant could still apply for extension of the stay orders he was given on the date of delivery of the judgement.

9. The respondent further submits that the 2nd appellant has not filed a Memorandum of Appeal against the main judgment of the suit delivered on 8th November 2016, instead he is pursuing an appeal on the ruling on the application of stay. The 2nd appellant ought to have filed a similar application for stay in the appellate court.

10. The respondent further contends that the 2nd appellant has no intention of appealing the main judgment delivered on 8th November 2016. Further that on 23rd January 2017, the court ordered the 2nd appellant to deposit the decretal amount in the name of both parties within 7 days. However the appellant did not comply and although the respondent is at liberty to execute the decree it has not done so and further nothing is stopping them from doing so.

11. The respondent concluded its submissions stating that this appeal ought to be dismissed and the respondent be at liberty to proceed with execution of the decree without feeling that there is an appeal hanging over its head.

12. The respondent further submitted that the appellants submissions dated 22nd July 2019 are not based on any grounds in the Memorandum of Appeal or in the appeal itself. The 2nd appellant brings forth issues that do not form part of the appeal herein. The issues raised touch on the judgment delivered on 8th November 2016 which judgment, the 2nd appellant has not appealed against to date.

13. It was further submitted that the appellant cannot raise new grounds of appeal by way of written submissions but ought to be raised in the Memorandum of Appeal to enable the respondent sufficient opportunity to address it. In saying so the respondent relies on **Rule 14 of the Court of Appeal Rules** and the cases of **Twaher Abudkkarim Mohammed vs Independent Electoral & Boundaries Commission (IEBC) & 2 Others [2014] eKLR and Attorney General vs Revolving Tower Restaurant (1988) KLR 462.**

14. The respondent reiterates that the appeal is not based on the judgment delivered on 8th November 2016 but on the ruling delivered on 28th November 2016. The 2nd appellant cannot bombard the respondent with new issues of determination not founded on the appeal he brought to this court. The respondent further submits that the 2nd appellant's submissions are an afterthought as the appeal herein does not have a chance of success, the submissions are frivolous, vexatious and an abuse of the court process. The appeal lacks merit and ought to be dismissed with costs.

Issues for determination

15. The 2nd appellant has cited 4 grounds of appeal which can be compressed into two main issue as to whether the appeal is competent in law and whether it is merited.

The Law

16. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

17. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

18. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

19. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the Appeal herein is competent in law:

20. Order 22 Rule 22 of the Civil Procedure Rules provides:-

(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to stay the execution, or for any other order relating to the decree or the execution which might have been made by the court of first instance, or Appellate court if execution has been issued thereby, or if application for execution has been made thereto.

21. Order 42 Rule 6(1) Civil Procedure Rules provides:-

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such orders set aside.

22. From the above provisions, it is clear that a party aggrieved by a judgment may apply for stay in the court that issued the decree or in the appellate court. The court is clothed with discretion to issue stay of execution upon sufficient cause being shown and the court may impose conditions or order security to be furnished by the judgment debtor. The trial court declined to issue a stay of execution order because the court had issued a 30 day orders for stay which were still valid running from 8/11/2016 to 8/12/2016. Thus, the court held that the application for stay before it was premature and that the 2nd appellant was at liberty to apply for extension of the stay order after the time had lapsed. However, the 2nd appellant did not do so nor did he apply to the appellate court for orders for stay of execution. It is trite law that the 2nd appellant was entitled to either apply for extension of the order of stay or he could have applied for stay of execution in the appellate court.

23. The 2nd appellant although having appealed against the ruling of the trial court delivered on 28th November 2016, does not raise any issues on the application for stay but instead raises issues on appeal in respect to the judgment dated 8th November. He does so without lodging an appeal on the said judgment without seeking leave of the court to raise new grounds of appeal. In this regard, Order 42 Rule 4 of the Civil Procedure rules which provides:-

The appellant shall not except with leave of court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on the ground.

24. A plain reading of the above provision clearly shows that a first appellate court in rendering its decision has the necessary power to consider grounds of appeal other than those set out in the memorandum of appeal provided that parties are given sufficient opportunity to address the court on the new grounds.

25. Given that the 2nd appellant did not seek leave of the court to raise the grounds of appeal which emanate from the judgment of 8th November 2016, I am of the opinion that such grounds ought not to be entertained. I am of the considered view that no appeal exists against the judgement of the learned magistrate and that any grounds raised herein by the 2nd appellant are misplaced and misconceived.

26. In regard to the appeal against the ruling of the trial court pronounced on 28/11/2016, I am of the considered opinion that appellants were at liberty to apply for extension of the stay orders granted earlier to give them time to approach the appellate court but not to apply for fresh orders for stay while the orders granted earlier were still valid.

27. It is my finding that the ruling of the trial court was in order and was guided by the law and the prevailing circumstances. Having found no fault on part of the trial magistrate, I hereby uphold the ruling delivered on 28/11/2016.

28. This appeal has no merit and it is hereby dismissed with costs to the respondent.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

Judgment delivered through video link this 20th day of May 2021