REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K Kemei J.)

CIVIL APPEAL NO. 103 OF 2015

TITUS MUTHAMA……..……...APPELLANT

VERSUS

JULIUS MUSEMBI MUTUVA…….…….....RESPONDENT

(An appeal from the whole judgement of Senior Resident Magistrate at Machakos delivered on 30th April 2015 by Hon. Mwangi SPM (Mr) in Machakos CMCC No. 1067 of 2013)

BETWEEN

JULIUS MUSEMBI MUTUVA……...PLAINTIFF

VERSUS

TITUS MUTHAMA…….…….....DEFENDANT

JUDGEMENT

1. This appeal is against the ruling of the learned Senior Principal Magistrate Mwangi dated 30th April, 2015 in Machakos CMCC No.1067 of 2013 wherein the appellant's application dated 14th November 2014 seeking orders to be allowed to pay the decretal sum via installments was dismissed.

2. A background history of the matter is that the respondent vide a Plaint dated 29th October 2013, averred that on 7th June 2012, the Appellant and Respondent entered into a written agreement for the purchase of the Appellant's motor vehicle registration number KAV 641K at an agreed sum of Kshs 1,280,000/ and in which the appellant made a down payment of Kshs 500,000/ leaving a balance of Kshs. 677,000/- for which the respondent sued.

3. By consent judgement entered on 18th September 2014 between the Appellant and Respondent, judgement was entered in favour of the Respondent in the sum of Kshs. 637,000.00/- with costs and interest at court rates. It was also a term of the consent that the Appellant pays the Respondent Kshs. 50,000.00/- on or before 30th September 2014 failing which execution was to ensue.

4. The Respondent has submitted that the Appellant frustrated the execution process by filing a Notice of Motion dated 14th November 2014 whereby he sought an order to be allowed to pay the decretal sum via installments. However, on 30th April 2015, the trial magistrate dismissed the application that has provoked the present appeal. I note that a copy of the application and certified copy of the ruling and/or order are not on record as well as the record of appeal.

5. The appellant being aggrieved by the ruling of the learned magistrate filed a memorandum of appeal dated 8th June 2015 setting out the grounds of appeal as follows:-

> ***1. The learned Senior Principal magistrate erred in law and in fact in failing to indicate his name and quoram in the ruling and therefore delivered an illegal ruling.***

2. The learned Senior Principal magistrate erred in law and in fact in failing to find that the Appellant had acted in good faith in entering into a consent judgement for which payment he had applied to pay by installments.

3. The learned Senior Principal magistrate erred in law and in fact in refusing to allow the Appellant to pay the decretal sum by way of installments of Kshs. 10,000/-.

4. The learned magistrate erred in law and in fact in ignoring and failing to consider that the Appellant was a civil servant with minimal income as seen from the pay slip presented as evidence.

5. The learned Senior Principal magistrate erred in fact and in law in finding that the decretal sum in question was Kshs. 834,580/= and that the same could take 85 months a position which was factually wrong.

6. The learned Senior Principal magistrate erred in law and in fact in failing to consider that the Appellant had made a substantial payment of the decretal sum prior to his ruling.

7. The learned Senior Principal magistrate erred in law and in fact in concluding that the decretal sum was Kshs. 834,580/- and further erred in failing to give credit of Kshs. 130,000/- which had been paid by the Appellant from the date of the judgement and ruling date.

8. The learned Senior Principal magistrate erred in law and in fact in failing to deliver a reasoned ruling.

9. The learned Senior Principal magistrate erred in law and in fact in considering the age of the debt in deciding an application for payment by installments.

10. The ruling is against the weight of the evidence and the law.

6. The Appellant has asked the court to set aside the ruling of the trial court dated 30th May 2015 and allow the Appellant's application dated 14th November 2014 with costs in the appeal and in the lower court.

7. The appeal was canvassed by way of written submissions. It is only the respondent who filed submissions. Counsel for the Respondent submitted that the appeal is an abuse of the court process since the Appellant is evading to settle the decretal amount that came from the consent judgement for a sum of Kshs. 637,000.00/- entered into in court on 18th September 2014 between the Appellant and Respondent. Counsel submitted that the Appellant agreed to pay Kshs. 50,000/- on or before 30th September 2014 failing which execution would ensue.

8. Counsel further submitted that the Appellant frustrated the execution process by filling a Notice of Motion dated 14th November 2014 seeking to pay the decretal sum in installments which had risen to Kshs. 834,580/- as per a Proclamation Notice dated 12th November 2014 but which application was dismissed on 30th April 2015 hence provoking the filing of the appeal. I note counsel supports the dismissal of the Appellant's application to pay via installments. It is urged by counsel that the Appellant has misled the court by stating that he paid Kshs. 130,000/- from the date of judgement to 30th April 2015 when the ruling on the said application was delivered. According to counsel, only Kshs. 90,000/- was paid as per two official receipts. Counsel submitted that the Appellant has not demonstrated any good faith since 30th April 2015 and that the consent judgement has never been set aside or challenged. Counsel brought to the court's attention the decision of ***Waki J.*** in ***HCCC No.4/1997(Mombasa) Lions Export & Import Agency Ltd vs Mems Group Trading Co. Ltd***. Counsel urged the court to dismiss the appeal.

9. I have considered the record of appeal and submissions filed. I find the singular issue for determination is whether the appellant's appeal has merit.

10. This being a first appeal, the role of this court under section 78 of the Civil Procedure Act and espoused in the case of ***Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA, 212*** wherein the Court of Appeal stated; inter alia: -

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. In the case of ***Mbogo vs Shah [1968] EA*** page 93 in which ***De Lestang VP*** (as he then was) observed at page 94:-

"I think it is well settled that this Court will not interfere with the exercise of its 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. However in ***Peters vs Sunday Post Ltd [1958] EA 424***, the court held that:-

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that

the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide".

13. The Appellant wants the court to set aside the trial magistrate's ruling dated 30th May 2015. The court's power to set aside is set out under Order 12 Rule 7 of the Civil Procedure Rules 2010 as follows:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

14. It is noted that the Appellant has not attached a copy of the application dated 14th November 2015, ruling dated 30th April 2015 or an order of dismissal as part of the record of appeal. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides as follows-

"(4) Before allowing the appeal to go for hearing <u>the judge shall be satisfied</u> that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal." (emphasis added).

15. It follows therefore that the above rule requires the Judge to be satisfied that the documents outlined under the rule are in the court file and parties have been served. Under (f) a copy of the judgement, order or decree appealed from should be on record. I note that a copy of the ruling or order has not been attached. What then is the position of the appeal when such documents are not on record?

16. Order 42 Rule 2 of the 2010 Rules provides that:-

"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject Appeal summarily under Section 79B of the Civil Procedure Act until copy is filed."

17. In ***Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR*** the court held that:-

"It was very clear that the Appellant's omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of Ndegwa Kamau t/a Sideview Garage vs Isika Kalumbo [2016] (Supra), Kulwant Singh Roopra vs James Nzili Maswii [2014] (Supra) and Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014] (Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, <u>this court took a different position that it would be too draconian to strike out the Appeal herein".</u>

18. At paragraph 16, the learned Judge held:

"This court's thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own. Further, the court has power under Order 42 Rule 2 of the Civil Procedure Rules to grant leave to an appellant to file such certified copy of the decree as soon as possible and in any event within such time that it may order.

19. It follows therefore that Order 42 Rule 2 confers the court with power to grant leave to the Appellant to file a certified copy of the order or decree so that the appeal is not rendered incompetent.

20. On 22nd February 2021, Appellant's and Respondent's counsels proposed to dispose the appeal by way of written submissions. Learned counsel for the appellant indicated to the court that some of the proceedings have not been captured in the record of appeal as the lower court file available was a skeleton one since the original one is still missing. As pointed out above, it is only the Respondent's submissions that are on record for consideration by the court.

21. Learned counsel for the appellant despite the lack of some crucial documents in the record of appeal nonetheless urged the court to proceed to determine the appeal based on what was availed. I am constrained not to fault the appellant over the lack of the crucial documents more particularly the order or decree appealed from and the trial court's proceedings due to the fact that the original lower court file is reported missing. It follows that I will have to go by what has been availed. It is noted that it is only the respondent who filed submissions.

22. A perusal of the memorandum of appeal dated 5/6/2015 indicates that the appellant's gravamen is that the trial court unfairly dismissed his application dated 14/11/2014 seeking to pay the decretal sums by way of instalments of Kshs 10,000/ per month until payment in full. The appellant also took issue with the trial court in factoring the age of the respondent's debt and failing to factor what had been paid prior to the ruling. The appellant now wants the trial court's order set aside and his application to pay the debt by monthly instalments of Kshs 10,000/ until payment in full.

23. The respondent's submissions appear to give the proper picture on what had transpired prior to the court's ruling of 30/4/2015. According to the respondent's counsel, the appellant had entered into a consent to start paying the debt but later reneged forcing the respondent to execute the decree whereupon the appellant filed the application that was later dismissed by the learned trial magistrate precipitating in this appeal. It was the submission of the respondent's counsel that the appellant has never set aside the consent judgement nor has he made any payment of the debt since 2015 as a sign of good faith. Counsel urged the court to dismiss the appeal.

24. The order made by the trial court was a discretionary one. The trial court rejected the appellant's request to pay the decretal sums by way of monthly instalments of Kshs 10,000/. The appellant now wants this court to interfere with that exercise of discretion. It is trite that an appellate court will not interfere with the exercise of discretion by a subordinate court unless the decision of that court is clearly wrong or that the trial court failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. **(**See the case of **Mbogo Vs Shah [1968] E.A 93.).** Looking at the memorandum of appeal, it is clear to me that the trial magistrate did not believe the appellant and thus dismissed his application on the grounds that the appellant had already failed to honour a consent earlier entered into and also the fact that the debt had taken long to be cleared and finally that the outstanding amount would take about 85 months to clear if the appellant's proposal was to be allowed. I am unable to fault the learned trial magistrate for arriving at the decision that he did. I find that he exercised his discretion and found that the appellant was not deserving of the order. It must be noted that the appellant had entered into a consent judgement against him where he undertook to repay the debt only to renege forcing the respondent to execute the decree. That consent judgement has never been set aside to date. Having defaulted in paying the debt as per the consent judgement, then the court being a court of equity found the appellant to be undeserving of the discretionary remedy. Further, I am in agreement with the learned magistrate's view that the proposal by the appellant to liquidate the decretal sums by way of Kshs 10,000/ monthly instalments would take a period of over 80 months which translates to about six years which is a long period indeed. Suffice to add that the appellant had already taken the respondent's vehicle and was using it while the respondent has been left at the mercy of the appellant. It is instructive to note that vide the earlier consent judgement the appellant had undertaken to start payment by instalments of Kshs 50,000/ but then he reneged and he cannot now come up with a proposal for a lower amount of monthly repayments. It is also noted that the appellant has not made any payment since the impugned order was made as a sign of good faith and in line with the consent judgement entered on 18/9/2014. Allowing the appellant's request would prejudice the respondent. I am satisfied that the learned trial magistrate properly exercised his discretion when he declined the appellant's application to pay by instalments.

25. In light of the foregoing observations, it is my finding that the appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **June, 2021.**

D. K. Kemei

Judge