



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E067 OF 2021

IBRAHIM ISAACK IBRAHIM.....APPELLANT

VERSUS

MOHAMEDIAN MOHAMEDRESPONDENT

(An appeal from the Ruling of Hon. E. Mbicha (P.M) in Meru CMCC No. E073 of 2020 delivered on 17/5/2021)

JUDGMENT

1. The respondent herein filed an application in the lower court dated 31/3/2021 seeking that the cutting machine HKSS-1400 with 150 KW cummins generator be released to him. The trial court in its ruling issued a conditional order by giving the appellant 14 days to comply with the court order of 24/2/2021 otherwise the machine would be released to the respondent. Instead of complying with the court order, the appellant lodged his memorandum of appeal on 2/6/2021 setting out 6 grounds, which I have collapsed into 4 as follows:-

- i. The learned magistrate misapprehended the law and applied unknown and/or wrong principles of law in arriving at an erroneous decision which was against the evidence on record.
- ii. The learned magistrate misdirected himself by not considering and sticking to the pleadings by the parties herein and addressed issues not raised in the defense, despite the fact that there was clear evidence tendered by the appellant.
- iii. The learned magistrate erred in law and fact in failing to consider the submissions made by the appellant on the issue for determination and the legal authorities provided thereof.
- iv. The learned magistrate erred in law and fact in failing to apply and follow the principle of ratio decidendi and stare decisis thus ignoring the established principles of law more so with regard to changing the terms of a contract.

2. The appeal was canvassed by way of written submissions, which were respectively filed on 23/7/2021 and 30/9/2021. The appellant submitted that he entered into a share sale agreement, where he sold the respondent 100 shares that is 10% of Hish Company Limited at a consideration of Ksh.1,450,000, and the profits or losses emanating from the ventures of the cutting machine HKSS-1400 with Cummins Generator with blades 4 pcs, 2 pcs small, rail 50 m, cable 150cm, were to be shared at a 10% 40% share ratio, as described and voluntarily laid down in the share sale agreement. He cited **Trollope Colls Ltd v North West Metropolitan Regional Hospital Board 1973 1 WIR 601 nat 609**, that the court will not make a contract for the parties and it will not even improve the contract which parties have made for themselves. He submitted that since the contract was legally binding, it should be enforced as executed and referred to **Mamta Peesh Mahajan (Suing on behalf of the estate of the late Peesh Premal Mahajan) v Yashwant Kumari Mahajan (Sued personally and as the executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan)(2017)eKLR** to support that point. He submitted that it was only the parties who could alter or modify the contract and the order by the trial court went against the terms of the original agreement. He cited **Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd(2017)eKLR**, for the proposition that it is not the business of the courts to rewrite contract/agreements between the parties and the parties are bound by the terms of their contract unless coercion, fraud or undue influence are specifically pleaded and proved. He submitted that the respondent executed the share sale agreement voluntarily but breached the same when he committed fraud by illegally selling the cutting machine to a 3rd party, a sale which was invalidated/voided by the trial court's decision of 24/2/2021. He submitted that the duty of courts is to construe and interpret contracts entered into by parties and cited **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd(2002)2 EA 503**, where it was held that, **"the primary role of the court is to construe the contract between the parties and any terms implied in it."** He urged the court to set aside the impugned decision as it contradicted the provisions of the share sale agreement dated 11/8/2018, which provided for sharing of profits/losses at a ratio of 10% 40%. He concluded that the machine ought to be released as per the above proviso of the share sale agreement.

3. The respondent submitted that the interlocutory appeal disclosed unfortunate intention of the appellant to defeat section 68 of the Civil Procedure Act, by bringing camouflaged back-door appeal against court orders of 24/2/2021. He submitted that the appeal was intended to defile the sanctity of the rule of law and abuse the extent and tenure of the court orders on 24/2/2021, hence the need for the court to intervene. He faulted the appellant for wrongly and unfairly introducing extraneous issues of contract and sale agreement dated 11/8/2018 in

his written submissions, instead of ventilating them in the hearing of the main suit. In his view, the essence of the impugned decision was to compel the appellant to comply with court orders of 24/2/2021, which have not been appealed against or reviewed. He cited **Bubul Investment Company Limited v Kassam Hauliers Limited (2021)eKLR**, on the need to obey court orders at all times without excuse. He also cited **Mbithuka Titus v Jackline Mutindi (2020)eKLR**, **Yatin Vinubhai Kotak v Tucha Adventures & anor(2000)eKLR** and **Fred Matiang'i, the Cabinet Secretary of Interior and Co-ordination of National Government v Miguna Miguna & 4 others(2018)eKLR**, on the serious consequences for willful disregard of court orders. He submitted that the appellant raised extraneous issues in the submissions which were not pleaded. He submitted that an appeal against the orders of 24/2/2021 ought to be filed with leave of the court, as the same is time-barred, incompetent and an abuse of the court process. He submitted that the pleadings and submissions by the appellant were duly considered by the trial court. He submitted that the trial court applied the correct principles of law and arrived at the correct decision. He relied on **Marcan Shipping v Kefalas(2007) 1 WLR 1864**, **Mae Properties Limited v Joseph Kibe 7 anor(2019)eKLR** and **Hytec Ltd Coventry City Council (1977) 1 WLR 1666**, on the meaning and application of an unless order. According to him, no wrong principle was applied by the trial court or any erroneous or injudicious decision made. He submitted that parties were bound by their pleadings and the appellant never pleaded the issue of the sale agreement. He frowned upon the appellant for introducing extraneous matters in the interlocutory appeal which amounts to misleading the court and unfair trial under Article 50(1) of the Constitution. He cited **Mwangi Kinyua v Waweru Kinyanjui & 3 others (2008)eKLR**, for the proposition that, where a court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit. He submitted that the trial court properly exercised its discretion in accordance with the legal principles in ordering the appellant to comply with its orders of 24/2/2021, which he had not appealed against or sought leave to appeal against. He urged the court to exercise its discretion reasonably and judiciously and find that the appellant's appeal lacks merit, is misleading, misconceived, laced with bad faith and is an outright abuse of the court process, which ought to be dismissed.

Analysis and determination

4. As the first appellate court, this court is duty bound to re-evaluate, re-assess and re-analyze the evidence on record and make its own independent determination, having in mind that it did not have the advantage of hearing witnesses testify. See: **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates(2013)eKLR**.

5. Before delving into the merits of the appeal, I note this to be an interlocutory appeal which by dint of order 43 can only be on stipulated orders or by leave of the court. The application giving rise to the ruling now challenged was made pursuant to various sections of the act and Order 51. It is thus an order from which no appeal lies as of right and there having been no leave sought and obtained, I am constrained to find that the same does not lie and the court lacks jurisdiction to entertain it. On that basis I would strike out the appeal but I have discerned that crucial issues of administration of justice have emerged that demand that I deal with the matter beyond the technical aspects involving the competence of the appeal. In doing so I invoke the jurisdiction of the court under article 165(6) and (7)

6. I have perused the memorandum of appeal, the rival submissions made by the parties as well as the authorities cited and the entire record of appeal. That perusal reveals that the dispute between the parties is a dispute over the management and control of an asset owned by a limited liability company called Hiss Company Ltd where the plaintiff/Appellant holds 40% while the respondent holds 10%. With that appreciation, the trial court in its solomonic decision dated 24.2.2021 directed the parties to litigate the dispute in a derivative suit in the appropriate court. Pursuant to that ruling all agree that there has been filed Meru HCCOMM No. E 028 of 2021. By that order it was appreciated that the property on the chattel vests in the corporate which is separate and distinct from its directors. It was also appreciated that for the dispute between the parties the court with jurisdiction is the high court. In effect the court appreciated that it lacked jurisdiction to entertain the dispute. I take the view that with such appreciation, and determination the court ought to have downed its tools with the result that no further proceeding ought to have been pursued before that court.

7. It follows therefore that when the application was presented the court ought to have appreciated its orders and the law on jurisdiction and just declined. That however did not happen with the result that the court entertained a matter it ought not have entertained. I am bound to say that what is done without jurisdiction amounts to not and thus imposes no obligation nor rights on the parties. That would be the only reason I would interfere in the matter by way of supervision now that I have come to the appreciation of what transpired before the trial court.

8. The record reveals that the court issued orders on 24/2/2021 directing that, **"In the meantime, the machine subject herein shall be released to the joint custody of the plaintiff and defendant herein who shall hire the machine to a party they shall agree on and share the proceeds/profits each at half pending direction of the High Court on the anticipated derivative action suit."** I deem it clear that the appellant did not comply with the said order for the reasons he asserts in the replying affidavit which necessitated the filing of the application dated 31/3/2021 by the respondent. I however consider the orders against the chattel to have been purely for the preservation of the same pending the determination of the dispute in a derivative suit. Having done so, the court should have been hesitant at ordering sharing of proceeds as that means appropriating the income of the company without its participation it having not been a party. The court was equally obligated not to alienate the property of the company in the chattel in a suit the company was not a party. For that reason alone I would allow the appeal so that the chattel remains in safe custody of the police pending determination of the dispute in the derivation suit. I chose to intervene as above so that the rules of natural justice are not breached against the company.

9. I have determined the appeal on ground that were not urged by the appellant and merely to correct the trial court. For that reason and the fact that it was the appellant who moved a court without jurisdiction in the matter, I direct that each party shall bear own costs

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF DECEMBER, 2021

PATRICK J.O OTIENO

JUDGE