



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 338 OF 2008

HARSHA CONSTRUCTION LIMITED.....APPELLANT

VERSUS

SURAJ CONTRACTORS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order delivered on 16th June, 2008

by Hon. Kiarie W. Kiarie (SPM) Milimani Commercial Courts

in CMCC No. 8025 of 2005)

JUDGMENT

1. The Appellant was the Decree Holder while the Respondent was the Objector in the proceedings before the lower court. During the execution process, the Respondent (Objector) filed the application (undated) filed on 9th April, 2008 which sought the following orders:

- “1. That due to the urgency of the matter, service of this application be dispensed with in the first instance.**
- 2. That pending the hearing and determination of the application, there be a stay of execution of the decree and the orders made on 28th February, 2008.**
- 3. That the orders made on 28th February 2008 be set aside unconditionally and the objectors application filed on 6th July, 2007 do proceed to hearing on merit.**
- 4. That cost of this application be borne by the Plaintiff in any event.”**

2. It was stated in the grounds and the affidavit in support of the application that the court file had a history of disappearance and that on the day the orders complained about were given the Applicant (Objector) was not in court. That they had not been served with any application and a certain Ms. Gikonyo who purported to hold brief and appear for the Applicant was not instructed by the Applicant's counsel. That the said appearance on behalf of the Applicant was intended to procure the courts orders irregularly, which was done.

3. The application was opposed. It was stated in the replying affidavit that the Objection Proceedings were dismissed on 6th July, 2007 and the Decree Holder allowed to proceed with the sale of motor vehicle Registration No. KAT 312N. That pursuant to the said orders, the motor vehicle was advertised and subsequently sold in a public auction and the transfer documents released to the purchaser. It was contended that the court file never went missing and that the Objector was not keen on fixing the matter for hearing. It was denied that there were any irregularities regarding the service or the hearing of the application dated 5th February, 2008 (which sought orders for dismissal of the Objector's application).

4. The trial magistrate allowed the application (undated) filed on 9th April, 2008 which essentially reinstated the Objector's application dated 5th July, 2007 and filed on 6th July, 2007 which sought orders that the attachment of the Objector's goods be lifted and the goods be released to the Objector. That is what triggered this Appeal.

5. The Appellant raised 11 grounds of appeal. The same can be summarized as follows:

- a. Whether the trial magistrate took into consideration extraneous factors resulting in wrong exercise of discretion and thereby arrived at the wrong decision.
- b. Whether the trial magistrate erred in failing to hold that the Respondent's Advocate was duly served with the Notice of motion dated 5th February, 2008.
- c. Whether the trial magistrate erred in allowing the application of 9th April, 2008 long after the execution of the decree by way of sale and transfer of the Motor vehicle.
- d. Whether the trial magistrate erred in failing to hold that the proper remedy would be for the Respondent to file a separate suit for damages.
- e. Whether the application of 9th April, 2008 was filed after inordinate delay.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“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 (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. It was submitted by the Appellant (Decree-holder) that pursuant to the orders given on 28th February, 2008 dismissing the application dated 5th July, 2007 which sought orders to have the attachment of the Objector's goods lifted, the attached motor vehicle was advertised and subsequently sold and transfer documents released to the purchaser. That therefore the setting aside of the orders dated 28th February, 2008 came rather late in the day as the motor vehicle that was the subject of the dispute had already been disposed of. That the parties by consent dated 9th March, 2010 withdrew the Objection Proceedings and agreed that the Objector do proceed to file a claim for damages, which was done.

8. It was further submitted that the Appeal herein has therefore been overtaken by events and will serve no useful purpose. That if the Appeal is dismissed, both parties will revert to the order by the trial magistrate given on 16th June, 2008. That on the other hand if the Appeal is allowed, it would mean the Respondent has no further recourse against the Appellant. It was further submitted that the trial magistrate failed to weigh and analyze the evidence on record.

9. The Respondent (Objector) supported the ruling of the trial magistrate. It was submitted that it was necessary for the trial court to determine whether the attachment and sale of the motor vehicle was lawful to enable the parties to move on. That the Respondent was not to blame for any delay as the same was explained.

10. The application (undated) filed on 9th April, 2008 which is the subject of the impugned ruling raises issues concerning failure to have the Objection Proceedings cause listed for hearing, missing court file which resurfaced later with orders, lack of service and attendance in court by counsel who is said not to have been instructed by the Objector. According to the Respondent (Objector), that is what resulted in the orders given on 28th February, 2008 wherein the stay of execution orders were lifted and the Appellant (Decree-Holder) allowed the proceed with the sale of motor vehicle KAT 312N. The application dated 5th July, 2007 which also sought the orders of attachment to be lifted and the attached goods released to the Respondent (Objector) was dismissed.

11. The allegations made in the averments in the affidavit in support of the application are serious. There are allegations of fraud regarding the signature and stamp on the alleged service of the application. The Respondent's efforts to trace the missing file is demonstrated by the exhibited copy of letter dated 15th February, 2008 written to the court complaining about the failure to cause list the matter and also raises the issue of the missing court file.

12. Failure to have the file cause listed for hearing is conceded to but the fraud issue and the missing court file issue were disputed. No investigations were carried out and the process server was not subjected to any cross-examination. It is therefore difficult for this court to tell whether there was any malpractice or not. In the circumstances, this court cannot point a finger at any of the parties herein as the side behind the disappearance of the court file or any of the other alleged irregularities. In the premises, the trial magistrate made the correct orders and allowed the application so that the parties could be put back to their previous position.

13. It has been submitted by the Appellant that by the date the impugned ruling was delivered, the motor vehicle had already been sold through a public auction and transfer documents released to the purchaser. That the judgment herein will therefore remain as an academic exercise as the Objector has already filed a suit for damages in respect of the wrongful attachment. The issue of filing suit for damages and the consent to drop the Objection Proceeding's was not the subject of the matter before the trial magistrate nor the Appeal herein. This court will therefore not pronounce itself on that issue.

14. With the foregoing, this court finds no merits in the Appeal. The Appeal is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 12th day of March, 2020

B. THURANIRA JADEN

JUDGE