REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO.30 OF 2018

JACKTON WIYEMA IMBWAKA……..APPELLANT

VERSUS

JAMII BORA BANK LTD……1ST RESPONDENT

MUGANDA WASULWA……..2ND RESPONDENT

T/A KEYSIAN AUCTIONEERS

JUDGMENT

1. Before Court is the Appeal filed by **JACKSON WIYEMA IMBWAKA (**hereinafter the Appellant) challenging the Ruling and decision of **Hon. L.W KABARIA** Resident Magistrate vide the Ruling delivered on **22nd December 2015**.

2. The Respondent **JAMII BORA BANK LTD** opposed the Appeal. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions on **18th April 2019** whilst the Respondent filed its submissions on **21st May 2019.**

BACKGROUND

3. Vide a letter of Offer dated **10th July 2014**, the 1st Respondent advanced to the Appellant an Asset Finance facility in the amount of **Kshs.1,750,000**. As security for repayment of said facility a Chattels Mortgage dated **28th July 2014** was registered in favour of the Respondent in respect to Motor vehicle **Regn KBZ 452U** (hereinafter the vehicle). The Appellant defaulted in the repayment and the Respondent repossessed the vehicle pursuant to the terms of the Chattels Mortgage.

4. Being aggrieved by the repossession the Appellant filed a suit in the lower court. Contemporaneously with that suit the Appellant filed an application seeking injunctive orders on grounds that the Chattels Mortgage the basis of the repossession of the vehicle by the Bank was unregistered and therefore illegal and of no effect.

5. The learned trial magistrate after considering arguments from both parties dismissed the Appellants prayer for an injunction and awarded costs to the Respondent. The Appellant moved to the High court in order to challenge the decision of the trial magistrate. The Appellant in his appeal raised eight (8) grounds of Appeal as follows:

(a) The learned magistrate erred in law and in fact in dismissing the appellant's application for injunction pending the hearing of the main suit.

(b) The learned magistrate erred in law and fact in not correctly applying the conditions set out in the case of **Giella Vs Casman Brown (1973) EA 358** for grant of temporary injunction.

(c) The learned magistrate erred in law and fact in wrongfully relying on undisclosed case law and reaching a nebulous conclusion that the appellant had not denied his default when he was in fact not in default at all.

(d) The learned magistrate erred in law and fact in ignoring the terms and conditions as stipulated in the asset Finance agreement signed between the appellant and the 1st Respondent.

(e) The learned magistrate erred in law and fact in not finding that the evidence and exhibits produced by the Respondents were

inconsistent, contradictory and did not support the Respondents case.

(f) The learned magistrate erred in law and fact in finding that the Appellants case would not succeed at the main hearing instead of addressing herself to the Applicants case likelihood of success.

(g) The learned magistrate erred in law and fact in determining the main suit at the interlocutory state.

(h) The learned magistrate erred in law in awarding costs to the respondents.

ANALYSIS AND DETERMINATION

6. I have carefully considered the written submissions filed by both parties in this matter. As a preliminary point the Respondent submits that the Appeal herein is in competent as neither the Memorandum of Appeal nor Record of Appeal bearing certified copies of the lower court proceedings have been lodged in the High Court. The Respondent further submits that no certified copies of the order being appealed against were annexed to the Record of Appeal. As such the Respondent contends that the present appeal is incompetent as it contravenes **Order 42 Rule 10(2) and 42 Rule 13(4) of the Civil Procedure Rules 2010**. They pray that the Appeal be struck out on these grounds.

7. **Order 42 Rule 2** of the **Civil Procedure Rules 2010** provides as follows:-

> **"2. Where no certified copies 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 time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.**

8. I have carefully perused the file before me. I note that the Appellant filed on **31st July 2018** a Record of Appeal which included a Memorandum of Appeal dated **20th August 2020**. A keen perusal of that Record of Appel reveals that it **did not** contain certified copies of the lower court proceedings nor did it **certified copies** of the Ruling being appealed. The Record filed on **31st July 2018** at pages 78-81 contains merely a photocopy of the Ruling in question which copy has not been certified.

9. It is manifest that by failing to annex the required documents the Appellant is in breach of the above rules. In **SALAMA BEACH HOTEL LIMITED –VS- MARIO ROSSI [2015] eKLR**, the court observed thus:-

> **"This Court considered the effect of lack of a certified copy of the decree or order appealed from as required by rule 87(h) of the Court of Appeal Rules, in FLORIS PIERRO V GIANCARLO FALASCONI, CA NO.145 OF 2012. The Court concluded that an appeal can only be against a decree or an order and that failure to include the order or decree appealed against renders the appeal fatally defective and incurable even under the overriding objective. In that case the order appealed from was not included. In the present appeal, the order is included but it is not certified. To the extent that the purpose of certification of the order is to confirm its authenticity, inclusion of an order that is not certified is, in our view, as bad as complete non-inclusion of the order."**[own emphasis]

10. In **BWANA MOHAMED BWANA V SILVANO BUKO BONAYA** (supra). In that case court struck out a record of appeal that did not contain, among others, a certified copy of the decree. On appeal to the Supreme court, in addition to holding that the appeal did involve issues of constitutional interpretation or application, the court affirmed that the omission of mandatory documents from the record had the effect of rendering the appeal defective and incompetent and that a court could not exercise its adjudicatory powers where an appeal is incompetent. The Supreme Court concluded that a court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled.

11. Likewise in **Ndegwa Kamau t/a Sideview Garage Vs Fredrick Isika Kalumbo [2016] eKLR**, it was held that:-

> **"It is clear from this provision of the law that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal."** [own emphasis]

12. Similarly, I find and hold that the present appeal is incompetent on account of failure to annex certified copies of the lower court Record as well as the Ruling/order in question. As such this appeal is for striking out.

13. Notwithstanding the above and for completeness I will proceed to consider the merits of the Appeal herein. The legal position is that a court listening to an appeal should not interfere with the discretion of a lower court unless the court exercised its discretion wrongly. In **Milka Nyambura Wanderi & Another Vs Principal Magistrate's Court Muranga & Another [201] eKLR**, said:-

> **"For us to interfere with the exercise of that discretion, it must be demonstrated that the exercise of that discretion was clearly wrong on account of misdirection on the part of the Judge, or that the Judge acted on extraneous matters or failed to take into account matter that he should have taken into account."**

14. The Appellant submits that the learned trial magistrate erroneously relied on undisclosed case law in order to reach the nebulous conclusion that the appellant has not denied the fact of his default in servicing the facility in question. The Appellant insists that contrary to the assertions of the Respondent, he was not in default at all.

15. In his Supplementary Affidavit, vide Para 3 (Page 58 of the Record of Appeal Likewise, the Appellant avers as follows:-

> **"(3) THAT sometime in December 2014, I defaulted to pay the monthly payment and had an agreement with the 1st Defendant…."**

Likewise at **Paragraph 3** of the Appellant's own submissions (Page 115 of the Record of Appeal)there is a clear admission by the Appellant that he was in default.

16. Accordingly, it is manifest that the Appellant admitted to his default and I find that the trial magistrate relied on these express admissions by the Appellant and not on case law to reach the conclusion that default had indeed occurred. This ground has no basis and the same is hereby dismissed.

17. The Appellant further submits that the learned trial magistrate erred in basing her decision that repossession of the vehicle was proper and legal where in fact no valid chattels Mortgage existed. The record at Page 23-29 clearly includes Chattels Mortgage dated **28th July 2015.** The Document was duly registered under the **Chattels Transfer Act** on **28th July 2014** over the said motor vehicle. I find that the trial magistrate did not err in this regard and this ground of the appeal likewise fails.

18. Finally the Appellant submits that the learned trial magistrate failed to properly apply the principles on **GIELLA –VS- CASMAN BROWN & COMPANY (1973)E.A.** It is alleged that instead of determining whether or not a prima facie case had been disclosed, the learned magistrate went on to find that the Appellants case would not succeed at trial thereby determining the main suit at the interlocutory stage.

19.I have carefully perused the ruling of the learned trial magistrate dated **22nd December 2015.** Nowhere did the magistrate make a determination that the Appellant's case would not succeed at trial. Instead I find that the trial magistrate did give consideration to whether a "**prima facie**" case had been disclosed in terms of the prerequisite for interlocutory injunctions set out in the **Giella case**. In ruling the trial magistrate stated as follows:-

> **"11. I have scrutinized the annexture of the parties; I have seen the letter of offer dated the 10th of July 2014 and the supplementary letter of offer dated the 16th January 2015. In addition to the two confirming (as conceded by the parties) that a facility was advanced to Mr. Wiyema, the letter of the 10th July 2014 also confirms contrary to Mr Wiyemas averments that the facility was secured by a joint registration and chattels mortgage over the vehicle which collaterals were pursuant to the supplementary letter the collateral increased to include a charge over title No. Kajiado/ Kitengela/5711. The Respondent has also shown to the court a duly registered chattels mortagage over the subject vehicle, one dated the 28th July 2014. It is duly executed. I have also seen the conditions of sanctions in the chattels mortage shown to the court. This court is satisfied that the Defendant had the right of seizure and attachment of the said motor vehicle under the instrument of chattels mortgage. <u>A prima facie case I find not established</u>.** [own emphasis]

20. Therefore based on the foregoing, I find that the trial magistrate applied the correct principles in determining the application for interlocutory injunctive orders. Accordingly, I find no merit in this appeal. The same is dismissed in its entirety with costs to the Respondent.

Dated in Nairobi this 16th day of June 2020

……..

Justice Maureen A. Odero