

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 137 OF 2015

MESHACK OWIRA OWINO1ST APPELLANT

STEREOMAX GROUP LIMITED.....2ND APPELLANT

VERSUS

JACKSON OUMA OGEDARESPONDENT

(Being an appeal from the ruling of Hon. T.S Nchoe (Mr) delivered on 4th March, 2015 in CMCC No. 6667 of 2012)

JUDGMENT

The respondent sued the appellants in the lower court seeking recovery of Ksh. 2,800,000/= plus costs and interest. The particulars are set out in the plaint dated and filed on 8th November, 2012.

The appellants denied the respondents claim. There is no defence in the record of appeal and it would appear, after service of summons to enter appearance the appellants herein filed an application by way of Notice of Motion dated 14th September, and filed on 17th September, 2014 seeking inter alia an order that the 1st appellant be allowed to pay the amount claimed by instalments of Kshs. 10,000/= per month. That application was heard and in the ruling dated 4th March, 2015 the lower court dismissed the application with costs. It is that ruling that promoted this appeal.

Thereafter, the advocate for the appellants in an appearance before the court on 27th July, 2015 informed the court that they were not disputing the amount owed and asked for a month to give a proposal. After several appearances in court, a warrant of arrest was issued against the 1st appellant and the record does not show what followed thereafter.

This appeal, based on the Memorandum of Appeal, faults the lower court for failing to exercise its discretion in favour of the appellants to liquidate the decretal sum in affordable instalments. The orders sought are that, this court should set aside the ruling of the lower court and allow the appellant to liquidate the decretal sum in instalments as proposed in the application dated 14th September, 2014.

It is now trite law that the appellate court may not interfere with the discretion of the trial court, unless the exercise of that discretion resulted to prejudice or injustice to the party applying. I have seen no evidence to suggest that the lower court did not exercise its discretion judiciously and in any case, the amount suggested by the appellants against the sum due and owing was going to cause more injustice on the part of the respondent.

Further, after the dismissal of the appellant's application by the lower court, the appellants did not have the right of appeal without leave of the court. This is as clearly provided by Order 43 Rule 2 of the Civil Procedure Rules. In fact, an application for leave to appeal ought to have been made before the trial court and there is no evidence that this was done.

The failure to comply with the said provisions makes this appeal incompetent. I have no hesitation to hold this appeal is lacking in merit and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE