



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 109 OF 2016**

**JOHN WANYAMA BENJAMIN.....APPELLANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

***(An appeal arising from the ruling and order of the Hon. Mr. S. Wahome Senior Principal Magistrate, in Kakamega CMCCC No. 70 of 1994 of 13<sup>th</sup> April 2016)***

**JUDGMENT**

1. The appellant lodged herein a memorandum of appeal dated 19<sup>th</sup> December 2016, amended on 8<sup>th</sup> January 2018, in which it was averred that the trial court erred in and over concentrated on the preliminary objection and ignored the affidavits which had evidence, erred in failing to note that the order the subject of the ruling was a perpetual injunction which was not subject to limitation of actions, order allowing erred in deciding on matters that had not been prayed for, erred in not treating the limitation of actions as a new suit and order payment of additional court fees, and in failing to appreciate that the High Court had ordered on 16<sup>th</sup> June 2015 that the orders made on 11<sup>th</sup> March 1999 be executed. It is sought that the said orders of the lower court made on 13<sup>th</sup> April 2016 be aside as they were made in contravention of the orders made on 16<sup>th</sup> June 2015 in HCCA No. 97 of 1999.

2. Directions were given on 7<sup>th</sup> June 2018 that the appeal be canvassed by way of written submissions. Both sides complied with those directions by filing detailed written submissions. I have perused through them and noted the arguments advanced.

3. This matter has a long and chequered history. It has been litigated at the Magistrate's Court, the High Court and the Court of Appeal in such suits as Kakamega SPMCCC No. 70 of 1994, HCCA No. 97 of 1999, Kakamega HCCA No. 50 of 2003, and Kakamega HCMisc. Application No. 15 of 2016 and Kisumu CA civil application number 35 of 2016. Its genesis is a charge dated 27<sup>th</sup> November 1989, which was registered on 19<sup>th</sup> December 1989, against North Kabras/Kivaywa/515 to secure a sum of Kshs. 100, 000.00 that the respondent had advanced to the appellant. The appellant fell in arrears and the respondent decided to realise the security by exercise of its power of sale. The property was advertised for sale, prompting the appellant to file the suit at the lower court, being Kakamega SPMCCC No. 70 of 1994, seeking injunctions to restrain the sale. The WA Juma (Mrs.), Senior Resident Magistrate, after hearing the application, granted the injunction, on 11<sup>th</sup> March 1999, to restrain sale of the property, with a further order that the title deed for the said property be released to the appellant. The orders were made upon the finding that the respondent had caused the appellant's moveable assets to be attached and disposed of, whose value was sufficient to settle the debt, therefore there was no basis for seeking to sell the security, North Kabras/Kivaywa/515.

4. The appellant herein then moved the trial court seeking to be paid a sum of money, which he said represented the value of the goods attached and sold by the respondent. The application was prompted by the failure by the appellant to comply with the orders made on 11<sup>th</sup> March 1999 for release of the title deed. The argument being that the respondent could not keep the security as well as the proceeds of the auctioned movables. The application was held in abeyance to await outcome of proceedings at the High Court. The High Court did grant stay of execution, but the said orders lapsed after sometime. In the meantime, the appellant taxed a party-to party bill of costs. The lapse of the stay orders paved way for execution for costs. It would appear that warrants were issued for arrest of officers of the respondent in execution of the decree for costs, which was stayed by consent for some time, but was eventually effected, and the matter was thereafter settled upon payment to the appellant by the respondent of a sum of Kshs. 410, 000.00 to secure the release of the arrested bank officer. AO Muchelule, Chief Magistrate (CM), eventually held on 28<sup>th</sup> February 2003, that the payment of Kshs. 410, 000.00 was in error as there was no order requiring its payment, and he directed the appellant to refund it to the respondent or execution ensued to recover it. He further directed the respondent to hold on to the title deed for North Kabras/Kivaywa/515 until the said money was refunded. It is not clear whether the said money was paid back to the respondent as there are counter allegations back and forth that the money was deposited and was not deposited.

5. The orders of 11<sup>th</sup> March 1999 provoked the filing of Kakamega HCCA No. 97 of 1999, on the basis that the orders ought not to have been granted on an interlocutory application instead of after a full trial, the court relied on uncommissioned documents which were not admissible, ordering release of a security without proof that the debt had been paid in full, restraining the appellant from realizing its security when there was no conclusive evidence that the respondent had settled the debt, among other grounds. The appeal was canvassed by way of

written submissions following directions given on 19<sup>th</sup> June 2014. In a judgment delivered on 27<sup>th</sup> May 2015, the appellate court upheld the findings of the lower court, that the debt in question had been settled in full and what remained was release of the title deed held as security. The appellate court stated that it agreed with the trial court that the title deed be released. It set aside the order of the lower court directing the appellant to hold on to the appellant's title until he had refunded the sum of Kshs. 410, 000.00. The respondent was directed to discharge the title within ninety (90) days. The appeal was dismissed with costs to the appellant herein. There were several post-judgment proceedings relating to the execution of the appellate decree and of a proposed further appeal to Court of Appeal. Rulings thereof were delivered on 21<sup>st</sup> February 2016 and 12<sup>th</sup> April 2017.

6. The appeal in Kakamega HCCA No. 50 of 2003 was against the orders made in the ruling by Muchelule CM of 28<sup>th</sup> February 2003, where it had been ruled that the process taken by the appellant herein against the officer of the respondent to recover values of the goods that had been attached and sold was in error as the issue of the values had been dealt with finally in the ruling of 11<sup>th</sup> March 1999, and it was stated that the only thing that the borrower was entitled to from the respondent was return of his title deed. Upon the arrest of the respondent's officer the parties had come to court and the appellant herein was paid a sum of Kshs. 410, 000.00 by the respondent and the officer of the respondent was released on a bond of Kshs. 100, 000.00. The trial court had ruled that that payment was in error as there was no judgment for it. It directed that the appellant refund the said sum to the respondent, but in the meantime the title deed would be withheld until payment in full. The appeal was canvassed and the appellate court delivered a judgment on 16<sup>th</sup> March 2010. It dismissed the appeal upon upholding the ruling by Muchelule CM of 28<sup>th</sup> February 2003. The court made specific findings that the order extracted on 8<sup>th</sup> December 1999 by the appellant herein, which was the basis of the execution process which culminated in the orders of 28<sup>th</sup> February 2003, was defective for the trial court had never awarded the appellant herein the values of the attached goods.

7. The ruling the subject of the instant appeal was delivered on 13<sup>th</sup> April 2016 by S Wahome, Senior Principal Magistrate (SPM). It arose from two applications dated 3<sup>rd</sup> September 2015 and 25<sup>th</sup> February 2016. The application dated 3<sup>rd</sup> September 2015 was by the respondent and it sought review and setting aside of orders made on 24<sup>th</sup> July 2015, which orders had vacated orders made earlier on 11<sup>th</sup> April 2014, allowing execution of orders made on 11<sup>th</sup> March 1999 and granting costs to the appellant herein. On 24<sup>th</sup> July 2015 the court had allowed an application dated 6<sup>th</sup> July 2015 as the same was unopposed. The application dated 25<sup>th</sup> February 2016 was also by the respondent, it sought stay of execution of warrants of attachment and sale and of arrest issued on 3<sup>rd</sup> February 2016 and 16<sup>th</sup> February 2016. It would appear that upon the order of 24<sup>th</sup> July 2015, the appellant herein had sought to execute a decree dated 4<sup>th</sup> May 2014 for Kshs. 194, 227.00, ostensibly arising from the order of 11<sup>th</sup> March 1999, and he obtained warrants dated 19<sup>th</sup> February 2016 to recover a sum of Kshs 1, 618, 634.00. In his ruling of 13<sup>th</sup> April 2016 Wahome SPM reviewed and set aside the orders of 24<sup>th</sup> July 2015 on the finding that the decree sought to be executed was more than twelve years old. It was held that there was nothing to execute.

8. The appellant herein filed a miscellaneous application at the High Court in Kakamega HCMisc. Application No. 15 of 2016 on 14<sup>th</sup> April 2016 in which he sought that the ruling of the lower court of 13<sup>th</sup> April 2016 be set aside and that the file of the lower court in Kakamega CMCCC No. 70 of 1994 be called up to the High Court for verification. The application was heard and a ruling was delivered on 13<sup>th</sup> December 2016 dismissing the same. The court noted that the appellant had been granted an order on 11<sup>th</sup> March 1999, which he did not execute until 2015, more than twelve years after it was made. The court was satisfied that the appellant had been heard on an application dated 5<sup>th</sup> September 2015 prior to the court ruling on the same on 13<sup>th</sup> April 2016. The appellate court was not satisfied that there was anything that could move it to set aside the impugned orders. It was opined that the appellant should have sought review or appealed against the said orders.

9. While dismissing the application in Kakamega HCMisc. Application No. 15 of 2016, Kariuki J stated –

*'11 ... I have had a chance to peruse the ruling of the PM which is sought to be set aside and do find that the learned magistrate heard both the parties on merit giving his reasons thereof and his findings. He ably captured the sentiments of both the parties herein. He did not consider issues that were not raised by the parties but confined himself on what was laid before him. I find that nothing really moves on the application to set aside the ruling. In any event the option available to the applicant were either to seek review before the same court, appeal to High Court, impugn the decision via constitutional or judicial review application.*

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*14 The upshot of all the above is that the applicant's Chamber Summons dated 14<sup>th</sup> April 2016 lacks merit and is dismissed with costs. The applicant should appeal against the said ruling if he is dissatisfied with the same.'*

10. Looking at the ruling by Kariuki J, I am of the persuasion that the issues raised in the instant appeal were the same issues that were canvassed before Kariuki J. The Judge considered the decision by Wahome SPM on its merits and concluded that he did not see any reason why he would have interfered with it. The Judge went on to observe that the appellant herein should have had sought review of the ruling by Wahome SPM at the lower court, or moved the High Court on appeal, or judicial or constitutional review. To my mind the matter is *res judicata*. The issues arising in the appeal were addressed by a court of competent jurisdiction, which found no merit in the same. It would be duplicitous for me to consider the merits, or lack thereof, of the same issues a second time.

11. One other thing, the orders impugned were made on 13<sup>th</sup> April 2016. Appeals from such orders lie with leave of court by virtue of section 75 of the Civil Procedure Act, Cap 21, Laws of Kenya, and, in any event, an appeal should be preferred within twenty-eight (28) days from the date of the impugned decision. The memorandum of appeal, which initiated this appeal, was lodged herein on 19<sup>th</sup> December 2016, some nine months or so after the making of the impugned orders. There is no evidence that leave to appeal and to appeal out of time were ever sought and granted to pave way for its filing. In my understanding, the order made by Kariuki J on 13<sup>th</sup> December 2016 in Kakamega

HCMisc. Application No. 15 of 2016 did not grant leave to the appellant to appeal against the order of Wahome SPM of 13<sup>th</sup> April 2016, nor leave to file appeal out of time. Neither can the said order be construed to amount to such leave. All that the Judge did was to observe that what the appellant ought to have done was to challenge the decision of Wahome SPM by way of appeal. The Judge, while dismissing the application before him, dated 14<sup>th</sup> April 2016, informed the appellant that he could appeal against his decision, of 13<sup>th</sup> December 2016, if he was dissatisfied with it. I, therefore, find that the appeal before me was filed out of time and without leave of court. It was therefore null and void from inception. I note that the same was admitted to hearing on 11<sup>th</sup> April 2018; however, that did not cure the anomaly. The appeal is as dead as a dodo.

12. In view of everything that I have said above, it is my inevitable conclusion that the appeal before me is incompetent and misconceived, and I accordingly dismiss the same with costs. Any party dissatisfied with the judgment herein has the liberty to challenge the same at the Court of Appeal.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 27<sup>th</sup> DAY OF September, 2018**

**W. MUSYOKA**

**JUDGE**