



**REPUBLIC OF KENYA**

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

**HCCA. NO. 471 OF 2011**

**JACKSON KATANA.....APPELLANT**

**-VERSUS-**

**NDUATI WAMAE & ASSOCIATES CO. LTD**

**G.N MBURU T/A HAKI TRADERS ..... RESPONDENT**

*(Formerly PMCC Civil Case 6988 of 2002 Milimani Commercial Courts, Nairobi).*

**JUDGEMENT**

**INTRODUCTION**

1. By plaint dated 09/09/2002, the Plaintiff/applicant sought reliefs for mandatory injunction, declaratory orders, general damages, special damages costs and interest against Defendant/Respondent.
2. The Plaintiff/Applicant pleaded that he was a tenant of the 1<sup>st</sup> defendant in Buruburu Phase II No.669 paying a rent of Kshs.15, 000/= per month.
3. However, on 28/08/2002, 2<sup>nd</sup> Defendant/Respondent on 1<sup>st</sup> Defendant/Respondent instructions distressed for rent without serving notice of proclamation. Thus distress averred to be illegal.
4. There was also averment that 2<sup>nd</sup> Defendant took Kshs.50, 000/=, Samsung camera valued at Kshs.22, 000/= thus the claim and reliefs thereof.
5. Plaint was amended subsequently enjoining the 3<sup>rd</sup> Defendants. The amended enjoined 3<sup>rd</sup> Defendant as the landlord and owner of the suit premises.
6. 1<sup>st</sup> and 2<sup>nd</sup> Defendants were agents of the Defendant no. 3. The Defendant filed Defense and denied the entire claim.
7. The suit was subsequently heard and determined in favor of the Plaintiff/Appellant.
8. In the decree of 13/05/2010, the 2<sup>nd</sup> Defendant was compelled to release the attached goods to the Plaintiff.
9. However, the Plaintiff had not collected some goods by 31/05/2011. Thus constrained 2<sup>nd</sup> Defendant to file motion dated 31/05/2011 to compel Plaintiff to collect same goods and pay storage charges.
10. On 29/06/2011, the court granted the sought orders.
11. A motion dated 06/07/2011 was lodged by Plaintiff seeking leave to appeal against the ruling of 29/06/2011. The same was filed on 06/07/2011.
12. On 24/08/2011, the same application was dismissed for lack of merit as the Plaintiff had declined to collect his goods from Defendant No. 2.
13. Being aggrieved by the aforesaid ruling, the Appellant/Plaintiff lodged an appeal on 23/09/2011 and set out six grounds of appeal namely:-

1. **THAT** the Learned Magistrate erred in both law and in fact in ordering the dismissal of the Appellant's application for leave to file the intended appeal as the same should be granted as a right and not as a discretion of the court.
2. **THAT** the Learned Magistrate erred in both law and in fact by denying the Appellant a grant of leave to file the intended appeal as it is a statutory requirement that leave be granted before preferring an appeal.
3. **THAT** the Learned Trial Magistrate erred in both law and in fact in dismissing of the Appellant's application as the intended appeal was in the interest of justice and that the Applicant stands to suffer irreparable loss and damage if Applicant's appeal is not filed and the court's order stayed.
4. **THAT** the Learned Magistrate erred in both law and in fact by misdirecting himself in the interpretation of law and facts in the instant case and thus arriving at wrong erroneous and unjust conclusion.
5. **THAT** the decision in its entirety is against the law and an irredeemable travesty of justice.
6. **THAT** the entire decision is contrary to law and a misapprehension of the justice.

14. The directions were given for the appeal to be canvassed by way of submissions but only the Appellant filed the same.

#### **APPELLANT'S SUBMISSIONS**

15. The Appellant submits that, the appeal is a creature of statute and is linked to the right to a fair hearing and the right to access justice.

16. Thus, **Section 75 of the Civil Procedure Act, 2010** provides that:-

***‘An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted .....***”

17. **Article 159 of the Constitution of Kenya, 2010** provides that *justice shall be done to all irrespective of status, which right has to be balanced out against the right of the Appellant not to be ousted from the seat of justice by denying them a stay since justice is a two way traffic as was brought out by Justice R. E. Aburili in the case of **EDWARD KAMAU AND ANOTHER VERSUS HANNAH MUKUI GICHUKI & ANOTHER.***

18. **Article 159(2) (d)** of the Constitution of Kenya provides that justice shall be administered without undue regard to technicalities. He relies on the case of **EDWARD KAMAU & ANOR –VS- HANNAH MUKUI & ANOR**, where it was held that *“the right to appeal is a constitutional right which is the cornerstone of the rule of law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article (50) (1) of the Constitution .....*”

19. On the issue of mistakes of advocate, the appellant relies on the Court of Appeal case of **BELINDA MURAI & ORS –VS- AMOS WANAINA** where it was held that:-

***“A mistake is a mistake. It is not less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake.***

***The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate .....** The Appellant herein is being punished and denied justice for mistakes of his advocates and for relying on the wrong provisions of the law and as a result, is being ousted from the seat of justice on procedural technicalities that were not within the said Appellant's limits to cure”*

20. In the above mentioned matter, they went further to state that:-

***“It is well known that courts of law themselves make mistakes which is politely referred to a erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule .....***”

21. It is also argued that, the goods, the subject matter of this suit were illegally taken away from the Appellant's home by auctioneers on the 28<sup>th</sup> August, 2002. This illegal action prompted the Appellant to institute a suit in 2002 and which suit was concluded on the 13<sup>th</sup> May, 2010 wherein judgment was delivered in favor of the Appellant herein.

22. A period of 8 years had passed between the date when the suit was instituted and the judgment date. The appellant indicated that some of the household goods that had been illegally seized by the defendants were non-existent while some had become obsolete.

#### **ISSUES, ANALYSIS AND DETERMINATION**

23. After going through the pleadings, affidavits and proceedings on record including the impugned ruling and cited provisions, I find the

issues arising are:-

- 1) *Whether the instant appeal is competent?*
- 2) *If above is negative the appeal have any merit?*
- 3) *What is the order as to costs?*

24. Order 43 Rule 3 CPR 2010, stipulates that:-

***“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from either orally at the time order is made; or within 14 days from the date of such order.”***

25. The orders sought to be appealed from were made on 29/06/2011. No oral application was made under Order 43 (2) CPR. However a Notice of Motion was filed on 06/07/2011 within the stipulated time thus appeal competent as the motion for leave was filed within time (14 days)

26. On merit, the Appellant was in a decree dated 28/07/2010 compelling 2<sup>nd</sup> Defendant to release Appellant’s attached goods. The Appellant never went for the same prompting 2<sup>nd</sup> Defendant/1<sup>st</sup> Respondent to lodge notice of motion dated 31/05/2011 directing the Plaintiff/Appellant to collect his goods within 14 days in default same be sold.

27. The Trial Court made a finding that since 13/05/2010 when Appellant’s goods were ordered to be released and despite an invitation to collect same by Respondent/2<sup>nd</sup> Defendant vide letter of 15/10/2010, the Appellant never went to collect the same.

28. It was also manifest vide Appellant letter of 22/01/2010 that he advised Respondent to dispose the same goods and recover his costs from the proceeds of the sale and remit the balance to him.

29. The court allowed the application by the 2<sup>nd</sup> Defendant/Respondent in the circumstances.

30. Thus to seek to appeal against such orders, it appears to be an afterthought and the Appellant is estopped from his own act of delay in collecting the goods and/or acceding to the sale of the same to be sold for the meeting auctioneer charges from now seeking to complain of trial court order subject herein.

31. In the case of **IL SANGO ESTATES & OTHERS –VS- DNESDNOR BANK 1972 EA, P.17.** The court held that leave would normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration.

32. See also **APPEAL NO. 13/2014 (ELC) KAKAMEGA BARNET LUTEA MUHATI –VS- NICHOLAS MUKONYONGO MUSAMAU** which held that:-

***“Leave to Appeal would be granted where proposed appeal raises fundamental issues.”***

33. The proposed appeal to challenge order of the Trial Magistrate did not demonstrate any serious judicial issue (s) or fundamental issue (s) to warrant grant of leave sought.

34. This is because after court decreed Appellant be released, the Appellant never went to collect the same. The Respondent invited the Appellant to collect the same but he failed. Instead the Appellant wrote letter dated 22/01/2010 advising Respondent to dispose same goods and recover his proceeds of sale and remit the balance to him.

35. One wonders then what would have the Trial Court done other than to grant the orders sought. The court was justified in issuing the orders sought.

36. Therefore, the court finds no merit in the appeal. The court thus makes the following orders:-

1. **The appeal is dismissed.**
2. **No orders to costs as Respondent never defended the appeal.**

**SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.**

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**HON. C. KARIUKI**

**JUDGE**