



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO.31'B' OF 2015**

**OMAR A. GULED ..... APPELLANT**

**VERSUS**

**SAHAL A. HUSSEIN ..... RESPONDENT**

**JUDGMENT**

This is an appeal from the ruling and order made on 30<sup>th</sup> March, 2015 by Hon. D. Ogal. OMAR HAMED GULED, (the appellant) filed five grounds of appeal through his memorandum of appeal dated 21<sup>st</sup> April 2015 which are couched as follows:-

1. That the learned trial magistrate erred in law and fact when he failed to take cognize of (sic) the execution orders as ordered by the court when arriving at the total cost and interest earned upon the decretal sum in his ruling.
2. The trial magistrate was openly biased against the appellant.
3. The learned lower court trial magistrate erred in law and fact by not making any finding upon any issue posed by the appellant.
4. That the learned trial magistrate in his ruling, completely failed to consider and appreciate the appellant's replies to the application of stay of execution.
5. That the learned magistrate erred in law in not at the very least, allow execution as ordered earlier by the honourable court on 23<sup>rd</sup> January, 2015.

At the end, the appellant prayed for setting aside and quashing of the ruling of the lower court in its entirety and dismissal of the respondent's objection to the execution in the said court. Upon filing the Record of Appeal and serving the same on the respondent's counsel, counsel filed written submissions dated 21<sup>st</sup> October, 2015 and filed in court on 26<sup>th</sup> October, 2015. The appellant on his part filed his submissions dated on 10<sup>th</sup> November, 2015 and filed in court on even date. Parties were to highlight submissions on 3<sup>rd</sup> December, 2015. On that day, the appellant requested for time to seek legal advise. The matter was adjourned to 25<sup>th</sup> January 2016 on which day parties opted to rely on their written submissions.

The appellant's grievances as can be gleaned from his submissions are that the trial court had on 20<sup>th</sup> January 2014 ordered the respondent to refund to the appellant Kshs.100,000/- costs of the suit and interest. On 3<sup>rd</sup> November, 2014 costs were assessed at Kshs.11,700/-. The respondent only refunded

Kshs.100,000/-. The appellant applied to execute but the respondent applied for stay of execution which application was determined on 30<sup>th</sup> March, 2015. That is the decision which aggrieved the appellant prompting this appeal.

In that decision, the appellant is shown to have conceded to having received Kshs.28,000/- though he now says he had objected to the calculations done by the assessing officer and did not agree with the advise by the court to seek a review or appeal against the court's decision and appears to have chosen the latter. The appellant says he did not receive Kshs.28,000/- as suggested in the order of 30<sup>th</sup> March, 2015 and that there is no evidence that he received the money as stated in that order. The appellant agrees that he received Kshs.100,000/- and the only issue is on the costs which he puts at Kshs.27,333 and interest which he puts at Kshs.1303/- per day and some other charges he says are due to him including further costs of Kshs.150, Kshs.800, Kshs.1500/- among other expenses.

Counsel for the respondent in his written submissions agrees substantially with the facts as stated in the appellant's submissions. He however says that the appellant had sought costs of Kshs.45,705/- which were assessed downwards to kshs.11,930/- on 2<sup>nd</sup> November, 2014 and that the decretal sum of Kshs.100,000/- was substantially settled together with the ordered costs. The appellant's claim of Kshs.28,000/- was for interest which was said to be exorbitant and the trial court ordered that the registry re-calculates the interest and the amount found due be paid when the matter came up again on 30<sup>th</sup> March, 2015. The amount was paid on that day but the appellant felt that interest was not properly calculated and was asked to seek redress in appropriate forums and marked the matter as settled.

Regarding the appeal itself, the respondent's counsel submitted that the appeal having arisen from an application under *order 22 rule 22* of the Civil Procedure Rules and *section 34* of the Civil Procedure Act, the appellant ought to have sought leave to appeal in terms of *order 43* of the Civil Procedure Rules. It has been therefore argued that in the absence of leave the appeal is untenable. On the grounds of appeal the respondent counsel argued that costs having been assessed, there was nothing to show that the appellant complained and did not show how costs should have been assessed. On ground two, counsel submitted that there was no evidence that the trial magistrate was biased, while on ground three, learned counsel argued that there was no formal issue raised before the court for determination or which required the court to make a decision on. On ground four counsel submitted that the appellant had the opportunity to respond before the trial court and was not denied the opportunity as he alleges. And finally on ground five, counsel submitted that the appellant had indirectly admitted before the trial court that the decree had been erroneously drawn and therefore submitted that the appeal as a whole lacked merit and asked that it be dismissed with costs.

I have considered this appeal, submissions by the appellant who acted in person and those for the respondent. From the memorandum of appeal and submissions by parties, it is agreed that the only issue that the appellant complains of is on the costs and interest. The appellant had succeeded in the court below and was to be paid Kshs.100,000/- plus costs and interest. The principal amount was paid and the appellant says costs of Kshs.28,000/- was to be paid together with interest on the principal sum. When the costs and interest were not paid, he moved to execute and there upon the respondent filed an application seeking a stay of execution. From the record, an order of stay was granted on 29<sup>th</sup> January 2015 and the application was set for hearing on 9<sup>th</sup> February 2015. On that day, the application was adjourned to 16<sup>th</sup> February 2015. Once again the application did not proceed and was adjourned to 2<sup>nd</sup> March, 2015.

On 2<sup>nd</sup> March 2015, counsel for the respondent addressed the court and when it was the appellant's turn to respond, he informed the court that he was only demanding costs and interest. At that point, the court adjourned the matter to 9<sup>th</sup> March, 2015 and directed the Civil Registry to calculate the interest due on the decree. When parties appeared in court on 9<sup>th</sup> March, 2015, counsel for the respondent told the court that they could pay in two weeks. The appellant is recorded to have said that he thought the calculation on interest was erroneous. It is important to point out here that neither the respondent's counsel nor the appellant mentioned how much interest had been found to be due. The appellant did not say why he thought the calculation was erroneous. The record is silent on the amount in

dispute.

When the matter was placed before court again on 30<sup>th</sup> March, 2015, the record shows that both the appellant and respondent were present in court in person. The record was as follows:-

*“30/3/2015*

*BEFORE D. OGAL RM*

*CC: JANET*

*PLAINTIFF PRESENT IN PERSON*

*DEFENDANT IN PERSON PRESENT.*

*DEFENDANT*

*I have the money to pay the plaintiff as per the calculation of the court.*

*PLAINTIFF*

*The calculation is wrong. I object to the amounts.*

*COURT*

*The plaintiff is advised to seek review of the matter or appeal against the decision of the court.*

*PLAINTIFF*

*I confirm that I have received Kenya Shillings 28,000/-.*

*D. OGAL RM*

*30/3/2013.*

*COURT*

*Matter is marked as settled.*

*D. OGAL RM*

*30<sup>TH</sup>/3/2015.*

Those are the proceedings culminating in the order of 30<sup>th</sup> March, 2015 which the appellant says he was aggrieved with and against which he has lodged this appeal. In his submissions, the appellant says that the amount in dispute was Kshs.28,000/- which he says he did not concede to. The appellant did not at least from the record, say how much he was demanding and even after the court ordered recalculation of interest, none of the parties said how much it was found to be. On 30<sup>th</sup> March, 2015 parties were in person and though the appellant appears to have said there was an error on calculation of interest, he did not say how much the amount was or how much according to him it should have been. However at the end, the appellant is recorded to have said he had received Kshs.28,000/- and the matter was marked as settled.

This is not an ordinary appeal against a judgment and decree of the lower court but an appeal against what the appellant feels is inadequate or perceived erroneous calculation of interest. It is not an

appeal on a point of law but what would appear to be a point of fact.

The record shows that there was some agitation by the appellant on the interest and the court ordered a re-calculation of that interest. There was no indication of how much that was. When the matter was mentioned again, the appellant still expressed some reservations without saying how much interest it should have been but eventually the record shows that the appellant was paid Kshs.28,000/- and the matter marked as settled. That being the position that the appellant was paid, I do not see how without any other reason, the appellant would turn around and deny having been paid. This court is sitting on appeal would go by the record and has no reason to believe that the appellant was not paid Kshs.28,000/- on 30<sup>th</sup> March, 2015. The record is clear on that and there is no factual basis for this court to hold otherwise.

Counsel for the respondent has raised a legal issue that this appeal is incompetent for the reason that it was lodged without leave to appeal having been sought. His argument is that the application which culminated in the order the subject of this appeal was made under *Order 22 rule 22* of the Civil Procedure Rules and in terms of *section 34* of the Civil Procedure Act and *Order 43* of the rules, no appeal would lie without leave.

I have perused *section 34* of the Civil Procedure Act but I do not think it applies to the issue at hand in this appeal. The relevant provision, in my view, is *Order 43* of the Civil Procedure Rules. *Order 43* is clear from which orders a party can appeal with or without leave. Regarding *Order 22* of the Civil Procedure Rules, a party may appeal without leave only from orders made pursuant to *rules 25,57,61(3)* and *73* (orders in execution). Appeals from all other rules under *Order 22* must be with leave.

From the record, it is true that leave was not sought to lodge this appeal which means the appeal was filed in violation of *Order 43*. Even if the appeal had been filed with leave, from my analysis of the record, I do not find grounds upon which the impugned order can be overturned.

For the foregoing reasons, I do not find substance in this appeal. The same is dismissed with costs for not only being incompetent but also unmeritorious.

**Dated and delivered at Kakamega this 16<sup>th</sup> day of February, 2016.**

E. C. MWITA

JUDGE