REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.30 OF 2011

DANIEL NGANGA WANYOIKE………………………………………. APPELLANT

VERSUS

INVESCO ASSURANCE CO. LTD…………………………………..RESPONDENT

JUDGMENT

Aggrieved by the ruling of C.K.Obara Resident Magistrate in Nyahururu Principal Magistrate Court's Civil Case No.34 of 2008 delivered on 9th February, 2011, the appellant, Daniel Nganga Wanyoike, filed the appeal herein on 12 grounds which can be summarized as follows:- The trial magistrate erred by:-

1. holding that the respondent's voucher was a valid and admissible document;

2. failing to find that no consent had been filed by the parties to signify any settlement of the suit in terms of the alleged voucher,

3. holding that the terms of the respondent's voucher were clear,

4. relying on the respondent's voucher yet it did not have any reference to the lower case number,

5.holding that the voucher had fully settled the appellant's claim and estopped him from demanding any other settlement of the decretal sum;

6. holding that the warrant of attachment issued in his favour was null and void,

7. holding that service of the notice of intention to proceed had not been proved;

8.failing to consider his response (contained in his replying affidavit) and

9. allowing the respondent's application when it had not been proved on a balance of probabilities.

On 30/6/2014, when the appeal was called for hearing, the appellant reiterated the foregoing grounds. In this regard he contended that the discharge voucher could not have been valid as it was trying to challenge the trial magistrates decision which had awarded him costs and interest of the suit and that, in any event, the voucher referred to a file that was With the respondent and not the court.

Terming the voucher an inadmissible document, the appellant faulted the trial magistrate for having relied on it to find that the respondent had complied with his orders which had directed them to make payments.

He argued that the respondent ought to have tendered proof of payment as per the court's judgment and decree.

Further, that the discharge voucher was an instrument chargeable with stamp duty under Section 19 of the Stamp Duty Act. Since the discharge voucher had not been stamped as by law required, he argued that the trial magistrate erred in law by admitting it into evidence. He also argued that since the voucher was issued on a without prejudice basis, it was supposed to be an agreement between the parties (the respondent and himself) and there is no way the respondent could rely on it to escape its obligations under the orders of the court.

Contending that the respondent's claim was not genuine, he argued that the voucher was issued after the case had been finalized (at the execution stage) and was made to insulate respondent from being taken to court in future. He denied having had any discussions with the respondent concerning the terms of the discharge voucher and argued that no consent had been filed to demonstrate that they had reached a settlement.

Claiming that the voucher brought confusion, the appellant explained that there were two claims in respect of the suit herein, the one filed in court and another one which was being handled by the respondent. He explained that he signed the voucher because the claim which was in the respondent's office had been paid in full. In this regard, he argued that the respondent paid him the value of his motor vehicle but failed to pay interest and costs. He also explained, that he signed the voucher thinking that it was going to be for their books. Because the voucher does not bear the lower court's number, the appellant argued that the payment neither related to the case nor estopped him from pursuing his claim.

As concerns the warrant of attachment which the trial magistrate declared null and void, the appellant wondered how the trial magistrate could declare his own warrant of attachment null and void and submitted that by so doing the trial magistrate usurped the High court's powers.

Concerning the respondent's contention that the objector (Public Investment Co. Ltd), was not a party to the suit,he explained that in July 2010, the respondent's counsel was busy engaging him in an application filed by the objector and that he had carried out a research which revealed that the objector had bought 80% of the respondent's shares. Because of that fact, he maintained that the objector and the respondent are one and the same entity.

With regard to the question of proof of service of the notice of intention to proceed with execution, the appellant maintained that he had served the objector and the court and wondered what the respondent's concern was as the notice was addressed to the objector who claimed to have no relationship with the respondents. Besides, he wondered why the respondent was asking questions on behalf of the objector who was also represented by a lawyer.

On his part, counsel for the respondent, Mr. Ochan'g, described the appellant as a person who reneges on agreements in pursuit of personal benefits . He gave a background of the case at the lower court and the circumstances that led to the signing of the impugned voucher. He pointed out that, after the suit in the lower court was filed, the respondent was placed under receivership. Consequently, a moratorium was issued in favour of the respondent.

Counsel explained that the proceedin gs leading to the judgment and decree herein were conducted when there was a moratorium in favour of the respondent and that when the appellant moved to execute the decree of the lower court, he entered into negotiations with the respondent for waiver of interest accrued during the moratorium. After the appellant agreed to waive all accrued interest, the respondent paid him and he signed the impugned discharge voucher. Thereafter, the appellant instructed an auctioneer to execute on the entire sum.

Counsel submitted that the discharge voucher was admissible because the appellant signed it and did not dispute its contents. He explained that the appellant's contation was that the voucher did not state the case number. Further that, although the document was written on without prejudice basis, it's admission in

evidence was necessary in order to help the court determine the genesis of the case. He argued that failure to admit the voucher would have denied the court the opportunity to look at the material evidence relating to the suit. For the foregoing reasons he maintained that the trial magistrate did not err by admitting the document.

On the question of there being no signed consent. Counsel submitted that it is not a standard practice that there must be a signed document especially when the contending party signed the impugned document and received payment in reliance of the document.

Concerning the alleged confusion in signing the voucher. Counsel submitted that the appellant attempted to introduce new details which were not part of the trial record. For instance, the letter from the Regulatory Authority.

With regard to the contention that the voucher was inadmissible because stamp duty was not paid as by law required, counsel submitted that the Stamp Duty Act is inapplicable to the discharge voucher because it was not intended to be registered anywhere.

On whether the trial magistrate had power to nullify his own warrants of arrest, counsel submitted that the trial magistrate had power to nullify the warrants after he realized that they were erroneously issued.

With regard to the notice of intention to proceed, counsel submitted that there was no evidence that the right procedure of effecting service was used as there was no evidence of receipt of service.

On whether the respondent and objector are one, and the same entity, counsel submitted that those questions are mute because they are premised on documents that did not form part of the record of the court and/or a warrant of arrest which was null and void.

Counsel also challenged the appellant's appeal on the ground that it was filed out of time and without the leave of the court. In this regard, he pointed out that memorandum of appeal was filed more than a month after delivery of the ruling. There being no evidence that the appellant obtained the leave of court to file the appeal out of time as by law required, Mr. Ochan'g submitted that the appellant cannot rely on article 159 of the Constitution of Kenya to save the appeal -

In reply, the appellant stated that the decision was made

on 9th February, 2012 and the Memorandum of appeal filed 10 days thereafter, without delay. He reiterated that the notice of intention to proceed with execution was served by registered post and that the magistrate had no powers to declare the warrant of arrest issued to him null and void.

I have read and considered the appeal filed herein and the submissions made by the respective parties in respect thereof. The issues for determination are:-

1. Whether the appeal is properly before this court? If yes,

2. Whether the appellant has made up a case for issuance of the orders sought?

Whether the appeal is properly before this court?

As pointed out above, the appeal herein is challenged on the ground that it was flied out of time and without the leave of the court. This contention brings into play the provisions of Section 79G of the Civil Procedure Act which requires an appeal from a subordinate court to the High Court to be filed within a period of thirty days from the date of decree or order appealed against. The said (Section 79G) excludes from such period any time which the lower court may have certified as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Under the proviso therein, **an appeal may be admitted, out of time if the appellant satisfies the court**

that he had a good and sufficient cause for not filing the appeal in time. (emphasis supplied).

In the circumstances of this case, the order (read ruling) appealed from was read on 9th February, 2011 and the appeal against it file on 19th February 2012, More, than a year from the time the ruling was delivered.

The appellant, who contrary to the evidence on record, contends that he filed the appeal 10 days after the ruling was delivered, neither applied for leave of the court to file the appeal out of time nor provided any explanation for filing the appeal out of time. The appeal as filed is bad in law as it offends the provisions of Section 79G aforementioned.

Since violation of Section 79G is not a procedural technicality, I agree with Mr. Ochan'g that the appeal is fatally defective and incurable by Article 259(2)(e) of the Constitution of Kenya 2010, which requires this court to administer justice without undue regard to procedural technicalities.

To underscore the importance of following time lines stipulated for lodging appeals or complyig with the requirement for leave to file appeals out of time see **Ali K. Ahmed T/A Sky Club Restaurant** v. **Kabundu Holdings Ltd Civil Appeal No. 29 of 2007 (2009)eKLR** where the Court of Appeal held:-

> **"Pursuant to that rule, the notice of appeal against the ruling of Maraga J should have been lodged by 20th September, 2005. It was not lodged within that time. It was lodged on 8th November, 2005, which was about 49 days later. The respondent says that it filed application for extension of time or to validate the late notice of appeal in the superior court but that was dismissed and he had filed notice of appeal against that dismissal and an application seeking stay of that order. That in effect confirms that no leave of the Court was obtained or has been obtained to file the subject notice of appeal out of time and none exists as at the date this application was heard. Thus it has come to our notice that a document had been filed out of conformity with the Rules of this Court. We have a duty to act *suo moto* and we hereby do act. The notice of appeal dated 7th November, 2005 and lodged in the Court on 8th November 2005 arising from the decision of Maraga J. dated 6th September, 2005 in Mombasa High Court Civil Appeal No. 82 of 2004 is struck out."** (emphasis mine).

I reiterate that Section 79G aforementioned is not a procedural technicality. For the the appellant's appeal to be said to be proper in law, the appellant ought to have filed it within the time stipulated in law and/or sought the leave of the court to file it out of time. Having failed to follow the Iaid down procedures, and being satisfied the appeal offends the law. I declare it to be fatally defective and dismiss it with costs to the respondent.

Dated, Signed and written at Bungoma this 18th day of December, 2014

H.A OMONDI

JUDGE

Delivered and dated this 28th day of January 2015 at Nakuru

JANET MULWA

JUDGE

In the presence of

....for applicant

....for respondent's

....court clerk