



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 116 OF 2011

ELIUD MUNGAI MURIRAAPPELLANT

VERSUS

FLAMCO LIMITED RESPONDENT

[Being an appeal from the ruling of Hon. Elizabeth Tanui delivered on 30th June, 2011 in Nakuru CMCC. No.257 of 2011]

JUDGMENT

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nakuru by **Flamco Limited**, (hereinafter referred to as the Respondent). The company sued **Eliud Mungai Murira**, (hereinafter referred to as the Appellant) seeking damages arising from loss of consignment.
2. The Respondent contended that the loss was caused by the Appellant's breach of contract of bailment or as a resultant contract of common carriage. The Respondent further filed a Notice of Motion seeking to attach Motor vehicle Registration KBK 642P or the Appellant to deposit security for Kshs. 632,000/=.
3. The Appellant responded through a Statement of Defence, in which he contended that he complied with the terms of the contract of bailment as the goods were delivered and acknowledged by the Plaintiff. Without prejudice to that defence, the Appellant further denied acknowledging liability of the alleged loss of consignment and that the agreement admitting liability was obtained under duress. In response to the Notice of Motion, he averred that the possibility that he does not have means to settle the decree were speculative and without basis.
4. The hearing of the Respondent's Notice of Motion commenced on 8th April, 2011. The court in its ruling delivered on 30th June, 2011 ordered that the Motor vehicle registration no. KBK 642P be released to the Appellant upon him depositing a sum of Kshs. 632,000/- in court.
5. Being aggrieved by that ruling, the appellant has lodged this appeal raising four grounds as follows:
 - i. **That the learned magistrate erred in law and in fact in granting the Plaintiff now Respondent with the orders sought in the application notwithstanding the affidavit evidence on record and the provisions of law to the contrary.**
 - ii. **That the learned magistrate erred in law and in fact in failing to appreciate and apply the principles applicable in adjudicating upon the matter before her.**
 - iii. **That the learned magistrate erred in law and in fact in importing extraneous issues in her finding;**

- iv. **The learned magistrate erred in law and in fact in applying erroneous standard of proof and failing to appreciate that the plaintiff had failed to discharge the burden of proof placed upon her as a matter of law.**
6. The Appellant's Counsel, Mr. Madeto submitted that the application sought for the deposit of Kshs. 632,000 to secure a decree in the lower court case or the motor vehicle to remain attached until matter was heard and determined. According to Counsel these orders cannot issue for performance of a decree that did not exist. Further the Respondent had not proved that the Appellant owes him the aforementioned sum of money.
7. Further Counsel argued that there was a criminal case arising from the same facts in which the court had ordered for the unconditional release of the motor vehicle. Thus he contended that the ruling was erroneous as it did not consider the ruling in the criminal court.
8. Mr. Githui, the Learned Counsel for the Respondent submitted that under **Section 392**, civil and criminal cases can proceed concurrently and orders made in the respective cases.
9. It was his submission that the Appellant is a man of straw and would not be able to satisfy the decree. Consequently, the Respondent filed the application under **Order 39 of the Civil Procedure Rules** which allows for attachment before judgment or deposit of security for due performance of decree. According to Counsel for the Respondent, the Appellant had failed to demonstrate to court his ability to settle the eventual decree and that the cheque he had issued to the Respondent was returned unpaid. Thus Counsel informed the court to issue the orders.

ISSUES FOR DETERMINATION

10. Upon hearing the submissions of the respective counsel this court finds the following issues for determination are;
 - i) whether to interfere with the trial magistrate's exercise of her discretion on the order for security for costs;
 - ii) Whether the trial magistrate erred in law and in fact in failing to appreciate and apply the principles applicable in adjudicating upon the matter before her.
 - iii) costs
11. The order for the deposit of security for costs was made by the trial court on the 30/06/2011 and the Appellant being aggrieved by the Order proceeded to lodge this appeal. He then approached the trial court vide his application filed on the 11/07/2011 for an order stay of execution of the order pending the outcome of the appeal.
12. The Applicant was granted a stay of the order provided he deposited the full sum claimed by the Respondent in the Plaint which sum upon review was on the 16/12/2013 reduced to the sum of Kshs.316,000/= being half the decretal sum to be paid into court as security for costs. The parties thereafter consented on the 12/07/2012 that within 14 days the sum be deposited into a joint bank account in the names of their respective advocates.
13. Thereafter the Applicant went to sleep and only awoke from the slumber when on the 8/04/2013 the Respondent filed an application for the dismissal of the appeal for want of prosecution. The applicant then proceeded to file his Record of Appeal on the 19/04/2013 and listed four (4) grounds of appeal therein and the same proceeded for hearing of the interlocutory appeal on the 25/11/2014.
14. This court notes with consternation that there has been indolence on the part of the appellant in prosecuting this appeal. That notwithstanding the issue at hand is whether the trial court was unreasonable when exercising her discretion and or applied erroneous principles.
15. It is trite law that this court will only interfere with the lower court's decision if it is found that the discretion was exercised unreasonably. The exercise of this discretion must be done judicially and not whimsically in order to meet the ends of justice.
16. The relevant facts and material should therefore be placed before the trial court to enable it to weigh them and arrive at an informed decision.

17. This court notes that the Respondent did not place any material or facts before the trial court on the amounts it expected or sought for costs to enable the court make a determination. In this case the sum claimed by the Respondent in the plaint was in the sum of Kshs. 632,000/= and the trial court went ahead and made an order that this full claim be deposited as security for costs.
18. This court is of the view that any amount ordered to be deposited ought to be fair and reasonable and should not be burdensome upon the Appellant. An order for the payment into court of the full sum claimed in the Plaint as security for costs cannot be said to be fair and reasonable particularly where the suit is at its infancy and has not been determined.
19. Further the trial court in its ruling delivered on 30th June, 2011 ordered that the Motor vehicle registration no. KBK 642P be released to the Appellant upon him depositing a sum of Kshs. 632,000/- in court.
20. There is an Order made in the Criminal proceedings where another trial court rightfully held that the motor vehicle KBK 642P be released as it was not subject to forfeiture proceedings.
21. This court concurs that the motor vehicle was and is not the subject matter to these proceedings and therefore making an order that it be held at the Auctioneers and pegging it to the payment of the security is not in the best interest of justice as the Appellant is greatly prejudiced by additional costs in the form of storage charges yet the vehicle has no nexus to the claim.
22. This court states that the proper test on an application for security for costs is that an order for security for costs is normally made where the Plaintiff or Defendant is resident outside the jurisdiction of the court and in particular in cases where the litigants are foreigners. The order can also be sought where a Plaintiff's or Defendant's place of abode is unknown and untraceable and there is a likelihood of an Applicant being unable to trace a Respondent so as to recover any costs envisaged.
23. This court notes from the pleadings that the Appellant is resident in Kenya and further notes from the submissions of Counsel for the Respondents that they failed to demonstrate to the satisfaction of this court that the place of abode of the Appellant is unknown and have further failed to show the unlikelihood of them being unable to trace the Appellant so as to recover any costs envisaged. Reference is made to the case of **Klaus Jurgen Thiele & Another V. Joseph Muya Njuru & Others**, HCCC No.223 of 2010. Therein the Order was granted as the Plaintiffs were foreigners and were not residents within the court's jurisdiction.
24. The timeliness in making such an application is also an issue that needs to be taken into consideration. In this instance I shall not belabor myself in addressing this issue as it has been noted that there was no delay by the Respondent as they filed their application for security for costs on the same day the Plaint was filed.
25. This court goes further to state that another general rule applicable is not whether the Plaintiff/Respondent has made out a *prima facie* case but whether the Defendant/Appellant has shown that he has a *bona fide* defence. Reference is made to the cases of **Pabeco Enterprises Limited V. Hi-tech Creations Limited and 3 others**, [2006] eKLR, and the case of **Timothy Manyara & 144 Others V. Pyrethrum Board of Kenya** (2005) eKLR in both cases the respective courts ruled that where there were triable issues, an application of such a nature ought not to be entertained.
26. This court opines that the allegations made and the admissions made both raise triable issues and having perused the Appellant's defence it cannot be said to be frivolous in nature.
27. It is this court's considered view that the trial court's ruling was indeed very brief and it failed to take into consideration the aforementioned principles and proceeded to make an order that was extremely high and which can very well be described as being patently unreasonable.

FINDINGS

28. For the reasons stated above this court finds that there is need to interfere with the trial court's decision as the trial magistrate erred in law and in fact in failing to appreciate and apply the principles applicable in adjudicating upon the matter before her.
29. The appeal is found to be meritorious and is hereby allowed.
30. The trial courts Order dated 30/06/2011 for security for costs is hereby set aside.
31. The motor vehicle registration No. KBK 642P be released to the Appellant forthwith. Storage costs shall be borne by the Respondent.

32.Each party to bear their own costs of this appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 13th day of March, 2015.

A. MSHILA

JUDGE