REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO.305 OF 2013

DANSON MURIITHI AYUB …….…….....…….....APPELLANT

-VERSUS-

EVANSON MITHAMO MUROKO ……..….RESPONDENT

JUDGMENT

1. DANSON MURIITHI AYUB is the appellant in this appeal and a decree holder in Gichugu Principal Magistrate Civil Case NO. 1 of 2007 where he has a decree of kshs 111,924 against the respondent in this appeal. **EVANSON MITHAMO MUROKO,** the respondent in this appeal had a judgment against the appellant herein in Nairobi High Court Civil Case NO. 2573 of 1991 where the court had awarded him kshs 80,000/ plus costs and interests which the court being appeal from now calculated to be totaling kshs 195,200 as of 17th April 2013 when the ruling , the subject of this appeal was delivered .

2. The respondent herein when faced with execution in Gichugu Principal Magistrate Civil Case NO. 1 of 2007 applied for a set off in the claim and the learned magistrate allowed the set off which left the appellant with a debt of kshs 83,276 to settle. He was dissatisfied and preferred this appeal raising seven grounds.

3. The listed grounds are as follows.

i. That the learned magistrate erred in law in allowing the respondent to set off the decretal sum awarded in Nairobi High court Civil Case No. 2573 of 1991 with the decretal sum awarded to the appellant in Gichugu Principal Magistrate Civil Case NO. 1 of 207.
ii. That the learned magistrate erred in law in allowing the respondent to set off a High court decree in a subordinate court.
iii. That the learned trial magistrate erred in law in allowing the set off of the Nairobi High court Civil Case NO. 2573 of 1991 with Gichugu Principal Magistrate Civil Case NO. 1 of 2007 when no decree had been extracted by the respondent in respect of the Nairobi High court suit.
iv. That the learned magistrate erred in law in finding that the appellant owes the respondent kshs 83,276 in Nairobi High court suit in absence of evidence to that effect.
v. That the learned magistrate erred in law in ordering the appellant to pay costs on respect of Nairobi High court Civil Case NO. 2573 of 1991.
vi. That the learned magistrate erred in law by ordering execution in respect of Nairobi High court Civil Case NO. 2573 of 1991.
vii. That the learned magistrate erred in law failing to find that execution could not be issued either by way of set off in respect Nairobi High court Civil Case NO. 2573 of 1991 as execution of the same was time barred.

4. The appellant filed brief written submissions to highlight his grounds of appeal and submitted that it was not feasible to allow a set off of decrees from different jurisdictional capacities.

5. The appellant further contended that the decree in Nairobi High Court Civil Case NO.2591 of 1991 had not been extracted and could not be executed as this violated the provisions of **Order 21 Rule 7(1)** of the **Civil Procedure Rules.**

6. The appellant further submitted that the judgment in Nairobi High Court Civil Case NO. 2573 of 1991 was time barred and that no attempt had been made by the respondent to execute the same within the statutory period of 12 years. He asked this court to allow his appeal in order to allow him execute his judgment in the subordinate court in Gichugu Principal Magistrate Civil Case NO. 1 of 2007.

7. The respondent opposed this appeal and filed written submissions to support the holding of the learned magistrate in Gichugu Principal Magistrate Civil Case NO. 1 of 2007. He pointed out that there was no dispute that the appellant herein is a judgment debtor in Nairobi High Court Civil Case NO. 2573 of 1991while he himself is a judgment debtor on Gichugu Principal Magistrate Civil Case NO. 1 of 2007. He submitted that both judgments are for money decrees.

8. The respondent drew this court's attention to the proceedings in the subordinate court on 19th December 2012 where he contended that parties had agreed to take accounts to see who owed who in so far as the two suits are concern.

9. The respondent also contended that **Order 22 Rules 14 and 15** of the **Civil Procedure Rules** allow for set offs and a person with a larger decree may execute for the balance after the deducting the smaller sum in the decree and in his view that is the position taken by the learned magistrate in Gichugu Principal Magistrate Civil Case NO.1 of 2007.

10. On the ground by the appellant that there was no decree in Nairobi High Court Civil Case NO. 2573 of 1991, the respondent replied that the **Civil Procedure Act** defines a "decree" to include a judgment and he had enclosed a copy of the judgment to show the subordinate how much had been awarded to him in Nairobi High Court Civil Case NO. 2573 of 1991. He further went on to say that the learned magistrate in Gichugu had merely indicated in his ruling that taxed costs in Nairobi High court Civil Case NO. 2573 of 1991 had not been proved for purposes of getting a final figure in calculating the set off.

11. On the issue of limitation of time to execute as per the **Statute of Limitation of Actions Act (Cap 22 Laws of Kenya),** the respondent submitted that he made his application dated 24th July 2012 which was within time prescribed by law.

12. The respondent in addition to the above submitted that the appeal herein is incompetent and bad in law for violating the provisions of **Order 43 (1) (2) of the Civil Procedure Rules**. The respondent's contention is that the appellant needed leave to appeal against the ruling which is now the subject of this appeal and that filing this appeal without leave rendered it incompetent.

13. Finally he submitted that the appellant has not demonstrated any prejudice in the set off ordered in the subordinate court as none of the parties in this appeal had made any payments to each other. He therefore urged this court to find that the learned trial magistrate exercised his discretion judiciously for the interest of justice.

14. I have considered the appeal and the submissions made by the appellant and the rival submissions made by the respondent through his counsel Mr Maina Kagio.

15. The first issue for determination is whether the appellant is properly before court or whether the appeal is incompetent and bad in law for want of leave as submitted by the respondent.

16. This appeal as stated in the introduction emanates from a ruling made by a subordinate court on a ruling made under **Order 22** of the **Civil Procedure Rules.** A look at the provisions of **Order 43 (1)**

(k) Civil Procedure Rules shows that a party aggrieved by an order of the court in regard to **Order 22** of the **Civil Procedure Rules** has a right to appeal without leave . The respondent in this appeal really required no leave to appeal. This court finds that the appeal filed herein is proper and competent.

17. Having determined the competency of the appeal before this court the next issue for determination is what constitutes a 'decree' and whether both the appellant and the respondent can be described as "decree holders" and "judgment debtors" in the respective suits referred to above.

18. To tackle the first issue we need to resort to the **Civil Procedure Act** to get the meaning of the word "decree". **Section 2** of the **Act** defined decree as follows:

"Decree means the formal expression of an adjudication which so far as regards the court expressing it conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final…….".

19. There is no dispute that the appellant herein had a judgment in his favour in Gichugu Principal Magistrate Civil Case NO. 1 of 2007 and the respondent had a judgment in his favour against the appellant in Nairobi High Court Civil Case NO. 2573 of 1991. The distinction or the difference between the two parties herein is that the appellant herein extracted a decree upon judgment being passed in his favour which decree determined with finality the entire or total decretal amount he was entitled to from the respondent herein while the respondent on the other hand apparently despite having a judgment passed in his favour failed to extract a decree that would have provided the definite or actual decretal amount the appellant was required to pay to satisfy the decree.

20. The respondent in his submissions gave the definition of a decree to include a judgment which is true but the act clearly specifies that the definition of a decree includes judgment but only for "purposes of appeal" and not for purposes of execution, **Order 22 of the Civil Procedure Rules** provides ways by which a judgment is reduced to a decree for purposes of execution. It is definitely apparent that from the rules under **Order 22** Civil **Procedure Rules** judgment is capable of execution only upon extraction or drawing of a decree. A successful litigant in a case becomes a "decree holder" when a decree in his favour is passed and has a decree which is capable of being executed against the defendant who then becomes a judgment debtor and unless he satisfies the decree, execution can be levied against him in any of the ways provided under **Order 22** of the **Civil Procedure Rules.**

21. A successful litigant in civil proceedings is unable in law to enjoy fruits of any judgment in his/her favour if he does not extract or draw a decree. In the case of **RUBO KIMNGETICH ARAP CHERUIYOT –VS- PETER KIPROP ROTICH (2006) e KLR** the court made the following observation

"It ***is a decree as a legal instrument which is executable and not the judgment itself. It is my view that in a suit what is executable is the "decree" of the court. I have carefully perused the court record and find that no decree has ever been drawn, approved and signed by the court through the Deputy Registrar or otherwise. It is trite law that no execution of any decree can take place without such a decree "***

22. It is clear from the above that while the two parties in this appeal both have different monetary judgment from different courts, the respondent is disadvantaged for obvious reasons. He failed to extract a decree after obtaining judgment in Nairobi High Court Civil Case NO. 2573 of 1991 in his favour. He cannot describe himself as a decree holder properly so called to be able to benefit from the provision of **Order 22 Rule 22 (1) (b)** of the **Civil Procedure Rules** . He was clearly incapacitated to apply for cross execution of decrees because he simply had none.

23. It could have been a totally different ball game if the respondent had a decree in his possession and had he annexed the same to this application dated 24th July 2012. It is understandable why the respondent moved the subordinate court but the application in the absence of an extracted decree was premature. I have looked at the Notice of Motion dated 24th July 2012 and note that what was annexed

to the application as a prove of judgment and the amount due to the respondent was a letter dated 12th July 2012 from his counsel in addition to the copy of the judgment annexed to his further affidavit sworn on 14th August 2012.

24. The judgment annexed showed that the respondent was awarded kshs 80,000 plus costs and interests in the Nairobi case. The question that arises is whether the learned magistrate was in order to take further steps in the judgment passed in Nairobi High Court civil Case NO. 2573 of 1991 by determining the total amount of interests payable . The learned magistrate fell into error as **Section 34** of the **Civil Procedure Act** clearly spells that such issues are determined by the court which executes the decree. No decree was placed before the Learned Magistrate to execute. The learned magistrate could not obviously comply with **Order 21 Rule 7** by calculating the interests payable even if he did not factor in the issue of costs because no decree was drawn in the first place and there was nothing presented to the subordinate to execute and it follows therefore that execution as contemplated under **Order 22 Rule 14 (1) Civil Procedure Rules** was not legally feasible.

25. I have considered the submissions by the respondent on the proceedings of 19th December 2012 before the subordinate court and noted that indeed the appellant herein had acquiesced to set off perhaps having not factored in the interests on the judgment passed against him in Nairobi. It is obvious that he changed his mind as soon as figures came out showing that the appellant was infact indebted to the respondent. It is clearly understandable why he felt aggrieved when the subordinate court worked out the figures .

26. The appellant has also not denied that there was a judgment that was passed against him but the respondent in this appeal appears to have handed him a ticket to escape a clear responsibility by failing to extract a decree in Nairobi case. It is on this basis that the appellant has raised a pertinent point of law under **Section 4 (4) of Limitations of Actions Act** which is the fact that execution of judgment in Nairobi case was time barred as it was done after lapse of 12 years .

27. Before the subordinate court , material was placed before the learned magistrate showing that judgment in the Nairobi case was delivered on 23rd January 2001 and therefore going by the Statute of **Limitation of** Actions Act time was to lapse in 2013. The issue was raised in 2012 when the respondent herein was well within time as judgment was still capable of being executed. The learned magistrate was correct in that regard as the judgment then could still be executed.

28. However the position of law clearly shows that a judgment cannot be executed after 12 years. The provisions of **Section 4 (4)** states that an action may not be brought upon a judgment after the end of 12 years from the date on which the judgment as delivered . The court of appeal dealt with this issue in the case **M'IKIARA M'RINKANYA AND ANOTHER –VS- GILBERT KABEERE M'MBIJIWE** where it made the following observations ;

"……as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in " LOWSLEY V FORBES" , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years".

From the holding in the above case it is clear that a judgment must be executed within 12 years from the date of its delivery otherwise it becomes legally stale and of no benefit to the decree holder.

29. From the foregoing the issues raised in this appeal shows that they are not merely technical technicalities capable of being cured under **Article 159** of the **Constitution.** They are weighty and backed by the statutes that have been referred above . This court is unable to overlook them. The upshot of this is that I find merit in this appeal. It is allowed . The ruling of the learned magistrate delivered on 17th April 2013 is reversed and set aside. Each party shall bear own costs.

R.K. LIMO

JUDGE

DATED SIGNED AND DELIVERED AT KERUGOYA THIS 24TH DAY OF APRIL 2015

in the presence of

The Appellant

Mr Mwangi holding brief for Maina Kagio counsel for the Respondent

Will Court Clerk