



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. E001 OF 2021

WEST AFRICAN FOODSTUFFS CO LTD.....1ST APPELLANT

MOJIRADE IDAYAT OLAYANJU.....2ND APPELLANT

Y. A OLAYANJU.....3RD APPELLANT

-VERSUS-

KAYSER INVESTMENT LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. Vide Memorandum of Appeal dated the 25th January 2021, the Appellants herein have appealed against the Ruling and Decision of the Learned Senior Resident Magistrate, namely **Hon. D. M Kivuti, SRM**, rendered on the 19th January 2021 and same has raised the following grounds of Appeal;

a. The Learned trial Magistrate misdirected himself when he purported to consider and issue an Interim Ruling in the middle of hearing an application dated the 17th November 2020, which ruling substantially jeopardized and pre-empted the determination of the application that was yet to be heard.

b. The Learned trial Magistrate misdirected himself and erred in granting orders which had not been prayed for in any of the pending applications yet the application before it dated the 17th November 2020, sought completely different reliefs.

c. The Learned Magistrate erred in directing that the judgment debtors do deposit the total decretal sum being kes.3, 810, 737.35/= only into a joint account to be held in the names of the two advocates yet the application of setting aside of the judgment had not been heard and ventilated before the court.

d. The Learned Magistrate erred in law and in fact in issuing further orders on the deposit on the decretal amount whereas the decree holder was already enjoying already freezing the 3rd Defendant/Judgment debtors bankers account with I.M Bank being account number 0300282903450, Yaya Centre Branch there effectively condemning him twice over the subject matter.

e. The Learned Trial Magistrate erred in law and in fact in failing to be guided by law and procedure in determining the matter and issuing his Ruling dated the 19th January 2021 and therefore arriving at a wrong conclusion.

BACKGROUND OF THE CASE

2. The Respondent herein had filed and/or mounted a suit vide Plaintiff dated the 12th February 2020, before the Chief Magistrate's Court at Milimani, whereby same had sought for various relief against the Appellants herein.

3. Upon the filing of the said proceedings, details in terms of the preceding paragraph, it is contended that the summons to enter appearance and Plaintiff were duly served upon the Appellants, but that the Appellants failed to enter appearance and or file statement of defense and in this regard, the Respondent herein proceeded to and sought for interlocutory judgment, which was duly entered and/or endorsed.

4. Subsequently, the Respondent proceeded to and caused the matter to be listed for formal proof, whereupon same was indeed heard and judgment was thereafter rendered on the **24th July 2020**. For clarity, judgment was indeed entered in favor of the Plaintiff in the sum of **Kes.3, 573, 800/=** only.
5. Suffice it to say, that after the entry of the judgment, the Respondent herein commenced the process of execution, culminating into the issuance of orders of garnishee nisi, whereupon the Appellants bank account, namely **account number 0300282903450** held at I & M Bank, Yaya Branch, was frozen, pending the inter-partes hearing of the garnishee proceedings.
6. Be that as it may, it appears that upon the freezing of the Appellants Bank Account, the Appellants herein were cajoled into action and same thereby filed and/or lodged an Application dated the **17th November 2020**, in respect of which same sought for various reliefs and essentially the setting aside of the ex-parte judgment and the discharge of the freezing order, which had frozen the Appellants named bank account.
7. From the record, the Application dated the **17th November 2020**, appeared to have been scheduled for hearing on the **21st December 2020**, but same could not take off because an Application was made for the cross examination of the deponent of the supporting Affidavit thereto. Consequently, the learned trial magistrate was obliged to and indeed adjourned the matter to the **15th January 2021**.
8. On the resumed date, namely the **15th January 2021**, an Application was made by and/or on behalf of the Appellants herein to have the freezing order lifted pending the cross-examination of the Commissioner of Oaths who had commissioned the Affidavit in support of the Application dated the **17th November 2020**, and eventual disposal of the Application dated **17th November 2020**.
9. Following the Application by and/or on behalf of counsel for the Appellants herein, which sought for the lifting of the freezing order, counsel for the Respondent indicated to the Honourable court that same was not opposed to the freezing orders being discharged and/or vacated, albeit on condition. For clarity, counsel insisted on provisions for costs.
10. Premised on the Application by counsel for the Appellants, which sought for the lifting of the said orders, the learned Trial Magistrate reserved a Ruling and which Ruling was rendered on the **19th January 2021**, and which is the Ruling which provoked the subject Appeal.

SUBMISSIONS BY THE PARTIES

11. The Appeal herein came up for directions on the **15th December 2021**, on which date the parties agreed to have the Appeal canvassed and disposed of by way of written submissions. Consequently, the court ordered and/or directed that the Appellant was to file and serve the written submissions within 14 days and thereafter the Respondent were also to file and serve their written submissions within 14 days from the date of service by the Appellants.
12. On the other hand, it was further directed that the parties herein shall highlight the submissions and, in this regard, the court ordered and directed that the submissions were to be highlighted on the **22nd February 2022**. For clarity, the submissions were duly highlighted.
13. On the part of the Appellants, it was contended that the interlocutory judgment that was entered and/or endorsed in favor of the Respondent herein, was not requested for. Consequently, the endorsement of such interlocutory judgment was made in error.
14. Secondly, it was contended that there were no records pertaining to the formal proof, if any, that were carried out and/or conducted before the learned trial magistrate. In this regard, counsel for the Appellant submitted that in the absence of formal proof, even the formal judgment which was entered in favor of the Appellants herein was erroneous.
15. Thirdly, it was contended that the learned trial magistrate had no mandate and/or jurisdiction to render and/or make the kind of Ruling and/or decision that same made on the **19th January 2021**, insofar as, the nature of the orders that were granted had not been sought for in the body of the Application dated the **17th November 2020**, which was pending before the court.
16. Fourthly, it was the Appellants further submissions that in granting the orders which the court did, the Honourable court abused its discretion and therefore meted out undue punishment upon the Appellants. Consequently, the Appellants further submitted that same were therefore denied and/or deprived of a right to be heard over and in respect of the Application which was still pending before the court.
17. In the premises, the Appellant's counsel contended that the orders of the court were therefore unlawful and thus ought to be set aside.
18. On his part, counsel for the Respondent raised four (4) pertinent grounds, which same addressed seriatim.
19. Firstly, counsel submitted that the issues as to whether a request for interlocutory judgment had been filed or otherwise and whether formal proof had been conducted were not part of the grounds raised and /or contained in the memorandum of Appeal. In this regard, the Respondent therefore submitted that counsel for the Appellants would therefore not be allowed to raise and canvassed new grounds which were not contained in the memo of Appeal.
20. In respect of the second ground, counsel for the Respondent submitted that it was the Appellant counsel who sought for the intervention of the court in the course of the proceedings relating to the Application dated the **17th November 2020**, and in particular, the lifting of the freezing order and upon seeking the intervention of the court, the court was obliged to render a Ruling one way or the other.
21. At any rate, the Respondent further submitted that the Honourable Court further exercised its discretion in the course of considering the

Application by the Appellants herein and that the court duly and properly considered the discretion.

22. Thirdly, it was the Respondent's submission that while considering the oral Application which was by and/or on behalf of the Appellants and taking into account that there was a judgment which was standing in favor of the Respondent, the court was at liberty to decree such conditions and/or terms as the court may deem fit and/or appropriate in the circumstances.

23. Based on the foregoing, it was the Respondent's submissions that the imposition of the terms and conditions and particularly the requirement that the Appellants do deposit the sum of **Kes.3,573, 800/=** only was lawful and reasonable.

24. Lastly, the Respondent submitted that the Honourable court had jurisdiction to render and/or deliver an interim Ruling, pending the hearing and conclusion of the Application dated the **17th November 2020**, and that in this respect, the Ruling rendered on the **19th January 2021**, was not illegal and or unlawful.

25. In the premises, the Respondent invited the Honourable court to consider the provisions of **Section 63 (e) of the Civil Procedure Act**, and thus contended that the Appeal was devoid of merits.

ANALYSIS AND DETERMINATION

26. In dealing with the subject Appeal, it is pertinent to observe that the impugned Ruling arose from an oral Application which was made by counsel for the Appellants during and in the course of the proceedings of **15th January 2021**, whereby counsel applied to the court to consider lifting the freezing orders pending the hearing and determination of the Application dated the **17th November 2020**.

27. Upon the Application for the lifting of the freezing order being made, counsel for the Respondent herein indicated to the Honourable court that same was not opposed to the discharge, vacation and/or otherwise lifting of the freezing order, provided that the Appellants availed security for costs.

28. Premised on the oral Application under reference, the Learned Trial Magistrate was constrained to and indeed reserved a Ruling, which was thereafter delivered on the **19th January 2021**. For clarity, the Ruling herein is what provoked the subject Appeal.

29. I must point out that the Ruling herein was not made in respect of the Application dated the **17th November 2020**, and therefore it is a Ruling that was made pursuant to an exercise of the discretion of the Learned Trial Magistrate. To the extent, that the said Ruling was made in exercise of the discretion of the court and that same was not predicated on any defined provision of the law, other than on the basis of the inherent jurisdiction of the court, it is a decision that was not appealable as of right.

30. In support of the foregoing position, I adopt and reiterate the statement of the law espoused in the decision vide **Francis Ndahebwa Twala v Ben Nganyi [2018] eKLR**, where the court observed as hereunder;

“.....Stay of execution or of proceedings can be made under Order 42 Rule 6(1) of the Civil Procedure Rules but only when the stay sought is pending hearing and determination of an appeal. In this case, there was no appeal hence the issue of stay pending appeal did not and could not have arisen. In Nyutu Agrovet Ltd Vs Airtel Networks Ltd [2015]eKLR, the Court of Appeal (5 Judge Bench) held that where there was no automatic right of appeal stipulated under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, then the Appellate Court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained. Karanja J.A. held, inter alia, that “.....I am convinced that a right of appeal is conferred by statute and cannot be inferred”.

31. Nevertheless, while going through the proceedings, which were taken before **Hon. Justice On'gudi J**, prior to the matter being transferred to this Honourable Court, I established that the question of whether or not Leave was required was addressed before her and the learned judge rendered herself on the issue vide Ruling made on the **30th June 2021**. For clarity, the learned judge, in her wisdom held that no leave was required to mount the subject Appeal.

32. To the extent that no Appeal was filed and/or lodged against the Decision and/or Ruling of the learned Judge rendered on the **30th June 2021**, I must exercise deference and observe that the issue of Leave is no longer alive for my deliberation and same must therefore be left to lie.

33. Having made the foregoing observation, it is now appropriate to venture and/or deal with the Grounds of Appeal that have been ventilated by the Appellants. In this regard, I propose to deal with the Grounds of Appeal as hereunder;

I. Grounds 1, 2 and 5.

II. Grounds 3 and 4

Grounds 1, 2 and 5:

34. In respect of the foregoing grounds of Appeal, it is worthy to note that midstream the proceedings pertaining to and/or concerning the Application dated the **17th November 2020**, the counsel for the Appellants, requested the learned trial magistrate to lift the freezing orders, which had frozen the Appellants bank account and thereby allow the Appellants free access to operate the said accounts.

35. Pursuant to and upon the Application by the Appellant, same was responded to by and/or on behalf of the Respondent, who indicated to the court that same was not opposed to the discharge of the freezing orders, provided however that the Appellants provided security for costs.
36. Having mounted and/or made the said Application and/or request before the learned trial magistrate, the learned trial magistrate was duty-bound and/or otherwise obliged to render a decision and/or Ruling, one way or the other.
37. For clarity, the request and/or oral Application by counsel for the Applicants was expected to attract a determination.
38. In fact, the determination would have gone either way, that is to favor the Appellants or the Respondents.
39. Nevertheless, what is important to note is that the court of law was duty-bound to render a determination, regardless of whether that determination was interim, interlocutory or final. Suffice it to say, whenever an issue does arise before the court, the court is called upon to intervene and such an intervention comes in the nature of a Ruling and/or Order.
40. In the premises, having made the oral Application before the court, inviting the Honourable court in making a determination on the freezing of the bank account, the Appellants cannot now be heard to complain that the court made an interim Ruling and/or Order, which ought not to have been made.
41. On the other hand, it is imperative to note that the oral Application was made while counsel for the Appellant knew and was aware that the Application dated the **17th November 2020**, was still pending hearing and determination. For clarity, the oral Application, was meant to attract an interim measure of protection pending the disposal of the Application dated **17th November 2020**.
42. Be that as it may, it is important to point out that a court of law is vested with jurisdiction to grant and/or issue Interim Rulings and/or decisions and/or orders, provided that such orders are meant to protect the rule of law.
43. Suffice it to note that the provisions of **Section 63 (e) of the Civil Procedure Act** allows the court to issue and/or grant certain interim reliefs. For clarity, the foregoing Section provides as hereunder;

63. Supplemental proceedings

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the court to be just and convenient.

Grounds 3 and 4:

44. As pertains to grounds three and four of the memorandum of Appeal, I beg to point out that at the point when the Learned Magistrate made the impugned Ruling, same was aware of or privy to a judgment that had been made and/or rendered and in respect of which the Respondent herein had been awarded the sum of **Kes.3, 573, 800/=** only.
45. On the other hand, the Learned Trial Magistrate was also aware of the Application dated the **17th November 2020**, which Application was seeking to set aside the judgment but however, which Application was pending hearing and determination.
46. Nevertheless, during the pendency of the Application to set aside the default judgment, an oral Application was made before the Learned Trial Magistrate for the variation and/or discharge of the freezing order which had frozen the account of the Appellants and whose purpose was to allow the Appellants to gain and/or otherwise regain access to the bank account.
47. Based on the foregoing, the Learned Trial Magistrate was vested with jurisdiction and discretion to consider the oral Application and to determine same and in the course of determining the orders which were deemed just and expedient, the learned trial Magistrate was at liberty to mete out such conditions and/or terms as same deemed appropriate and in the interest of justice.
48. In my humble view, the nature and kind of terms and/or conditions which the Learned Trial Magistrate could impose, were numerous, albeit varied and the choice as to which term or condition was deemed appropriate and/or suitable depended on the learned trial Magistrate and not otherwise.
49. It is imperative to observe, that one of the conditions and terms that was available to the Learned Trial Magistrate to decree and/or order,

was the deposit of the decretal sum in an Escrow Account in the names of the Advocates for the parties. Clearly, this was one of the options available for the Trial Magistrate.

50. Perhaps, if I were sitting as the Learned Magistrate and faced with a similar situation, I would have exercised my discretion differently or better still, I would have imposed a different set of conditions, not necessarily the deposit of the entire decretal sum in an Escrow account pending the lifting of the freezing order.

51. However, the critical question is not the nature of orders that this court would have granted if the court was sitting as the trial court, but the question is whether the Learned Trial Magistrate exercised his discretion judiciously and took into account the necessary factors and/or circumstances.

52. On the other hand, it is also appropriate to consider whether the Appellant herein has satisfied the threshold and/or ingredient upon which the Appellate Court can interfere with the exercise of judicial discretion of the lower court or at all. Unfortunately, the Appellants herein do not appear to have appreciated what the ingredients are and therefore same were neither raised nor canvassed.

53. Be that as it may, I must point out that before an Appellate Court can interfere with the discretion of a Lower Court, certain minimum thresholds must be met and/or satisfied. For clarity, the thresholds to be met and/or satisfied were underlined, espoused and underscored in the decision in the case of **Child Welfare Society of Kenya Vs Republic, Ex parte Child in Focus Kenya & AG & Others [2017]eKLR** per Waki, Nambuye & M’noti JJA held as follows, citing **Mbogoh & Another Vs Shah [1968] EA 93**, on the power of the appellate court in matters discretion exercised by the court below: -

*“37. Sir Clement De Lestang V-P in **Mbogoh & Another Vs Shah [1968] EA 93** stated thus:*

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

54. On the other hand, it is also worthy to take cognizance of the decision in the case of **United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (K) Ltd (1985) eKLR** where the Court of Appeal observed as hereunder;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

55. Given that the Learned Trial Magistrate was at liberty to lift the freezing orders on such terms and conditions as same deemed fit and expedient, the directions that the entire decretal sum be placed in an Escrow account, cannot be said to have been made in excess or abuse of discretion or at all.

56. In any event, I must point out that none of the Grounds of Appeal has alluded to the contention that the Learned Trial Magistrate exercised his discretion, arbitrarily, capriciously and/or whimsically or better still that same failed to take into account issues that were placed before him by counsel for the Appellants or took into account extraneous issues and thereby arrived at an erroneous conclusion.

57. On my own, I cannot commence a process of crafting grounds of Appeal for and on behalf of the Appellants and thereafter disseminating same on behalf of the Appellant, with a view to authenticating whether the Appellants, has a legitimate Appeal.

58. Finally, it is necessary to point out that during the highlighting of the submissions on the **22nd February 2022**, counsel for the Appellants herein raised issues at the validity of the interlocutory judgment as well as the final judgment, which were entered in favor of the Respondent herein.

59. Nevertheless, I must point out that the issues pertaining to the validity or otherwise of the interlocutory judgment as well as the final judgment, which was entered in favor of the Respondent herein, were neither enumerated nor espoused in the memorandum of Appeal. Consequently, the Appellants herein, could not be allowed and/ or permitted to canvas grounds of Appeal beyond the four corners of the memorandum of Appeal.

60. If any anchorage is needed, it is sufficient to reproduce the provision of **Order 42 Rule 4 of the Civil Procedure Rules 2010**, which provides as hereunder;

Grounds which may be taken in appeal [Order 42, rule 4.]

The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

FINAL DISPOSITION:

61. Having considered the Grounds of Appeal that were enumerated and/or canvassed before the court, it is appropriate to state that same are Devoid and/or Bereft of Merits.

62. For clarity, it is the Appellants' herein, who whilst faced with the hardship arising from the freezing order, which had frozen their Bank account at I&M Bank, Yaya Centre, made an oral Application, before the learned Magistrate for Interim measure of protection.

63. Clearly, having sought for interim measure of protection, the Learned Trial Magistrate was obliged and/or otherwise obliged by the law to render a determination. In this regard, the person who had invited the Magistrate to render such determination cannot now be heard to question the basis for the rendition of such determination.

64. In the premises, I now make the following orders;

- a. The Appeal vide Memorandum of Appeal dated the 25th January 2021, be and is hereby Dismissed.*
- b. The Orders of this court that were issued on the 11th November 2021, and essentially limbs 1, 2, 3, 4 and 5 are hereby Vacated and/or Extinguished.*
- c. The Orders of the Learned Magistrate issued on the 19th January 2021, relating to the opening of the Escrow Account in the names of the Advocates for the respective parties be and is hereby restored and/or operationalized.*
- d. Consequent to (c) hereof, the Escrow Account shall now be opened in the names of the advocates for the respective Parties within 30 days from the date hereof.*
- e. The Entire Decretal sum, that is the sum of Kshs.3, 573, 800/= Only, shall also be deposited in the Escrow Account within 30 days from the date of the opening of the said account and thereafter the said monies to be held therein pending the determination of the original proceedings vide MCOMMSU NO. E84 OF 2020 or until further orders of the court.*
- f. In default to comply with the deposit of the Decretal sum in the escrow account within the timelines provided in the preceding clause, the Respondent to be at liberty to proceed with execution with the judgment.*
- g. In the event of compliance, the Notice of Motion Application dated the 17th November 2020 shall be set down for inter-partes hearing and eventual determination, albeit on priority basis.*
- h. Costs of the Appeal are awarded to the Respondent.*

65. It hereby Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Miss Luvacheli h/b for Mr. Omondi for the Appellants

Mr. Taka for the Respondent