



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 50 of 2003

JOHN WANYAMA BENJAMIN.....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LTD.....RESPONDENT

JUDGEMENT

This is an appeal from the ruling of Hon. Muchelule, Chief Magistrate, as he then was, delivered on 28th February, 2003 in Kakamega CMCC No. 70 of 1994. The Appellant who was the Plaintiff in the trial court listed 14 grounds of Appeal. He informed the court that he would not wish to attend during the hearing of the Appeal and filed his written submissions.

From the submissions and the grounds of Appeal, the Appellant's contention is that the learned trial magistrate had already made a ruling on the same issue on 28th October, 2002 hence the matter had become Res-judicata; That the trial magistrate ignored the orders that had been issued by another magistrate, Hon. W. M. Muiruri, on 8th December, 1999, that the learned trial magistrate erred in law and fact in stopping execution without substantive formal application for review having been filed; That the issue of refunding Kshs.410,000/= by the appellant to the respondent had not been raised before the trial court.

The Appellant further contented that the trial magistrate ignored or disregarded a consent filed between the parties and that the values of the attached items belonging to the appellant had been computed at Kshs.9,055,500; The trial court acted in excess of its Jurisdiction, That one Zebedee Miliza was incompetent to swear an affidavit yet the trial court relied on that affidavit, Further, that the orders issued on 8th December, 1999 had not been appealed against.

The Appellant in his written submissions contend that what was before the trial magistrate was the determination of the final balance due to him as a result of the attachment of his property but the magistrate abandoned that task. The trial magistrate reviewed the orders made by Hon. W. M. Muiruri on 8/12/1999 which orders were being executed. Parties had recorded a consent and part payment of Kshs.410,000/= had been made; the only issue remaining was the determination of the balance. The trial magistrate had no jurisdiction to make the orders he made on 28th February, 2003.

It is the appellant's prayer that the orders of the trial magistrate made on 28/2/2003 be set aside and the appellant be allowed to proceed with the execution for the balance of Kshs.8,645,580, the respondent having paid Kshs.410,000/- out of the computed sum of Kshs.9,055,500.

Mr. Shitsama, counsel for the respondent opposed the appeal and submitted that the appellant was executing a non-existing order. The decision by W. M. Muiruri, Principal Magistrate was that he declined to order stay of execution of the orders that had been issued

in March, 1999. The appellant extracted a wrong order.

For purposes of clarity, it shall be prudent to set out the various orders issued in this matter. The initial order was made on 11th March, 1999. This is a ruling by W. A. Juma (Mrs.), Senior Resident Magistrate. W. M. Muiruri, Ag. Principal Magistrate delivered a ruling on 24th June, 1999 and an order was extracted on 8th December, 1999. The order being appealed from arises from a ruling delivered by Hon. Muchelule on 28th February, 2003 and the order was extracted on 13th March, 2003.

The ruling by W. Juma of 11th March, 1999 was as a result of an application by the appellant whereby he sought orders of Injunction to restrain the respondent from selling his Plot NO. NORTH KABRAS/KIVAYWA/515 and release of his other attached properties namely Motor Vehicle No. KYD 308, a Leyland Engine, One Sofa Set or their value given at Kshs.240,000, 150,000 and 20,0000 respectively.

W. A. Juma's ruling was that the respondent release the appellant's title deed for the above mentioned plot that had been used as security to secure a loan. The learned magistrate further ruled that she **could not order a return of the attached goods as they had already been sold by Chiki Auctioneers. The court found that the value of the attached and sold goods would have been sufficient to settle the loan balance which had already been adjudged and the appellant was a judgement debtor.** The decree as per the proclamation by Chiki Auctioneers was Kshs.113,120/=.

Turning to the ruling of W. M. Muiruri of 24th June, 1999, the same related to two applications. The first application was by the respondent who filed a Notice of Motion seeking to stay the ruling and order made by Mrs. Juma, SRM on 11th March, 1999. The appellant's application was that parties had consented and the decretal sum had been paid and therefore there was no justification for the attachment of his motor vehicle KYD 308 Peugeot 404 Pick-up and Leyland Engine and that the respondent had not accounted for the proceeds of the auction.

The learned magistrate ably enumerated the consent referred to in the application by the appellant herein. The terms of the consent were as follows:-

“By consent,

1. the sale of property called North Kabras/Bukhaywa (read Kivaywa) 515 be stayed.
2. Judgment be entered for the Defendant for Shs.80,000/= plus interest at Bank rates.
3. The Plaintiff/Applicant to start paying Shs.4,500/= as from 15.4.94 and thereafter to make similar payment after each 15th day of each Succeeding month till payment in full.

In the end, W. M. Muiruri declined to stay the ruling and order of Mrs. Juma, SRM made on 11th March, 1999 and dismissed the respondent's application for stay pending appeal. The learned magistrate did not make any finding on the appellant's application filed on 17th May, 1999. However, the appellant extracted an order on 8th December, 1999 which read as follows:-

1. **That the applications filed on the 23rd March, 1999 and 17th May, 1999 be and are hereby consolidated.**
2. **That the attachment levied on motor vehicle 308 (Peugeot 404 Pick-up) and Leyland Lorry DW 456 Engine be and is hereby lifted and the same or their full and/or present values be restored to the plaintiff.**
3. **That the costs of these applications goes to the Plaintiff.**

Armed with the above order the appellant obtained warrants of arrest dated 30th October, 2002. The warrants do not indicate any liquidated amount but indicate the motor vehicle KYD 308 and the Leyland Engine or their present values to be returned.

Parties ended up making an application before the trial court which culminated to the Ruling by Hon. Muchelule. Counsel for the appellant submitted that the order that directed the respondent to pay the present value of the attached goods had not been appealed against

and that the respondent was bound to pay Kshs.9,055,500/-.

The trial court directed that the respondent hold the title deed for the suit property until the appellant returned the sum of Kshs.410,000 that had been paid to him through his Advocates. The trial magistrate found that there was no justification for the warrants of arrest as that was not part of the ruling by Mrs. Juma

From the circumstances of the case, I do concur with the finding of Hon. Muchelule. The ruling by Hon. Muiruri was not that the respondent pay the appellant the value of the attached items that had already been sold. The order extracted on 8th December 1999 was therefore defective. The only order that could have been extracted was that respondent's/defendant's application for stay pending appeal is dismissed with costs to the Plaintiff/Applicant. Mrs. Juma had already held that the attached motor vehicle KYD 308 and Leyland Engine together with the Sofa-set had been sold and the amount recovered was applied to settle the decretal sum. There was therefore no room to call for payment of the present value of the sold goods as that would have meant that the appellant come out of the dispute without payment of the decretal sum. Indeed the proceedings establish that the Pick-up was simply an empty body and it was not a vehicle and was voluntarily surrendered to defray the auctioneer's costs of Kshs.14,000/=.

The appellant's computation of Kshs.9,055,500 as the present value of his attached goods is misconceived and out of this world. There is no basis for the computation and the same is misplaced. None of the presiding magistrates awarded him that amount or the value of his sold properties. The sold properties settled the appellant's debt with the respondent.

In the end, I do find that this appeal lacks merit and the same is dismissed with costs to the respondent.

SAID J. CHITEMBWE

J U D G E

Delivered, Dated and signed at Kakamega, this 16th day of March, 2010.

ISAAC LENAOLA

J U D G E