



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Appeal 850 of 2004

**PATRICK WAHOME KAMANGU.....APPELLANT
VERSUS
LUCY WAITHERERO MWANGI.....RESPONDENT**

(An appeal from the ruling of Hon. Magistrate D. Morara dated 7th September, 2004 in Civil Case No.577 of 2004 at Gatundu)

J U D G M E N T

1. Lucy Waitherero Mwangi (hereinafter referred to as the respondent), filed a suit in the Resident Magistrate's Court at Gatundu against Patrick Wahome Kamangu (hereinafter referred to as the appellant). The respondent sought judgment against the appellant as follows.

- (a) Permanent order restraining the appellant, his agents and/or servants from disposing of motor vehicle Registration No.KAL 032R.
- (b) That the appellant be condemned to pay Kshs.215,000/= being the balance of the purchase price together with 50% penalty.
- (c) General damages for breach of the agreement.
- (d) Costs of the suit and interest.

2. Filed simultaneously with the appellant's suit was an application by way of chamber summons brought under Order XXXIX Rule 2 & 2A, Order XXXVII of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, in which the respondent sought the following orders:

- (a) That the application be heard ex-parte in the first instance.
- (b) That this Hon. Court be pleased to issue a temporary order of injunction, restraining the appellant, his agents, employees, or any other person claiming under him from selling and/or disposing of by way of sale, and or otherwise motor vehicle registration No.KAL 032R BMW pending the hearing and determination of the suit.
- (c) That the said motor vehicle KAL 032R be driven or be towed to Thika Police Station yard for safe custody pending inter-parte hearing of the application, and that the OCS, Thika Police Station do supervise the enforcement of the orders granted.
- (d) That in the alternative and without prejudice to prayer (b) and (c) hereinabove the appellant be ordered to deposit in court forthwith the sum of Kshs.300,000/= as security against the claim herein.

3. The appellant filed a defence and counterclaim in which he admitted that there was an agreement of sale between him and the respondent but denied having breached the said agreement. The appellant contended that he declined to pay the sum of Kshs.50,000/= after the respondent refused to give the appellant, the motor vehicle described in the agreement. The appellant maintained that the respondent was the one in breach of the agreement and he counterclaimed a sum of Kshs.165,000/= being part of the purchase value for the motor vehicle which he had made to the respondent.

4. By a chamber summons dated 29th July, 2004, filed on the same date, the respondent applied under Order IV Rule 13(1)(b) of the Civil Procedure Rules for Orders:-

(a) That this honourable Court be pleased to strike out the statement of defence and counterclaim filed, for being scandalous, frivolous, and vexatious.

(b) An interlocutory judgment be entered in favour of the applicant.

5. The application was based on the grounds that the defence filed by the appellant was a mere sham, scandalous, vexatious, frivolous and only intended to mislead the court and that the counterclaim as filed was an afterthought, vexatious and intended to mislead the court. The application was supported by an affidavit sworn by the respondent.

6. In response to the application, the appellant filed a replying affidavit in which he objected to the application contending that his defence raised triable issues. A notice of preliminary objection was also filed indicating that the appellant would raise a preliminary objection to the application dated 29th July, 2004.

7. On the 5th August, 2004, when the chamber summons dated 29th September, 2004, was scheduled for hearing, there was no appearance for the appellant. The respondent's counsel submitted that the application was unopposed and urged the court to grant the orders sought whereupon the court granted the orders as prayed.

8. On the 11th August, 2004, the appellant filed an application under certificate of urgency seeking orders for review, variation, vacating and or setting aside of orders of 5th August, 2004 and all consequential orders. The appellant's application was a chamber summons brought under Order IXB Rule 8 of the Civil Procedure Rules, Section 80 and 3A of the Civil Procedure Act. The application was heard on 12th August, 2004 when counsel for the appellant explained that on the 5th August, he arrived in court late, because on his way to the court, his vehicle had a puncture. He found the matter having been called out and the application dealt with. He pointed out that the appellant had a good defence to the respondent's claim and urged the court not to punish the appellant for the mistake of his counsel.

9. The respondent's counsel opposed the application contending that the court was wrongly moved under Order IXB of the Civil Procedure Rules which deals with hearing of suits. He argued that what proceeded before the court, was the hearing of an application and not hearing of a suit. Counsel for the respondent argued that there was no provision in the Civil Procedure Rules for the setting aside of an interlocutory judgment after it was entered.

10. Counsel for the respondent further submitted that the appellant ought to have moved the court by way of a notice of motion. He noted that although the application sought orders of review, the application was not brought under Order XLIV of the Civil Procedure Rules which deals with review. The court was therefore urged to dismiss the application.

11. In his ruling delivered on 7th September, 2004, which is subject of this appeal, the trial magistrate noted that the court could only set aside or vary a judgment or order under Order IXB Rule 8 of the Civil Procedure Rules "upon such terms as are just" but that there were no such terms to warrant the court exercising its discretion. The trial magistrate found that the appellant was properly served with a hearing notice and that no proper reason was given in court for the appellant's failure to attend court.

12. The trial magistrate observed that the Civil Procedure Rules do not provide for a party to come to court for setting aside of interlocutory judgment entered pursuant to an application. He accepted the argument that the application ought to have been made by way of a notice of motion under Order L Rule 1. He rejected the appellant's argument that the application could also be considered under Order XLIV of the Civil Procedure Rules. He therefore dismissed the application as having no merits.

13. Being aggrieved by that application the appellant lodged this appeal raising 5 grounds which I reproduce herein verbatim:

(i) The learned magistrate erred in law and fact in failing to consider the applicant's defence and counter claim.

(ii) The learned magistrate erred in law and fact in not finding that the appellant had raised triable issues and the matter is fit to go for full hearing to determine the real issues herein.

(iii) That magistrate erred in law and fact in failing to direct himself and giving orders based on facts that has no legal basis and are non-enforceable.

(iv) The learned magistrate erred in law and fact in holding that the applicant's is bad in law.

(v) The ruling of the learned magistrate of not otherwise supported by the submission of the parties made at the hearing of the application.

14. Counsel for each party filed written submissions together with appropriate authorities each urging the court to find in favour of his client. I have carefully considered the record of the proceedings and pleadings filed in the lower court. I have also considered the submissions made by counsel and the authorities cited. I have noted the following:

15. Firstly, the respondent's application of 29th July, 2004, was heard ex-parte. It is not evident under which order the application was heard ex-parte, as there is no specific provision in the Civil Procedure Rules which allows such an application to be heard ex-parte. As observed by the trial magistrate, Order IXB of the Civil Procedure Rules expressly provides for the ex-parte hearing of suits and not applications. While the court could exercise its inherent jurisdiction, that jurisdiction was not invoked the respondent not having cited Section 3A.

16. Secondly, assuming that the trial magistrate had powers to hear the application ex-parte, the trial magistrate totally ignored the preliminary objection and the replying affidavit sworn by the appellant both of which were on record and misdirected himself that the application was not opposed. The fact that these documents which were both duly stamped as received by the court on 3rd August, 2004, were not in the court file at the time the trial magistrate dealt with the application of 29th July, 2004, was sufficient reason to justify the setting aside of the orders made by the trial magistrate upon the documents being brought to his attention.

17. Thirdly, while the trial magistrate tore apart the appellant's application, maintaining that it was brought under the wrong provisions, the trial magistrate was blind to the respondent's application which was also defective having been wrongly brought under Order IV Rule 13(1)(b) of the Civil Procedure Rules. No such rule exists in the Civil Procedure Rules.

18. Fourthly, the trial magistrate totally ignored the explanation given by the appellant's counsel for his failure to attend court.

19. Finally, the trial magistrate ignored the fact that the application was also brought under Section 80 of the Civil Procedure Act which gives broad powers to the court, for review of its orders, unlike Order XLIV which is restrictive. The applicant also invoked the inherent powers of the court by citing Section 3A of the Civil Procedure Act. Thus, the court could have exercised its inherent powers to hear and determine the appellant's application on merit.

20. It is true that the appellant's application was wrongly brought by way of a chamber summons instead of a notice of motion under Order XVI Rule 1 of the civil Procedure Rules. However, noting that the appellant had cited several rules and sections, some of which provided for an application to be brought by way of a chamber summons, the defect was a minor technical error which should not stand in the way of substantial justice. An issue was raised with regard to the fact that the appellant did not file a certified copy of the order appealed against. It is puzzling that although a copy of the ruling which is in the original court file is certified the copy of the ruling in the record of appeal does not appear to bear a signature. Under Order XLI Rule 1A of the Civil Procedure Rules:

“Where no certified copy of the decree or order appealed against is filed with a memorandum of appeal the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”

21. In this case, although the appellant did not file a copy of the decree or order appealed against, this court admitted the appeal to hearing under Section 79B of the Civil Procedure Act. Further, the court gave directions under Order XLI Rule 8B

for the hearing of the appeal to proceed. This was done in the presence of both counsel, none of whom raised any objection.

22. The bottom line is that there was sufficient ground for the trial magistrate to review and set aside the orders made on 7th September, 2004. Accordingly, I do allow this appeal and make the following orders:

(i) That the ruling of the trial magistrate made on 7th September, 2004 together with all consequential orders be set aside.

(ii) That the suit be remitted back to the lower court for the application dated 29th July, 2004 to be heard on merit by a magistrate other than the one who made the orders subject of this appeal.

(iii) That the respondent shall pay costs of this appeal.

Those shall be the orders of this court.

Dated this 27th day of January, 2010

H. M. OKWENGU

JUDGE

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Delivered this 29th day of October, 2010

In the presence of: -

Gikaria for the appellant

Advocate for the respondent absent

B. Kosgei - Court clerk

H. M. OKWENGU

JUDGE