



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Civil Appeal 8 of 2002**

**MESHACK SALWA ----- APPELLANT**

**V E R S U S**

**ALFAYO WETENDE ----- 1<sup>ST</sup> RESPONDENT**

**BETTY SALWA ----- 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

In this appeal, the appellant raised the following three grounds of appeal;

***“1. THAT the learned trial magistrate erred in law and in fact in holding that there was no error of law apparent on the face of the record.***

***2. THAT the learned trial magistrate erred in law in not holding/finding that the giving of directions in the absence of intimation from the 1<sup>st</sup> Respondent that he intended to proceed with execution was an error of law meriting review.***

***3. THAT the learned trial magistrate erred in law and in fact in finding for the 1<sup>st</sup> Respondent contrary to the evidence on record.”***

The appellant’s prayer was that the decision delivered on 25<sup>th</sup> January 2002 be set aside; and that this court should make an order allowing the application dated 14<sup>th</sup> August 2000.

Even before I delve into the merits of the appeal, I feel obliged to consider whether or not there is a competent appeal before me.

The issue of competence emanates from the submissions made by the respondent, who said that the decision which the appellant wished to have set aside was delivered on 13<sup>th</sup> April 2000. Therefore, the respondent’s contention was that the appellant erred by indicating that the decision he was challenging was dated 25<sup>th</sup> January 2002.

There is no doubt that in the record of appeal, at page 34, the date of the ruling is indicated as 13<sup>th</sup> February 2000.

Notwithstanding that fact, it is equally true that the decision in question was in relation to an application dated 14<sup>th</sup> August 2000. Clearly therefore, it would have been impossible for the learned trial magistrate

to give his decision on an application which was yet to be filed in court.

Yet, a perusal of the hand-written court records reveals that the learned trial magistrate did actually date the ruling as having been delivered on 13<sup>th</sup> February 2000. That would imply that the ruling was delivered some six months before the filing of the application!!

As if to complicate the issue even further, the learned trial magistrate specified in his ruling that the application which he was determining, was dated 14<sup>th</sup> August 2000.

The record of the proceedings shows that the application dated 14<sup>th</sup> August 2000 was actually argued on 10<sup>th</sup> November 2000. And when the parties had concluded their submissions, the learned magistrate informed them that he would give his ruling on 12<sup>th</sup> January 2001.

There is no indication, in the court records, as to what, if any, transpired on 12<sup>th</sup> January 2001. Presumably, therefore, the ruling was not ready by that date.

The next entry on the court file is dated 23<sup>rd</sup> February 2001, and it states that the court did deliver its ruling on that date.

By the said ruling, the learned trial magistrate dismissed the objector's application for review of the orders made on 11<sup>th</sup> August 2000. Also dismissed, was the plaintiff's prayer for stay of execution of the order dated 11<sup>th</sup> August 2000.

A few days later, on 6<sup>th</sup> March 2001, the appellant herein filed a Notice of Motion, seeking stay of execution, together with an order for the review of the orders made on 21<sup>st</sup> July 2000.

The application was brought under a certificate of urgency, and was heard *ex parte*, in the first instance. Later, when the application was argued *inter partes*, the court was told that there had been an error apparent on the face of the record. The alleged error was said to stem from the failure by the parties to inform the magistrate's court that the orders which were sought, had not been overtaken by events.

The objector, who is the appellant herein, told the magistrate's court that he had not been a party to the case until after his goods were attached. At that stage, he instituted objection proceedings. He therefore asked for an order lifting the attachment, or alternatively, an order that the proceeds realized from the sale of the attached goods be deposited in court.

In answer to those contentions, the respondent argued that the reliefs being sought had been overtaken by events.

On the other hand, if the said reliefs were still current, the respondent argued that they could only have been sought before an appellate court.

In his ruling, the learned magistrate expressed himself thus;

***“.....the attached vehicle Reg. No. KDY 771 Chevrolet, the subject of the objection proceedings had been sold or auctioned. To the extent that the objector wanted to recover the same in that form or condition, the sale had made that impossible. On the other hand, to the extent that the sale proceeds had been deposited in court and were still unreleased to any of the other parties to this case, then to that extent these objection proceedings had not been overtaken by events.”***

He then proceeded to reject the application for review because, it was his considered view that he could not be called upon to correct his

***“own mis-appreciation of the law.”***

As far as he was concerned, such an error can only be corrected through an appeal.

From the court records, it is evident that that decision was delivered on 25<sup>th</sup> January 2002. Therefore, when the respondents herein argued that there was no ruling dated 25<sup>th</sup> January 2002, they erred.

The appeal before me will now be determined on the sole issue, as to whether or not there was an error apparent on the face of the record, which the learned magistrate should have reviewed.

The application which the learned magistrate dismissed was brought pursuant to Order 44 rule 1, as read with Order 3 rule 9A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

In the case of **CHINA ROAD BRIDGE CORPORATION (KENYA) VS DMK CONSTRUCTION LTD. [2004] 2 E.A. 31**, at page 36, the Court of Appeal said;

***“In an application for review, an applicant has to show that there has been discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason.”***

In the case at hand, the appellant had submitted that there was an error apparent on the face of the record, and also that the objection proceedings had not been overtaken by events.

I have already set out hereinabove, part of the ruling in contention. It is clear therefrom that the learned magistrate did find that the vehicle which had been attached could not be released to the objector because it had been sold off.

But, it is equally true that the learned magistrate held that, to the extent that the sale proceeds were still deposited in court, the application before him had not been overtaken by events.

He nonetheless proceeded to dismiss the application for review of the orders made on 21<sup>st</sup> July 2000. Logically therefore, the next question must be, what orders were made on 21<sup>st</sup> July 2000, which the objector wished to have reviewed?

The record shows that the orders made on 21<sup>st</sup> July 2000 were in relation to the objector's application dated 1<sup>st</sup> July 1998. That application had been brought by the defendant. He sought stay of sale of the property which had been attached. He also sought release of the said goods. Finally, he asked the court to allow him to pay the decretal amount by instalments.

The parties intimated to the learned magistrate that there was need for the court to give directions on how the objection proceedings would be handled.

In my understanding, the orders made on 21<sup>st</sup> July 2000 were in the nature of directions. I say so because the parties had not yet canvassed the application.

The learned magistrate made some observations on factual matters without having heard the parties. His said observations were derived from his perusal of the court records.

That fact is significant because the parties did not hold a common view on the facts. In other words, there was a dispute on the facts. Therefore, it is not at all clear to me how the learned magistrate established which set of facts was accurate, without having had the benefit of submissions from the parties.

The disputes that I am alluding to relate to the date when the attached goods were allegedly sold. Whilst the auctioneer intimated that the vehicle was sold before 7<sup>th</sup> May 1998, the Objector deponed that the vehicle had not been sold by 12<sup>th</sup> May 1998, when he lodged his objection.

Be that as it may, the auctioneer had deposited in court, the sum of Kshs.37,365/=, on 14<sup>th</sup> May 1998. He informed the court that that was the sum realized from the sale of the vehicle which was being claimed by the objector.

The learned magistrate therefore concluded his “directions” as follows;

***“I would advise the objector to make whatever application he deems appropriate for this court’s consideration taking into account the time lapse and the above factual findings on this case.”***

As I stated earlier herein, I do not know the basis upon which the learned magistrate made the findings on factual issues, save only regarding the fact that the proceeds of sale had been deposited in court.

But in any event, the orders made on 21<sup>st</sup> July 2000, were in the nature of “directions”. They did not determine the application dated 1<sup>st</sup> July 1998.

Yet, later, when the learned magistrate gave a ruling on 25<sup>th</sup> January 2002, he expressly conceded that the objector’s application had not been overtaken by events, as the court had suggested earlier.

To my mind, that concession implies that the learned magistrate acknowledged having made an error, when he had earlier said that the application had been overtaken by events.

As the advise which the court gave to the objector was founded on facts which were not wholly accurate, that implies that the said advise cannot have been wholesome.

In the case of **EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK VS AFRICAN GREENFIELDS LIMITED & OTHERS [2002] 2 E.A. 377**, at page 381, Ringera J. (as he then was), cited the following words, which were stated by the Court of Appeal in **NATIONAL BANK OF KENYA VS NDUNGU NJAU [1996] LLR 469**;

***“It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”***

In this instance, the learned magistrate did not misconstrue any statute or other provision of law. But he did make a finding of law, without first allowing the parties to address him on the same.

In my considered view, once the learned magistrate appreciated that his “**decision**” which was made on 21<sup>st</sup> July 2000 was based on an erroneous “**fact**”, he ought to have reviewed his said decision.

Mr. Nandi, learned advocate for the respondent told me that the proceeds realized from the auction of the attached vehicle, are still deposited in court. Accordingly, the application for stay of execution may not necessarily be spent. In so saying, I am not at all offering any advise to the objector, nor am I expressing any views on the strengths or weaknesses of the application. It is simply not the role of the court to offer advice to the parties who appear before it.

In **GHARIB V NAAMAN [1999] 2 E.A. 88**, at page 91, the Court of Appeal said;

***“The only place, we as Judges can speak with authority and conviction is in our judgements.....***

***It is the responsibility of the parties appearing before us or their advocates to make us appreciate the points of law, involved in a given dispute.”***

In the result, I do allow the appeal, and set aside the “directions” or advice which the learned

magistrate had offered to the objector. However, I do not allow the application dated 1<sup>st</sup> July 1998, nor do I dismiss it, at this stage. I simply direct that the objector may prosecute it, if he is so minded.

The costs of the appeal are awarded to the appellant.

Dated, Signed and Delivered at Kakamega, this 27<sup>th</sup> day of April, 2009.

**FRED A. OCHIENG**

**J U D G E**