Auma v Khaduli (Civil Appeal E061 of 2024)
[2024] KEHC 11934 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E061 OF 2024

RE ABURILI, J

OCTOBER 4, 2024

BETWEEN

DISHON H OTIENO AUMA ..... APPELLANT

AND

MAURICE O KHADULI ..... RESPONDENT

(An appeal arising out of the Ruling of the Honourable R.M. Oanda in the Principal Magistrate's Court at Winam delivered on the 8th December 2023 in Winam PMCC No. 501 of 2004)

JUDGMENT

Introduction

1. The respondent was a decree holder in Winam Civil Suit No. 501 of 2004 that was concluded vide a judgement dated 5th October 2004 in his favour with the court awarding him special damages of Kshs. 47,168 together with costs and interest.

2. The plaintiff/ respondent filed a bill of costs dated 28th May 2012 on 29th may, 2012 and on the same date, through his counsel S.M.Onyango &Associoates Advocates, he applied to court to have the said bill of costs wholly withdrawn. It was not until vide letter dated 22nd March, 2021 that he filed an application for execution of decree in the matter The application for execution was by way of attachment and sale of movable properties and is dated 1st march, 2021 On 5th May, 2021, the firm of Khaduli & Co. Advocates applied for leave to come on record for the plaintiff in the place of S.M.Onyango & Associates. On 11th August, 2021, the advocates filed a consent to allow the firm of Khaduli & Co. Advocates to take over the brief from S.M.Onyango & Co. Advocates. The latter advocate then filed a Notice to Show Cause for which the warrant of arrest dated 9th February, 2024 was issued against the appellant seeking the appellant's committal to civil jail for failing to settle the aforementioned decree together with other costs assessed in other matters involving the advocate Mr.

S.M.Onyango and the plaintiff/ respondent herein as client vide Kisumu HCMISC Civil Application No. 113 and 114 both of 2019.

3. In response, the appellant who was the judgment debtor, filed a replying affidavit deposing that after judgement was delivered against him and in favour of the respondent, they did reach a settlement and compromised the entire claim wherein he paid Kshs. 40,000 in full and final settlement thus the claim was extinguished and that he no longer owed the respondent. He annexed a document showing that the plaintiff's counsel S.M.Onyango &Associates received Kshs 40,000 in settlement of decree although the relevant court case for which decree was being settled was not disclosed.

4. In his determination on the Notice to Show Cause application, the trial magistrate on 8th December, 2023 found that the appellant had been evading settlement of the decretal sum and that having moved to the superior court and his appeal been dismissed, the appellant was obliged to pay the costs owed to the respondent. The trial court proceeded to order that the appellant settles the decretal sum of Kshs. 314,195.80 due to the respondent, within 45 days from the date of the ruling and in default, an arrest warrant would issue.

5. Aggrieved by the trial court's ruling, the appellant filed this appeal dated 25th March 2024 on 27th March, 2024 raising the following grounds of appeal:

    a. The trial magistrate erred in law in failing to take into consideration all or any of the objections taken and cause shown by the appellant.

    b. The trial magistrate erred in law and in fact in failing to come to a finding that the decree was not in tandem or conform to the judgement of the court and the sum of Kshs. 274,195 claimed by the respondent was in excess of the decree.

    c. The learned trial magistrate erred in law in failing to come to a finding that on evidence and the cause shown, the decree had been settled by compromise and by payment of the sum of Kshs. 40,000 on or about 17.11.2004 and the debt therefor extinguished.

    d. The learned trial magistrate erred in failing to find that a certificate as to costs was never issued and that therefore, no assessment of costs was done and the decretal sum was therefore legitimately not recoverable in the suit and was a phantom and a fiction.

    e. The learned trial magistrate erred in law in failing to find that the debt, if any was extinguished, and the decree dated 5.10.2004, if any could not be executed on account of lapse of time and time bar, namely Section 4(4) of the *Limitation of Actions Act*.

    f. The learned trial magistrate erred in law and in fact in ordering for the appellant's arrest and detention without considering the appellant's complaint that: -

        i. The decree sought to be executed contained quantum of costs taxed and passed by the Deputy Registrar, Kisumu High Court in HCMisc. Application Number 113 and 114 of 2019 between the respondent and his advocates.

        ii. The subordinate court lacked the jurisdiction to enforce any order or decree of the High Court.

        iii. The appellant was not a party to the taxed costs in HCMISC No. 113 and 114 of 2019 and would not be liable to pay them.

iv. The costs in HCMISC No. 113 and 114 of 2019 were consensual and arrived at by consent between the respondent and his advocates without the appellant's consent or input and was not binding on him.

g. The learned trial magistrate in all circumstances of the case erred in compelling the appellant to be arrested and detained for not paying a stale and non-existent debt or decree and the order was unreasonable.

6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant relied on the affidavit showing cause and submissions filed and submitted that he had demonstrated that he was no longer indebted to the respondent as the debt had been extinguished by compromise when Kshs. 40,000 was paid on 17.4.2004 and that even the remaining outstanding amount of Kshs. 7,000 could not generate an interest of Kshs. 110,844.80 from 17.11.2004 to 29.6.2021.

8. The appellant further submitted that the trial court lacked jurisdiction to execute orders emanating from the High Court and further that the trial magistrate assumed a jurisdiction to execute an order for costs taxed in the High Court and not against or executed against the appellant. It was submitted that the jurisdiction to execute High Court Orders lay with the High Court.

9. The appellant further submitted that the decree was not executable on account of time bar as the order issued was bad. He submitted that the decree was dated 15.10.2005 and that he had settled it by payment of Kshs. 40,000 on 17.4.2004 and therefore there was no further action to enforce the decree and the costs which remained unassessed and unknown to date, which were thus overtaken by events and was time barred.

The Respondent's Submissions

10. The respondent submitted that the Appellant was misleading the court by sneaking in new evidence and/or documents that were not part of the pleadings being consent dated 13th March 2023 and Notice of Change of Advocates dated 12th March 2024 which should be expunged as the same do not reflect the said dates of the proceedings that had been referenced in the Appellant's record of Appeal as well as the said firm had never represented the Appellant in the lower court matter PMCC NO. 501 of 2004 since they came on record as illustrated, let alone serving the Respondent's appointed Advocate on record with the same documents.

11. It was further submitted that the appellant falsely intimated that the whole claim was compromised by paying Kshs. 40,000 for Kshs. 47,168 inclusive of costs and interests chargeable from the 27th October 2004 which was never proved and that this contradicts the appellant's position on page 200 of his Record of Appeal which illustrates the reminder of settlement of the balance.

12. The respondent further submitted that if the claim was truly extinguished, then there was no need to file the Appeal HCCA No.75 of 2005 that was prosecuted until its dismissal with costs to the Respondent herein which he had also failed to prove its settlement and that the said Appeal had not been disclosed by the Appellant as it was also a gimmick to avoid settling the decree in favour of the Respondent herein.

13. The respondent submitted that the act of concealing facts for an unfair decision leads to misleading tact with all the intention of defeating justice and the same warrants for dismissal of the Appellant's

Appeal as enshrined under Order 2 Rule 15 of the Civil Procedure Rules which empowers the Court to strike off claims of such nature as was held in the case of Francis Memba v Joel Yducha [2020] eKLR.

14. It was submitted that the Respondent herein had lost and continues to lose on his decretal amount of Kshs. 47,618, costs of Kshs. 60,345 as taxed and duly paid to his Advocates that was to be settled by the Appellant herein and interest of Kshs. 111,316.48 that had accrued since the judgment was delivered totaling to Kshs. 218,829.48 which he is entitled to enjoy as the fruit of his judgment.

15. The respondent further submitted that Section 4(4) of the *Limitation of Actions Act* on lapse of time should not be misused by malicious litigants to abscond from settling a decretal amount after defying the law and later claiming to be the victims.

16. It was submitted that Order 48 Rule 8 of the Civil Procedure Rules has been a subject of examination in a series of judgements of the Cyprian Supreme Court as was the case in Stavrinidis v Bank of Cyprus Public Company Limited, CA No. 367/12, where the principles governing the exercise of the discretion of the Court during the examination of applications for renewal of the execution of Court Judgements, as defined by the relevant case law, were summarized and also repeated by the same Supreme Court judgment of Orfanides and Ors v. S & G Securities and General Finance Ltd, Civil Appeal No. 302/2013.

17. The respondent submitted that the delay in executing was fully and/or wholly contributed to by the disappearing act of the Appellant and that the Respondent's efforts in tracing him have been well illustrated by his then appointed Advocates' letter dated 3rd August, 2015.

18. It was submitted that the Ruling and Order issued on 8th December 2023 and 30th April 2024 respectively by the Senior Principal Magistrate Court in Winam were well founded on law as the Respondent successfully demonstrated to the Court that the actions of the Appellant were and have been indeed tainted with illegality, irrationality, and procedural impropriety.

19. The respondent submitted that the Appeal be dismissed with cost and he be awarded the duly entitled decretal sum of Kshs. 218,829.48 as what the Appellant owes him since the entry of judgment in his favour as per the issued Decree by the then sitting Court.

Analysis and Determination

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. The appeal is against a ruling of the trial court on a Notice to show cause in execution of decree proceedings. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of

the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

22. I have considered the grounds of appeal, the trial court record herein as well as the written submissions by both parties' Counsel.

23. Execution of decree procedure is governed by Section 38 of the *Civil Procedure Act* which provides that:

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property;

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

24. What emerges clearly from the foregoing is that a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the *Civil Procedure Act*, are satisfied be committed to jail. Committal to civil jail in such circumstances is exceptional in the sense that a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state.

25. In the instant case, the appellant is a judgement debtor following the judgement dated 5th October 2004 delivered in Winam Civil Suit No. 501 of 2004 that awarded the respondent special damages of Kshs. 47,168 together with costs and interest against the appellant and according to the respondent, that award remains unsettled to date.

26. The appellant has pleaded and submitted before this court that he was no longer indebted to the respondent as the debt had been extinguished by compromise when Kshs. 40,000 was paid on 17.4.2004 and that even the remaining outstanding amount of Kshs. 7,000 could not generate an interest of Kshs. 110,844.80 from 17.11.2004 to 29.6.2021; that the trial court lacked jurisdiction to execute orders emanating from the High Court and further that the trial magistrate assumed jurisdiction to execute an order for costs taxed in the High Court and not against or executed against the appellant and that the decree was not executable on account of time bar hence the order for arrest and committal as issued was bad.

27. Firstly, I will deal with the issue of limitation of time which is a pure point of law raised.. This was at the core of this argument by the appellant and which is governed by Section 4 (4) of the *Limitation of Actions Act* which provides that:

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

28. The judgement sought to be enforced was delivered on the 5th October 2004 and although a bill of costs was filed, it was withdrawn the same day of filing. Thereafter, there was an attempt to apply for execution by way of attachment and sale of the appellant's movable properties as stated above but there is no evidence of such execution being undertaken.

29. From 23/8/2012 when the registry fixed the bill of costs dated 28/5/2012 for assessment on 19/9/2012, noting else happened on the latter date. The court proceedings came next on 6/5/2021 when the application dated 29/4/2021 was fixed for hearing on 3/6/2021.

30. From the time when judgment was entered against the appellant in 2004, the only enforcement of that judgment, that took place which was being challenged by the appellant was that commenced vide the respondent's Notice to Show Cause filed in 2021 well beyond the time set out by section 4 (4) of the *Limitation of Actions Act*.

31. There is noting on record to demonstrate that the respondent was unable to trace the appellant to enforce execution of decree against him as the initial application for execution of that decree of March, 2021 by way of attachment and sale has all the warrants intact in the court file with no evidence of an auctioneer taking them and or attempting to execute them and failing or returns made to court as required. The warrants were even never signed by anybody.

32. Additionally, although there was an appeal filed, there is no evidence of any order for stay of execution of decree pending that appeal. Additionally, no costs of the suit as awarded by the trial court were assessed in the suit for settlement and neither was decree drawn even at the time that the first application for execution of decree was being filed vide letter dated 22nd March, 2021.

33. The import of Section 4 (4) of the *Limitation of Actions Act* was considered by the Court of Appeal in M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe [2007] eKLR where the court held that where an attempt at enforcement of a decree after 12 years includes eviction proceedings, then such proceedings are statute-barred. The court went on to hold:

> " ... it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. ... It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of "action" in section 4 (4) of the Act would be inconsistent with the law of adverse possession."

34. At the end of 2019, the Court of Appeal revisited its M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe supra decision in Koinange Investment and Development Company Limited v Ian Kahiu Ngethe & 3 others (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased)) [2019] eKLR where it held that an order of stay of execution stopped time from running against a decree holder. The court stated:

> " 36. In the M'Ikiara matter, the Court held that all post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgments are statute barred after 12 years. However, in that matter the proceedings to recover the land in dispute had been filed nearly 18 years after the final judgment of the Court of Appeal and were rightly held to be statute barred.
>
> 37. Where a party is prevented from executing a lawful decree by a court order pending hearing and determination of an appeal against the decree, it would be unjust to hold that time still runs against the decree holder over the period when the appeal remains undetermined, and until the stay order is vacated."

35. My understanding of the decision in Koinange Investment and Development Company Limited supra is that the provisions of Section 4 (4) of the *Limitation of Actions Act* are not cast in stone. There could be valid intervening circumstances such as an order of stay of execution, which would take a particular case out of the stranglehold of Section 4 (4) of the *Limitation of Actions Act*.

36. In this case, it was contended and submitted by the respondent that the appellant had vanished after judgement was entered against him and that efforts to trace him so as to commence execution were not fruitful leading the respondent's own advocate to seek costs against him.

37. However, examining the trial court record, I note that there were no efforts made at execution of decree from the date the judgement entered on the 5th October 2004 and even though there was a letter to court and application for execution in 2021, there is no evidence that the warrants of attachment and sale were ever signed or collected for enforcement, until the respondent filed his Notice to Show Cause in 2023.

38. Further to this, I reiterate that the trial court record reveals that there was no stay of execution sought and obtained by the appellant that would stop the respondent from executing the decree using all the available methods under the Civil Procedure Rules.

39. It must be noted that the Limitation of Actions touches on a court's jurisdiction to adjudicate over a given matter. The purpose of the Law of Limitation was stated in the case of Mehta v Shah [1965] E.A 321, as follows;

> " The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

40. In Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows;

> " ...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

41. Accordingly, having obtained judgement on 5th October 2004, the respondent had until 2016 to execute the decree before the period of limitation kicked in. The respondent was thus not entitled to proceed with execution past the year 2016.

42. Further, I am inclined to agree with the appellant that the trial court lacked jurisdiction to execute orders emanating from the High Court on the costs awarded or assessed by the High Court whether on appeal or between the respondent and his advocate as is the case herein where S.M.Onyango Advocate had his advocate client bills of costs assessed in HCCMISC APPL Nos 113 and 114 of 2019 which costs were being included in the application for Notice to show Cause against the appellant herein. That is unacceptable practice that would cause an injustice to the appellant.

43. To do otherwise would be to assume jurisdiction to execute an order for costs taxed in the High Court where the appellant was not party to those proceedings involving fee disputes between the respondent and his advocates and therefore by the trial court adopting the said costs between advocate and client which were not costs in the suit involving the appellant and the respondent herein, (to which the appellant was not a party,) in effect, the trial Magistrate in issuing orders that effected execution in the aforementioned applications, the trial court assumed jurisdiction over the proceedings before a superior court, which was erroneous.

44. This in my view was an error of law as the trial court being a subordinate court lacks the jurisdiction to enforce the taxation orders emanating from the High Court which has a procedure laid out for execution of its orders spearheaded by the Deputy Registrar of the Court. The trial court further lacked jurisdiction to enforce as against the appellant, settlement of costs which were never assessed in the first instance as the only bill of costs filed was withdrawn on the same day as stated above in 2012.

45. Finally, it was the appellant's submission that he settled the decree emanating from the trial court's judgement dated 5th October 2004 by payment of Kshs. 40,000 on 17.11.2004 which constituted full settlement of the decretal sum. I note that this was after the judgement of 5.10.2004 and the receipt itself is marked as being payment for the "decretal sum".

46. The appellant contended that the aforementioned payment of Kshs. 40,000 constituted complete settlement of the decretal sum as the parties agreed to the same via a consent. I have reviewed the record and I note that there is no consent filed on the same. Nonetheless, as I have stated above, the decree became stale by operation of law upon expiry of 12 years from date of judgment and was therefore incapable of enforcement as there were no special circumstances preventing execution thereof.

47. In other words, the payment or non-payment of the Kshs. 40,000 is immaterial as there was no further action to enforce the judgment and more so, the costs remained unassessed and unknown to date therefore being overtaken by events and was time barred.

48. I reiterate that the respondent's claim in execution was caught up by laches by virtue of the provisions of Section 4 (4) of the *Limitation of Actions Act*.

49. The upshot of all the above is that I find that the trial court lacked the requisite jurisdiction to entertain the respondent's application to execute the judgement in his favour vide the Notice to Show Cause impugned by this appeal.

50. Accordingly, this appeal is found to be meritorious and is hereby allowed. The ruling dated 8th December 2023 by the trial Court on Notice to show cause against the appellant herein is hereby set aside in its entirety and dismissed and substituted with an order dismissing the respondent's Notice to show cause and all consequential orders including warrants of arrest issued against the appellant.

51. I order that each party bear their own costs of this appeal and of the Notice to show cause.

52. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE