Tuffsteel Limited v Ukwala Bargains Limited (Civil Appeal E389 of 2023)
[2024] KEHC 14266 (KLR) (Civ) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E389 OF 2023

RC RUTTO, J

NOVEMBER 15, 2024

BETWEEN

TUFFSTEEL LIMITED ..... APPELLANT

AND

UKWALA BARGAINS LIMITED ..... RESPONDENT

(Being an appeal against the decree from the Ruling issued by Hon. N Ruguru (SPM) on 5th May 2023 in Milimani Commercial Court No. E773 of 2020)

RULING

1. The background of this appeal is as follows; the Respondent sought judgment against the Appellant for the sum of Kshs 186, 430/=, together with the costs of the suit and interest. The Appellant failed to enter appearance and or file its defence as required, consequently an interlocutory judgment was entered against the Appellant on 10/8/2020.

2. When the Respondent moved to execute the said judgment, the Appellant filed a Notice of Motion Application dated 17/2/2023, seeking among other orders that; a stay of execution of the warrants of attachment dated 10/2/2023 and unconditional lifting of the warrants of attachment on the grounds that the interlocutory judgment delivered on 10/8/2020 had been set aside by a consent signed by both parties and throw away costs paid to the Respondent's advocate.

3. The Application was heard and determined and a Ruling delivered on 5/5/2023. In that Ruling the court allowed the Appellant to be heard, it set aside the judgment of 10/8/2020 on condition that the Appellant pays Kshs 50, 000/= to the Respondent as costs incurred by the auctioneer and for the application filed. It is this Ruling, specifically the condition that the Appellant pays Kshs 50, 000/= as both costs incurred by the auctioneer and the application, that has aggrieved the Appellant leading to the filing of this appeal.

The Appeal

4. The Appellant seeks that the appeal be allowed and the order requiring them to pay throw away costs of Kshs 50, 000/= be set aside. This is based on the ground that the purported execution of the decree was irregular and unlawful and offended the provisions of Order 22 Rule 18 (a) of the *Civil Procedure Rules* as the decree was more than a year old. The Appeal is based on three (3) grounds as follows: -

    a. That the Learned Trial Magistrate erred in law in ordering the Appellant to pay further throw away costs of Kshs 50, 000/= notwithstanding the fact that the Appellant had hitherto paid throw away costs of Kshs 20, 000/= for setting aside the judgment.

    b. The Learned trial Magistrate failed to appreciate the issues that were raised in the Appellant's application and in particular the fact that the parties had entered into a valid consent to set aside the judgment and the Respondent had indeed acted on the said consent, filed a reply to defence and fixed the matter for pre-trial.

    c. The Learned trial Magistrate fell into error in law when she failed to note that the Respondents were executing a decree which was more than one year and the matter had not been fixed for Notice to Show Cause as is required by law.

5. The Appeal was canvassed by way of written submissions. The Appellant's submissions were dated 11/6/2024 in support of the Appeal while the Respondent despite numerous mentions did not attend court or file its submissions.

Appellant's submissions

8. The Appellant begins its submissions with an analysis of the facts, stating that it was initially represented by Kounah & Company Advocates. By the time the current firm of advocates took over the conduct of the matter, the previous advocate had already made an application to set aside the judgment entered on 10/8/2020, a consent had been entered into, setting aside the judgment subject to the payment of throw-away costs. The Appellant asserts that the throw away costs were paid, and a receipt for Kshs 15,000/= issued by the Respondent's advocates. Following this, a defence was filed to which the Respondent filed a reply and the matter was subsequently set down for pre-trial.

9. The Appellant submits that it was improper for the Respondent to proceed with the execution of the judgment dated 10th August 2020 when there was a consent validly executed by both parties setting aside the said judgment. The Appellant argues that, although the consent was not adopted by the court, it was improper for the Respondent to proceed with the execution of the judgment dated 10th August 2020. Also, that it was improper for the trial court not to take into account the fact that the Appellant had already paid Kshs 15,000/= as throw-away costs. Furthermore, the Appellant contended that the trial court failed to consider the binding effect of an executed and performed consent order. The Appellant relies on the case of *Fidelity Shield Insurance Co. Ltd v Gabriel Ngaruha Kabue* [2021] eKLRto support this submission.

10. The Appellant also contended that the trial court erred in finding that it had failed to execute the consent, despite the fact that the signed consent was duly produced in court, demonstrating that both parties had executed it.

11. The Appellant submitted that from the record of appeal, before the proceedings of 14/12/21 there is only a minute entry indicating interlocutory judgment, without specifying the date or the judicial officer who entered the judgment.

12. In urging the court to interfere with the trial Court's exercise of judicial discretion, the Appellant relied on the case of *Mbogo and Another v Shah* [1968] EA 93, and submitted that the court overlooked the executed consent, the receipt evidencing payment of throw away costs, and the fact that the matter had been set for pre-trial.

13. The Appellant also submitted that the court did not consider the fact that the Respondent was sending correspondence and mention notices to the Appellant via the wrong email address.

14. The Appellant further submitted that; the Respondent acted contrary to Order 22 Rule 18(1) of the *Civil Procedure Rules* by executing a judgment that was over one year old. That since judgment was entered in 2020, execution could not proceed without first issuing a Notice to Show Cause. He urged that the appeal be allowed as prayed.

Analysis and Determination

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).

7. After careful analysis of the record of appeal and submissions the following issues arise for determination:

    a. Whether there was breach of Order 22 Rule 18 (1) of the *Civil Procedure Rules*.

    b. Whether the Trial Court erred in ordering the Appellant to pays throw away costs of Kshs 50,000/=

a. Whether there was breach of Order 22 Rule 18 (1) of the Civil Procedure Rules

8. The Appellant submitted that the Respondent sought to execute a judgment that was more than one year old which was contrary to the provisions of Order 22 Rule 18(1) of the *Civil Procedure Rules*.

9. Order 22 Rule 18 (1) of the *Civil Procedure Rules* provides that:-

    18. Notice to show cause against execution in certain cases

        (1) Where an application for execution is made—

            (a) more than one year after the date of the decree;

            (b) against the legal representative of a party to the decree; or

            (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him;

            Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

> Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

10. A reading of the above provision shows that it is couched in mandatory terms meaning that its compliance is mandatory and inevitable. Therefore, after the lapse of one year from the date of decree, a notice to show cause ought to be issued to a judgment debtor, unless where another application for execution was made within the past year against the party whom execution is applied for and an order of execution had been made against such person, then notice to show cause would not be necessary.

11. I note that the judgment leading to the decree issued on 7th February 2023 was delivered on 10/8/2020. The Respondent attempted execution and were issued with the warrants of attachment dated 10/2/2023. That was more than one year since the court entered judgment. No application for execution was filed in between the years.

12. This court therefore finds that Order 22 Rule 18 (1) of the *Civil Procedure Rules* specifically in consideration of Sub-Rule (a) was breached. The Respondent ought to have issued the Appellant with a Notice to Show Cause and not proceed with the execution by way of attachment.

13. In the case of *Reuben Nyanginja Ndolo v Dickson Wathika Mwangi, Jerusa Chepsap and Election Commission of Kenya*, Pet. 11/2008 the court clearly pointed out the importance of the Notice to Show Cause as below: -

> " The requirement for Notice to Show Cause serves two purposes in my view: First, it serves to give notice to the judgement debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice. This is a recognition that invariably a delay in execution of decrees leads to escalation of interests and the due process of the law in civil litigation should not be used as an avenue to extract penal consequences."

14. Consequently, guided by the above, this court finds that the decree having been issued on 10/8/2020 one year lapsed on 9/8/2021. Consequently, if the respondent wanted to execute, then a notice to show cause ought to have been served on the appellant in terms of the requirements of Order 22 Rule 18 (1)(a), *Civil Procedure Rules* and failure to comply with that provision rendered the execution by way of attachment irregular.

b. Whether the Trial Court erred in ordering that the Appellant pays throw away costs of Kshs 50, 000/=

15. The Appellant repeatedly submitted that the trial court disregarded the fact that it had already paid throw away costs. This court being a court of record relies on the record presented before it, which is a reflection of what transpired during the trial. Unfortunately, the proceedings that led to the judgment of 10/8/2020 are not part of the Record. That notwithstanding, I have carefully scrutinized the record, particularly the application dated 17 /2/2023 and the response filed by the Respondent together with the court's ruling.

16. Some of the uncontested facts are that: -

a. In compromising the Application dated 1st September 2020, the parties intended to consent in the following terms: -

   i. That the judgment entered on 10/8/2020 be set aside.

   ii. That the Appellant pays throw away costs of Kshs 15, 000/= to the Respondent.

   iii. That the Appellant files and serves the Statement of Defence within 14 days.

b. That the consent was never filed in the court, consequently it was never adopted as an order of the court.

c. That the Respondent received the amount of Kshs 15, 000/= as throw away costs.

d. That the Defence and Reply to Defence were filed and placed in the court record.

17. The Appellant contends that, since the consent had been agreed upon and its terms fully complied with, the Respondent should not have initiated the execution process.

18. Upon considering the foregoing, this court finds that, since the consent was not filed in court and subsequently adopted as a consent judgment, it cannot be said to have been duly adopted as a court order. What the parties did is akin to corresponding and agreeing without involving the court. Moreover, the Appellant did not provide any evidence to show that it had sent the consent back to the Respondent for filing, nor that it was the Respondent who failed to file the consent with the court. Additionally, the allegation that correspondences were sent to the wrong email address, is an issue being raised for the first time in this appeal, and has not been substantiated.

19. However, in consideration of the effort made by the Appellant in ensuring that it has complied with the terms of the consent that was intended to be filed and most importantly in the interest of justice, I find that the trial court was right in allowing the Appellant to be heard on merit. In holding so, the trial court observed that: -

> " However, noting the parties had initially consented to have the judgment set aside and suit heard on merit, I am of the humble opinion that, it would be prudent to allow the Defendant be heard by setting aside the judgment of 10/8/2020 on condition that the Defendant pays Kshs 50, 000/= to the Plaintiff as costs incurred by the Auctioneer and in this application. The said Kshs 50,000/= to be paid within 21 days otherwise execution to issue."

20. Was the trial court correct in ordering the Appellant to pay throw-away costs of Kshs 50,000? The trial court's reasoning for the payment of the sum of Kshs 50,000 was based on the consideration that it was meant for the auctioneer's costs as well as the costs of the application.

21. The Appellant has submitted that the trial court failed to account for the Kshs 15,000 already paid as throw-away costs, and not Ksh.20,000/- as stated in the Memorandum of Appeal. This court also notes that the Kshs 15,000 paid was specifically for throw-away costs, whereas the Kshs 50,000 ordered by the trial court was to cover both the auctioneer's costs and the application costs. The amount awarded by the trial court was discretionary and I am well guided by the decision in the case of *Mbogo v Shah* [1968] EA 93 where the court held that;

> " ...that this court will not interfere with the exercise of judicial 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 is should not have acted or because it failed to take

into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

22. I note that the trial court failed to consider the irregularity of the execution, as discussed in the first issue above. In light of this, I am of the view that the trial Court should not have condemned the Appellant to pay the Auctioneer costs, as the Respondent prematurely engaged the auctioneers without due regard to the requirements of Order 22 Rule 18 of the *Civil Procedure Rules*. Consequently, this court finds that the award of Kshs 50,000 was irregular and proceeds to set it aside.

23. In light of the foregoing, this court makes the following orders;

    a. the award of Kshs 50,000/- as costs for both the auctioneer's expense and the application is set aside.

    b. Costs for the Notice of motion dated 17/2/2023 shall be in the cause.

    c. Each party to bear their own costs for this Appeal.

    Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 15TH DAY OF NOVEMBER 2024.

For Appellant:

For Respondent:

Court Assistant: