



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 19 OF 2009

KISAM ENTERPRISES LTD.....1ST APPELLANT

VIRMIR AUCTIONEERS.....2ND APPELLANT

VERSUS

JOHN NGANGA KAMAU.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the ruling and order of the Resident Magistrate Milimani CMCC No. 7256 of 2008 issued on the 22nd December 2008.
2. The appellant's filed a memorandum of appeal dated 21st January 2009 based on 9 grounds of appeal which can be summarised as;
 - a) **The learned magistrate erred in law and in fact by ordering the unconditional release of motor vehicle registration number KWQ 154.**
3. In response the respondent through his advocate on record filed a replying affidavit dated 7th July 2017. It was deposed that the parties had consented on the release of the motor vehicle registration number KWQ 154.
4. The respondent's advocate further deposed that the consent aforementioned was recorded on the 11th December 2008 and was the basis upon which he filed his application dated 20th November 2008 in CMCC No. 7256 of 2008, which was heard and determined and now subject of this appeal.
5. The parties agreed to dispose of the matter by way of written submissions.

B. Appellant's Submissions

6. The appellant submitted that the application subject of this appeal was triggered by the attachment of the respondent's motor vehicle registration number KWQ 154 to satisfy a decree in favour of the appellants herein in CMCC No. 2554 of 2003.
7. It was further submitted that no consent judgement had been entered between the parties herein in CMCC No. 2554 of 2003 and further that the respondents had not placed any consent before this court for this court to peruse.
8. It was submitted that the trial magistrate erred in law and fact by ordering the release of the attached motor vehicle, which had been attached pursuant to a valid judgement in CMCC No. 2554 of 2003 which had not been varied or set aside and further that the attachment had not been stayed.
9. The appellant concluded that it was un-procedural for the respondent in appeal to file a replying affidavit when there was no application and thus urged the court to strike out from the record the replying affidavit dated 7th July 2017.

C. Respondent's Submissions

10. He submitted that the record of appeal was incomplete and thus rendered the appeal incompetent as it lacked the proceedings before the lower court, a copy of the challenged order of 22nd December 2008, the consent order of 11th December 2008 and the decree issued on 30th

January 2009. He relied on the cases of Francis Njoroge v Wanjiku Njoroge Civil Appeal No. 187 of 1995, Joel Obwori v Wilson Kinyenga Nairobi Civil Appeal No. 332 of 1996, Wallace Mutungwa Matolo & 2 Others v The Senior Land Adjudication/Settlement Officer – Machakos District & 3 Others Civil Appeal No. 127 of 1994 and Jackson Gatere v Mount Kenya Bottlers Limited Civil Appeal No. 107 of 1995.

11. He further submitted that the appeal against the interlocutory order had been overtaken by events and its exercise is a mere academic exercise as the subject motor vehicle went to waste years back.

12. It was further submitted that before the appeal was mounted he was not notified in time by way of a letter as required by law and in conclusion the respondent prayed that the appeal be dismissed with costs.

D. Analysis of Law

13. I have considered the written submissions of the appellants and those of the respondent. I have also considered the authorities relied on by the respective counsel.

14. **Order 42 Rule 13(4)** of the **Rules** is clear that the record of appeal will not be complete without the decree or order appealed against; it provides:

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- a) *The memorandum of appeal;*
- b) *The pleadings*
- c) *The notes of the trial magistrate made during the hearing;*
- d) *The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;*
- e) *All affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- f) *The judgment, the order or decree appealed from, and, where appropriate, the order(if any) giving leave to appeal:*

Provided that-

- i. *a translation into English shall be provided of any document not in that language;*
- ii. *the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”*

15. I have perused the record of appeal and contrary to assertions by the respondent, surprisingly, all the documents required under order 42 Rule 13 (4) are contained therein. I therefore find that appellant has satisfied all the above provisions of the law and thus the appeal is properly before this court.

16. The appellant raised the issue of the respondent filing a replying affidavit in response to the memorandum of appeal and urged this court to strike out the same. I do note that Order 42 of the civil procedure is silent on the manner of response to the record of appeal. It is my opinion that there is no prejudice occasioned on the appellant by the aforementioned replying affidavit. I therefore decline to strike it out.

17. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

18. This appeal is against the ruling by the Resident Magistrate in Milimani CMCC No. 7256 of 2008 issued on the 22nd December 2008. This ruling reinforced a previous order issued by the Principal Magistrate’s Court on 3rd December 2008 for release of the motor vehicle KWQ 154.

19. The appellants herein were successful in CMCC 2544 of 2003 against the respondent and 2 other parties not currently before the court but parties in the aforementioned lower court suit. The appellant subsequently triggered proceedings of attachment of the respondent's motor vehicle registration number KWQ 154 to satisfy the decree in their favour leading the respondent to file an application dated 20th November 2008 to stop the attachment. The respondent was granted temporary orders on the 3rd December 2008 pending inter-partes hearing.

20. I have perused the aforementioned order issued on the 3rd December 2008 and it is clear that it was a temporary order which it was bound to. Firstly, it was granted ex-parte and secondly the orders were granted to preserve the subject matter pending inter partes hearing on the 11th December 2008.

21. The orders issued on the 3rd December 2008 in CMCC No. 7256 of 2008 were as follows;

That the auctioneer's M/s Virmir Auctioneers be and are hereby ordered to release forthwith motor vehicle registration number KWQ 154 pending inter partes hearing on the 11th December 2008.

22. The matter came up for inter partes hearing on the 11th December 2008, it is noteworthy that the ex-parte orders granted to the respondent herein lapsed. What transpired is that the parties subsequently recorded a consent in terms of allowing prayers 2, 3, & 4 of the respondent's application dated 20th November 2008. The subsequent orders emanating from this consent were thus;

a) There be a declaration that the 1st defendant (Standard Assurance (K) Ltd) is liable to satisfy the judgement sums entered in CMCC No. 2554 of 2003 against the plaintiff/applicant (respondent herein).

b) The Honourable Court be pleased to order the 1st defendant/respondent (Standard Assurance (K) Ltd) to satisfy the judgement sums in the aforesaid suit forthwith.

c) Costs be provided for.

23. There was another application pending before the court dated 2nd December 2008 seeking to have the 2nd appellant release the subject motor vehicle to the respondent. The 2nd appellant filed his grounds of opposition on the 9th December 2008. From the Court record, it is clear that this application was not prosecuted.

24. The respondent herein filed another application dated 15th December 2008 seeking to have the 2nd appellant release the subject motor vehicle to the respondent. It is this application's ruling on the 22nd December 2008 that is now subject of this appeal.

25. It is my opinion that the trial magistrate erred and misdirected himself in upholding the orders issued on 3rd December 2008 as these were temporary orders which lapsed on the 11th December 2008 when the respondent's application dated 20th November 2008 came up for inter partes hearing.

26. It is worth noting that there are orders in CMCC 2544 of 2003 against the respondent and two other parties that have not been set aside. On the other hand, there is a consent order apportioning liability of settling the judgement decree arising from CMCC 2544 of 2003 on Standard Assurance (K) Ltd, a party that is not before this appeal.

27. In my view, this court has inherent power under section 3A of the Civil Procedure Act to do all that is necessary for ends of justice to be met and to prevent abuse of its processes. It is also in the discretion of the court to set aside an order but such discretion must be exercised judiciously and not capriciously, and with the sole intention of avoiding injustice or hardship resulting from accidents, inadvertence or excusable mistake or error.

28. The Court of Appeal in the case of Samuel Wambugu Mwangi v Othaya Boys' High School Civil Appeal No. 7 OF 2014 [2014] eKLR set out the circumstances under which a consent order can be set aside. The court observed that:

"Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement."

29. Also the Court of Appeal in Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another Civil Appeal NO. 276 OF 1997 [1998] eKLR cited with authority the judgment in the case of Flora Wasike vs Destimo Wamboko [1988] 1 KAR 625, Hancox JA (as he then was) said in his judgment at page 626 -

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

30. Applying the principles of law cited above in facts of this case, the respondent's case is that consent was entered between the appellant's and himself to the effect that the liability of settling the decretal sum would be carried by Standard Assurance (K) Ltd.

31. In my view the consent in this case can be set aside. Once a consent order has been adopted by a court it becomes a judgment or an order which can be set aside if the conditions stipulated were not met. In saying so am persuaded by the case of **Edward Acholla v Sogea Satom Kenya Branch & 2 others [2014] eKLR** where the court held that:

“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”

32. In my view the consent order was rescinded since the aforementioned Standard Assurance (K) Ltd was closed sometime in March 2009 before the consent judgement above could be effected.

33. On the second issue, whether the respondent’s motor vehicle should have been released back to him while his applications were still pending hearing and determination, this court notes that the motor vehicle was attached in fulfilment of a court order which had not been set aside. By allowing the attached motor vehicle to be released before the claim determined, the court was putting the appellant in a position in which should the respondent’s application fail, it would be difficult for the appellant to realize the fruits of his litigation.

34. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

35. Although the respondent alleges that the appellant’s claim has been overtaken by events as the subject motor vehicle has wasted, the allegation has not been substantiated and further the judgement and decree against the respondent has not been set aside or dismissed.

36. The upshot of the above is that the order of the trial magistrate dated 22nd December 2008 is hereby set aside. The appellant is at liberty to institute execution proceedings in fulfilment of the judgement decree obtained in CMCC 2544 of 2003.

37. The vehicle had been lawfully attached in execution of judgment in CMCC No. 2554 of 2003 which was a case distinct from No. 7526 of 2008. Judgment in CMCC No. 2554 of 2003 had not been satisfied and remains so to date.

38. I am of the considered opinion that the order issued by the magistrate on 22/12/2008 in CMCC No. 7526 of 2008 for release of motor vehicle registration no. KWQ 154 was irregular.

39. It is my finding that this appeal is successful and it is hereby allowed with costs to the appellant.

40. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE