



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL 182 OF 2016**

**THOMAS P WOLF.....APPELLANT**

**VERSUS**

**GEORGE OKELLO OFUNJA.....RESPONDENT**

**(Being an appeal from the Ruling of Hon T S Nchoe (Mr), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 6695 of 2010 delivered 22<sup>nd</sup> February 2014)**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 22<sup>nd</sup> February 2014, the Learned Trial Magistrate, Hon T S Nchoe (Mr), Resident Magistrate (RM), entered judgment in favour of the Respondent herein against the Appellant for the sum of Kshs 88,840/- made up as follows:-

**General damages      Kshs 80,000/=**

**Future medical expenses      Kshs 8,840/=**

Plus interest on general damages from date of decree to the date of full payment at court rates and interest on special damages from the date of filing suit and costs.

2. Liability against the Appellant was on hundred (100%) per cent basis as interlocutory judgment was entered against him on 10<sup>th</sup> July 2012.

3. The Appellant stated that he became aware of the proceedings in the lower court when M/S Jumbo Airlink Auctioneers went to his place of work and threatened to attach and/or remove his goods.

4. He filed an objection application which was heard and dismissed by the Learned Trial Magistrate on 22<sup>nd</sup> April 2014. Being aggrieved by that decision, he filed his Memorandum of Appeal dated 7<sup>th</sup> April 2016 on 14<sup>th</sup> April 2019 after being granted leave to file his Appeal out of time. He relied on five (5) grounds of Appeal.

5. His Written Submissions were dated 24<sup>th</sup> October 2018 and filed on 25<sup>th</sup> October 2018 while those of the Respondent were dated and filed on 7<sup>th</sup> November 2018.

6. The parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

7. The Appellant was categorical that he was not the Thomas Wolf who was referred to in the pleadings in the lower court. He pointed out that summons to Enter Appearance were sent to one Thomas K Wolf at P.O. Box 44038 Nairobi. He pointed out that his full name was Thomas Paperno Wolf which appeared in all his documents such as his US Passport, Kenyan Alien ID, driver's license, logbooks, cheques and any other Identity Card (ID Card) that he ever held.

8. He denied ever having owned the Motor Vehicle Registration No KAB 932W (hereinafter referred to as “Subject Motor Vehicle”), the aforesaid postal address, being involved in the aforesaid accident or ever having received Summons in the lower court. He contended that the only motor vehicles he had ever owned and continued to own in Kenya were Motor Vehicle Registration No KZJ 021 a Daihatsu 4 x 4 and Motor Vehicle Registration No KAH 979T, a Toyota Hilux. He stated that his Postal Address was and continued to be P.O. Box 642 00606 Sarit Centre Nairobi.

9. He submitted that in his objection proceedings, he attached all his documents as aforesaid to demonstrate that he was not the Thomas Wolf who had been sued in the Trial Court. He had also attached a copy of the Telkom Directory of 1998 to demonstrate that he was not the Thomas Wolf the Respondent intended to sue.

10. He was emphatic that the Respondent’s advocates ought to have amended their pleadings once he alerted them that he and the Plaintiff who had been sued were different persons.

11. He therefore urged this court to set aside the Ruling of the Learned Trial Magistrate and uphold his objection.

### **THE RESPONDENT’S CASE**

12. The Respondent submitted that the Appellant’s Appeal was incompetent as he did not seek leave to appeal the order of the Learned Trial Magistrate because an appeal emanating from an order in respect of objection proceedings did not lie as a matter of right.

13. He further argued that its Written Submissions in the Trial Court were not annexed in the Appellant’s Record of Appeal which imputed malice on his part. He attached his said Written Submissions to the submissions before this court.

14. He argued that the Ruling by the Learned Trial Magistrate was grounded in law and fact and that the Appellant’s application was rightfully dismissed because he was duly served with a copy of the Complaint and Summons to Enter Appearance at his place of work and accordingly given notice of the suit. It was his contention that the Appellant ought to have moved the court to strike him out of the suit if he was not Thomas Wolf referred to in the Complaint once he was served with the same.

15. He further stated that the Appellant did not comply with the provisions of Order 22 Rule 51 of Civil Procedure Rules that mandates an objector to serve notice, in writing to court, to all the parties and the decree holder of his objection to the attachment.

16. He added that there was no evidence by the Appellant denying that he did not receive a copy of the Complaint and Summons to Enter Appearance served at his place of work. He was adamant that Thomas Wolf and Thomas P Wolf were the same individual and having failed to defend the suit, the Appellant herein had no right to object to the attachment of his property towards execution of the decree against him.

17. It was his submission that the issue of whether or not the Appellant was served was a foregone conclusion and that the issue at hand was whether or not he was the same person as Thomas Wolf in the lower court.

18. He averred that the Appeal lacked merit and urged this court to dismiss the same.

### **LEGAL ANALYSIS**

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

20. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

21. Having looked at the grounds of Appeal, it appeared to this court that the only issue that had been placed before it was whether or not the Learned Trial Magistrate erred in fact and law when he dismissed the Appellant’s objection application in which he had indicated that he had never owned the subject Motor Vehicle which was said to have collided with Motor Vehicle Registration No KAM 089A in which the Respondent had been travelling in as a lawful fare paying passenger along Uhuru Highway after Bunyala Road round about, Nairobi. The court therefore dealt with all the grounds of Appeal together as they were all related.

22. As a preliminary issue, this court deemed it prudent to address the question of whether or not the Appellant had leave to institute the Appeal herein.

23. As was correctly pointed out by the Respondent, an appeal does not lie as a matter of right from Order 22 Rules 51 and 52 of the Civil Procedure Rules. Order 43 (1) (k) of the Civil Procedure Rules stipulates as follows:-

**(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—  
k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution).**

24. From the proceedings, there is no indication of the Appellant having sought leave to file his Appeal out of time. Having said so, this court found that argument to have been moot as he was granted leave to file an appeal out of time by the High Court and his Appeal admitted for hearing on 17<sup>th</sup> May 2017. The issue of no leave having been granted did not arise at this stage unless it was disclosed by the Appellant. However, bearing in mind that his Appeal was not summarily rejected under the provisions of Section 79B of the Civil Procedure Act, this court was not persuaded to find that the Appeal herein was incurably defective and incompetent. The Respondent's arguments in this respect thus fell by the wayside.

25. As regards the written notice under Order 22 Rule 51 of the Civil Procedure Rules, this court noted that the said provision provides as follows:-

**1. Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.**

**2. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.**

**3. Such notice of objection and application shall be served within seven days from the date of filing on all the parties.**

26. The Respondent's emphasis appeared to be on the **"notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment ..."**

27. He added that the notice the Appellant purported to rely on in support of Order 22 Rule 51 of Civil Procedure Rules were brought under Order XXI Rule 54 and Order XXII Rule 50 (both now repealed) of the Civil Procedure Rules which were not under which the objection proceedings had been brought. He added that he was never served with the Notice and that it was because of the Appellant's failure to comply with mandatory provisions of the law that his application for objection proceedings was dismissed.

28. A perusal of one of the Notices of Objection showed that it was filed on 15<sup>th</sup> August 2013. It was undated and had been brought under the provisions of Order XXI Rule 54 of the Civil Procedure Rules (now repealed). The second Notice was dated 13<sup>th</sup> August 2013 and had been brought under Order XX Rule 50 of Civil Procedure Rules (now repealed).

29. It was correct as the Respondent submitted that the Notice was brought under the wrong provisions of the law. However, the contents therein were clear that the notice given was in respect of objection proceedings. Indeed, Order 51 Rule 10 (2) of the Civil Procedure Rules stipulates that **"No application shall be defeated on a technicality or want of form that does not affect the substance of the application."**

30. In addition, Article 159 (2) (d) of the Constitution of Kenya provides that courts are mandated to administer justice without undue regard to procedural technicalities.

31. Whereas there was no evidence that the said Notices were served upon the Respondent or that they were served with his application, this court was satisfied that the Appellant partly complied with the provisions of Order 22 Rule 51 of the Civil Procedure Rules. This court is called upon to do substantive justice where there is a procedural technicality. It was the considered view of this court that the Respondent was notified of the Appellant's objection in his Notice of Motion application dated 13<sup>th</sup> August 2013 and filed on 14<sup>th</sup> August 2013 and to dismiss the Appellant's Application merely because the Notices were issued under a wrong provision or not served would cause great prejudice and injustice to the Appellant herein.

32. Turning to the issue of whether or not the Appellant herein was the same person as Thomas Wolf in the lower court proceedings, this court looked at the Affidavit of Service of Isaac O Oichoe that was sworn on 10<sup>th</sup> January 2011 and filed on 19<sup>th</sup> August 2012. Paragraph 6 of the said Affidavit of Service stated as follows:-

**6. "THAT the said 1<sup>st</sup> defendant who is known to me being a public figure, accepted service after he was called to the reception, retained copies of Summons to Enter Appearance together with the plaint but, declined to endorse his signature on the reverse of the principal copy returned herewith duly serve.**

33. As there was no signature that was endorsed on the reverse side of the Summons of Enter Appearance, it was difficult to say for a fact whether or not the Appellant was served with the Plaint and Summons to Enter Appearance as the Process Server had contended. This was particularly because the Appellant herein is a public figure who was easily recognisable.

34. Going further, this court noted that whereas the Request for Judgment dated 10<sup>th</sup> July 2012 and filed on 19<sup>th</sup> July 2012 in the lower court was in respect of the Appellant and Zacharia R Wambida, the 2<sup>nd</sup> Defendant. However, interlocutory judgment only appeared to have been entered against the 2<sup>nd</sup> Defendant therein and not the Appellant herein. If it had been entered against the Appellant, it was not clearly discernible from the file.

35. The implication of this was that the Appellant herein, if he was the Thomas Wolf, referred to in the said proceedings ought to have been served with a Hearing Notice for the Formal Proof. There was no proof of service and consequently Thomas Wolf and the 2<sup>nd</sup> Defendant were denied an opportunity to cross-examine the Respondent, a right they retained notwithstanding that interlocutory judgment had been entered upon against them, and in this case, against the Appellant herein.

36. This court was also not satisfied that the Appellant herein was Thomas Wolf because all his official documentation bore his name as Thomas Paperno Wolf. This court could not say if the Thomas Wolf who had been sued was Thomas K Wolf as there was no single document that showed that Thomas K Wolf of P O Box 44038 Nairobi GPO was the person who had been sued.

37. Bearing in mind that the Learned Trial Magistrate only relied on the ground that the Appellant had failed to comply with the mandatory provisions of Order 22 Rule 51 of Civil Procedure Rules in dismissing his Objection proceedings, this court was persuaded to find and hold that the Appellant would suffer great injustice if the aforesaid Ruling was to be upheld.

38. Having considered the evidence that was adduced in the lower court and the Written Submission that were relied upon by both parties, this court came to the firm conclusion that there as merit in the Appellant's Notice of Motion application dated 13<sup>th</sup> August 2013 and filed on 14<sup>th</sup> August 2013 as the proceedings showed that the Respondent did not demonstrate that the 1<sup>st</sup> Defendant in the lower court proceedings was one and the same person as the Appellant herein.

#### **DISPOSITION**

39. For the foregoing reasons, the upshot of this court's Judgment was that the Appellant's Appeal that was dated 11<sup>th</sup> April 2016 lodged in court on 14<sup>th</sup> April 2016 was merited and the same is allowed.

40. The Respondent will pay the Appellant's costs of this Appeal.

41. It is so ordered.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**