REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 103 OF 2014

MAKAU MWANGANGI.....APPELLANT

VERSUS

MUTHONI CHEGE.....1ST RESPONDENT

WAIMIRI MAINA.....2ND RESPONDENT

RULING

1. This is an appeal arising out of the ruling and orders of Hon. A.W. Nyoike delivered and issued on 30th October 2014 vide Nairobi Milimani Children's Court Case No. 1084/2012. The appellant listed nine grounds of appeal as follows:

(a) The learned Resident Magistrate grossly erred in law and in fact in dismissing the appellant's application dated 8th April 2014.

(b) The learned Resident Magistrate grossly erred in law and in fact in failing to discharge the appellant from the proceedings in the lower court.

(c) The learned Resident Magistrate grossly erred in law and in fact in holding that the appellant was bound to satisfy the periodical payments ordered in the suit on 5th December 2013.

(d) The learned Resident Magistrate grossly misdirected herself in holding that the appellant had not demonstrated to the satisfaction of the court that the appellant has terminated his tenancy in the premises owned by the defendant in the lower court suit.

(e) The learned Resident Magistrate grossly misdirected herself and thereby grossly erred in law and in fact by failing to appreciate that her failure to discharge the appellant from the lower court suit and her orders that the appellant continues to make periodical payments or at all in the suit would occasion great injustice to the appellant who was a total stranger to the marital discord between the respondents and who had no responsibility whatsoever to provide upkeep for the respondents' children.

(f) The learned Resident Magistrate grossly erred in law and in fact by failing to appreciate that by ordering that the appellant continues to make periodical payments she was issuing orders in vain since the appellant was no longer a Garnishee in the suit.

(g) The learned Resident Magistrate grossly erred in law and in fact by failing to appreciate that by ordering that the appellant continues to make periodical payments she was issuing orders in vain since the appellant was no longer a Garnishee in the suit.

(h) The learned Resident Magistrate grossly erred in law and in fact in making orders in favour of the 1st respondent as against the appellant when neither the 1st respondent nor the 2nd respondent had presented any affidavit evidence or grounds of opposition to challenge the appellant's application dated 8th April 2014.

(i) The learned Resident Magistrate grossly erred in law and in fact in disregarding the appellant's evidence on the application dated 8th April 2014 and the submissions filed thereon.

(j) On the whole the learned Resident Magistrate exhibited gross misapprehension specifically of the relevant law and the facts of the case presented to her by the appellant and generally of the proceedings in the matter before her.

2. Before proceeding with the determination of the appeal, a brief

background will suffice.

3. The appellant (Garnishee) herein was one of the directors of a company known as Hotel Connections Ltd an entity engaged in hotel industry business. The 1st respondent was a plaintiff while the 2nd respondent was a defendant in Nairobi Children's Court case No. 1084/2012 where the two, wife and husband respectively were embroiled in a children maintenance dispute.

4. Vide an exparte interim order made on 28th August 2012, the 2nd respondent was directed to pay school fees for their two children (minors) plus Kshs.30,000/= per month to meet food, clothing and shelter expenses with immediate effect. Having defaulted, the 1st respondent sought garnishee orders against the appellant who by then was a tenant operating hotel business in the 2nd respondent's premises being Plot No. CS – E36 Umoja Estate.

5. The orders sought to allow quarterly rent payable by the appellant to the 2nd respondent to the tune of Kshs.390,000/= utilized to satisfy the outstanding debt in favour of the 1st respondent. Via a court order dated 19th October 2012, the appellant was directed to deposit Kshs.220,000/= as security for the amount due to the judgment creditor and costs yet to be assessed.

6. Having complied with the order, the appellant failed to remit rent to the 2nd respondent as per the tenancy agreement. However, the 2nd respondent did instruct auctioneers to levy distress against the appellant over nonpayment of rent in respect of the amount of Kshs.220,000/= which he had deposited in court. In response, the appellant filed a suit being civil case No. 515/2012 Nairobi High Court to stop the auction.

7. Out of frustration, the appellant issued a notice dated 30th August 2013 seeking to terminate the tenancy agreement to avoid unnecessary litigation in a matrimonial dispute. As a result, the appellant claimed that the said tenancy was terminated on 31st December 2013 leaving no rent arrears.

8. To the appellant's surprise, on 7th April 2014, one of his employees then working in his Mombasa Road Hotel was served with a notice requiring him (appellant) to attend court on 4th April 2014 to show cause why execution could not issue against him. Apparently, the said execution was for nonpayment of Kshs.601,700/= to the 1st respondent being rent due to the 2nd respondent in satisfaction of the court decree in place in favour of the 1st respondent.

9. Dissatisfied with this move, he lodged an application dated 8th April 2014 seeking to be discharged from any financial responsibility or obligations in place of the 2nd respondent as he had ceased being his tenant.

10. After hearing the application, the court dismissed the same on grounds that there was no proof of termination of tenancy. The court however directed for the debt then due and owing for maintenance of the children to be recovered by way of attachment of the defendant's (2nd respondent's) immovable property as earlier ordered. Further, the court held that the garnishee was to remain a party to the suit for purposes of the periodical payments as ordered on 5th December 2013 unless shown to the satisfaction of the court that the tenancy had been terminated.

11. Aggrieved by this ruling, the appellant filed the instant appeal seeking to set aside those orders.

12. When the matter came up for hearing, parties agreed to canvass the same by way of written submissions. Consequently, the appellant filed his on 5th December 2018. The respondents did not file any submissions but opted to rely on submissions relied on when the application giving rise to the impugned ruling was canvassed before the lower court.

13. In her submissions, Mrs. Mwangangi appearing for the appellant reiterated the grounds of appeal arguing that rent payable to a landlord by a tenant is not a debt for purposes of lodging garnishee proceedings and debt recovery. Counsel referred the court to Order 22 rule 42 of the Civil Procedure rules arguing that it is only salary or periodical allowances payable to a judgment debtor by any person which is attachable.

14. To support her position, counsel referred to a decision in the case of **Busuru Richard Mark T/A Busuru R.M. and Partners, Architects vs B.A. Omuse T/A Afro-Anglo Investment Ltd Misc. Civil application 130/02 Nairobi High Court (2007) eKLR** where the court held that rent payable to a landlord is not a debt and cannot be subject to garnishee proceedings.

15. Counsel further submitted that a tenant cannot be forced to continue with a tenancy agreement even when there is clear breach of the tenancy agreement. That the appellant was a total stranger to matrimonial differences hence should not be drag into the proceedings. Lastly, counsel asserted that the learned magistrate failed to exercise her discretion properly by dismissing his for termination of the tenancy agreement with the second respondent thus forcing him to remain as a party to the proceedings for ever.

16. Regarding the plaintiff/1st respondent's submissions, her counsel referred the court to her submissions filed before the lower court. I have perused the said submissions attached to the record of appeal by the appellant at pages 124, 127. Principally, the 1st respondent/plaintiff urged the court to enforce the garnishee order arguing that the rent payable to the 2nd respondent by the appellant was subject to garnishee proceedings in the best interest of the children.

17. I have considered the appeal herein and submissions by both parties. The appellant raised nine grounds of appeal. I wish to break them down into three substantive grounds as follows:

(i) Whether the appellant was properly enjoined as a party to these proceedings.

(ii) Whether the appellant was bound to satisfy the periodical payments ordered by the trial court on 5th December 2013.

(iii) Whether the appellant had ceased being a tenant to the 2nd respondent.

18. I will combine grounds 1 and 2 as they are intertwined. There is no dispute that there was a dispute between the respondents who were wife and husband respectively arising out of a disagreement over maintenance of their children.

19. It is also common ground that an order was made by the court directing the 2nd respondent to pay school fees for the two children and a monthly sum of Kshs.30,000/= to meet other expenses like clothing, food and shelter. It is part of this amount that the appellant as a garnishee paid amounting to Kshs.220,000/= being part of the rent payable to the 2nd respondent as his landlord and a further demand for sum of over 601,000/= being outstanding arrears due to the 1st respondent.

20. Attachment of a debt by way of garnishee proceedings is clearly captured under Order 23 (1) and 22 (42) of the Civil Procedure rules. Order 23 (1), provides that, where a decree holder by affidavit satisfies the court the decree has not been satisfied and that another person is indebted to the judgment debtor and is within the jurisdiction of the court, a court can order that all debts owing from such 3rd person (garnishee) to the judgment debtor shall be attached.

21. Order 22 rule 42 further provides that, where the property to be attached in settlement of a debt is a salary or periodical allowance payable to the judgment debtor or the person by whom such salary or allowance is payable, the court may order subject to Section 44 of the CPA that the amount be withheld from such salary or allowance and payment be made as the court may direct.

22. According to the appellant, he was not a debtor to the 2nd respondent hence improperly enjoined to the proceedings. It is not in doubt that the appellant was a tenant to the 2nd respondent who had leased his premises to him to operate a hotel. Rent was payable on quarterly basis in advance. For all purposes and intents, execution on garnishee proceedings under Order 23 (1) cannot apply, as the appellant cannot be categorized as a debtor.

23. This position was succinctly expressed in the case of **Richard Mark T/A Busuru R.M. and Partners, Architects v B.A. Omuse T/A Afro-Anglo Investments Ltd (supra) eKLR** where the court held that:

> **"A debt must either be proved or admitted. with due respect counsel rent (sic) payable to the landlord is not a debt and cannot be subject to garnishee proceedings. Rent payable is equivalent to periodical allowance which could be covered by Order XXI rule 43 of the Civil Procedure".**

24. It is my finding that the appellant was improperly brought on board in these proceedings for purposes of enforcement of garnishee orders. I do agree with Mrs. Mwangangi that the trial court did misdirect itself by holding that the appellant was liable and duty bound to satisfy a decree on garnishee proceedings.

25. Even assuming for a moment that the court was right that the appellant was a debtor indebted to the 2nd respondent which is not, he should have been discharged under Order 23 (8) of the Civil Procedure rules the moment he paid the outstanding debt of Kshs.220,000/= as at the time when the garnishee order was issued and not to wait for future debts to accrue. To do that will amount to holding a tenant hostage to a tenancy agreement regardless of the breach of the contract.

26. For the aforesaid reason, I do hold that the appellant was improperly served as garnishee and the orders issued ought not to have issued.

27. Regarding whether the notice to terminate tenancy was sufficient proof that the lease agreement had been terminated, it was upon the 1st respondent to prove that the appellant was still a tenant to the 2nd respondent. Issuance of notice to terminate tenancy is primafacie proof that the appellant had terminated tenancy. At the expiry of the notice, what follows is that the appellant ceases being a tenant. There was no other way of ceasing from tenancy obligations other than by way of notice to terminate the same as per the agreement.

28. Under Order 23 (5) of the Civil Procedure rules, where a garnishee disputes liability to the judgment debtor, the court instead of making an order that execution be levied may order that an issue or question necessary to determine indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined. In other words, the court should have caused the judgment creditor to adduce evidence to prove that the appellant was still a tenant and that he was bound to pay rent to the 2nd respondent.

29. The court failed to conduct reasonable inquiry to ascertain the existence of

any liability against the 2nd respondent by the appellant. I am in agreement with the appellant that the court erred by demanding proof from the appellant that he was not a tenant to the 2nd respondent.

30. For the 1st respondent to rely on the lower court submissions in which he simply urged the court to issue orders of execution against the

appellant in the best interest of a child is simply to abuse Article 53 (2) of the Constitution. Whereas I agree that courts are duty bound to uphold a child's best interest at all material times, when making decisions, the same must be balanced against other person's individual interests or liberty which is also a fundamental freedom and cannot be sacrificed at the altar of a generalized principle of best interest of a child.

31. For the above reasons stated, it is my holding that the appeal herein is merited and the same is allowed with orders that:

(a) The orders of the trial magistrate dated 30th October 2014 directing the appellant to continue paying debts owed by the 2nd respondent to the 1st respondent on account of child maintenance and pay school fees are set aside.

(b) That the appellant be and is hereby discharged from being a party in garnishee proceedings instituted in Nairobi Children's Case No. 1084/12 between the respondents.

(c) That costs of this appeal shall be borne by the 2nd respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2019.

J.N. ONYIEGO

(JUDGE)