



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL 40 OF 2017

WILLIAM N. ONWONGA t/a BWONWONGA & CO. ADVOCATES.....1st APPELLANT

PETER MUCHIRI KARIUKI t/a AIRWAYS AUCTIONEERS.....2nd APPELLANT

VERSUS

MWANGI MUTAHI RUGA.....RESPONDENT

(Being an appeal from the Ruling of Hon. Ruth Kefa delivered on the 9th October, 2017 in Nyeri Misc.Appl.No.17 of 2017)

JUDGMENT

FACTS

1. This matter originates from a court order made in Civil case No.819 of 2006 dated 7/05/2006 whereby the sale of motor vehicle KAK 224T was declared a nullity and its attachment quashed; the appellants by an Order dated the 9/10/2017 were ordered to return motor vehicle registration number KAK 224T and in default the appellants were to pay the respondent the sum of KShs.6,000,000/- within thirty (30) days; which amount was considered reasonable as the respondent had been deprived of its use since 2011; the appellants were also condemned to pay costs to the respondent;

2. The appellants being dissatisfied with the ruling that was delivered on the 9/10/2017 appealed against it in its entirety; and listed thirteen (13) grounds of appeal as are set out in their Memorandum of Appeal dated 27/10/2017 are as summarized *inter alia*;

- (i) There was no competent suit upon which the orders sought were granted;
- (ii) The trial magistrate failed to hold that the Misc.Appl.No.17 of 2017 was '*Res Judicata*' and had no merit;
- (iii) The trial court failed to fully comprehend the meaning and import of the orders of 3/01/2014 upon which Misc.Appl.No.17 of 2017 was based; and failed to comprehend and appreciate the rules governing suits and miscellaneous applications;
- (iv) The claims in the Misc.Appl.No.17 of 2017 were statute barred; the prayers were for special damages which ought to have been specifically pleaded and proved;
- (v) The trial court held the appellants to be in contempt of the Court Orders of 17/05/2013 yet there was no order demanding compliance;
- (vi) The authorities quoted by the trial court were not applicable; the awards and orders made had no legal or factual basis; the trial court made references to annexures in CMCC No.819 of 2006 yet the same had not been filed by the Respondent; there was no amended plaint as referred to by the respondent in his supporting affidavit;
- (vii) The Miscellaneous Application No.17 of 2017 was referred to as a suit and a purported judgment delivered whereas there was no proper suit before the court;

3. The appellants were represented by learned counsel Mr.Abwour whereas the respondent was unrepresented and acted in person; the appeal was canvassed by way of written submissions; hereunder is a summary of the rival submissions;

APPELLANT'S SUBMISSIONS

4. The appellants contend that Misc. Appl.No.17 of 2017 is not a competent suit in law in which the sum of Kshs.6,000,000/- could be

awarded; the trial court ought to have delivered a ruling on the application and not a judgment as there was no substantive suit; that there was a similar application made in CMCC 819 of 2006 and the respondent ought to have appealed instead of filing a similar application; that the respondent claim was statute barred as the decision was delivered on 3/01/2014 and the application for compensation was filed on 24/07/2017 which was outside the three (3) year period for claims under tort; they reiterated that a claim for such a huge sum of money as special damages can only be instituted by way of a proper suit as opposed to through an application; and the appellants reiterated that special damages was not proved;

5. The appellants claim that they were not in contempt of court as there was no order dated 07/05/2013 as alleged which was capable of being contravened by the appellants; the motor vehicle KAK 224T was sold by public auction on the 25/05/2011 and any subsequent order to return the vehicle was misplaced;

6. The appellants submit that the respondent's application in the lower court was '**Res Judicata**'; on this issue they relied on Section 7 of the Civil Procedure Act and on the authority **John Njue Nyaga vs Attorney General & 6 Others (2016)eKLR**; on the point that special damages must be specifically pleaded and proved the appellants cited the case **Paul N. Njoroge vs Abdul Sabuni Sabonyo (2015)eKLR**.

7. Based on these submissions the appellants seek to have the Ruling and Order of the lower court dated 9/10/2017 set aside; and that the respondent's application Misc. Appl. No.17 of 2017 be dismissed with costs; alternatively the appellants pray for the substitution of the lower Court's Ruling with an Order it deems fit, just and expedient.

RESPONDENTS SUBMISSIONS

8. In response the respondent submitted that the facts that remain unchallenged were that the appellants seized his lorry with full knowledge that it was not the judgment debtor's property; that the appellants ignored the court order and proceeded to dispose of the vehicle within 24 hours of its seizure with the aim of defeating the orders issued on 9/06/2011; the lower court quashed the attachment and sale; and that it was the court that gave orders to the respondent to take up the issue of execution;

9. The appeal had no merit as it only challenged the manner that his claim was brought in the lower court; that his application was properly before the court as it brought under the provisions of Section 91 of the Civil Procedure Act which provides as follows;

"[1]Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

[2]No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."

10. The application was only meant to enforce the previous orders dated 03/05/2013 which quashed the attachment and sale of motor vehicle registration KAK 224T; and the other order dated 03/01/2014 endorsed his right to file suit to claim for damages against the appellants;

11. The respondent included a cross-appeal in his written submissions which included a claim for hiring charges at the rate of Kshs.20,000/- per day from the date of the ruling; and loss of use at the rate of Kshs.30000/- per day upto the time the sum Kshs.6,000,000/- awarded was paid up; the respondent also claimed interest at court rates for this outstanding sum.

ISSUES FOR DETERMINATION

12. Having perused the trial court's proceedings and read the written submissions of the respective parties herein, the following are the issues found by this court for determination;

- (i) Whether the impugned application was properly before the lower court;
- (ii) Whether an advocate as an officer of the court can use due process to circumvent and escape liability;
- (iii) Whether there is a proper cross-appeal on record.

ANALYSIS

13. Being the first appellate court it is incumbent upon this court to re-evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 Others, C.A. No. 344 OF 2004**.

Whether the impugned application was properly before the lower court:

14. The appellants contend that there was no competent application before the trial court and that a claim for special damages could only be brought by a Plaintiff; in response the respondent countered this by stating that his suit was properly brought under the provisions of Section 91(1) of the Civil Procedure Act;

15. The applicable law is found at Sections 2 and 91(1) of the Civil Procedure Act; Section 2 aforesaid defines a suit to be all civil

proceedings commenced in any prescribed manner; in the instance which is the subject of this appeal the respondent approached the lower court under the provisions of Section 91 of the Civil Procedure Act which reads as follows;

***“[1]Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.*”**

[2]No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).”

16. In this instance the appellants in execution of a decree had wrongfully attached the respondent’s motor vehicle; the lower court found that the vehicle did not belong to the judgment debtor and declared the sale of motor vehicle KAK 224T as a nullity and the attachment was quashed; the appellants by an Order dated the 9/10/2017 were ordered to return motor vehicle registration number KAK 224T and in default the appellants were to pay the respondent the sum of KShs.6,000,000/- within thirty (30) days;

17. A reading of Section 91(2) of the Criminal Procedure Act prohibits the bringing of a fresh suit for restitution or a relief which can be obtained through an application under Section 91(1) of the Civil Procedure Act; the latter section clearly outlines that this section is for restoration to a party, or the variation or reversal of a decree, which has been lost as a consequence of such a decree; and that this can be done through an application;

18. The Court of Appeal in the case **Cyrus Komo vs Hannah Nyambura Gikamu [2018]eKLR** outlined and interpreted the principle behind this Section 91 aforesaid; as follows;

“The principle behind that provision is that on the reversal or variation of the decree, the law imposes an obligation on the party to the suit who received the benefit of the reversed decree to make restitution to the other party for what he has lost.”

19. This court is guided by the above Court of Appeal decision; and is satisfied that the respondent’s application was competent and properly before the lower court;

20. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether an advocate as an officer of the court can use due process to circumvent and escape liability;

21. This court notes that one of the appellants is an advocate practising under the name and style of Bwonwonga & Co. Advocates and the other is an auctioneer; and that both appellants are officers of the court; in the submissions they submitted on the issue of the impugned application being res-judicata and statute barred; and that the application was therefore an abuse of court process;

22. The appellants both being officers of the court are conversant with the law and both had an outstanding obligation to comply with the court order for restitution; which they failed, refused and or neglected to comply with before insisting on or advancing their rights;

23. This court would have indeed framed the two issues of ‘res-judicata’ and limitation for determination had the two appellants complied with the order for restitution as they awaited the outcome of the appeal; as it is this court makes a finding like the lower court that the appellants have not come to court with clean hands; it made the following observation in its judgment;

“ Accordingly, I find that the respondents have not come to court with clean hands by selling the motor vehicle KAK 224T to offset a decretal sum while knowing that the vehicle had been sold to the applicant. The sale was quashed by court order dated 7th may, 2013. The court order is still in force and has not been set aside and the respondents are in contempt.”

24. This court makes reference to the overriding objectives in civil litigation which are clearly set out in the case **Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 Others [2011]eKLR**; where the Court of Appeal observed were;

“ The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.”

25. The sale of the vehicle having been nullified and the attachment quashed and there being no setting aside of this order or stay of the order for restitution the appellants were obligated to comply with the court orders of restitution;

26. This court will not belabor itself in addressing the two issues and will disallow the two grounds of appeal as the appellants are not deserving litigants as this court finds that the appellants have forgotten that they both had outstanding obligations before insisting on their rights; this court is obligated to focus on rendering substantive justice and to obviate any hardship that may befall a deserving litigant, in this case the respondent; this court finds that the appellants want to use the law to their own advantage knowing full well the hardship it would cause to the respondent; this court is satisfied that the appellants have not come before the court with clean hands;

27. For the aforesaid reasons the two grounds of appeal relating to res-judicata and limitation are hereby disallowed;

Whether there is a proper cross-appeal on record.

28. The respondent it is noted filed undated written submissions and purported to include a cross-appeal therein claiming for hiring of alternate transport at the rate of Kshs.20,000/- per day; a loss of user at the rate at Kshs.30,000/- per day from the date of the award of Kshs.6,000,000/- until payment in full; and interest at court rates on the outstanding sum;

29. It is this court's considered view that inclusion of a cross appeal in the written submissions is not the proper format of approaching the court; this court is again guided by the Court of Appeal decision in **Kenpipe Co-operative Savings & Credit Society Ltd vs Githinji Waiganjo [2012]eKLR** where it held that written submissions are not pleadings and that the cross-appeal brought under the submissions was found not to be a proper cross-appeal;

30. This court is guided by the said decision and is satisfied that the cross-appeal is incompetent;

31. Although the respondent may be deemed as having not filed a cross-appeal the provisions of Order 42 Rule 32 of the Civil Procedure Rules may be exercised in his favour; the rule reads as follows;

"[Order 42, rule 32.] Power of appellate court on appeal.

32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."

32. Secondly, the appellants included an alternate prayer which is found to be of great interest as they pray for ***'the substitution of the lower Courts' Ruling and Order as it deems fit, just and expedient'***.

33. The provisions of the rule and the appellant's above prayer then gives this appellate court the mandate to visit and consider the respondent's claims made in the cross-appeal and to make such order as the circumstances of the case may deem fit, just and expedient to grant;

34. Upon perusal of the appellants' written submissions it is noted that they did not respond to the respondent's purported cross-appeal; and from the record it is apparent that the trial court found liability of both appellants is a forgone conclusion; therefore the only issue for re-consideration by this court relates to the claim for the loss of use, hiring rates and the interest applicable;

35. Unfortunately for the respondent any contingent adjustment to the award can only be made with supporting documentary evidence; this court finds no such documentary evidence provided by the respondent to verify the hiring rates and the loss of user to satisfy this court and to enable it to arrive at a just decision that is not speculative;

36. But all is not lost as the issue of the interest rate on the award that is the saving grace; the appellants are obligated to pay interest on the amount that was awarded by the lower court and this court is satisfied that the application of the interest from the date of the ruling till payment in full will be adequate compensation for the respondent; the rate of interest is hereby determined to be the prevailing court rates and the same shall be applicable on the sum of Kshs.6,000,000/- from the date of the ruling until payment in full;

37. This ground of appeal is hereby allowed;

FINDINGS

38. For the reasons set out above this court makes the following findings;

- (i) The impugned application is found to be competent and it was properly before the lower court;
- (ii) The appellants as officers of the court cannot use due process to circumvent and escape their obligations and liability;
- (i) This court finds the purported cross-appeal to be incompetent; as it is not properly before the court;

DETERMINATION

39. The appeal is found lacking in merit and is hereby dismissed;

40. The decision of the trial court in Misc. Appl. No.17 of 2017 is hereby upheld.

41. There shall be interest on the sum of Kshs.6,000,000/- at court rates from the date of the ruling till payment in full;

42. The appellants to bear the costs of the appeal;

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 4th day of July, 2019.

HON.A. MSHILA

JUDGE