



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 600 OF 2016

JOSEPH GIKONYO

T/A GARAM INVESTMENTS.....APPELLANT

VERSUS

STEPHEN K KIBUNJA T/A KIBUNJA & ASSOCIATES

ADVOCATES.....RESPONDENT

(Being an appeal from the Ruling delivered on 27th March, 2015 by Hon. I. Gichobi (Resident Magistrate) Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 2453 of 2014).

JUDGMENT

1. The Appellant, Joseph Gikonyo T/A Garam Investments instituted a suit in the Lower Court against the Respondent, Stephen K. Kibunja T/A Kibunja & Associates Advocates. The claim was for the sum of Ksh.448,479/= which amount was taxed as the Auctioneers fees in respect of a decree issued in Industrial Court Cause No. 479(N) of 2009 wherein the Respondent was the Judgment Debtor.
2. It was pleaded that the parties reached a settlement in the aforesaid case before the auction but that the Respondent failed to pay the Auctioneers fees. That the Appellant filed a Bill of Costs in HC Misc. 266 of 2013 and the same was taxed at Ksh.448,479/= and a Certificate of Taxation issued on 18th March, 2014 but the said amount was not paid.
3. The claim was denied as per the Statement of Defence dated 24th June, 2014. It was denied that the Appellant was instructed in Industrial Cause No. 479/2009. That the Appellant was not awarded costs in Industrial Cause No. 479/2009 and further that no consent order was adopted in the said cause. That the consent order signed between the parties in Industrial Cause No. 479/2009 provided that the caution against the land was to be removed first upon payment of Ksh.700,000/= to the Judgment-Creditor before the consent order was recorded in court. That the said payment was made but the caution is yet to be removed. It was further pleaded that the ruling on taxation was delivered without notice and that the Respondent intended to file a reference to challenge the same.
4. In reply to the defence, the Appellant reiterated the contents of the plaint and joined issues with the defence. The Appellant subsequently filed the Notice of Motion dated 30th July, 2014 seeking orders that the Statement of Defence be struck out and judgment be entered for the Appellant.
5. It was stated in the grounds and the affidavit in support that the Appellant was an auctioneer and not a party in Industrial Cause No. 479/09. That the costs to the Auctioneer against the Respondent were taxed at Ksh.448,479/= but the same have not been paid.
6. The application was opposed. It was stated in the replying affidavit that in the application at hand, the Appellant repeated the same issues in the plaint that had been responded to in the statement of defence. That the defence raised is not a sham and raises issues that require to be decided by way of evidence.
7. The trial magistrate dismissed the Application with costs. That is what triggered the filing of the appeal herein.
8. The grounds of appeal are as follows:

1. That the learned magistrate erred in fact and in law in failing to direct his mind to the Appellant's Notice of Motion Application in particular in failing to find that the application has merit

2. That the learned magistrate erred in fact and in law in failing to take notice of the fact that the Appellant's claim is grounded on a duly filed and taxed auctioneer's Bill of Costs whose certificate of costs has never been challenged by the Respondent.

3. That the learned magistrate erred in fact and in law in finding that the Defendant's statement of defence raises triable issues.

4. That the learned magistrate erred in fact and in law by finding that the Defendant's statement of Defence merits a full trial.

5. That the learned magistrate erred in fact and in law in failing to find that the Appellant's application is a good and deserving case for dismissal of the statement of Defence.

6. That the Appellant craves leave to add, or omit any grounds of Appeal at or before the hearing.

9. During the hearing of the appeal the Respondent was not present although duly served. The Appeal was disposed of by way of written submissions which I have considered.

10. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”

11. The warrants of Attachment and Notification of Sale issued in Industrial Court cause No. 479(N) of 2009 were exhibited. The same are in respect of land parcel No. Kajiado/Kaputiei- North/22315 described as belonging to Respondent (The Judgment Debtor) therein for a debt of Ksh.709,851/=. The Bill of Costs between the Appellant Auctioneers and the Respondent was taxed at Ksh.448,479/= following the hearing of both parties. The certificate of Taxation dated 18th March, 2014 has been exhibited. There is no evidence that the certificate of taxation has been set aside and there is no evidence of the filing of any Reference.

12. It was pleaded in the statement of defence that the sum of Ksh.700,000/= was paid to the Decree-Holder by the Respondent. If any step requires to be taken in the removal of the caution, that is a matter between the Judgment-Creditor and the Judgment-Debtor. There is no evidence of any payment made to the Auctioneer. There is therefore no triable issue raised in the Statement of Defence.

13. My aforesaid view is further buttressed by the holding in **Margaret Anindo T/a Igare Auctioneers v Harambee Sacco Society & another [2010] eKLR** where the court expressed itself thus:

“In the present case, both parties participated in the taxation; the only avenue for the respondent to challenge the certificate is by way of filing a reference. Thus even if the applicant filed a suit, the Bill of Costs is taxed and a certificate issued, a defence by the respondent will be meaningless, will serve no useful purpose apart from adding to the costs, and prolonging the proceedings...”

14. With the foregoing, I find the appeal has merits and allow the same. Consequently, the ruling of the trial magistrate is hereby set aside and substituted with an order allowing the Notice of Motion dated 30th July, 2014. Costs to the Appellant both in the High Court and the Lower Court.

Dated, signed and delivered at Nairobi this 9th day of Oct., 2019

B. THURANIRA JADEN

JUDGE