



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 52 OF 2016

GACHANJA MUHORO & SONS LIMITED.....APPLICANT/APPELLANT

VERSUS

CORNELY KIMANTHI KUTI.....RESPONDENT/DEFENDANT

[Being an appeal from the ruling delivered in CMCC No. 379 of 2013- GACHANJA MUHORO & SONS LTD v CORNELY KIMANTHI KITU by Honorable C.A. Ocharo Principal Magistrate]

JUDGMENT

1. The appeal herein arises from the ruling of Hon C.A. Ocharo (PM) dated 17/2/2016 in Machakos CMCC No 379 of 2013 wherein the Appellant's application dated 3/12/2015 was dismissed with costs to the respondent.

2. Aggrieved by the said ruling, the Appellant raised the following grounds of Appeal, namely:

a. THAT the Honorable Magistrate intentionally and without reason erred both in law and in fact by failing to make available the ruling which she read in open court but when the appellant asked for the same could not be available leading to a miscarriage of justice.

b. THAT the Honorable Magistrate erred both in law and in fact that the Civil Case no 379 of 2013 had been finalized and that a decree had been entered for a sum of Kshs 3,062,485 and that it was ready for execution thereby exposing the appellant to unproportional damages thereby leading to a miscarriage of justice.

c. THAT the Magistrate erred in finding and holding that the matter herein had been finalized and authorized the auctioneers by the name Kande Auctioneers to attach motor vehicle KXH 092 and other assorted goods to make good the claim even when the matter had not been heard and with counterclaim in place thereby exposing the appellant herein to quantifiable loss and thereby leading to a miscarriage of justice.

d. THAT the magistrate herein misdirected herself on both the law and fact by holding that motor vehicle KXH 092 and other assorted goods could be attached even when it was clear that the matter had not been heard and determined thereby exposing the appellant to ridicule by the public and thereby leading to losses in business.

e. THAT the Honorable Magistrate in Machakos CMCC No. 379 of 2013, intentionally and willingly ensured that she had inflicted maximum exploitation on the appellant by giving orders that cannot be understood even by an ordinary citizen which the appellant herein is questioning the rationally and application on them therefore calls for this courts intervention to get a clear interpretation .

f. THAT the Honorable Magistrate was both mischievous and inconsiderate by holding that the appellant owed the respondent even when the said respondent had received Kshs 2,100,000/- and the remainder deposited in court but went ahead to allow the auctioneers to inflict maximum damage thereby traversing justice.

3. The Appellant sought for the following reliefs:

i. The purported attachment be set aside.

ii. The Motor Vehicle KXH 092 be returned to the appellant.

iii. All proceeds received from the use of the Motor Vehicle KXH 092 be paid to the appellant

iv. All assorted goods attached be returned to the appellant forthwith

v. Costs of the Appeal

vi. Interest on (iii) and (v)

vii. Any other relief as this court may deem fit to grant.

4. Parties canvassed the appeal by way of written submissions. The submissions are discussed below.

Arguments by the Appellant

5. In brief, Appellant's quarrel is that the claim in this matter was never heard through the normal hearing, thus it is not clear how the amount that was awarded in the decree was arrived at and the consequential attachment of his vehicle was illegal. He submitted that the Appellant through one of its directors had entered into a lease agreement to lease premises belonging to the respondent at a monthly rent of Kshs 300,000/- and had stayed in the premises for 10 months; the Appellant had deposited a sum of Kshs 2,100,000/- in court which covered the rent for 7 months. He further submitted that this being the case, it is unclear why the attachment of the appellant's assorted goods and motor vehicle KXH 092 was carried out. The Appellant complained in his submissions that there are other charges on the lease period that have no explanation. It was further submitted that there being a dispute, the matter ought to have gone through a hearing process to ascertain the amount owed.

6. It was contended that the appeal be allowed by restraining the respondents from any purported attachment and or the same be set aside; damages for loss of use of the attached motor vehicle be awarded to the appellant as well as the costs.

Arguments by the Respondent

7. On the other hand, it was submitted for the Respondent that pursuant to the lease agreement, the appellant did not make any other payment towards rent after the initial deposit thereby constraining the respondent to take out distress for rent. The distress precipitated into the filing of Civil Suit 379 of 2013 together with an application for interim orders which application was dismissed. All in all, the respondent proceeded with their proclamation because there was no order stopping them. He disputes the payment of Kshs 2,100,000/- by the appellant and submits that the proclamation and auction process was legal and regular as there was no order restraining the same and that the appeal should be dismissed with costs.

DETERMINATION

8. I have carefully considered this Appeal, the Record thereof, submissions by the parties and the authorities relied upon by the parties. This being a first appeal, the court shall carry out its task, to wit, analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. On this I refer to the case of **LAKE FLOWERS vs. CILA FRANCKLYN ONYANGO NGONGA & ANOR [2008] e KLR** where it was stated:

"...being a first appeal, the principle upon which this court acts are well settled, in that the 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 that respect. In particular this court is not bound necessarily to follow the trial judge's findings of facts if it appears either that she 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. Selle v. Associated Motor Boat Company [1968] EA 123."

Legal test

9. This Appeal is on the issue of the regularity of the proceedings in CMCC 379 of 2013 and the legality of the consequential orders thereof.

10. In **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1** where it was stated that:-

"a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle" - see EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278.

I will apply the foregoing test on the facts of the case.

11. Apart from the main suit, the trial magistrate was faced with 4 applications to challenge the proclamation and or allow it. The first one being the one that was filed with the plaintiff and was heard on 26th April, 2013. On the said date stay of execution was granted in the interim, however the same was dismissed as lacking merit on 4th October, 2013

12. An application to lift the stay orders so as to proceed with execution was made and it was dated 28th October, 2014 and in which stay orders were lifted vide ruling given on 3rd March, 2015.

13. On 6th March, 2015, another application was made challenging the amount being claimed by the Respondent yet he had been paid Kshs 2,100,000. Interim stay orders were granted and vide ruling delivered on 18th June, 2015, the application was dismissed and execution allowed within 30 days from the ruling date.

14. On 27th October, 2015 another application was made to execute, however an application was made on 3rd December, 2015 to object to the sale of the motor vehicle, the subject of this appeal. The application for stay was dismissed on 17th February, 2016 on the finding that the application was an abuse of the court process being that the court had previously dismissed applications by the applicant. It is noteworthy that as at the time the Appellant filed the plaint, the Respondent had proclaimed his vehicle and goods and all that the Appellant seems to be doing is blame the Respondent for failing to refund the amount that he paid as deposit for rent, upon opting to rescind the lease after realizing that renovation of the leased premises had swallowed a huge chunk of his finances; bearing in mind that he had not occupied the premises. The defendant/respondent rushed by filing an application for execution and obtaining quick orders from the lower court in a move clearly calculated to defeat the case pending before this court and steal the match from the Appellant. I note that it would not have cost the Respondent anything to await the due process of the law to run its course. This conduct by the Respondent does not augur well for the proper and fair administration of justice. It is for this reason the appeal succeeds in terms of prayers 1, 2 and 4 as it is patently clear that no hearing took place and the trial court converting an application to determine the suit without the consent of the parties was quite irregular.

15. In In Suleiman –vs- Amboseli Resort Limited [2004] 2 KLR 589 Ojwang A J, (*as he was then*) expressed himself as follows:-

“It is the business of the court, so far as possible, to ensure that any transitional motions before the court do not render nugatory that ultimate end of justice.....

The trial magistrate therefore ought to have considered that the Appellant’s plaint and the Respondent’s counterclaim still remained undetermined. There was thus need to subject the issues to trial. As this was not done, this appeal must succeed so that the parties could be heard.

16. In the end the appeal succeeds and the following orders are made:

a. Order by the trial court attaching the Appellant’s goods is hereby set aside.

b. The Appellant’s motor vehicle registration number KXH 092 Mitsubishi Fuso shall be released forthwith and unconditionally to the plaintiff by the Respondent.

c. The All assorted goods attached be returned to the appellant forthwith

d. The main suit be fixed for hearing in the trial court

e. Any claim that the plaintiff may have in respect to the alleged damage to the Motor Vehicle may be canvassed before trial court.

f. The Appellant is awarded the costs of the Appeal.

It is so ordered.

Dated and delivered at Machakos this 7th day of November, 2018.

D.K. KEMEI

JUDGE