



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.86 OF 2016

LOCHAB TRANSPORTERS LTD.....APPELLANT

VERSUS

FANUEL KAMBONA MUTESA.....RESPONDENT

**(Being an Appeal from the Ruling of Hon. T.Obutu (PM) in Kisumu CMCC NO.345 of 2007
delivered on 4th November 2016)**

JUDGMENT

Background

By an application dated 16th October 2015; the appellant moved the court seeking the following orders:

- a) That warrants of attachment and sale issued on 14th May 2014 be recalled, cancelled and/or set aside for having been issued irregularly and in total affront of the law
- b) That the auctioneer's costs be borne by the plaintiff as the execution was illegally conducted in an area outside its jurisdiction

The application was premised on the grounds that the warrants of attachment and sale were irregularly issued since the respondent had not complied with Order 21 rule 8 of the Civil Procedure Rules and further that the warrants were executed in Nairobi which was outside the jurisdiction of the executing auctioneer.

The Appeal

By a ruling delivered on 4th November 2016; the trial magistrate in dismissing the application rendered himself as follows:-

“Failure to send a draft decree for approval was a technicality that cannot be used at the expense of justice. On the 2nd issue of jurisdiction of the auctioneer, it was upon the applicant to demonstrate that the auctioneer did not have jurisdiction to operate. Thus the applicant failed.”

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed a Memorandum of Appeal dated 14th November 2016 which set out 4 grounds which may be summarized into 2 grounds to wit:-

- 1. The Learned Magistrate erred in law and in holding that failure to comply with Order 21**

rule 8 of the Civil Procedure Rules was is not a mandatory requirement

2. The Learned Magistrate erred in law and in dismissing the application dated 16.10.15

Both Counsels agreed to dispose of the application by written submissions filed before the trial court. It was submitted for the appellant that the provisions of Order 21 rule 8 of the Civil Procedure Rules are mandatory. In this regard, counsel relied on *Eunice Nafula Tembe v Multiple Hauliers (E.A) Ltd & 3 others [2014] eKLR* in which, Muchelule J held that warrants in that case were issued prematurely as the decree had not been approved by the Respondent's Advocates in breach of Order 21 Rule 8 (2) and (3) of the Civil Procedure Rules and ordered that the warrants be recalled.

It was further submitted for the appellate that the decretal sum of Kshs. 1,300,000/- was paid in two cheques of Kshs. 400,000/- and Kshs. 900,000/- issued on 21.5.14 and that the warrants should therefore be recalled.

It was submitted that the respondent has fully settled the decretal sum pursuant to the warrants of attachment and sale and is therefore estopped from challenging its legality. It was further submitted that the Registrar signed and sealed after she was satisfied that the decree was drawn in accordance with the judgment.

I have considered Order 21 rule (8) which provides:

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, its shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

Order 21 rule 8 (2) uses the word **MAY**. It is therefore not coached in mandatory terms and failure to comply with the said provision is not fatal to the execution process. Further to the foregoing; the applicant upon being served with the warrants of attachment and sale paid the decretal sum in full. The warrants have therefore been spent and there is nothing to be recalled, cancelled and/or set aside.

Section 107 of the Evidence Act provides:

(1) Whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

As rightfully observed by the learned trial magistrate, it was upon the appellant to prove that the auctioneer that executed the warrants of attachment and sale were executed in Nairobi which was outside the jurisdiction of Pambo Investments Auctioneer, a burden that it failed to discharge.

For the foregoing reasons, the prayer to recall, cancel and/or set aside the warrants is untenable and cannot stand as the warrants were properly issued. There is no evidence that the warrants were executed outside the jurisdiction of the auctioneer and the appellant is therefore liable for the auctioneer's costs.

In this regard, I am satisfied that this appeal has no merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED THIS 15TH DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant FELIX

Appellant Mr. Oriero

Respondent Mr. Bagwasi/Odongo