



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CIVIL APPEAL NO 29 OF 2015**

**AURON ODIPO T/A BARAKA BOOKSHOP.....APPELLANT**

**AND**

**BOITALLIN SUPPLY & TRADING COMPANY LIMITED.....1<sup>ST</sup>RESPONDENT**

**PHILEMON MWEU T/A COCONUT AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the whole Ruling of Hon E.M. Kadima, Resident Magistrate delivered on 26<sup>th</sup> August 2015 in SPMCC No 141 of 2014 Vol Law Courts)**

**REPUBLIC OF KENYA**  
**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT VOI**

**CIVIL SUIT NO 141 OF 2014**

**AURON ODIPO T/A BARAKA BOOKSHOP.....PLAINTIFF**

**AND**

**BOITALLIN SUPPLY & TRADING COMPANY LIMITED.....1<sup>ST</sup>DEFENDANT**

**PHILEMON MWEU T/A COCONUT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Ruling delivered on 26<sup>th</sup> August 2015, Hon E.M. Kadima, Resident Magistrate at Voi Law Courts found that the Appellant herein was still in arrears in the sum of Kshs 35,814/= owed to the Defendants.
2. Being dissatisfied with the said Ruling, the Appellant filed his Memorandum of Appeal dated 18<sup>th</sup> December 2015 on 22<sup>nd</sup> December 2015. The grounds of appeal were as follows:-

**a) THAT the Learned Magistrate erred in law and in fact in failing to caution himself, be informed, take into consideration, peg and/or hold in his ruling that parties to a suit are bound by their pleadings and a Court can only grant what is prayed for in the pleadings**

before it.

**b) THAT the Learned Magistrate erred in failing to set out issues raised in the pleadings and analyse each of them in relation to the documentary evidence tendered.**

**c) THAT the Learned Magistrate erred in failing to give a reasoned ruling/judgment as required by Order 21 Rules 4 and 5 of the Civil Procedure Rules that is capable of being executed.**

**d) THAT the Learned Magistrate through his ruling did in effect summarily determine the matter before him contrary to the provisions of Sections 1A and 1B of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and the principle of natural justice that dictates that a party cannot be condemned unheard.**

3. The Appellant's Record of Appeal dated 25<sup>th</sup> February 2016 was filed on 1<sup>st</sup> March 2015. He filed his Written Submissions dated 21<sup>st</sup> April 2016 on 22<sup>nd</sup> April 2016 in compliance with this court's directions of 7<sup>th</sup> April 2016. Although M/S Katee Omollo Onyango & Co Advocates for the Respondents were duly served with the extracted order outlining the time lines within which they were to file their respective Written Submissions as was evidenced in the Affidavit of Service of Maxwell R Nyakoni that was sworn on 21<sup>st</sup> June 2016 and filed on 23<sup>rd</sup> June 2016, they did not do so.

4. They did not also attend court on the several dates they were served with Mention Notices to attend court. On 23<sup>rd</sup> June 2016, the said Respondents' advocates failed to attend court despite having been given notice to attend court as could be discerned for the aforementioned Affidavit of Service leading this court to conclude that they were not keen to defend the Appeal herein. The Appellant's advocates thus requested for a Judgment date. The Judgment herein is therefore based only on the Appellant's Written Submissions which he relied upon in their entirety.

## **LEGAL ANALYSIS**

5. The court dealt with the Grounds of Appeal under separate heads shown hereinbelow.

### **I. NATURE OF RELIEFS SOUGHT VIS-À-VIS THE PLEADINGS**

6. The Learned Trial Magistrate's entire Ruling of 26<sup>th</sup> August 2015, the subject matter of the Appeal herein was as follows:-

**“The ruling herein was precipitated by submissions put in by the plaintiff on 6<sup>th</sup> July 2015 and further oral submissions by the defence counsel that the plaintiff still owes the defendant a sum of kshs (sic). 35,814/= since no proof had been adduced to indicate he was a distributor to the 1<sup>st</sup> defendant. They invoked section 109 of Cap 80 to buttress their argument. The plaintiff has already made a good payment of kshs (sic) 98,814/=-. I have examined all the evidence tendered before this court including documents and it is still clear that the plaintiff is still in arrears to the tune of kshs. (sic) 35,814/=-. No evidence has been (sic) to show that this amount was settled or waived by the defendants. I therefore find the plaintiff is still in arrears of kshs (sic) 35,814/= owed to the defendants.”**

7. The said Ruling made no reference whatsoever to the particular application it related to. It did appear to this court, however, that the Learned Trial Magistrate may have been delivering a decision in respect of the Appellant's Notice of Motion application dated and filed on 29<sup>th</sup> August 2014 which the Appellant had brought under a Certificate of Urgency.

8. This court made that assumption as it was the only application that was in the court file. Additionally, there were Written Submissions dated 25<sup>th</sup> February 2015 and filed on even date by the Respondents

herein in which they had made reference to the said application.

9. In the said application, the Appellant had sought the following orders:-

**1. That the Hon Court be pleased to certify the application herein as urgent and service thereof be dispensed with in the first instance.**

**2. That the Hon Court be pleased to grant temporary orders of injunction against the defendants together with their servants, employees and/or agents from levying distress against the plaintiff pending hearing and determination of this application.**

**3. That the Hon Court be pleased to grant permanent orders of injunction against the defendants together with their servants, employees and/or agents from levying distress against the plaintiff pending hearing and determination of this application.**

**4. That the Hon Court be pleased to grant such or further orders the Hon Court deems fit to grant in the interests of justice.**

**5. That the costs of this application be provided for.**

10. In arguing that the Learned Trial Court erred in law and fact in failing to take into account the parties' pleadings, the Appellant made considerable submissions regarding the provisions of Order 12 Rule 12(3) of the Civil Procedure Rules, 2010.

11. Although this court read the very detailed submissions and the case law which the Appellant had relied upon, it found that the question of joinder of issues was not relevant herein for the purposes of the Appeal herein as what appeared to have been placed for determination before the Trial Court was an application seeking an interlocutory injunction in which the said Learned Trial Magistrate gave a decision. It was not the main trial that was before the Learned Trial Magistrate when the question of consideration of joinder of issue would have found relevant at the appeal stage.

12. The more pertinent issue, therefore, was whether or not the Learned Trial Magistrate could grant the orders he did give taken against the backdrop of the orders that the Appellant had been sought in his application. In this regard, the Appellant placed reliance on several cases wherein the common thread was that parties are bound by their pleadings- See **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR** and **Libyan Arab Uganda Bank for Foreign Trade and Development & Another vs Adam Vassiliadis [1986] UG CA 6.**

13. This court could not have agreed more with the Appellant's counsel that parties are bound by their pleadings. Indeed, there would have been no need to belabour a principle that is so well settled in law. It would have sufficed for this court to have stated that the Learned Trial Magistrate had no power or jurisdiction whatsoever to make the orders that he did.

14. However, in view of the fact that it was not even clear to this court whether what the Learned Trial Magistrate made was an order or a declaration or if so, whether or not the said order or declaration was valid and capable of enforcement, it was necessary to analyse the import of such a determination to in greater detail to establish whether indeed, the Learned Trial Magistrate could grant the said order based on the pleadings that had been placed before him.

15. It is evident that there was no correlation between the declaration and/or order that the Learned Trial Magistrate granted and the orders that had been sought in the aforesaid application or the Appellant's Complaint that was dated and filed on 29<sup>th</sup> August 2015, which Complaint had sought the following reliefs:-

**a. A permanent injunction do issue against the defendants together with their servants, employees and/or agents from levying distress against the plaintiff.**

**b. Costs of the suit.**

**c. Such further orders the Hon Court may deem fit to grant in the interest of justice.**

16. It is important to point out that the Learned Trial Magistrate could not even purport to issue what appeared to be a declaration by relying on relief (c) of the Plaintiff for the simple reason that the Appellant had not sought such an order anywhere in his pleadings. In any event, the Learned Trial Magistrate was making an interlocutory order having not heard the matter on merits. It is also improbable that the Appellant would have intended that the Learned Trial Magistrate could have expanded the purpose of Relief (c) to grant orders that would have been adversely affected his interests.

17. Further, the Respondents had not even filed a Counter-Claim in which they would have claimed for the said amount. In their Statement of Defence that was dated and filed on 15<sup>th</sup> September 2014, the Respondents had sought the following relief:-

**“REASONS WHEREFORE the Defendants prays (sic) that the Plaintiff’s suit against the Defendants be dismissed with costs.”**

18. In this respect, the court found and held that there was merit in Ground 1 of the Appellant’s Appeal herein as a court only grant what had been prayed for in the pleadings that have been placed before it.

**II. ANALYSIS OF EVIDENCE AND REASONS OF DECISION**

19. The Appellant submitted that the Learned Trial Magistrate erred in not analysing issues according to the documentary evidence that was raised in the Pleadings and failing to give a reasoned decision. He referred the court to the provisions of Order 20 Rule 5 of the Civil Procedure Rules which provides as follows:-

**“In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.”**

20. In that regard, this court was therefore in agreement with the case of **Mufrank Builders Limited v Kirti Women Transport And Housing Co-Operative Society [2015] eKLR** in which Mabeja J rendered himself as follows:-

**“It is a general rule that a judgment or ruling should contain a concise statement of the case, the points for determination, the decision and the reasons for such decision. The object of so doing was given by Henry LJ in the English case of Flanner Vs Halifax Estate Agencies Ltd (200) IALL ER 273 he stated at pages 377 – 378: -**

***“(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.***

***(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself...”***

21. An appellate court or parties to a suit must never be left to guess why they won or lost a case. They

must at all times be made aware of the reasons that led a judicial officer to arrive at a particular decision and finding. This also enables an appellate court determine whether or not a trial court has applied the law to the facts that have been placed before it.

22. Facts, evidence and the law ought to be set out and analysed to enable the parties know what the basis of the decision of a court is. Evidently, Order 20 Rule 5 of the Civil Procedure Rules does not distinguish make any distinction between a judgment and a ruling as they are both findings and decisions that must be reasoned.

23. Although the Learned Trial Magistrate seemed to reason that the Appellant was in arrears and hence owed the Respondents the sum of Kshs 35,814/=, he did not make any reference to the application he was making a decision on. This court would have expected the said Learned Trial Magistrate to have analysed facts and law relating to interlocutory injunctions and given reasons why the Appellant was or was not entitled to an interlocutory injunction.

24. The fact that the Respondents went off the tangent in their submissions of 25<sup>th</sup> February 2015 by arguing that the Appellant owed them money or that the Appellant had made part payment of certain monies to the court was not a justification for the said Learned Trial Magistrate to state that the Appellant was in arrears and that he then ought to pay the Respondents the sum of Kshs 34,814/=, 34,814/=. The Learned Trial Magistrate should not have rendered him as such for the reason that the parties had not entered into a consent that would have given them leeway to deviate from their respective pleadings.

25. Having said so, there was a lot of confusion because there was also another Ruling that was delivered on 27<sup>th</sup> March 2015, about five (5) months prior to the Ruling that was being appealed from herein that indicated the matter in the Trial Court was marked as closed. There was no indication whatsoever what the said decision of 27<sup>th</sup> March 2015 related to as there was only one (1) application in the court record.

26. If indeed the matter was marked as closed as was stated in the proceedings of the said date, there was no legal basis for re-opening the matter so that the Learned Trial Magistrate could deliver his Ruling of 26<sup>th</sup> August 2015. If there was any justification to re-open the matter, no reason was recorded to assist this court in understanding the same.

27. In the absence of any indication as to which application the Ruling that has been appealed against was referring to and the fact that the Learned Trial Magistrate did not analyse the facts of the case against the law for granting interlocutory injunctions, this court found that there was merit in Grounds 2 and 3 of the Appellant's Grounds of Appeal.

### **III. FAIRNESS OF TRIAL**

28. In respect of Ground No 4, this court also wholly concurred with the Appellant's arguments that the Learned Trial Magistrate erred in law and fact by summarily determining the rights of the parties without taking their evidence. As can be seen in Ground of Appeal No 1, he had no mandate to hear issues that had not been placed before him and summarily determine the same without taking the evidence from both parties.

29. Doing so was a travesty of justice and greatly prejudiced the Appellant and gave advantage to the Respondents by granting them a relief they had not sought at all. Courts are neutral arbiters and must never enter into the arena to prosecute cases on behalf of parties to the detriment of opposing parties. This is what appears to have the case herein as the Learned Trial Magistrate transformed himself into a prosecutor and a judge. Indeed no party should be condemned unheard.

30. For this reason, this court found and held that Ground No 4 of the Appellant's Ground of Appeal was also merited.

### **DISPOSITION**

31. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal that was lodged on 22<sup>nd</sup> December 2015 was merited and the same is hereby allowed.

32. There shall be no order as to costs as the mistakes that pervaded the entire proceedings were as a result of the actions and/or omissions of the Learned Trial Magistrate and could not be attributed to the Respondents herein.

33. It is so ordered.

**DATED and DELIVERED at VOI this 18<sup>TH</sup> day of JULY 2016**

**J. KAMAU**

**JUDGE**