REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E002 OF 2024

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....APPELLANT

VERSUS

RUMBA KINUTHIA..... 1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L. Ambasi (CM) delivered on 19th December 2023 in Milimani CMCC No. 2365 of 2017)

JUDGMENT

Background

1. The 1st Respondent had obtained judgment in Milimani CMCC No. 2365 of 2017. Upon filing an appeal, the High Court directed the Appellant to deposit the decretal sum in court. The Appellant subsequently deposited the decretal sum pursuant to the court orders, which it contends fully satisfied the decree. Evidence of payment was provided and acknowledged by the 1st Respondent.

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2. Despite this, on 19th December 2023, the trial court delivered an ex parte ruling permitting execution, notwithstanding the fact that the matter had been scheduled for mention on 31st January 2024 for purposes of a Notice to Show Cause.
3. Following the ruling, the Respondent instructed auctioneers who issued a proclamation attaching the Appellant's movable property, including public property under its statutory mandate.
4. The Appellant contends that it complied with the order and fully satisfied the decree.
5. Conversely, the 1st Respondent asserts that only partial payment (Kshs. 5,000,000) was made while the balance was irregularly deposited into the wrong account. He states that costs and interest remains unsettled and that no formal order recording satisfaction of the decree was obtained.
6. Execution proceedings were initiated, culminating in a proclamation dated 21st December 2023. The Appellant now challenges the ex parte ruling permitting execution, alleging denial of the right to be heard and unlawful execution of a satisfied decree.

The Appeal

7. Aggrieved by the trial court's ruling and the auctioneer's proclamation, the Appellant filed the instant appeal wherein it contends that the trial court erred in law and fact by:

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a) ***Denying the Appellant the right to be heard on the Notice to Show Cause;***
b) ***Issuing ex parte orders prior to the scheduled mention date;***
c) ***Facilitating execution of a decree that had allegedly been fully satisfied;***
d) ***Failing to safeguard public property and adhere to constitutional principles of public service;***
e) ***Declining to treat the Appellant's application for stay of execution as urgent;***
f) ***Finalizing proceedings on a date when the Appellant was not expected to be present;***
g) ***Creating procedural unfairness and exposing the Appellant to prejudice and potential loss of public assets.***

8. The Appellant seeks orders that;

i) ***The appeal be allowed with costs;***
ii) ***The ruling and orders of 19th December 2023 be set aside;***
iii) ***The decree in Milimani CMCC No. 2365 of 2017 be declared fully satisfied;***
iv) ***The proclamation and intended attachment be declared unlawful, null, and void.***

9. The Appeal was canvassed by way of written submissions which I have considered.
10. The Appellant submitted that the decretal sum was fully settled through payments made into court, and that further execution was therefore unlawful. It is argued that execution of a satisfied decree constitutes an abuse of the court process and violates the principle of finality.
11. On the question of fair hearing, the Appellant contends that the trial court proceeded ex parte despite having fixed a

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future date for mention, thereby denying it an opportunity to be heard contrary to constitutional guarantees of fair hearing and access to justice.

12. It was further submitted that the attachment of property, including public assets, was irregular, unlawful, and contrary to public policy, particularly where execution was premised on a decree already satisfied.
13. The 1st Respondent, on the other hand, asserted that the Appellant only partially complied with the court order by depositing Kshs. 5,000,000 but failed to pay the full decretal sum inclusive of costs and interest. It was further contended that the Appellant deposited part of the balance in an incorrect account and failed to notify the Respondent. It was the 1st Respondent's case that satisfaction of a decree must be formally recorded by the court and cannot be presumed from payments or correspondence. It was argued that the Appellant failed to obtain a court order marking the decree as satisfied or to enter into a formal consent.
14. The 1st Respondent argued that the burden of proving satisfaction of the decree rested on the Appellant, who failed to discharge it.
15. The Appellant was also alleged to have failed to prosecute its earlier appeal, resulting in its dismissal and subsequent application for execution and issuance of a proclamation by auctioneers on 21st December 2023.
16. The 1st Respondent maintained that there was no formal court order recording satisfaction of the decree.

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17. The 1st Respondent contended that the Appellant was not denied the right to be heard but failed to utilize available procedural opportunities. It was submitted that the trial court acted within its discretion under the Civil Procedure Rules to proceed ex parte where a party fails to attend court or show cause. The Appellant is said to have had notice of the proceedings but did not act diligently.
18. The 1st Respondent argued that the right to be heard is not absolute and cannot be invoked where a party is indolent or fails to take steps to protect its interests.
19. The 1st Respondent submitted that the proclamation issued by the auctioneers was lawful, having been based on a valid court order and in the absence of any stay of execution.
20. It was argued that attachment of movable property is a lawful mode of execution under the Civil Procedure Rules, and that the Appellant neither obtained a stay nor demonstrated that the decree had been satisfied. It was further contended that public entities are not exempt from execution unless specific statutory protections are invoked, which the Appellant failed to do.
21. The 1st Respondent argued that the appeal does not disclose any error of law or fact to justify appellate interference.
22. It is submitted that an appellate court should not interfere with the exercise of discretion by a trial court unless it is shown that the decision was plainly wrong or based on misdirection.

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23. The 1st Respondent contended that the Appellant failed to act diligently, did not seek appropriate reliefs at the trial court, and is now improperly invoking appellate jurisdiction.
24. The 1st Respondent submits that costs should follow the event and that it is entitled to costs of the appeal.

Issues for Determination

25. I have carefully considered the record of appeal and the parties' submissions. I find that the main issues for determination are:

    a) ***Whether the ex parte ruling of 19th December 2023 violated the Appellant's right to be heard;***
    b) ***Whether the decretal sum in Milimani CMCC No. 2365 of 2017 was fully satisfied;***
    c) ***Whether the proclamation and attachment were lawful and procedurally proper in light of the alleged satisfaction of the decree;***
    d) ***Whether this Court should interfere with the trial court's exercise of discretion.***

Analysis and Determination

Right to be Heard

26. The right to be heard goes to the root of the proceedings. A perusal of the record reveals that the matter had been fixed for mention on 31st January 2024 for purposes of a Notice to Show Cause. However, the trial court proceeded

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to determine the matter ex parte on 19th December 2023, a date when the Appellant was not expected to be present.

27. The right to be heard is constitutionally entrenched under Article 50(1) of the Constitution which provides that every person has the right to have any dispute decided in a fair and public hearing.
28. Further, Article 47 guarantees fair administrative action.
29. The principle of ***audi alteram partem***, that no person should be condemned unheard, is a cardinal rule of natural justice.
30. In ***Onyango Oloo vs. Attorney General*** **[1986-1989] EA 456**, the Court held that a decision arrived at in violation of the rules of natural justice is void.
31. Similarly, in ***Pashito Holdings Ltd vs. Paul Ndungu & 2 Others*** **[1997] eKLR**, the Court of Appeal affirmed that decisions affecting a party's rights made without according that party a hearing offend the rules of natural justice.
32. My finding is that while Order 22 Rule 18 of the Civil Procedure Rules permits ex parte proceedings, such discretion must be exercised judiciously and not in a manner that defeats scheduled hearing dates or denies a party a legitimate expectation to be heard.
33. In the present case, it is clear that the trial court had already fixed a future date for the Notice to Show Cause and the Appellant therefore had a legitimate expectation to be heard on that date. It however turns out that the matter was determined on an earlier date without notice or justification. My view is that this was not merely a

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procedural irregularity but a fundamental breach of the right to fair hearing. It is my finding that the ex parte ruling of 19th December 2023 violated the Appellant's constitutional right to be heard and is therefore a nullity.

Decretal Sum

34. The gist of the parties' dispute is whether the decretal sum was fully paid. While the Appellant claims that the it paid the full decretal sum, the Respondent contends that only partial payment was made with the remaining balance being sent to a wrong account.
35. Section 34 of the Civil Procedure Act and Order 22 Rule 6 of the Civil Procedure require formal recording of satisfaction of the decree. In this case, given the contest on the issue of whether full payment was made, I find that the same cannot be conclusively determined in the absence of a proper hearing and that the trial court ought to have heard the parties on the Notice to Show Cause and determined if the payment was complete, whether costs and interest were settled and whether satisfaction should be recorded. It is my further finding that this is an issue that should be remitted to the trial for proper determination after hearing both parties.

Proclamation

36. Turning to the issue of whether proclamation was lawful, I find that where the foundation order is tainted with breach of natural justice, and in this case, failure to grant the

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Appellant a hearing, the subsequent actions cannot stand. I am guided by the decision in ***Macfoy vs. United Africa Co. Ltd*** **[1961] 3 All ER 1169**, where it was held that if an act is void, then it is in law, a nullity.

37. My view is that since the ex parte ruling was made in violation of the right to be heard, then the execution process flowing from it is equally unsustainable.

Discretion

38. An appellate court will interfere with discretion of the trial court where it is shown that the court acted on wrong principles or occasioned injustice. (See ***Mbogo & Another vs. Shah*** **[1968] EA 93).** I find that the denial of a hearing is a fundamental misdirection warranting appellate intervention and that this Court is justified in interfering with the trial court's decision.

Costs

39. Given the nature of the dispute and the fact that the matter is being remitted for hearing, it is appropriate that costs abide the outcome of the proceedings in the trial court.

Disposition

40. In light of the foregoing, the Court finds that the appeal has merit, particularly on the issue of denial of the right to be heard and accordingly allow it in the following terms: -

    a) ***The ruling and orders of the Chief Magistrate delivered on 19th December 2023 are hereby set aside;***

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b) ***The proclamation and all consequential execution proceedings arising therefrom are hereby declared null and void;***

c) ***The matter is hereby remitted to the Chief Magistrate's Court for hearing and determination of the Notice to Show Cause on its merits, before a different magistrate;***

d) ***Costs of the appeal shall abide the outcome of the proceedings in the lower court.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

HON W. A. OKWANY

JUDGE

In the presence of

Ms Kahuria for Gitonga for Appellant

Kuria for Respondent

Abdirzak - Court Assistant

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