IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 4 OF 2017

BETWEEN

ABUBAKAR A.H. MOHAMED.....APPELLANT

AND

AHMED MOHAMED SAID.....1ST RESPONDENT

MOHAMED OMAR MOHAMED.....2ND RESPONDENT

AHMED OMAR SAID.....3RD RESPONDENT

OMAR MOHAMED SAID.....4TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Malindi

(Chitembwe, J.) dated 27th October, 2016

in

Bankruptcy Cause No. 1 of 2010)

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JUDGMENT OF THE COURT

1. **Ahmed Mohamed Said**, the 1st respondent, commenced bankruptcy proceedings under the ***Bankruptcy Act (repealed)*** being Bankruptcy Cause No. 1 of 2010 contending that he was unable to meet his debts. Towards that end, the High Court issued a receiving order on 19th March, 2010 over his estate. The effect of the said receiving order was that any proceedings instituted against the 1st respondent were stayed.

2. Apparently, on 12th March, 2010 **Abubakar A. H. Mohamed**, the appellant, obtained judgment against the 1st respondent in Civil Appeal No. 209 of 2009 for a sum of Kshs.1,486,650. Thereafter, in an attempt to execute for the decretal amount, the appellant took out a notice to show cause against the 1st respondent for his committal to civil jail. In response, the 1st respondent produced the above mentioned receiving order.

3. The appellant believed that the bankruptcy proceedings were an abuse of the court process and that the 1st respondent was using the same to avoid meeting his obligations towards bonafide creditors. According to him, the 1st respondent had not provided an accurate statement of affairs as required under the ***Bankruptcy Act***. In particular, the 1st respondent had failed to disclose and/or include the appellant as one of his creditors.

4. As such, the appellant filed an application seeking to set aside the receiving order. By a ruling dated 1st March, 2011 the High Court declined to set aside the receiving order because the appellant had only attached the last page of the judgment hence the court could not tell who the orders therein related to. Unrelenting, the appellant filed another application this time round praying for the review of the aforementioned decision which was equally dismissed on 11th October, 2011.

5. Be that as it may, pursuant to ***Section 54*** of the ***Bankruptcy Act*** a warrant of seizure dated 14th July, 2015 was issued in the bankruptcy proceedings for the seizure of property belonging to the 1st respondent. The appellant who had been appointed as a trustee engaged Malindi Real Agency Ltd. to enforce the said warrant. In turn, Malindi Real Agency Ltd. attached a restaurant known as Shukrani Café situated on Plot No. 4090 and goods found in a house situated on Plot 682 Barani, Malindi.

6. The aforesaid attachment elicited objections from **Mohamed Omar Mohamed, Ahmed Omar Said,** and **Omar Mohamed Said**, the 2nd, 3rd and 4th respondents respectively. They all contended that the properties attached did not belong to the 1st respondent and that the attachment was not carried by a bailiff as required under the law. More specifically, that the building wherein the restaurant is situated belongs to the 2nd respondent who had leased out the same to the 1st respondent. The 1st respondent was the proprietor of the said restaurant. On the other hand, the 4th respondent who happens to be the 1st respondent's brother, claimed that the house on Plot No. 682 belonged to him and that he only allowed the 1st respondent to live in the said house because of his financial predicament. The appellant strenuously opposed the objections maintaining that they were part and parcel of an elaborate scheme by the 1st respondent to avoid paying his debts.

7. Upon considering the objections, the learned Judge (Chitembwe, J.) vide a ruling dated 3rd December, 2015 directed the objectors to adduce oral evidence. Ultimately, the learned Judge was convinced that the objectors had established their respective positions. In upholding the objections, the learned Judge in a subsequent ruling dated 27th October, 2016 expressed:

> ***"The objectors have proved that Shukrani Cafe does not belong to the judgement*** *(sic)* ***debtor. They have also proved that the building where the Shukrani Cafe is located also does not belong to the judgement*** *(sic)* ***debtor. I am satisfied that the attached properties do not belong to the judgement*** *(sic)* ***debtor…The evidence shows that the building housing Shukrani Cafe belongs to Ahmed Omar Said while the Cafe belongs to Mohamed Omar Mohamed. There is no concealment of the judgment debtor's properties.***
>
> ***In the end, all the objector's applications are granted to the extent that the seizure of their respective properties is hereby lifted. The warrant of seizure dated 14.7.2015 is hereby cancelled as it is not being executed by the court appointed auctioneer. Costs to the objectors."***

8. It is that decision that provoked the appeal before us wherein the memorandum of appeal contains evidence and arguments contrary to ***Rule 86*** of the ***Court of Appeal Rules*** (the Rules). Nevertheless, the appeal was prosecuted by way of written submissions as well as oral highlights. The appellant appeared in person while Mr. Kimani appeared for the 1st respondent and also held brief for Mr. Abubakar for the 2nd respondent. Mr. Otara appeared for the 3rd respondent.

9. The appellant reiterated that the bankruptcy proceedings were an abuse of the court process and principally aimed at illegally absolving the 1st respondent from meeting his debts. He contended that the properties which were seized by virtue of the warrant of seizure in question belonged to the 1st respondent hence the learned Judge erred in finding otherwise. In his view, there was sufficient evidence that the 1st respondent was attempting to conceal his properties.

10. Moreover, the appellant contends that the change of ownership of the properties from the 1st respondent to the objectors within a period of less than two years prior to the receiving order was suspect. In his view, by dint of ***Section 47*** of the ***Bankruptcy Act (repealed)*** the learned Judge should have declared such change of ownership void.

11. He also challenged the consent order dated 18th December, 2013 alluded to by the 1st respondent as adjusting the decretal amount as being false and categorically denied executing the same. In any event, the appellant submitted that, bankruptcy proceedings do not recognize such a consent order. He went on to cast aspersions on the learned Judge who he deemed to have colluded with the 1st respondent to issue not only the impugned ruling but other unlawful orders in the matter and more specifically discharging the 1st respondent in the terms of the disputed consent order. He submitted that a bankrupt could only be discharged when he/she has paid all his/her debts which was not the case herein.

12. The appellant also took issue with the representation of the 1st respondent by Messrs S. M. Kimani. As far as he was concerned, the 1st respondent as the bankrupt ought to have informed and received consent of such representation from the official receiver and the trustee. He intimated that as the trustee he had not given his consent to such representation thus it was void.

13. In opposition, Mr. Kimani stated that the memorandum of appeal was incoherent rendering it impossible to decipher the grounds upon which the appellant was challenging the impugned ruling. Making reference to the sentiments of Ibrahim, SCJ in **Yusuf Gitau Abdallah vs Building Centre (K) Ltd & 4 Others [2014] eKLR**, counsel posited, despite the appellant acting in person this Court could not overlook the aforementioned anomaly.

14. He also attacked the competency of the appeal on the grounds that firstly, the record of appeal which was filed on 7th February, 2017 was filed out of time without leave of the Court. He contended that the 1st respondent was denied an opportunity to challenge the competency of the appeal because the record of appeal was not served upon him or his counsel. Secondly, he added that the record was also incomplete since the certified order with respect to the impugned ruling, which is a primary document, was not included therein.

15. According to Mr. Kimani, the appeal lacked merit and was academic. He argued that there was no subsisting dispute between the parties and the appeal, to him, was intended to vex the respondents. Expounding on that line of argument, he stated that the terms of the consent order executed by the appellant and the 1st respondent had been met; the appellant had already been paid the amount that the parties had agreed on, that is, Kshs.600,000, as full and final settlement of the debt that was owing from the 1st respondent. All in all, there is no

justiciable issue capable of adjudication.

16. On his part, Mr. Otara opposed the appeal on more or less similar grounds as the 1st and 2nd respondents.

17. We have considered the record, submissions by counsel and the law. ***Rule 84*** of the Rules provides the avenue of challenging the competency of an appeal on the basis that an essential step had not been taken or that such step has been taken outside the prescribed time frame. However, the proviso thereto sets out the condition of making such a challenge in the following terms:

> ***"Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."*** *[Emphasis added]*

18. The import of the foregoing proviso has received considerable deliberation by this Court. It is settled that litigants are bound by the mandatory nature of the proviso and failure to comply with the same renders an application filed thereunder defective. See this Court's decision in ***Total Kenya Limited vs. Reuben Mulwa Kioko*** **[2018] eKLR**.

19. In this case, the 1st, 2nd and 3rd respondents have challenged the competency of the appeal on the grounds that it was filed out of time and that the certified decree has not been attached to the record. Applying the above principle to the circumstances of this appeal, we find that none of the respondents raised the objection within the prescribed time frame of 30 days of being served with the record. It is common ground therefore that such an objection is defective.

20. In addition, we cannot help but note that on 1st October, 2018 with the consent of the parties, this Court marked an application dated 28th May, 2018 seeking to strike out the appeal on the aforementioned grounds as withdrawn. Consequently, we cannot entertain this issue as the respondents purport to raise in their submissions.

21. Equally, the scope of our jurisdiction in this appeal is delineated by the notice of appeal filed by the appellant on 31st October, 2016. The said notice of appeal challenges the ruling dated 27th October, 2016. Accordingly, our mandate is restricted to the consideration of the subject of the said ruling, that is, whether the objections raised with respect to the properties attached pursuant to the seizure notice had merit. We do not doubt that there is a consent order dated 18th December, 2013 on record but its validity or enforcement was not the subject of the impugned ruling. This much was appreciated by the learned Judge who held:

> ***"The issue for determination is whether the objection proceedings are properly before the court and whether the objections should be upheld.***
>
> ***...***
>
> ***I will not dwell on the issue of payment arrangements between the judgment debtor and the trustee as there is an application pending in relation to that issue."***

22. The application which the learned Judge referred to was an application for enforcement of the consent order which was determined in a ruling dated 23rd June, 2017 which clearly was not subject of this appeal. This is as much as we are willing to say on the issue of the said consent and its effect on the decretal amount. Our position is reinforced by the sentiments of this Court in ***Kenya Revenue Authority vs. Doshi Iron Mongers & Another*** **[2016] eKLR**:

> ***"The Notice of Appeal delineates the scope of the appeal of which the other side has notice … We have no jurisdiction to consider those issues that fall outside the notice of appeal before us."***

23. Turning back to the merits of the appeal, we like, the learned Judge do find that the objectors did prove their respective objections. We say so because, the evidence on record demonstrated that the building situated on Plot No. 4090 initially belonged to the 1st respondent who later on 13th November, 2008 sold it to his wife, Safiyyah Mohamed Ahmed, for a consideration of Kshs.700,000. Almost two years later, on 14th September, 2010 Safiyyah sold the building to one Said Mbarak Said for Kshs. 3,000,000 who in turn sold it to the 3rd respondent on 15th January, 2013 for Kshs. 3,700,000. The aforementioned transactions were corroborated by duly registered sale agreements. The 3rd respondent also gave uncontroverted evidence that he developed the said building and let it out to the 2nd respondent who runs a restaurant therein. Similarly, a lease agreement dated 12th May, 2015 evidencing the arrangement as well as business and health permits taken out for the said restaurant by the 2nd respondent were produced. The foregoing gave a clear picture that neither the restaurant nor the building it was situated on belonged to the 1st respondent.

24. Additionally, it is not in dispute that Malindi Real Agency Ltd. who executed the warrant of seizure by attaching the properties in issue were not bailiffs or auctioneers. Consequently, they could not execute the said seizure warrants as contemplated under ***Section 2*** of the ***Bankruptcy Act*** which defined a bailiff as a person charged with the execution of any process under the said Act.

Therefore, the learned Judge could not be faulted for holding that:

> ***"A warrant of the court should be issued to a licensed auctioneer who is answerable to the court. It is not clear whether Malindi Real Agency Ltd. is a duly licensed Auctioneer. It is alleged that they are debt collectors. Court warrant cannot be executed by***

auctioneer's agents. They have to be executed by a licensed auctioneer duly appointed by the court."

25. In light of the foregoing the learned Judge could not be faulted for allowing the objections and cancelling the warrant of seizure dated 14th July, 2015. As a result, we find that the appeal herein lacks merit and is hereby dismissed with costs to the 1st, 2nd and 3rd respondents.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR