IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 57 OF 2015

BETWEEN

SHEIKH ALI TAIB.....……...…..……APPELLANT

AND

GEORGE ELLAM WEKESA.....……..…1ST RESPONDENT

SELINA WEKESA.....2ND RESPONDENT

(Appeal from the rulings and orders and decree of the High Court of Kenya at Mombasa, (Mukunya, J.) dated 23rd August 2013 and 14th November 2014 In HCCC No. 454 of 2002 (OS)).

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JUDGMENT OF THE COURT

In this appeal, the appellant, ***Sheikh Ali Taib***, quite unusually appealed in the same appeal, against two separate rulings of the ***Environment and Land Court*** at Mombasa ***(Mukunya, J.)*** dated ***23rd August 2013 (first ruling)*** and ***14th November 2014 (second ruling)***. Regarding the first ruling, the appellant filed a notice of appeal on 28th August 2013 while for the second he filed the notice of appeal on 20th November 2014. By the first ruling, the learned judge stayed proceedings in ***High Court Civil Application No. 260 of 2003***, which he found to be between the same parties and to involve the same subject matter as ***High Court Civil Case No 454 of 2002 (OS).*** By the second ruling, he dismissed an application for review of the first ruling, holding that the appellant had failed to attach a copy of the order that he sought the court to review.

Appreciating the unusual approach he had adopted, at the hearing of this appeal the appellant, with leave of the Court, abandoned all the grounds of appeal founded on the first ruling, thus effectively confining the appeal to the second ruling only. Although it is therefore quite possible to dispose of this appeal on the narrow issue of whether failure to attach a copy of the decree or order is fatal to an application for review, because of the peculiar facts of this appeal, we find it necessary to delve into its background. The litigation leading to this appeal is riddled with unbridled and undisguised abuse of the court process as found by ***Ibrahim J.*** (as he then was) in a ruling dated 11th May 2011 and by this Court in a judgment dated 25th July 2013 in ***Civil Appeal No. 146 of 2011***. In particular it is a classic example of abuse of the devise of *ex parte* applications, which courts of law should not countenance or condone.

The 1st respondent, ***George Ellam Wekesa***, who died on 26th July 2006, was married to the 2nd respondent, ***Selina Wekasa*** on or about 9th January 1964 under *Luhyia* customary law. At all material times, the 1st respondent was the registered owner of the parcel of land known as ***Mombasa/Block x/97***, situate in Tudor, Mombasa (the suit property). By an agreement dated 14th November 2002, the 1st respondent sold the suit property to the appellant for ***Kshs. 6,800,000/=.*** The transaction was completed and the suit property was registered in the appellant's name on 25th November 2002 and a certificate of lease duly issued to him.

It appears that the 1st respondent failed to give the appellant vacant possession of the suit property as agreed and by a plaint dated 21st October 2003, the appellant filed Mombasa High Court Civil Case No. 260 of 2003, seeking specific performance of the agreement and vacant possession of the suit property. The 1st respondent entered appearance but did not file a defence within the prescribed period or at all. Accordingly on 15th November 2003 the appellant applied for and obtained default judgment against the 1st respondent. By an application dated 11th February 2004, the appellant applied for an order of vacant possession of the suit property, which was granted by ***Khaminwa, Commissioner of Assize, (as she then was)*** on 25th February 2004. On 5th April 2004, the decree was enforced and the appellant was put in possession of the suit property. As is evident, all these development took place when the 1st respondent was alive, but he did not contest the suit and applications, despite service.

We must now turn to consider how the 2nd respondent comes into the dispute. By an originating summons dated 20th December 2002, the 2nd respondent instituted against the 1st respondent Mombasa High Court Civil Suit No. 254 of 2002 (OS) under the ***Married Women's Property Act, 1882*** seeking among others, a declaration that she was entitled to half share of the suit property, having contributed to its acquisition. Simultaneously with the summons, she took out a chamber summons seeking a temporary injunction to, among others, prohibit the 1st respondent from interfering with her occupation of the suit property and to bar the Registrar of Lands, who was not a party to the summons, from registering any transfer or dealings with the suit property. On 23rd December 2002, Khaminwa, CA. granted those orders *ex parte* and directed the same to remain in force ***"pending final determination of this suit and or further orders of the court."***

The 2nd respondent's next step was to file a chamber summons in the originating summons on 23rd May 2003 seeking an order to join the appellant in that suit and a further order extending to him the injunctive orders that she had obtained *ex parte* on 23rd December 2003. On 28th May 2003, Khaminwa, CA, again *ex parte*, issued an injunction restraining the appellant from evicting the 2nd respondent from the suit property, even before he had been joined in the suit. The appellant was ultimately made a party to the suit some five months later, on 24th October 2003 and the court directed the 2nd respondent to serve upon him summons to enter appearance, which she failed to do.

Next, the 2nd respondent took abuse of court process to an entirely new level. After execution of the decree of the High Court giving the appellant vacant possession of the suit property, the 2nd respondent filed an application in the originating summons seeking a mandatory injunction to put her back into possession of the suit property. ***Mwera, J.*** (as he then was) denied that application on 7th April 2004 and directed that it must be heard *inter partes*. The very next day, namely 8th April 2004, the 2nd respondent filed another notice of motion, this time in HCCC No. 260 of 2003 seeking *inter alia* an order joining her into the suit, review and setting aside of the judgment and decree already entered in favour of the appellant, reinstatement into possession of the suit property and an order restraining the appellant from entering into or dealing with the suit property. The last two prayers were the exact prayers that she had failed to obtain in the originating summons the previous day before Mwera, J. Needless to add, the 2nd respondent did not disclose she had a similar application in the originating summons pending for hearing *inter partes.*

Once again, on 13th April 2004, Khaminwa, J. issued *ex parte* orders joining the 2nd respondent to the

suit, restoring to her possession of the suit property, and restraining the appellant from entering or dealing with the same. After hearing the application *inter partes*, the learned judge, on 30th July 2004 set aside the judgment entered in favour of the appellant in HCCC No 260 of 2003, granted the 2nd respondent leave to file a defence within 14 days, and ordered her to give an undertaking as to damages within 7 days. The 2nd respondent did not comply with the orders of the court as a result of which the appellant obtained default judgment against her.

Undeterred, on 26th October 2004 the 2nd respondent applied to set aside the default judgment against her and for leave to file defence, claiming that her failure to comply with the court orders of 30th July 2004 was inadvertent. Once again the 2nd respondent's application was allowed on 22nd April 2005, but on condition that she furnishes a bankers' guarantee for Kshs 2, 500,000 within 30 days, after which she was at liberty to file a defence within 14 days. Otherwise, in default, her application would stand dismissed.

The 2nd respondent once again did not furnish the guarantee within the prescribed time or at all. Instead, on or about 20th May 2005 she applied for review and setting aside of the orders of 22nd April 2005 requiring her to furnish a guarantee prior to filing defence. ***Sergon J.*** heard and dismissed that application on 19th October 2006.

By this time, the 1st respondent had passed away on 26th July 2006. On 19th July 2007, ***Kennedy Ellam Wekesa (Kennedy),*** the son and legal representative of the 1st respondent, applied to be substituted as the defendant in the originating summons in *lieu* of the deceased 1st respondent. It would appear that this application was not prosecuted. Thereafter Kennedy effectively took over the 2nd respondent's cause and on 16th October 2009, applied in HCCC No 260 of 2003 to be joined as a party as prayed in the application filed in the originating summons and to set aside the default judgment entered against the 1st respondent way back on 15th November 2003, claiming that it was illegal, null and void and that he had discovered new and material evidence. It will be noted firstly that the default judgment was obtained when the 1st respondent was alive and he never challenged it. Secondly, what Kennedy was applying for is exactly what his mother, the 2nd respondent applied for and obtained, but eventually lost after she failed to comply with the conditions set by the court. Lastly Kennedy was asking the court to grant in one suit an application filed in an entirely different suit.

Ibrahim, J. (as he then was) heard and struck out the application on 11th May 2011, holding that the orders sought in the application dated 19th July 2007 in the originating summons could not be granted in a different application in HCCC No 260 of 2003. Aggrieved by that order, Kennedy lodged ***Civil Appeal No. 146 of 2011*** before this Court. By a judgment dated 25th July 2013, this Court dismissed the appeal with costs to the appellant. In particular the Court noted that HCCC No. 260 of 2003 had abated, on 25th July 2007, the 1st respondent having died on 26th July 2006 and that even by the time of the death of the 1st respondent, the suit was literally concluded.

By then, the Environment and Land Court established by Article 162 (2) (b) of the Constitution had been operationalized. Accordingly by an order dated 6th November 2012 the originating summons was transferred from the High Court to the Environment and Land Court where a week later, on 13th November 2012, the 2nd respondent filed the application which has led to this appeal. By that application, made substantively under sections 5 and 6 of the Civil Procedure Act, the 2nd respondent applied for an order of stay of further proceedings in HCCC No 260 of 2003 claiming that it was "in similar nature" to the originating summons. The appellant opposed the application contending among others that the two suits were not between the same parties, raised different issues and that HCCC No 260 of 2003 was concluded and judgment entered and therefore was not a pending suit. By the first ruling dated 23rd August 2013, the learned judge allowed the application and stayed HCCC No. 260 of 2003. It is apt to point out that the learned judge was effectively staying a suit, which this Court had found to have abated and which neither Kennedy nor the 2nd respondent had applied to revive.

On 18th September 2013 the appellant applied, substantially under Order 45 of the Civil Procedure Rules for review of the first ruling, on the grounds of the judgment of this Court dated 25th July 2013, which he contended was delivered after the hearing of the application before the trial court had concluded on 24th April 2013. It was the appellant's further contention that the judgment of this Court constituted sufficient reason for review of the first ruling. The 2nd respondent opposed the application, not by her own affidavit, but one sworn by her advocate, ***Jack W. Matheka*** on 6th March 2014 who deposed that the application was in bad faith, in contempt of the trial court, and a ploy to further delay the hearing and determination of the dispute. On his part Kennedy opposed the application contending that it was defective for failure to attach a copy of the order that the appellant was seeking to review. In the second ruling dated 14th November 2014, the learned judge dismissed the application in the following terms:

> **"From the above list of authorities, it is clear that not attaching the order or decree sought to be reviewed is fatal. The application cannot be sustained. The application for review is therefore dismissed with no order as to costs."**

We need only to add that although the learned judge talked of "***list of authorities"***, he actually referred to only one ruling of the High Court in ***Stephen Munga Maingi v. The Government of the United States of America & Another, HCCC No. 1197 of 2005***.

That then, is how this appeal landed in this Court. By consent the appeal was heard through written submissions and time-bound oral highlights. As we earlier adverted, the appellant abandoned his grounds of appeal founded on the first ruling and with that, most of his written submissions, as well as those of the respondents, which focused on the first ruling, were rendered irrelevant to this appeal. Simply put the remaining appeal before us related to the dismissal by the learned judge of the application for review and the issue was whether he had erred by holding that failure to attach the order, the subject of an application for review, was fatal. Focusing on the second ruling, ***Mr. Ochieng,*** learned counsel for the appellant, submitted that the learned judge had erred by dismissing the application for review on the grounds that the order that the appellant wanted reviewed was not attached to the application. In the appellant's view, the order was readily available in the court file and failure to attach it was a mere and curable technicality, which did not warrant dismissal of the application. Relying on ***Article 159 (2)*** of the Constitution, the appellant faulted the learned judge for relying on a pre-2010 decision and giving effect to technicalities over substance. In any event, the appellant concluded, there was no requirement either in the Civil Procedure Act or the Civil Procedure Rules that the order must be attached in an application for review.

As far as is relevant to the remaining issue in this appeal, Kennedy's learned counsel, ***Mr. Wameyo*** submitted that the appeal was academic and moot and would serve no purpose because HCCC No. 260 of 2003 had already abated. Most interesting and having raised the issue before the High Court, Kennedy did not at all address, either in his written or oral submissions, the consequence of failure to attach the order in an application for review.

The 2nd respondent's written submissions, like all the others, veered off the central issue in this appeal and addressed a host of peripheral matters founded on surmise and conjecture and utterly at variance with the record. Unlike Kennedy, the 2nd respondent maintained that HCCC No 260 of 2003 had not abated and that this Court was wrong in finding otherwise. In the view of her learned counsel, ***Mr. Matheka,*** the suit was still pending because the decree had not been executed. Again, like Kennedy, the 2nd respondent completely avoided addressing the main ground upon which the learned judge had dismissed the application for review, namely failure to attach a copy of the order.

We have carefully and anxiously considered the tangled history of this appeal, the record of appeal, the memorandum of appeal, the two rulings of the High Court, the written and oral submissions by respective counsel and the authorities that they cited. Did the learned judge err by holding that the application before him for review was fatally defective for failure to attach the order that the appellant wished the court to review?

A reading of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules which

confer the review jurisdiction of the High Court do not have any requirement that in an application for review, an applicant must attach to the application an order that he or she seeks the court to review. In saying this, we are not stating anything new. In ***Sadrudin Kurji & Another v. Shalimar Ltd & 2 Others, CA No 64*** of 2006 this Court noted that there was no legal provision requiring inclusion of the order in an application for review. With great respect, the ruling of the High Court in ***Stephen Munga Maingi v. The Government of the United States of America & Another (supra),*** does not stand for the proposition the learned judge assigned it. The application for review in that case was dismissed because the court was not satisfied that there was any new and important matter which had come to light which was not within the knowledge of the applicant or which he could not have produced after the exercise of due diligence at the time the order was made; that there was no mistake or error apparent on the face of the record, and that there was no other sufficient reason.

That is not to dispute that the High Court has severally held that failure to attach a copy of the order is fatal to an application for review. See for example, ***William Saina v. Joshua Cherutich, HCCC No 259 of 2001 (OS)*** and ***Suleiman Murunga v. Nilestar Holdings Ltd & Another, ELCC No. 1549 of 2013.*** However, recently in ***Peter Kirika Githaiga & Another v Betty Rashid, CA No. 210 of 2014***, this Court emphasized the fact that the law does not require attachment of a decree or order to an application for review and concluded:

> "***As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."***

We reiterate that view and add that it is the most consistent with the requirement in Article 159 that courts should not pay undue regard to technicalities, particularly in a case like the present one where there was no dispute at all regarding what the court held in the first ruling, which the appellant wanted reviewed.

We conclude that this appeal has considerable merit. In light of the history and circumstances of this appeal, which we have set out above, we allow this appeal, set aside the order of the High Court dated 14th November 2014 and substitute therefor an order allowing the appellant's application dated 30th August 2013. The appellant will have costs of that application and of this appeal. It is so ordered.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR