



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 55 OF 2014

BAKARI IBRAHIM APPELLANT

VERSUS

ISSA IBRAHIM RESPONDENT

(An appeal from the Ruling and order of the High Court of Kenya at Bungoma, (A. Mabeya, J.) dated 10/6/2014

in

HCCA NO. 47 OF 1999)

JUDGMENT OF THE COURT

1. In a ruling delivered on 10th June 2014, the High Court at Bungoma, (A. Mabeya, J.) allowed an application by which the respondent, Issa Ibrahim, objected to the attachment of what he claimed were his cows and a bicycle. Three cows and a bicycle had been attached by an auctioneer in November 2004 in execution of a judgment in favour of Bakari Ibrahim, (the appellant) against Suleiman Ibrahim.

2. Issa Ibrahim (the respondent) contended before the High Court that he was the sole owner of the three cows and the bicycle (the attached goods) that were attached. He asserted that, Suleiman Ibrahim (the judgment debtor) did not have any attachable interest in the attached goods. It was also his case that the execution process was a nullity as the judgment debtor died on 12th November 2002 and execution proceedings could not be taken after his death without applying to execute against his legal representative in compliance with Section 37 of the Civil Procedure Act.

Background

3. The appellant, the judgment debtor (to whom we also alternatively refer as “the deceased”), and the respondent are brothers. They are the sons of the late Ibrahim Wangulu who was the registered proprietor of a property known as Title Number S. Malakisi/Mwaliye/214 measuring approximately 3.2 hectares. That property was the subject of a dispute between the appellant and the deceased. That dispute, the nature of which is not relevant for the purpose of this appeal, was escalated from the Land Disputes Tribunal to the Land Disputes Appeals Tribunal and ultimately on appeal to the High Court at Bungoma, where an award for costs was made in favour of the appellant against the judgment debtor. Those costs

were taxed and certified at Kshs. 53,105.00 and a certificate of costs dated 22nd October 2004 issued.

4. In his bid to recover the taxed costs, the appellant commenced execution proceedings against the judgment debtor that resulted in the attachment of the attached goods on 19th November 2004, through Kuronya Auctioneers, which the respondent claims belonged to him. Although the application for execution by the appellant before the lower court is not in the record of appeal, the auctioneers proclaimed the attached goods in November 2004.

5. By the time the certificate of costs was issued, and by the time the appellant commenced execution proceedings with a view to recovering those costs, the judgment debtor had long since died. The Certificate of Death on record indicates that the judgment debtor died on 12th November 2002. We will advert to the significance of this later.

6. The attachment precipitated objection proceedings by the respondent under the then Order XXI Rule 53 of the Civil Procedure Rules. The respondent claimed sole ownership of the attached goods and asserted that the deceased did not have any attachable interest in them. Despite notice of objection to the attachment, the appellant maintained that the attached goods belonged to the deceased but that the same “were kept and entrusted” to the respondent.

7. To establish his claim over the attached goods with a view to having the attachment lifted, the respondent moved the High Court by way of Chamber Summons dated 1st December 2004 under Order XXI Rules 56 and 57 of the Civil Procedure Rules. It appears from the record that the court file ‘went missing’ for a long time and the respondent had to apply for the reconstruction of the court file on at least two occasions.

8. Ultimately the application was heard by Mabeya, J. who, as already indicated, delivered the impugned Ruling on 10th June 2014 allowing the respondent’s application. When allowing the application, the Judge also ordered that the deceased had no attachable interest in the attached goods; that if the attached goods were already sold, the value thereof be agreed upon by the parties or assessed by the Deputy Registrar of the court and be paid to the respondent within 45 days; and that the costs of the objection proceedings be awarded to the respondent in any event.

9. The appellant was dissatisfied and lodged the present appeal.

The appeal and submissions by counsel

10. Referring to the memorandum of appeal, learned counsel for the appellant, Mr. B. A. Nyanga, submitted that the learned Judge of the High Court did not properly analyze the matter before him; that the Judge misapprehended Section 37 of the Civil Procedure Act and wrongly concluded that upon the death of the judgment debtor, substitution with his legal representative should have been done; that the Judge failed to appreciate that under Order 24 rule 10, the provisions on abatement of suits under rules, 3, 4 and 7 of that Order requiring an application to be made within a year for the legal representative of the deceased defendant to be made a party do not apply to proceedings in execution of a decree or order.

11. Counsel for appellant also complained that the Judge erred in faulting the proclamation and for his finding that the notification of sale was given prematurely before 7 days had lapsed from the date of proclamation.

12. Opposing the appeal, learned counsel for the respondent Mr. Omundi Bw’Onchiri, submitted that there is no competent appeal as the judgment debtor died in the year 2002 as indicated in the Certificate of Death; that the learned Judge properly interpreted and applied Section 37 of the Civil Procedure Act in that the appellant should have applied to execute the decree or order on costs against the deceased’s legal representative. Furthermore, counsel argued, the finding by the Judge that the proclamation and notification of sale by the auctioneer were defective is well founded.

13. In his brief reply, Mr. Nyanga submitted that any defect in the appeal, which the appellant lodged *pro se*, was cured by subsequent amendment of the record in terms of an order of this Court given on 20th May 2015 granting the appellant leave to file a supplementary record of appeal reflecting Issa Ibrahim as the respondent and which was done by filing a further amended memorandum of appeal on 25th January 2016.

Analysis and determination

14. We have considered the appeal and the submissions by learned counsel. Although the appellant set out five grounds of appeal in his further amended memorandum of appeal, the principal question on which the appeal turns is whether the High Court was right in its holding that it was imperative for the appellant to comply with the provisions of Section 37 of the Civil Procedure Act if any execution proceedings were to be undertaken against the deceased’s estate and that the failure to do so rendered the execution process “unlawful, null and void and of no consequence.”

15. There is no dispute that the judgment debtor died on 12th November 2002. Costs payable by the judgment debtor to the appellant in respect of the High Court proceedings were certified in October 2004 well after his death. Equally, execution proceedings against the judgment debtor were commenced after his death. That was irregular. Under Section 37(1) of the Civil Procedure Act, the appellant should have applied to execute against the judgment debtor’s legal representative. That section provides:

“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”

16. Counsel for the appellant argued that the use of the words “may apply” in that provision conferred a discretion on the appellant whether or not to apply. That it was up to the appellant to determine whether or not to apply to the court to execute against the deceased’s legal representative. We are not persuaded by that argument. In our view, the words “may apply” as used in section 37 of the Civil Procedure Act signify that a judgment creditor may elect to execute a decree or order against the legal representative of a deceased judgment debtor. However, if the judgment creditor elects to do so, he must, in our judgment, make an application to execute against the legal representative of such deceased person. [See **Mulla on the Code of Civil Procedure**, 14th edition by J. M. Shelat, Volume 1 at page 354-358].

17. We are therefore in agreement with the learned Judge of the High Court when he held that “it was imperative that if any execution proceedings were to be undertaken against the deceased’s estate, the decree holder had to comply with the provisions of Section 37 of the Civil Procedure Act” and that absent such application in this case, the execution process against the deceased, was “unlawful, null and void and of no consequence.” We need not consider the other grievance by the appellant.

18. The result is that the appeal fails and is dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Kisumu this 18th day of November, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true
copy of the original.

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DEPUTY REGISTRAR