



IN THE HIGH COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 317 OF 2010

MARTI TELECOMMUNICATIONS LTD.....APPELLANT

VERSUS

G4S SECURITY SERVICES (K) LIMITED.....RESPONDENT

(An appeal from the orders made by the High Court of Kenya at Nairobi (Okwengu, J.) made on 25th February, 2010 and 9th March, 2010 (Pursuant to leave granted on 11th June, 2010)

in

H.C.C.A. No. 686 of 2009)

JUDGMENT OF THE COURT

The appellant, **Marti Telecommunications Limited** (“*the appellant*”), sued the respondent, **G4S Security Services (K) Limited** (“*respondent*”), in the subordinate court (***Milimani Commercial Court CMCC No. 3771 of 2008***), for damages for breach of contract. That court awarded the respondent Kshs.426,816.03. The respondent, **G4S Security Services (K) Limited**, was aggrieved and, therefore, lodged Appeal Number 686 of 2009 at the High Court in Nairobi. The High Court (**Sergon, J.**), allowed the respondent’s appeal and set aside the award of Kshs. 426,816.03 substituting the same with a judgment in favour of the appellant for Kshs. 1,000/= . The respondent was awarded the costs of the appeal. That judgment of the High Court is not the subject of this appeal.

This appeal arises this way. During the pendency of **HCCA No. 686 of 2009**, the respondent, on 16th February, 2010, lodged an application for stay of execution which application was amended on 15th March, 2010. Before the amendment the respondent’s application for stay was placed before Okwengu, J. (*as she then was*), on 25th February, 2010. The proceedings of that day resulted in an order which gave rise to the appeal before us. The proceedings are short and we set the same herein in extenso:

“25.2.2010

Coram: Okwengu, J. Eric: Court Clerk

Kiragu for Appellant/Applicant Mutua for the Respondent

Kiragu:

I am ready to proceed with our Notice of Motion dated 15.02.2010. However, I wish to point out that the Auctioneer has not complied with the Court Order issued on 17.02.2010 for deposit of the money into court

Mutua:

The Auctioneer could not comply with the order as He had already released the money to us by the time He was served with the Court Order.

Kiragu:

I wish the court to note from the affidavit sworn by Mr. Mutua and the annexures thereto that the Auctioneer purported to forward the money to Mr. Mutua on 15.02.2010, before the cheque issued to him by the appellant had matured. He purported to pay the advocate through a post-dated cheque dated 19.02.2010.

Court:

It is evident that the Auctioneer is attempting to circumvent the order of the Court by purporting to pay the Respondent's advocate through a post-dated cheque.

Clearly, the funds were still in the Auctioneer's account by the time the order of 17.02.2010 was made I, therefore, order the Respondent's advocate to deposit the proceeds of the post-dated cheque paid to them by the Auctioneer into this Court forthwith. The order of 17.02.2010 for deposit of money into court must be complied with. Order of stay of execution is extended to 9.3.2010 when Notice of Motion dated 15.2.2010 is to be heard.

OKWENGU

JUDGE".

The order quoted above is the order which peeved the appellant and after obtaining leave of the High Court, lodged the appeal before us, premised upon four (4) grounds. However, Mr. Mutua, learned counsel for the appellant, only argued grounds 1, 2 and 3 globally. The gist of his argument was that by the time the learned Judge of the High Court made her order for deposit of the decretal amount, there was no order of stay in place as the one previously given had lapsed. In learned counsel's view, the order of the learned Judge presupposed that the appellant was blameworthy which was not the case as in his view, the payment of the money to him by the Auctioneer was regular.

Ms Muringu, learned counsel for the respondent, opposed the appeal contending in the main that the learned Judge of the High Court exercised her discretion in making the order for the deposit which exercise was proper in law as the order was necessary to preserve the subject matter pending the hearing of the application for stay. Learned counsel submitted that the respondent was, indeed, vindicated as its appeal succeeded in the end.

The appellant in this appeal challenges the exercise of judicial discretion of the Judge of the High Court. There is no dispute about the principles that apply in considering the appeal against the exercise of judicial discretion. The principles were stated in ***Mbogo and Anor -v- Shah, [1968] EA 93 by Sir Clement De Lestang V-P***, as follows: -

"I think it is well settled that this Court will not interfere with the exercise of its

discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or it has acted on matters on which it should not have taken into consideration and in doing so arrived at a wrong conclusion”.

On his part, ***Sir Charles Newbold P.***, in the same appeal, stated:

“For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

We have perused the record of this appeal and observe that on 17th February, 2010, Rawal, J. (*as she then was*), after hearing learned counsel for the respondent on the respondent’s application for stay of execution ordered:

“I also thus grant interim orders in terms of prayer No. 4 and stay of execution of the Decree up to 25th February, 2010 when application dated 15.2.2010 shall be heard inter partes. The Respondent be served”.

Prayer 4 of the respondent’s application was in the following terms:

“4 In the alternative, Mr. John Mbijiwe trading as Bealine Kenya, a firm of auctioneers, do deposit all proceeds of the Cheque Number 048603 dated 15th February, 2010 in court pending the hearing inter partes and determination of this application”.

The inter partes hearing was then fixed for 25th February, 2010. But as the order of Rawal, J. had not been complied with, the respondent moved the court on 17th February, 2010 as already stated resulting in the order appealed from.

We have anxiously considered those proceedings and are unable to detect any improper exercise of discretion by both Rawal, J. and Okwengu, J. The appellant may have felt entitled to execute the decree of the subordinate court at the material time as, indeed, there was no order of stay in place when the execution happened. However, there was nothing irregular in the order of the learned Judge staying the process of execution whether the same was regular or otherwise. The learned Judge considered that the auctioneer had acted in breach of the order directing him to deposit the proceeds of the cheque issued to him by the respondent. As by 17th February, 2010, the appellant’s advocate acknowledged receiving the proceeds of the execution which proceeds were made to him notwithstanding the order of the court, the learned Judge was, in our view, perfectly entitled to order the deposit of the decretal amount.

In our view, the order made by the learned Judge of the High Court was intended to preserve the subject matter being the proceeds of the execution pending the hearing of the application which was lawfully pending hearing and determination before the learned Judge of the High Court. That is the kind of order courts make, routinely in the course of dispensing justice.

In our opinion, it was not only right that the court should attempt to preserve property which was in issue but it was the clear duty of the court to do so. As it turned out the respondent’s appeal eventually succeeded thereby reinforcing our view that the learned Judge cannot be faulted for making the order of deposit of the sums paid in execution of the decree. We hasten to add that even if the respondent had lost its appeal, the learned Judge’s exercise of discretion to preserve the proceeds of execution pending the hearing and determination of the appeal would still not be disturbed as the same was properly exercised.

Having found that there was proper factual and lawful basis for making the order of deposit, we have no reason to interfere with the exercise of that discretion as to do otherwise, would simply be substituting our

discretion for that of the High Court.

In the result, the appeal is for dismissal in its entirety and we so order. As there indeed was a decree of the subordinate court in existence at the time of execution, we think the appropriate order on costs is that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015.

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR