REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 160 OF 2010

BETWEEN

SAMWEL AYIENDA MOKUA .....APPELLANT

AND

TINGA TRADING CO. LTD. .....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Kisii (Musinga, J.) dated 22nd April, 2010

in

KISII H.C.C. NO. 98 of 2010)

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JUDGMENT OF THE COURT

This is a first appeal from the Ruling of Musinga, J. (as he then was) delivered at the High Court of Kenya, Kisii, on 22nd April, 2010 in Kisii High Court Civil Case No. 98 of 2010. The application before the learned Judge requested him to set aside, vary or vacate an interlocutory judgment and decree which had been entered in the said suit. The learned Judge dismissed the application for reasons recorded in the Ruling. That is what provoked this appeal.

Being a first appeal we must reevaluate the matter and come to our own conclusions but must remember that we did not handle the matter in the first instance. We must only interfere with the findings of the learned judge if the Judge failed to take into account particular circumstances or based his impression on matters inconsistent with the evidence – see the judgment of this court in **Maimuna s/o Patrick Mutou vs Wilson Njau Nyaki Civil *Appeal* No. 131 of 1994**. In the oft–cited case of **Peters vs Sunday Post Limited [1958] EA 424** it was held that while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide. These principles are true whether the trial judge conducted a trial where he took evidence of witnesses or in situations like here where the

judge was dealing with an application which we have referred to.

The appellant, ***Samwel Ayienda Mokua*** has travelled a long journey in pursuit of his rights which he considered to have been breached by the respondent Tinga Trading Company Limited. As we will show in this judgment he has been before many judges of the High Court and of this Court with various applications which were not successful. The genesis of the whole matter was the plaint filed at the High Court of Kenya, Kisii, on 17th August, 2000 - a good 14 years ago. It was alleged in that suit that the appellant was a tenant in the respondent's premises known as Kisii Municipality Block 111/265 and 266; that the respondent issued a termination notice which led the appellant to take proceedings at the Business Premises Rent Tribunal but as those proceedings were pending at that Tribunal the respondent evicted the appellant who suffered loss. It was therefore prayed that injunction do issue to prevent the respondent from interfering with the appellants possession of the premises; that a mandatory injunction issue to compel the respondent to put the appellant back into possession of the premises; that the appellant be awarded stated loss of earnings and interest on the same.

The respondent filed a defence and counterclaim where the appellant's tenancy was admitted; it was alleged that the appellant had surrendered one of the two shops he occupied as a tenant and it was also alleged that the appellant was in rent arrears particulars of which were given which formed the basis of the counter-claim. The respondent also prayed for an order of eviction, mesne profits and general damages. It would appear from the record that the appellant was duly served with defence and counter-claim, did not file a defence to the counter-claim and upon an application by the respondent, judgment was entered on the same by a Deputy Registrar on 8th January, 2001. A decree followed. An application to set aside that judgment was made and heard by I. C. C. Wambilyangah, J (as he then was) who dismissed it in a Ruling delivered on 8th March, 2001. The respondent then took out a notice to show cause against the appellant where it was prayed that the appellant be committed to civil jail for failure to satisfy that decree. On 13th June, 2001 the appellant was committed to civil jail for 30 days by the Deputy Registrar of the High Court.

On 28th June, 2001 following an application by the appellant to be set free from civil jail I.C.C Wambilyanga, J. recorded the following order:

"**Court**:

1. By consent the application dated 21/6/2001 is hereby abandoned.

2. Judgment Debtor to give vacant possession of the suit premises Plot No. Kisii Municipality Block 111/265 shall be vacated forthwith.

3. Judgment debtor to pay to judgment creditor a total sum of Kshs.300,000/= being rent arrears in the following installments.

i. On or before 5/7/2001 Kshs.50,000/=.

ii. Thereafter he shall pay a sum of Kshs.50,000/= on or before 5th day of every succeeding month until payment in full and in default execution to issue without further application.

4. The J.D. to be released forthwith from Kisii G.K. Prison where he is currently detained.
5.

I.C.C. WAMBILYANGAH

JUDGE

Signed Maari for the applicant 28/6/2001

Signed Bosire advocate for respondent 28/6/2001"

The appellant was thereafter released from civil jail.

Yet another application was filed before the said judge by the appellant challenging the consent order we have set out above. The learned judge did not hear the parties on that application – he acted *suo moto* and in an order made on 2nd July, 2001 dismissed it holding that on the authority of **Flora N. Wasike v Destima Wamboko [1982 – 1988] KLR 625** the appellant could not challenge the consent order recorded in the matter. Similar applications followed and were dismissed by different judges for the same reasons on 6th June, 2002 and 23rd July, 2007.

On 25th July, 2007 the appellant was thereafter before Lady Justice Gacheche with an application for stay of execution. The learned judge noted that execution had been ordered by the court; that an application to this Court for stay of execution had been dismissed and in the premises she dismissed the application.

An application for review was then filed by the appellant and was heard by Musinga, J. (as he then was) on 30th October, 2008. A preliminary objection was taken by the respondent which succeeded and the application failed. The appellant was not done.

On 29th April, 2009 the appellant filed an application praying *inter alia* that judgment and decree on the counter-claim be set aside. That application failed and it is the Ruling thereof that has provoked this appeal.

But so as to complete the rather torturous journey the appellant has travelled, there was also Civil Application No. 244 of 2007 filed in this Court and Civil Appeal No. 197 of 2007 which application and appeal were withdrawn.

Eight grounds are taken in the Memorandum of Appeal drawn by the appellant's then advocates. We say "*then advocates*" because the appellant did on 31st May, 2011 file a "*Notice of Intention to Act in Person*" and urged this appeal himself. The grounds are:

1. *The learned Trial Judge misdirected himself in fact and in fact and in law when he held that he did not have jurisdiction to entertain the Notice of Motion Application dated the **29th day of April 2009** and/or grant the prayers sought vide the said application, whereas the same was bestowed with unfettered jurisdiction as conferred under the Provisions of section 3A of the Civil Procedure Act and Section 1A and 1B, of the amended Civil Procedure Rule.*

2. *The Learned Judge of the Superior Court further misdirected himself in law when he ratified and validated acts committed by unqualified person masquerading as an Advocate, contrary to the requirement of law and practice and specifically, the illegal consent dated the **28th day of June 2001.***

3. *The Learned Trial Judge clearly misapprehended the Law by holding that it was incumbent upon the Appellant or person whom instructed one **Mr. Maari David Tom (now deceased)**, to investigate whether he had practicing certificate before instructing the same.*

4. *That at any rate, the Learned Trial Judge erred in law and in fact by allowing the Appeal to suffer for the mistake of his Counsel.*

5. *The Learned Trial Judge erred in fact and law in dismissing the Application thereby sacrificing substantive justice in the alter of technicality thereby denying the Appellant justice.*

6. *The Learned Judge erred in law in failing to appreciate that new and important issues of law, which had not been raised previously, had been brought to his attention and required consideration and determination on substance for the end of justice and public interests.*

7. *The Learned Judge of the Superior Court clearly failed to address all the issues raised before him and thus occasioned a miscarriage of justice.*

8. *That the Learned Judge erred in law and in fact by failing to find that both the Decree and the consent Order the subject of Application were null and void and called for action of Court* ***Ex-Debito justriatiae****, since the same constituted illegalities and were Orders which ought to be disturbed, Suo Motu, if the attention of the Court is drawn to the same*

The appellant filed written submissions which he highlighted when the appeal came up for hearing before us on 21st July, 2014. He argued that the consent order recorded before Wambilyangah, J. on 28th June, 2001 was made by an unqualified person because the advocate who purported to represent him had no practicing certificate for the year 2001 and had no authority to represent him. He complained that his property was attached and sold without his knowledge and the appeal should therefore be allowed.

Mr. B.K. Gichana, the learned counsel for the respondent, in opposing the appeal, submitted that the appellant was a vexatious litigant who had mounted a multiplicity of applications in various courts. Counsel further urged that the judgment entered on the counter-claim was a regular judgment which had been executed and the appellant's parcel of land had been sold. He further argued that the appellant had benefited from the consent order and cant disown it.

We have considered the record and memorandum of appeal, submissions made and the law.

In the course of the Ruling appealed from the learned Judge stated:

> **"As a result of the consent orders, the applicant was released from prison. He also vacated the suit premises but did not fully comply with clause 3 regarding payment of the outstanding debt. Several years after the said consent was entered into and acted upon, the applicant now wants it set aside because his advocate did not have a practicing certificate for the year 2001. The default clause in the consent order has also been operationalised.**
>
> **I think it will be inequitable for this court to do that. I ask myself, why didn't the applicant or whoever acted on his behalf in instructing Mr. Maari not bother to find out whether he had a practicing certificate at that time?**
>
> **If the applicant had complied with clause 3 of the said consent, this matter would not be in court any more. It is his own default that has raised all these issues. The applicant, having benefited from the impugned consent orders, cannot now be allowed to turn around and argue that his own appointed counsel had no capacity to record the consent. I am of the view that there are instances in which the interests of justice are better served by asking a litigant to pursue his or her own advocate for his own negligence or misconduct rather than re-opening proceedings unnecessarily and this is one of them. See MUNICIPAL COUNCIL OF THIKA & ANOTHER -VS- LOCAL GOVERNMENT WORKERS UNION (THIKA BRANCH) Civil Application No. Nai. 4 of 2001……"**

We totally agree with the learned Judge. The appellant, who had been committed to civil jail for inability to pay a civil debt, was released from prison after a consent order was recorded where he was released on condition that certain conditions be met. The appellant was therefore a beneficiary of the consent order but upon being released from civil jail he instead of meeting his part of the bargain mounted a multiplicity of applications that have run a good 13 years culminating in this appeal. The learned Judge was right to hold that there are instances in which the interests of justice are better served by asking a litigant to pursue their advocate for negligence or misconduct rather than re-opening proceedings. Once consent order was recorded it became a binding contract between the appellant and the respondent and the interests of justice cannot be served by re-opening the matter. The appellant had the option, if he deemed it necessary, to pursue the lawyer who allegedly acted without authority although, again, the lawyers' action had a direct benefit to the appellant who was released from civil jail

after the consent order was recorded.

This appeal has no merit and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR