REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 218 OF 2008

EDWARD LENJO MUSAMULI ……..……... APPELLANT

VERSUS

AMESNET ENTERPRISES LIMITED ……....…… RESPONDENT

(Appeal from the ruling & order of the High Court of Kenya at Mombasa (Sergon, J) dated 24th July, 2008

in

H.C.C.C. NO. 86 OF 2008)
****

JUDGMENT OF THE COURT

On 17th April, 2008 ***AMESNET ENTERPRISES LIMITED*** (hereinafter referred to as the Respondent) filed a suit before the High Court against ***Edward Lenjo Musamuli*** (hereinafter referred to as the Appellant). The respondent was seeking that the appellant be ordered to pay a liquidated claim of KShs.4,350,000/= with costs and interest. The respondent's claim was that sometimes in June 2005, the appellant appointed the respondent as his agent for purposes of sub-dividing and selling a property known as LR No: 1480/11/MN situated at Mwakirunge, Mombasa.

The respondent was supposed to be paid a selling commission equivalent to 5% of the sale price. The respondent was further authorized by the appellant to spend up to KShs.100,000/- as incidental expenses which was refundable or recoverable after the sale of the suit premises. The respondent contends that it set out to source for buyers and carried out many activities including valuations, searches, meetings and dealing with squatter problems who had invaded the land.

The respondent contends that it secured a buyer, namely, the Government of Kenya **(GOK),** through the Ministry of Lands and Settlement who bought the suit premises and by the time the respondent filled this suit in April 2008, the appellant had been paid up to KShs.60,000,000/-. There was a balance of KShs.25,000,000/-. In the suit, the respondent claimed that the appellant neglected and/or ignored to pay the agreed 5% sale commission being KShs.4,250,000/- and KShs.100,000/- mobilization fees totaling to KShs.4,350,000/-.

The appellant filed a statement of defence and denied liability. The respondent applied by way of a chamber summons dated 17th April, 2008, for conditional attachment before judgment of the respondent's property namely, plot No. LR 1480/11/MN or the defendant's partial payment in the sum of KShs.4,548,750/- held by the Settlement Fund Trustees in the Ministry of Lands and Settlement of the Government of Kenya (GOK) pending the hearing and determination of this suit.

The second prayer sought by the respondent was that the appellant do furnish security in the sum of KShs.4,548,750/- being the principal sum plus costs of the suit pending the hearing and determination of the suit. By a ruling dated 24th July, 2008, Sergon J, made the following findings:

"It is apparent from the submissions and the material placed before this court that the defendant has not disputed the allegation that the only known property he owns is LR No. 1480/11/MN. That property has been sold to the Government of Kenya at a price of KShs.85 million. It is also not in dispute that the defendant has received a sum of KShs.60 million having a balance of KShs.25 million. I must state from the beginning that the aforesaid property cannot be attached without involving the purchaser which has paid substantial part of the consideration. The prayer for attachment before judgment therefore fails. I however find the application for provision of security to be well founded. It is clear that the defendant has disposed of the only known property and he is about to get the final payment of the consideration. A fair order in the circumstances of this application is order which I hereby command the defendant to furnish security in the sum of KShs.4,350,000/- which sum should be deposited in an interest earning account in the joint names of the advocates or firms of advocates appearing in the matter within 30 days from the date hereof. In default, the plaintiff will be at liberty to obtain summary judgment since the defendant will have lost the opportunity to defend the suit. The above action will enable the plaintiff to institute garnishee proceedings, if any against the purchaser of the defendant's property pursuant to the provisions of order XXII of the Civil Procedure Rules. The plaintiff to have costs of the application."

Being aggrieved by that order, the appellant appealed and in the memorandum of appeal, he has raised the following grounds:

1. The learned judge erred in law and fact in partially allowing the Respondent's application by way of Chamber summons dated 17th April, 2008 while it was fatally defective on the face of it.

2. The learned judge erred in law and fact in holding that the Respondent's application for furnishing of security was well founded.

3. The learned judge erred in law in holding that failure to furnish security in terms of order XXXVIII takes away the right of a Defendant to defend a suit.

4. The learned judge erred in law in denying the appellant the constitutional right to challenge and/or oppose the envisaged Respondent's application for summary judgment.

5. The learned judge violated the cardinal principles of natural justice and acted and/or appeared to act both as a judge and a lead counsel.

6. The learned judge misunderstood and/or misapplied the principles laid down in Ndirangu vs Abdalla (1984) KLR 747.

7. The judge erred in law in considering extraneous and irrelevant facts in arriving at his decision.

In further arguments to support this appeal**, *Mr Odongo***, learned counsel for the appellant, argued that since the learned Judge dismissed the prayer seeking for the attachment of the property, that took away the powers of the court to grant the prayer for provision of security. Further it was argued that the application was fatally defective as it was brought under the wrong provisions of the law. The applicant should have been given an opportunity to show cause before he was ordered to provide security as provided for under ***order 38 rule 6 of the Civil Procedure Rules***. Moreover, both prayers were consolidated, as the respondent failed to prove that the appellant was intending to frustrate the eventual

decree by removing his property from the jurisdiction of the Court. Although it was acknowledged that the suit property was the only known asset of the appellant that alone cannot form the basis for ordering the appellant to provide security.

Mr. Odongo further submitted that under the provisions of the Constitution, every party has a fundamental right to be accorded a fair hearing. However we find this line of argument does not hold as it is on record that the learned Judge subsequently dismissed an application by the respondent for summary judgment. The appellant will definitely have an opportunity to ventilate his defence during the hearing.

This appeal was opposed; ***Mr Mutisya,*** learned counsel for the respondent was of the view that this appeal lacks merit. This is because the appellant failed to comply with the order to deposit security as ordered by the High Court and also the Court of Appeal. Upon being ordered by the High Court to deposit security the appellant filed ***Civil Application No NAI 260 of 2008***, which was brought under ***rule 5 (2) (b) of the Court of Appeal Rules***, seeking for an order of stay of proceedings pending the hearing and determination of the appeal.

That application was dismissed with costs to the respondent on 12th March, 2010. That notwithstanding the appellant failed to comply with the court orders, and according to ***Mr. Mutisya*** the appellant should not be given audience until he complies with the orders.

On the merit of the application, ***Mr Mutisya*** submitted that *Prayer No (b) in the Chamber Summons* which sought for an order of conditional attachment was well within the provisions of ***Order 38 (5) of the Civil Procedure Rules*** which gives the court three (3) options, one of them being furnishing of security that the respondent had proved and satisfied the Court that the appellant was about to finalize the sale of the suit premises, and it was the only known asset by the respondent. Lastly, Mr Mutisya argued that since the application for summary judgment was dismissed, the appellant's right to be heard is still available.

This appeal raises two issues, firstly, whether the order that the appellant do furnish security was well founded. Secondly, whether or not the default clause providing that in default of furnishing security, the respondent was at liberty to obtain summary judgment took away the appellant's right to defend the suit.

Grounds Numbers 3, 4, and 5 of the grounds of appeal refer to the default clause. It is convenient to deal with the issue of default clause first. At the hearing of the appeal, the appellant abandoned ground 4 of the grounds of appeal.

Rule 6 (1) of Order XXXVIII (now Order 39 rule 6) provides that if a defendant fails to show cause why he should not furnish security or fails to furnish security required within the time fixed, the court may order the property specified or a portion of it be attached.

Thus, the default clause imposed by the High Court to the effect that the respondent was at liberty to obtain summary judgment as the appellant would have lost the opportunity to defend the suit was made in excess of jurisdiction and was erroneous. The learned Judge realized this error when he subsequently dismissed a subsequent application made by the respondent for summary judgment. Thus, grounds 3 and 6 of the grounds of appeal have merit.

Regarding the first issue, the application was made under ***Order XXXVIII Rule 5 and 12, Civil Procedure Rules*** and ***Section 3A of the Civil Procedure Act***. (Act)

Order 38 Rule 5 (1) provides:

5. (1) "Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with the intent to obstruct or delay the execution of any decree that may be passed against him-

(a) is about to dispose of the whole or any part of his property;

Or

(b) is about to remove the whole or part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or appear and show cause why he should not furnish security."

The case of ***NDIRANGU V ABDALLA [1984] KLR page 746,*** relied on by the appellant, construed the above rule. It is clear that the respondent was required to show either that the appellant was about to dispose the whole or any part of his property or was about to remove the whole or part of his property from the local limits of the jurisdiction of the court and that such disposal or removal was with intent to obstruct or delay the execution of any decree that may be passed against him.

It is evident that the respondent did not satisfy the requirements of these Rules. The only property which the appellant sold is the one that gave rise to the respondent's claim for commission and, as the learned Judge found, that property could not be conditionally attached without involving the purchaser. Further, since that property was sold before the respondent's course of action arose, the respondent did not satisfy the pre-requisites under ***Rule 5 of Order XXXVIII*** for granting an order that the appellant either furnishes security or shows cause why he should not furnish security. In any case, default of either to furnish security or to show cause gives rise to an order for conditional attachment, and, as ***Rule 5 (2)*** and ***Rule 6 of Order XXXVIII*** show, the property to be conditionally attached must be specified.

It follows from the foregoing, that the learned Judge erred in granting an order of conditional attachment under ***Rule 5 of Order XXXVIII.***

However, the application was also made under the inherent jurisdiction of the court (that is, Section 3A of the Act). The respondent claimed that it procured the sale of the appellant's property at KShs.85 million to the Government, that he was thus entitled to a commission of KShs.4,350,000/- and that the Government had paid KShs.60 million to the appellant leaving a balance of KShs.25 million. The respondent specifically sought an order for conditional attachment of KShs.4,548,750/- out of the balance remaining to be paid to the appellant. The Rules do not provide for such a case. However, in the interest of justice, we are satisfied that the inherent jurisdiction of the court could be invoked in the circumstances of this case.

For the foregoing reasons, we allow this appeal to the extent that we set aside the ruling and the orders of the High Court and, in lieu thereof, grant an order in terms of the 2nd limb of prayer (b) of the chamber summons dated 17th April, 2008, that out of the amount held by the Settlement Fund Trustees of the Ministry of Lands and Settlement on the account of the appellant, KShs.4,548,750/- be conditionally attached. The Permanent Secretary, Ministry of Lands, shall pay the said sum if it is still held by the Ministry to the Registrar of the High Court within thirty [30] days from the date hereof. Upon payment of the said sum to court, the money shall be deposited in an interest bearing joint bank account in the names of the parties of their respective advocates until the hearing and determination of the suit.

The appellant has substantially succeeded. We give the appellant half of the costs of the appeal.

Orders accordingly.

Dated and delivered at Mombasa this 16th day of March, 2012.

E. M. GITHINJI

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR