REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 48 of 2004

SAMUEL K. NGUTI……..…….....
…….APPELLANT

AND

BROOKE BOND (K) LTD…….....……..
……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Khaminwa, Comm.

of Assize) dated 14th October 2002

in

H.C.C. NO. 236 OF 1996)

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JUDGMENT OF THE COURT

The appeal before us is from an order of the superior court (Khaminwa J) which was made on 15th December, 2004, **in Mombasa High Court Civil Case No. 236 of 1996.** In that order the Court, on the main commanded the appellant, Samwel K. Nguti (the appellant), to return to the respondent Brooke Bond (K) Limited (the respondent) at his own expense certain vehicles which had been attached at the appellant's instance, in execution of decree in the above suit. The order followed a finding that the appellant took out execution proceedings when to his knowledge there was an order of stay of execution in force.

The order the appellant allegedly breached was, in pertinent part, worded in the following terms:

"…**I order stay of execution on condition that the defendant/Applicant shall deposit the sum of Kshs 2,238,854 into a joint account to be held jointly with the applicants advocates and the advocates of the respondent. The deposit to be made within the next 30 days from today. Costs of the application to the respondent"**

It is not in dispute that the respondent complied with that order although it did so six days outside the time it was given. Likewise, it is not in dispute that the appellant's counsel on record, Mr Njenga, accepted the deposit, executed the necessary documents to open the Joint Bank Account into which Kshs,

2,238,854/- was deposited as had been ordered by the judge. The execution process was undertaken soon after the appellant's counsel had co-operated in the opening of he joint account and also, after the aforesaid amount of money had been deposited.

The respondent's motor vehicles, registration numbers KAH, 213S and KAK 134 T, were attached pursuant to the aforesaid execution process. The respondent was, quite properly, not amused by this, and moved the superior court by Chamber Summons expressed to be brought under **Order XXXIX rule 2(2)** of the Civil Procedure Rules, **section 3A** of the Civil Procedure Act , Cap 21 Laws of Kenya, and **section 5** of the Judicature Act, Cap 8 Laws of Kenya, and prayed, among other things:

" **2 That the defendant be granted leave to institute proceedings for contempt of court against the plaintiff and his agents or others acting on his behalf**

3. That the attachment sale of the defendant's motor vehicles registration No. KAH 213S and KAK 134 T but the plaintiff and/or his agent be stopped and the said motor vehicles be returned to the defendants forthwith."

It was pursuant to that application that the order appealed from was made. The appellant's memorandum of appeal contains seven grounds of appeal, namely, that the superior court erred in failing to hold that the respondent's application was not justciable and was incurably defective; that the application lacked merit; that the court erred in failing to hold that the order of stay had lapsed because of the respondent's failure to deposit the decretal sum within the time it was allowed; that the court erred in failing to hold that no appeal was filed within the stipulated time; and such default vitiated the stay order; that the court erred in holding that the appellant needed to seek the court's approval before proceeding with execution and that it erred in holding that the execution of decree was unlawful as a result of which the appellant was condemned to bear all costs incidental thereto.

We would like to state from the outset that whether or not the respondent filed its appeal timorously and whether or not its notice of appeal had lapsed was not a relevant factor in the application. The main issue in that application was whether or not the order of stay had lapsed as to have entitled the respondent to proceed with the execution of decree in the aforementioned suit. The superior court held that it hadn't.

Mr. Njenga for the appellant submitted before us that as soon as the 30 day period was granted to deposit the decretal sum expired the order of stay lapsed. That in our view would have been the position had he not accepted the late deposit of the money and himself executed all the necessary bank documents to facilitate the deposit. We did not understand Mr. Njenga to say that he did so to hoodwink the respondent. Whatever he agreed to do must have been in furtherance of the conditional order of stay. It should therefore not lie in his mouth to submit that that court order had lapsed by the time the appellant took out execution proceedings. By his conduct he led the respondent to believe that although the time for deposit of the decretal sum as ordered by the court had lapsed the appellant was prepared to accommodate them. The superior court was perfectly entitled to hold that the appellant blatantly breached the order of stay.

Mr. Njenga also submitted before the superior court and the appellant has made it a ground of appeal, that the application from which the ruling appealed from arose was not justiciable because it was incurably defective. We earlier set out the main prayers in that application. Stay of execution in the suit was granted under order **XLI Rule 4** of the Civil Procedure Rules. There is no provision under either order **XLI** or **order XXI** of the Civil Procedure rules, which deals with breach of a stay order. We appreciate the difficulty the respondent's legal adviser must have been in when drafting the aforesaid applicant. Clearly **order XXXIX** was not applicable as the order in question did not grant injunctive relief's. However, the respondent having invoked inherent jurisdiction under **section 3A** of the Civil Procedure Act in addition, the application cannot be said to have been incurably defective. That is the more so because from its contents the application clearly spelled out the breach the respondent was complaining about and the relief it was seeking. The appellant understood the nature of the application and fully responded to it. We are unable to discern any prejudice to the appellant arising from the improper inclusion of **Order XXXIX** in the application.

There is, however, a fundamental issue which we raised ***suo Motu***, but which Mr. Njenga did not appear to appreciate fully. In substance the respondent's application was challenging what it considered to be wrongful or unlawful attachment of its property. The provisions relating to attachment fall under **Order XX1** of the Civil Procedure Rules. **Section 75** of the Civil Procedure Act, prescribes orders of the superior court which are appeallable as of right. These are amplified under **Order XLII.** The only orders under **Order XXI** which are appeallable as of right are those made under **rule 25,** which deals with stay of execution pending the determination of a suit, **rule 57,** which relates to objection proceedings, **rule 65(3),** which deals with auction sales of attached property, and **rule 81,** which deals with the issue of when a sale in auction- sale becomes absolute. The order appealed from does not fall under any of those provisions, and it cannot be said that the appellant had an automatic right of appeal

Mr Njenga's submission on this aspect was that the respondent's application having been expressed to be brought under among other provisions, **Order XXXIX**, the appellant had an automatic right of appeal. The appellant was obliged to consider the substance and not the forum of the application. We are however, inclined to give the appellant the benefit of the doubt because ordinarily this appeal should have been struck out as incompetent.

A final point we need to consider is the order the superior court made on costs. Mr Njenga submitted that there was no justification for condemning the appellant to pay all the costs arising from and occasion by the execution proceedings which were vacated. Mrs Atieno Otieno, for the respondent submitted that the issue of costs in the entire litigation between the parties was dealt with by this Court in Civil Appeal No 50 of 2004. In that appeal the respondent, as appellant successfully challenged the award of damages to the appellant in the aforesaid suit. The order on costs was that each party would meet own costs, and the order of the superior court in which that court had awarded cost to the appellant in this appeal was respondent in that appeal was set aside. We do not think that order affected the order made against the appellant in the execution proceedings as those proceedings were not under consideration. We are also of the view that that order was proper as the appellant's conduct was blatant, uncalled for and wrongful.

In the result we hereby dismiss the appellant's appeal but make no order as to costs as the respondent though successful was responsible for inclusion of wrong provisions of the law in its application to the superior court.

Dated and delivered at Mombasa this 21st day of July 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR