



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC APPEAL NO. 8 OF 2018

JOHN NYAUMA OMBATI.....APPELLANT

VERSUS

SOTIK TEA CO. LTD.....RESPONDENT

JUDGEMENT

1. This appeal was filed by way of Memorandum of Appeal dated 17th March, 2014 and Amended on 20th September, 2019 filed through the firm of Mboga G.G & Company Advocates. It is based on the following grounds;-

- 1) THAT the Honourable Magistrate failed to appreciate that provision of security is not payment of a decretal sum and therefore interest continues to accrue at court rates as ordered by the court throughout the period an appeal is pending.**
- 2) THAT the Learned Magistrate erred in Law and in fact in failing to understand and appreciate the Appellants submissions.**
- 3) THAT the court erred in holding that the plaintiff was seeking for unexplained costs and interest which are unjustified.**
- 4) THAT the Honourable trial court erred in law and in fact in holding that the plaintiff did not give any explanation as to why he did not extract a decree inclusive of an extra costs and interest earned.**
- 5) THAT the Honourable trial Magistrate erred in Law in holding that there was undue and unexplained delay regarding the filing of the application dated 2nd April, 2013.**

He prays as follows;

- i. That the Orders of the trial magistrate dated 18th February, 2014 be set aside.***
- ii. That the appellant be allowed to proceed with execution to recover accrued interest and further costs.***
- iii. That costs of the Appeal be provided for.***

Brief facts

2. The Appellant vide a plaint dated 20th January, 2004 brought a suit against the Respondent in Keroka being SRMCC 49 of 2004, seeking for special damages, general damages and cost of suit arising from alleged injuries sustained at the Respondent's workplace brought about by the negligence and failure by the Respondent to issue him with safe working condition while at the employ of the respondent.

3. The suit was heard and judgment delivered on 27th April 2005 in favour of the plaintiff for Kshs. 60,000/= general damages and Kshs. 2,500/= special damages together with costs and interest.

4. The matter was scheduled for hearing of the main suit on 6th April, 2005, as was consented by both parties and evidence in the proceedings herein. However, on the said date, the defendants did not attend court therefore hearing proceeded in their absence.

5. On the date of judgment, counsel for the respondent attended court and applied for stay of execution for 30 days which was granted. Before the lapse of the 30 days, the respondent on 20th May, 2005, filed an application dated 19th May, 2005 securing interim stay of execution pending inter partes hearing which application did not proceed on several occasions leading to its dismissal on 28th October, 2005.
6. On 2nd November, 2005, the defendant/respondent filed another application seeking stay of execution and reinstatement of the application dated 19th May, 2005 which was dismissed on 28th October, 2005. The respondent yet again obtained interim orders of stay and the Hon. Magistrate directed them to serve for inter parte, but they failed to serve the said application and adjourned severally culminating on its dismissal on 20th December, 2005 with costs to the Plaintiff/ Applicant herein.
7. For the third time, the Respondent filed another application dated 22nd December, 2005 on 23rd December, 2005 now seeking stay of execution and reinstatement of the application dated 2nd November 2005. Stay of execution was granted and extended severally until 5th May, 2006 when the same was heard inter partes and a ruling was delivered on 24th May, 2006 dismissing it with costs.
8. On 13th June, 2006, the defendant/respondent filed a fourth application of even date, seeking stay of execution pending hearing and determination of their appeal against the decision of 24th May, 2006 being Kisii HCCA No. 132 of 2006. The said application was granted on condition that pending hearing and determination of the defendant's appeal a sum of Kshs.87,000/= inclusive of costs be deposited in a joint interest earning account in counsels' names which was done on 8th August 2006 when a sum of Kshs. 86,675/= was deposited.
9. The respondent herein did not prosecute their appeal (Kisii HCCA 132 of 2006) and on 4th August, 2009 the applicant herein sought for its dismissal for want of prosecution vide an application dated 3rd August, 2009 and the said appeal was eventually dismissed with costs to the appellant herein.
10. Subsequently, the appellant sought for release of the security that was in the advocates' joint account and a sum of Kshs. 97,895.70/- was released to him. The said sum had earned an interest of Kshs. 11,220/= only, an amount which the appellant herein considered extremely low as compared to the interest awarded at Court rate.
11. A decree was drawn by the court dated 9th March ,2011 showing that the total amount due as at that date was Kshs. 159,390/- less the received amount of Kshs. 97,895/= leaving a balance of Kshs. 61,495/- which the appellant herein sought to execute and recover from the respondent.
12. It is alleged that the execution was received with a lot of resistance and the respondent herein filed an application dated 26th April, 2011, seeking, to set aside those warrants arguing that the sum received by the appellant from the joint account was in full settlement of the decretal sum together with costs and interest.
13. The application was opposed by the appellant herein but the Court allowed the said application on grounds inter alia that no notice to Show cause was taken.
14. On 2nd April, 2013 the appellant herein filed an application seeking for orders inter alia that the defendant/respondent herein Shows Cause why the said decree should not be executed. Similarly, the application was opposed and the Honourable Magistrate dismissed it, which formed the basis of this appeal.
15. This appeal proceeded by way of written submissions with the appellant filing his submission on 9th March 2021 and the respondent filing theirs on 31st March, 2021.

Appellant's submissions.

16. The Appellant submitted on all the five grounds of appeal together. He submitted that the Honorable Trial Magistrate completely misapprehended the facts of this case and delivered a ruling that was a travesty of Justice.
17. He submitted that from the decree drawn by the trial court, the total sum payable to the appellant was a sum of Kshs. 159,390/-. He further confirmed that, the appellant received a sum of Kshs. 98, 665/- from the joint account held by the advocates for the parties, leaving a balance of Kshs. 61, 495/- plus attachment costs all adding up to Kshs. 69,455/- which remain unpaid to date. He submitted further that the decree was not faulted by the respondent in court. He thus argued that, the appellant is entitled to recover the decretal sum fully.
18. Accordingly, he submitted that the assertion by the Honourable trial Magistrate that the appellant was seeking for unexplained costs and interest which was unjustified is wholly erroneous. He argued that, a decree was passed on 27th April, 2005 for Kshs.62,000/= plus costs and interest .the decretal sum was assessed at that time and agreed at Kshs. 87,000/- which the respondent herein gave as security and was deposited in an interest earning account. He however argued that security is not payment and therefore interest on the decretal sum continued to accrue at Court rates.
19. It is the appellant submissions that, since the court had set aside warrants of attachment on grounds that no notice to Show Cause had been taken out as required by order 22 rule 18 of the civil procedure Rules 2010, the appellant's application dated 2nd April, 2013 ought not to have been declined.
20. He attributed the delay to execute the decree for over 5 years to the respondent's numerous applications in the trial court and Respondents Appeal being Kisii HCCA 132 of 2006.

21. He submitted that the respondent did not show any cause why execution would not be levied but still the Honourable trial Magistrate proceed to dismiss the appellant's application erroneously.

22. He thus urged this Honourable Court to allow his appeal and set aside, the Honourable trial Magistrate's ruling dated 18th February 2014. In addition, sought for costs of this Appeal.

Respondent's submissions.

23. The respondent submitted on only one issue; whether the learned magistrate erred in finding that the appellant was seeking unexplained costs and interests and submitted that execution can only be levied pursuant to a valid decree issued in favour of the party seeking execution and cited the case of **Rubo Kipngetich Cheruiyot –versus- peter kiprop Rotich[2006] eklr.**

24. It is the respondent's submissions that, the appellant herein sought to levy execution against the respondent by way of Notice to show cause for costs which according to the respondent were stayed by consent order entered by the court on 23rd June, 2006 pending the respondent's appeal number HCCA 132 of 2006 in Kisii High court.

25. It is argued that, the appellant herein did not exhibit any decree & certificate of costs amended or otherwise to guide the trial court in determining the existence of the further costs pleaded therein. Accordingly, the respondent submitted that the trial magistrate cannot be faulted for holding that the appellant herein was seeking unexplained costs.

26. It is the respondent's submissions that, the costs contested herein were never taxed or assessed as required. Additionally, that the claim of further interest on the costs claimed by the appellant herein is unwarranted as it is tantamount to double enrichment in view of the fact that the decretal amount earned interest upon being deposited in the interest earning account opened by advocates for both parties. They thus urged this court to estop the appellant from seeking further interest and dismiss the appeal in entirety.

27. I have examined the averments and submissions of the parties herein. From the record before me there is only one issue to determine being whether the amount deposited in court as security settled this claim. Order 22 of the Civil Procedure Rules deals with execution of decision. Order 22 Rule 1 & 2 states as follows:-

[Order 22, rule 1.] Modes of paying money under decree.

1. (1) All money payable under a decree or order shall be paid as follows—

(a) into the court whose duty it is to execute the decree;

(b) direct to the decree-holder; or

(c) otherwise as the court which made the decree directs.

(2) Where any payment is made under subrule (1) (a), notice of such payment shall be sent by the court to the decree-holder and his advocate, if any.

[Order 22, rule 2.] Payment out of court to decree-holder.

2. (1) Where any money payable under a decree of any kind is paid direct to the decreeholder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree- holder may certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly.

(3) The judgment-debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

28. In the instant case money was deposited in court as security and later released to the claimant applicant. The money released was released as part of the claim.

29. On 9/3/2011, the applicant herein extracted a decree on the matter. The decree set out the amount payable to the claimant including costs and interest taking into consideration the amount deposited in the account.

30. Before execution could proceed the respondents filed application for stay and later an appeal which stalled the execution process.

31. The respondent still failed to prosecute the appeal further delaying execution.

32. Since there is a decree which was extracted and approved by court, the delay in executing it can only be blamed on the respondent with his numerous application.

33. It therefore follows that it is true that the decree extracted in 2011 has not been fully executed and therefore I agree with the appellant that

the security deposited in court didn't satisfy execution of the decree fully and it was in error that the Hon. Magistrate declined to allow the appellant to execute what is owned to him by the respondent.

34. I allow this appeal and allow the appellant to proceed and execute the decree and recover what is pending unpaid.

35. The orders of the trial magistrate dated 1st February 2014 are hereby set aside.

36. Costs of the appeal and of the lower court be borne by the respondent.

Dated and delivered in open Court this **27TH day of MAY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwita for respondent – present

Mboga for appellant – absent

Court Assistant - Fred