



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI

CIVIL APPEAL NO 2 OF 2020

STEPHEN MWALLYO MBONDO.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

(Being an appeal from the ruling of D Wasike Senior Resident Magistrate Court delivered on the 13.08.2020 in ELRC No. 36 of 2019)

BETWEEN

STEPHEN MWALLYO MBONDO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT

JUDGMENT

1. This is an appeal from the ruling of the trial court delivered on 13<sup>th</sup> August 2020 in respect of the application dated 18<sup>th</sup> June 2020. In the application, the Respondent (Defendant before the trial court) applied for orders to declare the execution of the decree arising from the ex-parte judgment delivered by the said court as unlawful. It was sought that the attachment levied pursuant to the impugned execution be lifted and the goods seized in the attachment be released to the Respondent. Further, the Respondent applied that the said ex-parte judgment be set aside and that the Respondent be granted leave to defend the suit on its merits. These orders were granted by the trial court.

2. Unhappy with the ruling, the Appellant now appeals to this court against it on ten (10) grounds. An analysis of the ten (10) grounds yields five (5) broad issues for determination as follows:

- a) *Whether the trial court erred in lifting the impugned execution against the Respondent.*
- b) *Whether the trial magistrate, in setting aside the ex-parte judgment, exercised her discretion capriciously.*
- c) *Whether the trial court acted with bias against the Appellant and his Advocates on record.*
- d) *Whether the trial court erred in condemning the Appellant's Advocates to pay the costs of the auctioneers for the nullified execution.*
- e) *Whether the Appellant is entitled to the orders sought in the Appeal.*

3. When the appeal came up for directions, the parties agreed that it be heard by way of written submissions. Both the Appellant and the Respondent have filed detailed and helpful submissions which will inform my decision. I will consider the issues set out above seriatim.

4. This is the first appeal from the impugned decision. I am aware of my obligation to re-evaluate the record including the affidavit evidence and come up with my own conclusions (see *Moses Odhiambo Muruka & another v Stephen Wambembe Kwatenge & another [2018] eKLR*).

5. The 1<sup>st</sup> issue relates to whether the execution of the ex-parte judgment was unlawful. On this, the trial court found in favour of the argument that the execution levied against the Respondent was unlawful. As a result, the court lifted the resultant attachment and directed that the Appellant restores to the Respondent the motor vehicle that had been seized.

6. The Appellant does not agree with the trial court's view in this respect. In the Appellant's view, the execution was valid and regular and ought not to have been recalled. The Appellant contends that the question whether execution by way of attachment of goods can be levied against the Respondent is a procedural matter which should not stand in the way of enforcement of the trial court's judgment.

7. I have considered the rival arguments on this point. The Respondent's case before the trial court on the issue is quite straight forward. The Respondent contended that it is a government body. Therefore, in terms of section 21 of the Government Proceedings Act, a court judgment against it cannot be enforced by way of attachment and sale of its property.

8. Further, it was the Respondent's case before the trial court that the auctioneers failed to comply with the Auctioneers rules as they allegedly failed to issue the Respondent with a proclamation. That the said auctioneers did not furnish the Respondent with an inventory of the attached property for the Respondent's signature. Neither did they issue a certificate indicating that the Respondent had declined to sign any inventory presented to it. For these reasons, the Respondent argued that the execution levied against its property was unlawful and had to be lifted unconditionally.

9. On the other hand, the Appellant's counsel argued (as he does in the appeal) that the rules purporting to bar execution of court orders against the Respondent by way of attachment of its assets are merely procedural. That in view of article 159 of the Constitution which forbids paying of undue regard to procedural technicalities, these rules ought to be ignored as to do so will be facilitative of delivering substantive justice to the Appellant.

10. Counsel contended that a proclamation issued. Indeed, the court was satisfied that the Auctioneers rules in relation to issuance of proclamations were complied with. Therefore, nothing turns on this in the current appeal.

11. However, I am not in agreement with the position taken by the Appellant on mode of execution visited upon the Respondent. Section 21 of the Government Proceedings Act clearly spells out the procedure to be followed in executing decrees against the government or government agencies. Further, the section clearly provides that this procedure shall apply to county governments with appropriate modifications. The procedure clearly forbids enforcement of decrees against government (including county governments) through attachment of assets.

12. Counsel for the Appellant argues that the court should have invoked article 159 of the Constitution to ignore these clear provisions of law. While article 159 of the Constitution underscores the need to facilitate substantive justice, it is clear to me that what it frowns at is paying "undue regard" to procedural technicalities at the expense of substantive justice. This provision is not a license for the court to overlook every procedural rule in the book in pursuit of substantive justice. In my view, only when a procedural rule presents undue demands on the parties can it be justifiable to ignore it. And this must be only when the decision to ignore the rule will not occasion undue prejudice to the other party to the litigation.

13. Indeed, the position of the court is that where the law provides clear procedure for executing a particular act (including execution of decrees and orders), this procedure should as a general rule, be followed. It is not permissible that a party should ignore clear provisions of statute only to seek to stand behind article 159 of the Constitution for purposes of seeking refuge even when it is clear that to do so will prejudice the opponent. This question has been addressed by the court in a number of cases. In **Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another [2015] eKLR**, the Court of Appeal had this to say of the matter: -

***"It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the Elections Act stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the Constitution. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition."***

14. The rationale for shielding government agencies from direct execution of court decrees and orders against their assets appears sensible. As was observed by Odunga J in **Republic v Permanent Secretary Office of the President Ministry of Internal Security & another Ex-Parte Nassir Mwandihhi [2014] eKLR**, no government agency has money that is readily available for release unless it has been factored in the agency's expenditure. Only funds which have been approved in the agency's budget can be lawfully paid out.

15. Processing approvals to commit funds to satisfy court decrees often takes some time. During this period, it is necessary that the agency is shielded from a run in on its assets through attachments. If this is not done, there is a likelihood of the government being overrun by attachments with the consequence that it will be completely incapacitated to deliver on its core mandate of providing services to the public.

16. There is therefore every reason for the procedure set out in section 21 of the Government Proceedings Act. And it appears clear to me that to ignore it will have adverse consequences on government agencies including the Respondent herein.

17. The trial court was therefore correct in holding that before enforcing a court decree or order against a government agency including the Respondent herein, the procedure set out in section 21 of the Government Proceedings Act has to be strictly followed. I find no error on the part of the trial court in this regard.

18. On the 2<sup>nd</sup> issue, it is contended by counsel for the Appellant that the trial court acted capriciously in making its decision to set aside the ex-parte judgment. The Appellant argues that as the ex-parte judgment was regular, the trial court ought not to have exercised its discretion to set it aside as the Respondent did not meet the parameters that would entitle the court to exercise its discretion to upset the judgment.

19. In the Appellant's view, the Respondent's conduct was that of an indolent litigant who was undeserving of the court's intervention to bend back in its aid. The Appellant argues that the Respondent did not demonstrate that it has a defense on the merits against the claim.

20. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of ***Mbogo & Another vs Shah***, [1968] EA, these principles were set out as follows: -

***“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”***

***“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”***

21. In ***Patel v E.A. Cargo Handling Services Limited*** (1974) E.A. 75, this Court held as follows:

***“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”***

22. In ***Shanzu Investments Ltd v Commissioner of Lands*** [1993] eKLR, the court observed as follows on the discretion to set aside ex-parte judicial decisions: -

***“The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?”***

23. In ***Shabir Din v Ram Parkash Anand*** (1955) 22 EACA 48 Briggs JA said at 51: -

***“I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”***

24. From the foregoing, it is evident that the trial court was clothed with wide discretion to set aside the decision it had made ex-parte. The only conditions the court was to consider were: whether the Respondent had a reasonable defense on the merits; whether there would be any prejudice occasioned on the Appellant if the orders sought were granted; and whether there was a reasonable explanation for the delay.

25. From the record, the trial court considered all these factors. First, it considered whether the Respondent had a viable defense to the cause. The court considered that the claim for pending allowances of Ksh. 508,000/= had been disputed by the Respondent. This contestation, in the court's view, raised a triable issue.

26. The Appellant's counsel argues that the sum of Ksh. 508,000/= had in fact been admitted by the Respondent in the internal memo dated 6<sup>th</sup> February 2018. Therefore, it could not be a basis for holding that the Respondent had a reasonable defense to the cause.

27. I have looked at the internal memo under reference and produced by the Appellant as exhibit one (1) in the case before the trial magistrate. The document is authored by the Appellant. In it, the Appellant raises the issue of pending payments to him from the Respondent. However, he does not indicate the amount in question.

28. On the memo, there is a hand written comment on what is described as pending “PUs” that were not paid. However, what is meant by pending “PUs” is not self evident from the said document. And neither is it clear who the author of the note was.

29. The only other document that mentions the sum of Ksh. 508,000/= claimed by the Appellant in the cause is a hand written tabulation of the amount produced by him as exhibit two (2). However, the tabulation is neither signed nor addressed to any specific person.

30. In the face of these discrepancies, I think that the trial court was right in holding that the claim for Ksh. 508,000/= was, prima facie, reasonably contested by the Respondent. Whether the amount was due to the Appellant was clearly a triable issue particularly having regard to the fact that the Respondent disputed it.

31. A defense that raises a triable issue is not one that must ultimately succeed. Rather, it is one that raises a matter that is deserving of further interrogation at a full trial.

32. This position is explained in *Five Forty Aviation limited v Tradewinds Aviation Services Limited [2015] eKLR* where the Court of Appeal, citing its previous decisions stated as follows:-

***“We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said: “In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”***

33. On whether setting aside the ex-parte judgment would occasion the Appellant prejudice, I note that the trial magistrate addressed the issue. After careful evaluation, the court arrived at the conclusion that any prejudice suffered by the Appellant could be addressed by an award of costs. In the final analysis, the court awarded the Appellant costs of the application.

34. Finally, the court also addressed the question whether the application to set aside ex-parte judgment had been filed after undue delay. In the court’s view, the suit was hardly one year old in the court. Although the magistrate expressed her displeasure with the manner in which the Respondent had handled the court processes, she took the view that the dictates of justice weighed in favour of allowing the matter to be heard on merits.

35. In *Shabir Din v Ram Parkash Anand*, it is noted that the court expressed the view that notwithstanding that the applicant’s conduct may have been negligent, the court could still grant orders allowing re-opening of a cause where there were other compelling reasons to do so. What ought to be appreciated here is that the court’s discretion in this regard is wide and freely but judiciously exercised.

36. In view of the foregoing, I find that the court did not exercise its discretion capriciously when deciding whether to set aside the ex-parte judgment on record. The Appellant has failed to demonstrate that the court failed to take into account matters it ought to have or that it considered matters it ought not to have considered in arriving at its decision.

37. In the words of *Shah v Mbogo*, I am not satisfied that the court in exercising its discretion misdirected itself in respect of some matters and as a result arrived at a decision that was erroneous. Nor am I convinced that the court was evidently misdirected in the exercise of its judicial discretion in this respect with the consequence that it has occasioned injustice on the Appellant. Accordingly, I decline to allow this ground of appeal.

38. The 3<sup>rd</sup> issue relates to whether the trial court acted with bias against the Appellant and his Advocates on record. The Appellant’s Advocate has made several observations in support of this contention. First, he suggests that the trial court ignored the Appellant’s submissions in opposition to the Application for lifting of execution and setting aside the ex-parte judgment. Second, he suggests that by adjudicating on the question of auctioneers’ costs when it had not been raised by the parties, the trial court was in effect assisting the Respondent in the matter. Third, it is the Appellant’s advocate’s view that by the court ordering him to personally pay the auctioneers’ costs without first hearing him on the issue she displayed open bias against the Appellant and his lawyers.

39. I am hesitant to attribute bias on the trial court purely on the basis of the above averments by the Appellant. First, the Respondent objected to the impugned attachment on, inter alia, the ground that the auctioneer had violated the Auctioneers’ rules by failing to issue the requisite proclamation. The Appellant filed evidence of a proclamation having issued and submitted on the matter. Relying on the submissions by the Appellant, the court dismissed the Respondent’s assertion on this question. This alone is clear evidence that the trial court considered the Appellant’s evidence before it made its decision.

40. Section 27 of the Civil Procedure Act in part provides as follows on the issue of directions on costs incurred in a suit:-

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.”***

41. My understanding of the above provision is that it vests in a trial court the power and discretion to determine who should bear costs that arise directly from a suit and those that are incidental to it. In my view, this covers all costs including auctioneers’ costs if not specifically provided for in another statute.

42. Section 7 of the Auctioneers’ Rules provides as follows regarding payment of auctioneer’s charges: -

***“ A debtor shall pay the charges of the auctioneer unless: -***

***a) that debtor cannot be found; or***

***b) he has no goods upon which execution can be levied; or***

***c) the sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.”***

43. What is clear from the rule is that it deals with situations where there is a debtor/judgment debtor and creditor/deed holder. The rule does not address a situation where there is neither a creditor nor a debtor and yet auctioneer’s costs have been incurred and are to be settled. In the current case for instance, there is neither a debtor nor creditor, the ex-parte judgment having been set aside.

44. In my view, in such a scenario, the trial court had the power to give directions on who should bear the costs of the auctioneer in terms of the power donated to her under section 27 of the Act. And having regard the conduct of counsel in the cause, the court had the power to decide whether he/she should shoulder the costs. As is suggested in *Ngomeni Swimmers Limited v Katana Chara Suleiman [2014] eKLR*, this power is summary in the sense that the issue need not have been pleaded for the court to pronounce itself on it. I therefore see no bias by the court in this respect.

45. However, as I will indicate later in the judgment, although there is no evidence of bias against the trial court, I think it was an error of judgment on the trial court's part to condemn the Appellant's advocates to pay the costs personally without first hearing him. This is notwithstanding that the issue of costs need not have been pleaded in order for it to be addressed by the court. I therefore decline to grant the grounds of appeal that challenge the court's decision on the broad ground of bias by the trial magistrate.

46. The 4<sup>th</sup> issue relates to whether the trial court erred in condemning the Appellant's advocates to pay the costs of the auctioneers for the nullified execution. Whereas I have indicated that it was within the court's power to address this issue without it having been pleaded, it was nevertheless necessary for the court to draw counsel's attention to the fact that it was considering issuing directions that he pays the costs personally before it issued its directions in this regard. The failure to do so resulted in misdirection on the part of the trial court with the result that counsel's views were not taken on board before the order was made.

47. On this issue, the Court of Appeal in *Ngomeni Swimmers Limited v Katana Chara Suleiman [2014] eKLR* had this to say: -

***“In determining whether an Advocate should be condemned to bear costs personally, his conduct in the matter is of paramount importance. Where an Advocate's conduct is plainly unjustifiable for instance, if he deliberately misleads the court and or client, craftily interprets or misinterprets the law, his conduct is oppressive and blatantly aimed at achieving ulterior motives an order for costs also known as ‘wasted costs’ can be made against him personally. We must hasten to add that the above list of indiscretions is not exhaustive. At the end of the day, each case must be determined on its own facts. Suffice to add that before the order is made, the Advocate in question is entitled to be heard in rebuttal.”***

48. Had the trial court heard the Appellant's advocate, he would have had the chance to raise the objection he now does in relation to the order. For instance, the court would have been told that although it's the lawyer who applied for execution, it was in truth the court that ultimately had the power to grant or refuse the application. That in granting a warrant to execute a decree by way of attachment and sale where the law did not permit, the trial court made an error of law and that this could not be blamed on the lawyer entirely.

49. Further, I understand auctioneers to be officers of the court. They are actually appointed by the court to execute its orders. To this extent, they are agents of the court. It therefore appears to have been inaccurate for the trial court to have observed that the Appellant's advocates appointed the auctioneers to execute the warrants in question. This position is made clear in *National Bank of Kenya Ltd v Joly Family Stores & another [2005] eKLR*, when the court said as follows: -

***“Contrary to the finding of the trial Court, auctioneers, while executing decrees of the courts, are indeed agents of the Court. It is the courts which give them authority to execute, for example by the different modes of warrants and the same court can order them to stop an execution process.”***

50. As an officer of the court involved in the day to day process of enforcing court warrants, one would wonder why a licensed auctioneer would move to execute warrants of attachment of movable assets against a government agency. One would want to believe that it ought to be within the knowledge of such auctioneer that this would be irregular. And if this is so, one would wonder why an auctioneer who has undertaken this irregular process would raise a fee note to be paid for undertaking an illegality. I only make these abstract observations as obiter dictum. However, I will order that the order by the trial court that the Appellant's advocate pays the costs of the auctioneer be and is hereby set aside. Accordingly, the auctioneer may move the court for a determination regarding whether his costs are payable and by whom.

51. For the avoidance of doubt, I do not think that the Respondent should be burdened by the auctioneer's costs. The Respondent was a victim of an irregular attachment. To that extent, I uphold the trial court's finding that the Respondent is not responsible to settle the costs of the auctioneer in any event.

52. As both parties have partially succeeded in this appeal, I shall order that each party bears his/its own costs.

## **Summary**

The following are the court's findings: -

i) *The court affirms that the execution process against the Respondent was unlawful. The trial court was right to order that the process be set aside and the attachment be lifted.*

ii) *The trial magistrate did not exercise her discretion to set aside the ex-parte judgment capriciously. The ex-parte judgment was validly set aside.*

iii) *The trial magistrate was not biased against the Appellant and his advocates.*

iv) *The trial magistrate erred in condemning the Appellant's advocates to personally pay the auctioneer's costs. Consequently, this order is set aside.*

v) *For the avoidance of doubt, the trial court's order that the Respondent was not liable to settle the auctioneer's costs was valid. The same is maintained.*

vi) *As both parties have partially succeeded in the appeal, each party shall bear their own costs.*

**DATED, SIGNED AND DELIVERED ON THE 20TH DAY OF DECEMBER, 2021**

**B. O. M. MANANI**

**JUDGE**

**IN THE PRESENCE OF:**

**NO APPEARANCE FOR THE APPELLANT**

**MISS GITARI FOR THE RESPONDENT**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M. MANANI**

**JUDGE**