REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 8 OF 2019

NANCY WAKUTHII KAGO.....APPELLANT/APPLICANT

VERSUS

JULIA MUTHONI KIURA.....RESPONDENT

RULING

A. Introduction

1. I have before me an application dated 25.02.2021 which was filed under certificate of urgency and wherein the appellant/ applicant seeks the following orders; -

1) Spent

2) Spent

3) Spent

4) Spent

5) That this Honourable Court be pleased to find that the warrants of arrest issued on 7.01.2021 in Embu CMCC 146 of 2017 as a mode of enforcing the decree of the lower court is unconstitutional, unfair and disproportionate and a clear infraction of her right to personal liberty.

6) That this Honourable Court be pleased to set aside the warrants of arrest issued on 7.01.2021 in Embu CMCC 146 of 2017 committing the applicant to civil jail and set her free forthwith.

7) Costs of this application.

2. The application is premised on the grounds on its face and further on the supporting affidavit sworn by the appellant/ applicant. In a nutshell, the applicant deposed that she was committed to civil jail by the lower court on 25.02.2021 and she was not aware of the Notice to Show Cause before the lower court issued on 5.01.2021 and the warrants of arrest issued 2 days later on 7.01.2021 but only learned about her arrest when she sent her advocates on record to go and peruse the file. That even if she was aware, there is no way she could have had an opportunity to accept service and defend herself within the 2 days the warrants were issued. The applicant further deposed that it has not been shown that the respondent herein has exhausted other and less intrusive or restrictive measures to secure payment from the applicant and the only recourse is to have the applicant incarcerated and that the applicant is not gainfully employed and is a housewife and has exhibited her inability to pay the decretal sum before this court in an affidavit sworn on 20.01.2020 and she even offered the logbook to motor vehicle registration number KCE 200T as security pending the hearing of the appeal herein. Further that the warrants and the ultimate incarceration are not in compliance with article 11 of the International Convention of the Civil & Political Rights to the extent that no one shall be imprisoned merely on the grounds of inability to fulfill a contractual obligation.

3. The said application is opposed by way of a replying affidavit sworn by Mr. Morris M. Karigi the respondent's advocate, and wherein he deposed that the instant application is *res judicata* as there had been two previous similar applications which had already been determined by this court and which ruling the applicant did not appeal against; that the advocate and the judgment debtor were duly served with the Notice to Show Cause but the applicant chose not to attend court and in any event, the issue of non-service ought to be addressed before the trial court seized of the proceedings and which issued the warrants of arrest and the committal orders; that in a similar application determined by this court on 17.09.2019 the court allowed the same conditionally but the applicant has never complied with those orders to date and is not keen on satisfying the decree subject of this appeal as required and does not even attempt to partly settle the decree but is only determined to defeat the respondent's interest in enjoying the fruits of the decree or judgment which was delivered more than two years ago; that there are no good grounds raised to warrant issuance of the orders sought and the instant application ought to have been made in the lower court and

not this court; that the only mode of execution left is for committal to civil jail as provided by law and which mode is not unconstitutional and neither is the instant application a constitutional petition seeking declaration of rights and the application ought to be struck out *ex dibito justitiae*. The respondent's counsel deposed that the instant application ought to be dismissed with costs to the respondent for being res judicata, abuse of the court process and misleading.

4. With the leave of the court, the applicant filed a further affidavit and wherein she reiterated that the warrants of arrest were issued a year after the Notice to Show Cause was issued and without any further notice of the proceedings. She further deposed that the application is not res judicata and that she has not willfully refused to pay the decretal sum but she does not see how she can pay the same in her current state.

5. The application was disposed of by way of written submissions and wherein each of the parties reiterated their rival positions in their respective pleadings.

6. I have considered the pleadings herein and the rival submissions filed by the parties and it is my view that the issue which this court is invited to determine is whether the application herein is merited. However, before delving to the merits of the application, I note that the respondent raised an issue as to the application being *res judicata* for the reasons that this court had earlier heard and determined similar applications. It is trite that where a matter is *res judicata*, the court does not have jurisdiction over such a matter. As such, the issue ought to be determined *in limine.*

7. The principle of *re judicata* is found in section 7 of the Civil Procedure Act which provides that: -

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

8. For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied that is; the suit or issue was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. **{See Accredo AG & 3 others v Steffano Uccelli & another [2019] eKLR}.**

9. The question which needs to be answered in the preliminary is whether the application herein is *res judicata*. The respondent based the defence of *res judicata* on the application dated 20.01.2020 and which was heard and determined by this court vide a ruling delivered on 17.08.2020 and wherein the said application was dismissed.

10. I have perused the said application and I note that the substantive orders sought in that application were orders of stay of execution of the ruling and orders issued on 26.06.2019 in this matter and in Embu High Court Civil Appeal No. 5 of 2019 and any other subsequent orders pending the hearing of the appeal herein; for orders that this court be pleased to grant leave to the applicant herein (appellant) to deposit the documents of ownership of the accident vehicle KCE 200T in court as security in lieu of the said orders of 26.06.2019 pending the hearing and determination of the appeal. In the present application, the applicant seeks substantive orders to the effect that this Honourable Court be pleased to find that the warrants of arrest issued on 7.01.2021 in Embu CMCC 146 of 2017 as a mode of enforcing the decree of the lower court is unconstitutional, unfair and disproportionate and a clear infraction of her right to personal liberty and that this Honourable Court be pleased to set aside the warrants of arrest issued on 7.01.2021 in Embu CMCC 146 of 2017 committing the applicant to civil jail and set her free forthwith.

11. It is clear that the prayers in the instant application are not similar to the ones in the application of 20.01.2020 and which was determined on merit. The instant application appears to be based on grounds that the warrants of arrest were issued without the applicant having been heard. The earlier application was based on different grounds being that the applicant herein is unable to pay the decretal sum herein and wherein she offered the logbook to the accident motor vehicle as security. The earlier application also sought the stay of execution of the ruling and orders issued on 26.06.2019 whereas the instant application seeks setting aside of the warrants of arrest issued on 7.01.2021 and also the orders of 25.02.2021 committing the applicant to civil jail. The instant application also raises the issues of the constitutionality of the committal to civil jail as a mode of executing a decree. This is an issue which was not determined in the previous application. It is thus my considered view that the instant application is not *res judicata*.

12. The applicant further attacked the jurisdiction of this court to entertain the instant application on the basis that the application ought to have been made in the lower court and not this court. The applicant in her written submissions submitted that this court is seized of the matter as it has a constitutional supervisory jurisdiction over subordinate courts especially where the dispute raises fundamental constitutional issues and that this court can invoke the said jurisdiction so as to police excesses of subordinate courts. Reliance was made on the case of **Director of Public Prosecution –vs- Perry Mansukh Kansagara & 8 Others (2020) eKLR**. The respondent in opposing the jurisdiction of this court reiterated that the application herein is red herring and the same ought not to be entertained herein since the applicant has never sought to review, set aside and/ or appeal against the decision of the trial court to commit her to civil jail. The question therefore is **whether this court is the right forum to challenge the committal orders and/ or the warrants of arrest issued by the trial court?**

13. From the court record, it is clear that the applicant filed a memorandum of appeal and further sought stay of execution of the decree herein and which application was dismissed by this court. What this means is that the respondent has the liberty of executing the decree using any legal and lawful means as recognized by the Civil Procedure Rules 2010. It is in execution of the said decree that the warrants of arrest and the orders for committal to civil jail were issued by the trial court being the court issuing the decree. This court's jurisdiction was invoked when the memorandum of appeal was filed and as such it entertained the application for stay of execution "pending the hearing of the appeal". Having decided on the said application, the powers of this court are only limited to the pending appeal. The trial court being the court which issued the decree still has the original jurisdiction over the execution of the decree issued by it.

14. It's my considered view that if at all the trial court in the course of assisting the respondent herein execute her decree made orders which were unfavourable to the applicant herein, she ought to have moved this court by way of an appeal against the said orders. The jurisdiction of this court is provided for under article 165 of the Constitution of Kenya 2010 and the said article does not grant this court jurisdiction to review orders made by the lower courts save for exercising its appellate jurisdiction and which is not the case herein. The court is not properly moved in that respect.

15. I note that the applicant submitted that this court has supervisory jurisdiction and can invoke the same to police subordinate courts more so where violation of constitutional right is at stake. The applicant in urging the court to find that it has jurisdiction made reference to the decision in **Director of Public Prosecution –vs- Perry Mansukh Kansagara & 8 Others (supra)** where the Learned judge extensively explained the constitutional supervisory jurisdiction of the High Court and differentiated the same with statutory supervisory jurisdiction. However, it is my view that the said authority is only but persuasive to this court and not binding. Further, it is clear that the court rendered the said decision while determining on an application brought in a criminal case as opposed to the situation herein. The same, even if it was to be held as persuasive, cannot apply to the instant case as the proceedings herein relate to a civil dispute as opposed to a criminal matter. The Learned Judge in the said case was trying to compare and contrast the Constitutional supervisory jurisdiction under Article 165 of the Constitution with the statutory revisionary jurisdiction under section 362 of the Criminal Procedure Code.

16. Even applying the dictum in the above decision *mutatis mutandis* to the application herein, and to which I hold a contrary view, the Learned Judge held thus; -

> ***"150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:***
>
> > ***a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;***
> >
> > ***b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;***
> >
> > ***c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.***
> >
> > ***d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice";***
> >
> > ***This list showing rationale for intervention is of course not exhaustive.***
>
> ***151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:***
>
> > ***i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court's independence in the conduct and management of its proceedings***
> >
> > ***ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question***
> >
> > ***iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;***
> >
> > ***iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;*** *……..(emphasize by court)"*

17. It is clear therefore that the supervisory jurisdiction of this court cannot be exercised and/ or invoked in the instant case. The applicant had the option of reviewing the orders of the trial court in the said court. Further it is clear that the applicant herein in filing the instant application is just but taking a shortcut for an appeal against the orders of the trial court whereas the circumstances for an appeal clearly pertain and are more appropriate.

18. Taking all the above into consideration, the application herein is misconceived and an abuse of the court process. Further it is my considered view that this court has no jurisdiction to entertain the said application even if it was to invoke the constitutional supervisory jurisdiction whose application was explained by the Learned Judge in **Director of Public Prosecution –vs- Perry Mansukh Kansagara & 8 Others (supra).**

19. In the end, the said application is hereby struck out with costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

…….for the Applicant

…….for the Respondent