



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 33 OF 2019

BLISS GVS HEALTHCARE LIMITED.....RESPONDENT

VERSUS

CONSOLATA HOSPITAL MATHARI.....APPLICANT

RULING

1. The Notice of Motion is dated the 27/01/2020 and is brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, Sections 99 and 3A of the Civil Procedure Act; the applicant seeks the following orders;

(i) The Orders made by the Honourable Magistrate in CMCC No.51 of 2018 on the 14/11/2019 be set aside in their entirety;

(ii) Fresh warrants of attachment be issued to the respondent and to proceed with the execution process to recover the decretal sum plus costs and interest.

2. The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **JANE MWIHAKI HARI**.

3. The parties were directed to canvass the application by filing and exchanging written submissions; hereunder is a summary of the rival submissions;

APPLICANTS CASE

4. The applicant submitted that there was a judgment entered in its favour in the sum of Kshs.9,348,837/30 which had as at 21/05/2019 accrued interest in the sum of Kshs.3,343,809/-; however when the parties entered into a consent the parties agreed that the decretal sum be Kshs.12,000,000/- and agreed on the manner in which the amount would be liquidated; the Consent Letter was dated 20/08/2019 and it was filed and adopted as an order of the court on 14/11/2019;

5. The respondent paid a sum of Kshs.10,950,000/- which arithmetically has a shortfall of the total agreed decretal sum by Kshs.1,050,000/-; this difference comes about due to the arithmetical error in the Consent Letter at paragraph 4; when the respondent was called upon to pay the difference the respondent stated that it had complied by paying off the total decretal sum and the subsequent summons dated 22/11/2019 issued to Chadon Auctioneers were defective and did not reflect the actual amount owed;

6. The applicant sought to invoke the supervisory powers of this court over the subordinate courts as provided under Article 165(6) and (7) of the Constitution 2010; the applicant submitted that this court had the power to correct the figures as stated as this was an error apparent on the face of the record and needs no interrogation and can be seen at one glance; and the lower court's records and proceedings had already been placed before the court; case law referred to **Wanjiru Gikonyo & 2 Others vs National Assembly of Kenya & 4 Others [2016] eKLR**;

7. The intention of the parties was that the sum of Kshs.7,500,000/- be paid in two installments however the amount in the sub-clause in the Consent Letter add up to Kshs.6,450,000/- leaving a short fall of 1,050,000/-;

8. The applicant therefore sought review of the trial court's order made on 14/11/2019 or in the alternative an amendment of the order by virtue of Section 99 of the Civil Procedure Act and to give effect to the intentions of the parties; case law relied on **Dominic Alois George Omenye t/a Omenye & Associates vs Prime Bank Limited [2017]eKLR**;

9. The applicant also invoked the provisions of Sections 3A and 1B of the Civil Procedure Act that empower the court to act in the best interest of justice; the order having emanated from the trial court this court was not precluded from rectifying the same which would ensure the matter was disposed of expeditiously without unwarranted delay and ensured the court's resources were utilized effectively to serve

justice; case law relied on **Robert Alai Onyango vs Cabinet Secretary (Health) & 7 Others [2017]eKLR; In the Matter of Interim IEBC [2011] eKLR; and S K Macharia & Another vs KCB Ltd & 2 Others [2012]eKLR;** which have all held that a courts' jurisdiction flows from either the Constitution or legislation or both;

10. The applicant was also entitled to costs and interest on the balance as provided by Section 6 and 27 of the Civil Procedure Act; that after rectifying the amount, the applicant prayed that court issues fresh warrants of attachment to allow for the execution and recovery of the balance owed;

11. In conclusion, the applicant reiterated that this court had the requisite jurisdiction to rectify the error apparent on the Order made on the 14/11/2019.

RESPONDENT'S CASE

12. In response the respondent opposed the application and raised a Preliminary Objection on the jurisdiction of this Honorable Court; by virtue of Section 80 of the Civil Procedure Act the review of the decree/order/consent could only be undertaken by the court that passed it and the trial court was the correct court;

13. The respondent contends that the application was un-procedural and as the same was an appeal this court had no jurisdiction to entertain it; the application was full of unilateral mistakes and made in bad faith as there is material non-disclosure of facts and the applicant has not come to court with clean hands;

14. The respondent submitted that once a consent was adopted it could not be set aside unless there was an element of fraud and that a court that interferes with a consent goes against the principle of privity of contracts; case law relied on **Jagjit Singh Landal ns Surjit Singh Sagoo & 2 Others (2004)eKLR; Reli Sacco Society Ltd vs Kenya Railways Corporation (2004) eKLR; Ben Juma Masika vs Moses Makokha Wanga (2004) eKLR and Charity Kemama vs EA Building Society (2004);**

15. The respondents contention was the decretal sum agreed upon was Kshs.12,000,000/- and all the payments in line with the consent have been made; the balanced claimed by the applicant was catered for in the auctioneer's costs; the warrants were therefore defective and incapable of execution; the applicant seeks to circumvent the substantive and procedural laws on review and also the course of justice and it was the respondent's prayer that the application be struck out with costs.

ISSUES FOR DETERMINATION

16. From the rival written submissions filed by the parties, this court has framed the following issues for determination;

(i) Whether this court has jurisdiction to hear and determine the application;

(ii) Whether to review or set aside the order made on 14/11/2019;

ANALYSIS

Whether this court has jurisdiction to hear and determine the application;

17. The parties were directed to canvass the application for review and the Preliminary Objection simultaneously; this court will commence with the preliminary objection raised which is on a point of law relating to the jurisdiction of this court; jurisdiction is everything and without it this court has no power to take any further steps and must down its tools without much further ado; case law relied on **Owners of Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd [1989] KLR1;**

18. As it has been raised by the respondent at this preliminary stage and this court being seized of the matter must decide on this issue forthwith at the earliest opportunity using the material placed before it;

19. Jurisdiction is conferred upon a court either by the Constitution or legislation or both; in this instance the applicant makes reference to Article 165(6) and (7) of the Constitution 2010 and also relies on Section 80 of the Civil Procedure Act;

20. Article 165(6) and (7) of the Constitution 2010 read as follows;

The High court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi –judicial function, but not over a superior court.

(7) For the purpose of clause (6), the High court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. Section 80 (a) and (b) of the Civil Procedure Act read as follows;

Any person who considers himself aggrieved:-

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) By a decree or order from which not appeal is allowed by this Act, decree or made the order, and the court may make such order thereon as it thinks fit.

22. The constitution provides for a supervisory role by the High Court over the subordinate courts; and the question posed is whether this includes reviewing of orders of a subordinate court when the procedure for review is clearly set out in Section 80 of the Civil Procedure Act;

23. By virtue of Section 80(b) of the Civil Procedure Act the review of the decree/order/consent can only be undertaken by the court that passed it and the trial court is found to be the correct court;

24. This court notes that the record is devoid of any cross-appeal filed by the applicant listing the review as a ground of appeal; nor is review listed as a ground of appeal in the Memorandum of Appeal filed herein by the aggrieved party; clearly this court cannot preside over an issue that is not the subject matter of appeal;

25. For those reasons this court is of the view that it is not seized of jurisdiction to entertain the application for review of the subordinate courts order.

FINDINGS AND DETERMINATION

26. For the foregoing reasons this court makes the following findings and determinations;

(i) This court has no jurisdiction to hear and determine the application for review; the Preliminary Objection is hereby upheld; the application is hereby struck out;

(ii) The Respondent to set down the appeal for hearing within 30 days;

(iii) The costs shall be in the cause.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 29TH DAY OF APRIL, 2021.

HON. A. MSHILA

JUDGE