



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**MISC. APPLICATION NO. 25 OF 2020**

**IN THE MATTER OF ARTICLES 165(2b)**

**AND**

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**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE ACT**

**BETWEEN**

**FRANCIS KANGETHE WARARI.....APPLICANT**

**VERSUS**

**MOSES MANGENI WANYONYI .....RESPONDENT**

**AND**

**BUJO ENTERPRISES.....1<sup>ST</sup> INTERESTED PARTY**

**JOHN MBURU.....2<sup>ND</sup> INTERESTED PARTY**

**THE CHIEF MAGISTRATE BUNGOMA.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

In his notice of motion application dated 15<sup>th</sup> June, 2020 expressed to be brought under sections 5,6,7 and 13 of the Fair Administrative Act, , the applicant seeks;-

1. The court be pleased to review the decision by the chief magistrate Bungoma which amended the decree in CMCC 684 of 2010 to the extent that the decree added the applicant as 3<sup>rd</sup> defendant to the suit.
2. That the court be pleased to hold that the joining the applicant in Bungoma CMCC 684 of 2010 as a defendant in the decree dated 28/5/2020 violated the applicant's constitutional rights.
3. That the court do use its supervisory jurisdiction to strike out the name of the applicant from the decree dated 28/5/2020 in Bungoma CMCC NO. 840 of 2010.
4. That the court be pleased to grant general damages to the applicant for the violation of the his constitutional rights.
5. That costs of this Application be provided for.

The application is premised on the grounds on the face of the motion and the applicant's affidavit. The grounds briefly are that the application was not sued in Bungoma CMCC 840 of 2010, the joining of the applicant in the decree which had been obtained against the 1<sup>st</sup> and 2<sup>nd</sup> interested party ex-parte was unprocedural and finally that the court had rejected the applicant's application to be joined as a party but thereafter allowed s decree to be amended with a person who had no jurisdiction to amend it.

The applicant depones that he was served with a proclamation, a fee note and an instructions note by an auctioneer on 2/6/2020 to be executed against him, Bujo enterprises and John Mburu, that the decree wrongfully puts him as as one of the one to settle the decree yet he has never been a party in case 684/2010-Bungoma CMCC.

He depones that he came to know of the existence of the suit in 2013 when his Motor vehicle was attached wherein, he filed an application to be enjoined in the suit and on being enjoined, the plaintiff appealed to the High Court vide Civil Appeal 33/2013 which was subsequently allowed. That later on he applied to be formally enjoined but his application was dismissed on 10/01/2020.

He depones that the decree sought to be executed against him has errors as his name ought not to be there. That the goods sought to be proclaimed belongs to his wife who has already filed objection proceedings.

The application is opposed. The respondent filed his replying affidavit deponing that the application offends the mandatory provisions of order 45 of the Civil Procedure rules, that the court cannot review the decree given in Bungoma CMCC 684/2010, that the decree sought to be retrieved has not been annexed to the application, that the application raises no constitutional issue.

The respondent depones that the applicant filed an application dated 6/11/2019 which was dismissed with costs on the 17/1/2020 and a bill of costs dated 21/1/2020 was filed by the respondent which was also allowed on 29/4/2020.that therefore , it is clear that the applicant was a party. The respondent finally depones that the applicant application is a gimmick by the applicant to delay his enjoyment of orders emanating from the decree in Bungoma CMCC 684/2010.

Parties thereafter filed their written submissions which this court has carefully and meticulously considered. In my view, the issue to be considered is whether the applicant in light of the facts set out in the application and the reply thereto, entitled to the orders sought.

The applicant in the main seeks a review of the decision by the Chief Magistrate Bungoma which amended the decree in CMCC 684 of 2010 to the extent that the decree added the applicant as 3<sup>rd</sup> defendant to the suit.

The court's understanding of this prayer is that the applicant invites this court to review a decision of the trial magistrate which enjoined him to the proceedings in Bungoma CMCC 684/2010. From the application and the replying affidavit, this court has not been furnished with the decree that is sought to be reviewed. However, the court is alive to the principles governing review which is found in **Section 80 of the Civil procedure Act** which states;

*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 no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

The procedural aspect for such an application is found in order 45 which states;

*1. (1) Any person considering himself aggrieved—*

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

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

It is clear from the foregoing provision that the applicant is required to lodge his application before the court which passed the decree. This court in the absence of the decree sought to be reviewed cannot with certainty discern the error complained of.

The court therefore declines this prayer for review for the reasons given above.

Secondly, the applicant invites the court to hold that the joining the applicant in Bungoma CMCC 684 of 2010 as a defendant in the decree dated 28/5/2020 violated the applicant's constitutional rights.

The court has critically looked at the application and found no decree dated 28/5/2020. The only document bearing such a date is a warrant of attachment of movable property in execution of a decree for money.

From the warrant, the debt sought to be satisfied emanates from a decree passed by the court on 31<sup>st</sup> August, 2012. The Decretal sum thereon

was Kshs 462,000/=.

Without the benefit of the decree, this court is unable to ascertain whether the warrant as drawn is at variance with the decree and whether indeed the applicant was a party to that suit.

It can be deduced from the application that there were a number of applications in the matter in the lower court. The respondent states that the applicant was condemned to costs on 29/4/2020 as result of his application dated 6/11/2019 being dismissed. It is still not clear whether the proclamation and the warrant of attachment are a result of the bill whose ruling was delivered on 29/4/2020.

Even if the court is to hold that the warrant is in satisfaction of the bill of costs given on 29/4/2020, the amounts thereon are at variance. The Bill was taxed off at Kshs 15, 715/= while the proclamation and the warrant of attachment makes reference to a decree passed on 31/8/2012 for the sum of Kshs 462,000/=.

As to whether the joining of the applicant in suit violated his constitutional rights, no specific right has been cited to have been violated or threatened. In the case of *Anarita Karimi Njeru V R No. 1 of 1979 KLR 154*, Trevelyan and Hancox J held:

***“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed.”***

Thus in the absence of reference to any specific rights this court is unable to make any pronouncement on the rights that have been threatened.

On the issue of whether this court should invoke its supervisory powers and strike out the applicant’s name from the Decree, this court has earlier on observed that it has not had the benefit of looking at the decree complained of and cannot therefore make any order in relation to that order.

The supervisory power of this court is donated by Article 165 (6)(7) of the constitution 2010 which provides:-

***6. 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 purposes 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.***

The facts surrounding this application discloses no merit to warrant the court invoking its supervisory power. What is disclosed is a matter that should be adjudicated upon by the trial court through the well laid out legal procedures.

On whether to award damages, this court finds no rights that have been violated.

The application is expressed to be brought under Sections 5, 6, 7 and 13 of the Fair Administrative Actions Act. I must comment on the relevance of the Act in relation to the proceedings herein.

The short title to the act which came into force on 17<sup>th</sup> June, 2015 is; ***An Act of Parliament to give effect to Article 47 of the Constitution, and for connected purposes.***

Article 47 of the constitution deals with the right to fair administrative action and therefore the legislation is in some way restricted to the rights under the said Article of the constitution.

There is no nexus between the provisions of the said Act and the current proceedings which I hold ought to be subjected to the processes provided by law.

In the result, the application dated 15<sup>th</sup> June, 2020 is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED and SIGNED at BUNGOMA this 30<sup>th</sup> day July, 2021.

**S N RIECHI**

**JUDGE**