



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC CIVIL APPL. NO. 84 OF 2018

CHINA ROAD & BRIDGE CO-OPERATION KENYAAPPLICANT

VERSUS

MAKINDU ELDERS SOCIETY.....RESPONDENT

RULING

1. Essentially the Notice of Motion dated 10/06/2018 seeks review of ex-parte orders in Makindu PMCC 408/2016 dated 07/06/2018 (not attached) meanwhile stay of application of execution be granted.
2. The application is supported by affidavit of Joshua Maime sworn on 10/06/2018 and annexures thereto and a supplementary affidavit by same deponent sworn on 12/09/2018.
3. Same application is opposed via affidavit of Olieti Raphael Okibo sworn on 14/06/2018.
4. The parties agreed to canvass the same Notice of Motion via submissions which they filed and exchanged.

APPLICANT'S SUBMISSIONS

5. The Applicant submits that 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 and relies on art 165(3) and (5),thus sub art (7) says, 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), any may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
6. The Constitution is express on the jurisdiction of the, thus has the court has jurisdiction and discretion to grant the prayers herewith. It can also invoke overriding objectives provisions in the interest of justice as envisioned under Article 159 and 169(7) of the Constitution and Section 1A, 1B, 3, 3A, of the Civil Procedure Act Cap 21.
7. Applicant relies on the case of **Stephene Boro Githa –Vs- Family Finance Building Society and 3 Others Nbi Civil Appl No. 263 of 2009** and **Lucy Bosire –Vs- Kehanch Division Land Dispute Tribunal & 2 Others (2013) Eklr** which held that the challenge to courts is to use the new broom of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead adjudicate on the principal issues in a full hearing if possible.
8. Thus Applicant prays that the orders to issue in exercise of courts inherent powers to determine the principal issues without undue regard to technicalities.
9. Further it is submitted that the Applicant has a prima facie counter claim thus entitled to fair hearing under Article 50(1) of the Constitution and a principles of Natural justice. He relies on the case of **Richard Nchapi Leiyegu –Vs- IEBC & 2 Others Civil Appeal No. 18 of 2013**; which held that the right to a hearing has always been a well-protected right and is the cornerstone of the rule of law.
10. He submits that it was his former Advocates administrative error, that he failed to comply and for which error the client must not suffer; (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
11. He relies on the case of The Court of Appeal of Tanzania **The Registered Trustees of the Archdiocese of Dar es Salaam –Vs- The Chairman Bunju Village Government and Others [9]** discussing what constitutes sufficient cause which held;-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellants” (Emphasis added).

RESPONDENT SUBMISSIONS

12. He submits that, applications for review under sect 80 and order 45 civil procedure act and rules, can only be made to the judge or judicial officer who passed the judgement or where he is not attached to that station, the judge currently attached to that court and finally where the judge attached to that court is precluded by reason of absence or any other reason for three (3) months, then to the Chief Justice is to designate who may hear the application.

13. He thus submits that, this court therefore lacks jurisdiction on the basis that it was not the court which passed the judgement and as such cannot grant any orders as to review of an order it did not pass. He relies on the case of **Owners of the Motor Vessel (Lillian S) –Vs- Caltex Kenya Limited (1989) KLR.**

14. The Applicant also cites the case of **Muyodi –Vs- Industrial & Commercial Development Corporation & Another (2006) 1 EA 243** Cited with approval in **Ryce Motors Limited –Vs- Jonathan Kiprono Ruto & Another [2016] eKLR** held thus;

“For an application for review under Order 45 Rule 1 to succeed, the Applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

15. And also **Akiwumi & O’kubasu JJA** in the case of **The official Receiver and Liquidator –Vs- Freight Forwarders Lenya Limited Civil Appeal No. 235 of 1997** added that;

“these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.”

16. And also the case of **The Hon. Attorney General –Vs- The Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011**, Musinga, JA stated thus;

“Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

ISSUES

17. After going through the Application, Affidavits and the parties submissions, I find the issues arising are;

- *Whether the application is incompetent?*
- *If above is in the negative, whether same application has merit?*
- *What is the order as to costs?*

ANALYSIS AND DETERMINATION

18. On first issue, on competence of the application, there is now a chain of authorities from the High Court as well as the Court of Appeal to the effect that, where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute.

19. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly –Vs- Njenga Karume [2008] 1 KLR 425**, where it held that;

“.....In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”

20. Order 45 Rule 2 provides that:-

An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause

for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

21. From the foregoing, it is clear that applications for review can only be made to the judge or judicial officer who passed the judgement or where he is not attached to that station, the judge currently attached to that court and finally where the judge attached to that court is precluded by reason of absence or any other reason for three (3) months, then to the Chief Justice is to designate who may hear the application.

22. The definition of a judge under civil procedure act also means a magistrate. See **Section 2 Cap 21“judge” means the presiding officer of a court;**

23. The Applicant in his application states that the Presiding Magistrate Hon. A. Ndung’u S.R.M fundamentally failed to consider the said application and as such failed to grant a stay of the decree and warrants of attachment as prayed and instead directed that the matter be heard inter parties therefore exposing the Applicant’s property to the risk of being attached and sold without being accorded a hearing.

24. Thus the Applicant ought to have moved same court for review or impugn same via an appeal or judicial review application. In civil cases unlike in criminal cases, there is no specific provision for High Court to undertake revision of lower court order save via judicial review or constitutional application. The instant application is none of the above.

25. The court thus cannot undertake the sought review sought as it is within the scope of the trial court jurisdiction as provisions of sect 45 of the CPR so stipulates.

26. Thus the court finds that the application is incompetent and thus struck out with costs to the Respondent.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE