REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 12 OF 2017

STEPHEN NDOLO WAMBUA.....APPELLANT/RESPONDENT

VERSUS

BEATRICE MBULA MUTILU.....1ST RESPONDENT/RESPONDENT

JUSTUS NZAU MUNYWOKI.....2ND RESPONDENT/APPLICANT

RAPHAEL MUTINDA MULWA....3RD RESPONDENT/RESPONDENT

RULING

1. By a Notice of Motion dated 7th February 2019 and filed the same day, the applicant primarily seeks that there be stay of orders made on 6th February 2019 regarding the application dated 31st January 2019 by this honorable court and that the honorable court allow the application dated 31st January 2019 be heard inter partes. The application is brought under Order 40 of the Civil Procedure Rules, Sections 1A, 1B and 63 of the Civil Procedure Act. It is supported by the Affidavit of Justus Nzau Munywoki sworn on 7th February, 2019.

2. The applicant stated that he had not been served with the application dated 31st January, 2019 and he is not in contempt of the consent order dated 25th May, 2017 as there was no consent on the said dates. The applicant stated that he was to proceed with execution of warrants given by the lower court in Tawa SRMCC 87 of 2013 and he was not privy to the consent dated 3rd April, 2017. He averred that he entered into an agreement for payment of Kshs 700,000/- from the appellant/ respondent and the same has not been paid from 2014 to date and thus seeks that he be given time to be heard regarding the application dated 31st January, 2019

3. The application was opposed vide affidavit deponed on 25th March, 2019 and filed the same day. The appellant/ respondent deponed that the consent order pursuant to consent entered on 25th May, 2017 was acknowledged as valid by the court and the same mandated the applicant to execute the judgement in Tawa SRMCC 87 of 2013 against the 1st Defendant/Respondent and not the appellant/respondent. The deponent averred that the applicant in contempt of the said consent order went ahead to attach the appellant/respondent's motorvehicle and in so doing the said attachment is illegal. The deponent averred that the finalization of the appeal on 22nd January, 2019 set the applicant at liberty to execute as per the consent order of 25th May, 2017 thus the application is in bad faith and the application has not adduced any good grounds for the court's exercise of discretion in his favour and thus the application should be dismissed.

4. The application was canvassed by way of oral submissions.

5. The applicant submitted that he sold a vehicle and was yet to be paid the balance of Kshs 700,000/- however the same was involved in an accident and sold despite a court order on the grounds that the same did not belong to the applicant and he wanted the money or the vehicle.

6. Counsel Mulei for the appellant/respondent submitted that the applicant had gone outside the application dated 7.2.2019 and therefore the same had not been argued. Learned Counsel submitted that the applicant was given judgement in his favour in Tawa SRMCC 87 of 2013 and an appeal was filed by the appellant who later compromised the appeal vide a consent to the effect that the judgement in Tawa SRMCC 87 of 2013 be set aside and the applicant be at liberty to execute against the 1st Respondent- Beatrice Mbula and the same was entered into with the applicant's advocate on record. Learned Counsel urged the court that the validity of the consent was upheld by the court and the appeal was held as being finalized in light of the consent and thus the applicant went ahead to obtain warrants to attach the appellant's vehicle and this prompted the filing of the application dated 31.1.2019 that was served on the applicant who did not attend court. The court *inter alia* ordered the release of the appellant's vehicle. The applicant filed the instant application that learned counsel submitted that the applicant does not deserve the orders granted and that the same should be dismissed with the subject vehicle being released and the applicant be committed to

civil jail.

7. The application is based on Order 40 of the Civil Procedure Rules and Sections 1A, 1B and 63 of the Civil Procedure Act. Order 40 provides for temporary injunctions and interlocutory orders

8. Section 63 is titled "Supplemental proceedings In order to prevent the ends of justice from being defeated" and provides as follows

> **"the court may, if it is so prescribed—**
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> **(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;**
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> **(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;**
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> **(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;**
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> **(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;**
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> **(e) make such other interlocutory orders as may appear to the court to be just and convenient.**

9. I have considered the Application herein, the grounds and affidavit in support thereof and the replying affidavit thereto. I have also considered the submissions tendered by the applicant and the respondent/appellant and I find the following issues need determination:

> **a. Whether the application is meritous;**
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> **b. What orders the court may grant.**

10. Before proceeding to resolution of the issues, I wish to point out the following;

> a. "Jurisdiction is everything" and "litigation must come to an end" are the sweet melodies that bellow in the ears of the court pursuant to a wealth of decisions by the courts in this regard.
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> b. Submissions cannot be treated as evidence or take the place of evidence as stated by the Court of Appeal in **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another (2014) eKLR** when it held that:
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> > **"Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties "marketing language...."**
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> c. Parties are bound by their pleadings as was elicited in the case of **Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR** where the court referring to a decision of Nigerian Supreme Court stated-**"In ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;**
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> > **'…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."**
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> d. The court is also bound by the pleadings as was in the Ugandan case of **LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR v ADAM VASSILIADIS [1986] UG CA 6** where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD** [1957]2 QB 55 that;
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> > **"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."**
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> e. The case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** cited the decision of the Malawi Supreme Court of Appeal in **MALAWI RAILWAYS LTD v NYASULU [1998] MWSC 3**, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;
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> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a**

different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

11. Having perused the application and understood the law governing injunctions the remedy sought under the law that the application is brought, there is no indication of pleadings or any argument to satisfy the court that the applicant has satisfied the requirements for grant of an injunction as elicited under Order 40 and the case of **Giella v Cassman Brown [1973] EA 358** where the test that was laid down is as follows:-

a) **Has the Applicant established a prima facie case with high chance of success?**

b) **Will the Applicant suffer irreparable damages unless an injunction is issued?** and

c) **Where does the balance of convenience lie?**

12. Even if for argument's sake I were to consider the contents of the application, being aware that the court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this application has semblance of an application for stay of execution and also camouflaged with an application to set aside ex-parte orders and have the substantive application dated 31st January, 2019 to be heard. In the absence of the citation of the law applicable, the court is unable to draft the application for the applicant and in this regard I am unable to grant prayer 2 of the application. With regard to the prayer 3 that bears semblance to an application to set aside ex-parte orders in the purview of **Mbogo v Shah (1968) EA 93** where the court has unfettered jurisdiction to set aside ex-parte orders so long as just cause has been demonstrated.

13. A perusal of the court record indicates that there is a return of service indicating that the applicant was duly served, the applicant has in his application made no attempt to assist the court to resuscitate his application; there is no demonstration that **he deserves** exercise of discretion in his favour so as to allow prayer 3 and in any event his conduct in levying execution against the wrong party gives a bad taste in the mouth of this court and therefore I find that the applicant is not deserving of equity and consequently deny to grant prayer 3 in the application.

14. With regard to the 2nd issue, I am guided by the provisions of Section 1A and 1B of the Civil Procedure Act. The consent order pursuant to consent entered on 25th May, 2017 remains valid and the same mandated the applicant to execute the judgement in Tawa SRMCC 87 of 2013 where he was at liberty to execute against the 1st Respondent- Beatrice Mbula. The applicant has not shown any reason why he chose to deviate from the consent and proceed to levy execution against the appellant/respondent. Be that as it may, the applicant cannot have the luxury of executing at whomsoever he pleases and yet the court made a determination on the validity of the consent and specifically stayed the proclamation and ordered release of vehicle KCA 244J vide order given on 5.2.2019. To date the said vehicle has not been released and as per the evidence on record the same remains at the yard of Sadique Enterprises who are claiming Kshs 278,416.21 as charges to secure release of the said vehicle. This honourable court deems that it is in the interests of justice that the subject vehicle be released and the applicant to foot the auctioneer's charges.

15. The upshot is that the entire application is found to be an abuse of the court process, a waste of court's time and beyond salvage despite any attempt to do so. I also find the need to crack the whip on the applicant whose actions are in total disregard of the court process and I hereby order that the application be and is hereby dismissed for it lacks merit and the applicant should pay the costs of the application with interest at court rates. In this regard I make the following orders

a. **The application dated 7.2.2019 is dismissed.**

b. **The vehicle KCA 244J Mitsubishi Canter be released forthwith from the yard of Sadique Enterprises together with the 128 bags of Simba Cement and any other of the appellant's goods detained in the said yard.**

c. **The Applicant shall pay the auctioneer's charges together with the costs of this application with interest at court rates.**

It is so ordered.

Dated, signed and delivered at Machakos this 29th day of March, 2019.

D. K. KEMEI

JUDGE