



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.389 OF 2018

DOCKPORT TRADING & COURIER CO. LTD.....1ST PLAINTIFF

FRANCIS MUNYI.....2ND PLAINTIFF

VERSUS

HEIFER INTERNATIONAL PROJECT.....RESPONDENT

RULING

1. Before this court is the Preliminary Objection dated 24th October 2018, filed by the Respondent which objection is premised upon grounds that:-

“1. This court lacks jurisdiction to hear and determine this application as the same is filed contrary to Section 78 and 79G of the Civil Procedure Act (CAP 21) and Order 42 Rules (6) and (32) of the Civil Procedure Rules, 2010 and as there is no appeal or intended appeal preferred against the decision of the subordinate court in CMCC No.6346 of 2014.

2. In any case, the application is bad in law vexatious and an abuse of court process and ought to be struck out in limine.”

2. The Applicants on 29th October 2018 filed Grounds of Opposition to the Preliminary Objection. The Court directed that the matter be disposed by way of written submissions. Accordingly the Respondent filed their written submissions on 13th November 2018 whilst the Applicant filed their written submissions dated 23rd November 2018.

3. The genesis of this matter is the civil suit CMCC NO.634 of 2014 filed by the Respondent in the Chief Magistrates Court. The Respondent sought for interlocutory judgment in that suit and on 2nd February 2016, the lower court entered judgment in the matter for the sum of Kshs.1,880,796/=. Thereafter a decree was issued on 2nd September 2016. The Respondent then moved to execute the judgment.

4. The Applicants then filed the Notice of Motion dated 12th September 2018 seeking to stay execution proceedings in CMCC No.6346 and seeking to quash the judgment and Decree issued in that matter. The Respondent in turn filed this Preliminary Objection arguing that the High Court lacked requisite jurisdiction to hear and determine the application dated 12th September 2018.

ANALYSIS AND DETERMINATION

5. The definition of a Preliminary Objection was given in the case of MUKISA BISCUITS MANUFACTURING CO. LTD –VRS- WEST END DISTRIBUTORS LTD [1969] E.A. 696, as follows:-

“A preliminary objection is in the nature of what used to be a demurrer.

It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” [emphasis supplied]

6. Where a Preliminary Objection has been raised the court is obliged to determine the same at the first instance and this is more so the case when a question of jurisdiction is raised. In OWNERS OF MV LILIAN S. VS- CALTEX O/C KENYA LTD [1989] KLR 1 the court

held that:-

“a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The only issue for determination here is whether this court is clothed with requisite jurisdiction to hear and determine the Notice of Motion dated **12th September 2018**.

7. In that application the Applicants sought inter alia for orders that:-

“3. This Honourable Court be pleased to stay execution proceedings in the lower Court in CMCC 634 of 2014 pending the hearing and determination of this Application.

4. This Honourable Court be pleased to order the Respondent and its agents from attaching, selling or otherwise dealing with the personal property of the 2nd Applicant in any way whatsoever pending the hearing and determination of this Application.

5. The judgment delivered on the 2nd February 2016 and Decree issued thereto by the lower Court in CMC 6346 of 2014 be quashed and or set aside.

6. The Honourable Court be pleased to call the file referenced as CMCC 6346 of 2014 for purpose of satisfying itself to the correctness of the orders and the proceedings before the subordinate court for perusal and further directions.

7.”

8. In this matter the summons to enter appearance were renewed by the lower Court and the same court allowed an application by the Respondents seeking to effect service upon the Applicants by way of substituted service. Pursuant to this order the Process – Server proceeded to effect service upon the Applicants by pinning a copy of the summons in a conspicuous place at the Court house and at Vision Plaza 3rd Floor, Suite 26 Mombasa Road, which was the last known address of the Applicants.

9. The Applicants failed to enter appearance within the stipulated time and the Respondent proceeded to apply for judgment in default of Appearance. On **2nd February 2016** the lower court did enter judgment against the Applicants in default of appearance. A decree was subsequently issued on **2nd September 2016** in favour of the Respondents for the sum of **Kshs.1,880,796** together with as costs of **Kshs.163,850**.

10. The Respondents Advocate then engaged the services of a private investigator to trace and determine the whereabouts of the Applicants so that service of Notice of Entry of Judgment and Notice to Show Cause could be effected upon them. The matter was heard in the absence of the Applicants upon the lower Court satisfying itself that service had been properly effected.

11. Thereafter the Respondent extracted Warrants of Attachment which were forwarded to Giant Auctioneers for action. The Applicants filed in the lower court an application dated **15th December 2017**, seeking a stay of execution, which application was opposed by the Applicants. The same was heard inter partes and dismissed by the Trial magistrate who found that the Applicants had in fact been properly served and found that there was no reason to upset the interlocutory judgment which was validly on record. The Applicant then filed the present application seeking stay of execution.

12. This Preliminary Objection raises the point that in view of the provisions of **Section 79G** of the **Civil Procedure Act**, this court has no jurisdiction to entertain this application for stay. **Section 79G** provides:-

“79G Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal maybe admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

13. The application dated **12th September 2018**, though not couched specifically as such, essentially amounts to an appeal against the decision of the lower court declining to grant to the Applicants a stay of execution. The Applicants appear to have gone to sleep after that ruling. They were only galvanized into action upon the realization that their property was at risk of being sold in execution of the Decree. Clearly the Applicants have been indolent in this matter. They did not file an application for review in the lower court, nor did they file a Memorandum of Appeal before the High Court. Since there is no Memorandum of Appeal, this Court cannot be said to be sitting in its appellate jurisdiction, in which case the Court would have had the jurisdiction to consider granting a stay pending appeal. The Applicants have also not filed any application seeking to have an appeal filed out of time.

14. The Applicants have relied on **Articles 48, 50(1) and 159(2) (d)** of the **Constitution of Kenya 2010**, as the basis upon which their application is hinged. However where there exists a specific procedure on how to approach the court being **Section 79G** then it is that statutory procedure that must be followed. The Applicants sat back and allowed three (3) months to elapse after the ruling of the lower Court only to rush to court later having not availed themselves of the specific statutory provisions.

15. In the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 others 2014 eKLR Justice Patrick Kiage** held as follows:-

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence.”

16. This is a matter which has been in the Court corridors for the past eight (8) years. The Court must weigh both sides. The Respondent having followed laid down statutory processes and having obtained judgment in their favour are entitled to the fruits of that judgment. In **ABRAHAM LENAUNA LENKEU –VS- CHARLES KAKEYO NKARU [2016] eKLR** the High Court sitting in Kajiado held:-

“.....there is no dispute that both under the constitution and statute the court is clothed with appellate jurisdiction. In the exercise of that jurisdiction the same Constitution and statute provides for due process of the law. It is upon fulfilment of any condition precedent to the exercise of jurisdiction by a party the court’s jurisdiction is invoked. The condition precedent to be fulfilled by the applicant in this case was to comply with Order 42 rule 1(2) and Rule 32 of the Civil Procedure Rules. The validity of the appeal is to be entertained when adjudication jurisdiction has been determined. The procedural provisions are aimed at achieving a quality case flow management as between the parties and the court.

In this respect there was absence by the appellant to bring himself within the statutory provisions in a formal way by filing a memorandum of appeal as provided for under Order 42(1) (2) of Civil Procedure Rules. On the fact of it the writ of notice of motion was inappropriate as a procedure without accompanying memorandum and decree appealed from for this court to entertain the appeal. The function of any pleadings like a memorandum of appeal under 42(1)(2) of the Civil Procedure Rules is to put the other party on notice of what to expect at the trial.”

17. The Applicants having failed to avail themselves of the statutory means of approaching the court, are victims of their own indolence. There is no basis upon which the court can now consider their application having effectively rendered themselves time- barred to seek the appellate jurisdiction of this court. As such I find that the High Court has no jurisdiction upon which to hear and determine this present application for stay.

18. The Applicants have in Prayer 6 of the Notice of Motion dated **12th September 2018**, alternatively prayed that the High court exercise its supervisory role and **“review”** the decision of the magistrate by calling for the file **CMCC 6346 of 2014** in order to satisfy itself of the correctness of the orders and proceedings that took place in the lower Court. Once again, I find that this is a roundabout way of seeking invoke the appellate jurisdiction of this court. There can be no contest that **Article 165(b)** of the **Constitution of Kenya 2010** does grant to the High Court supervisory jurisdiction over subordinate courts, but this supervision is limited only to breaches in procedure which may have been committed by the lower court – it is not appellate in nature.

19. In **REPUBLIC –VS- DIRECTOR OF IMMIGRATION SERVICES & 2 OTHERS EXPARTE OLAMILEKAN GBENGA FASUYI & 2 OTHERS [2018] eKLR** it was held:-

“The role of the court in judicial review is supervisory. It is not an appeal and the Court should not attempt to adopt the forbidden appellate approach.”

By Prayer (6) of their Motion the Applicants in asking the Court to satisfy itself of the **“correctness of the proceedings”** are in effect seeking a judicial review of the lower court decision. They ought then to have come under **Order 53** of the Civil Procedure Rules.

20. I find that this application is nothing but a clever attempt by the Applicants to circumvent the provisions **Section 79G** of the **Civil Procedure Act**, and to an attempt to rectify their own laches in this matter. This amounts to an abuse of court process. I find this court has no jurisdiction to entertain the Notice of Motion dated **12th September 2018**. Accordingly I allow this Preliminary Objection and strike out the said application with costs to the Respondent.

Dated in Nairobi this 20th day of June, 2019.

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Justice Maureen A. Odero