



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.196 OF 2012**

**EMK suing as legal representative of the estate of the late NW.....APPELLANT**

**-VERSUS-**

**PIUS NTHIWA.....1<sup>ST</sup> RESPONDENT**

**SIMBA COUCH LTD.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. E. Riany, Resident Magistrate given on 17<sup>th</sup> October, 2012 in Naivasha SPM No.784 of 2010)*

**JUDGMENT**

**INTRODUCTION**

1. This appeal arise from determination in a suit filed by the appellant seeking general and special damages for the death of her son **NW** who died as a result of an accident involving the 2<sup>nd</sup> defendant's motor vehicle registration number KBF 826H which was being driven by the 1<sup>st</sup> defendant on 14<sup>th</sup> May 2010 along Moi Avenue road.

2. On 17<sup>th</sup> October 2012, the trial magistrate delivered a ruling in two applications dated 3<sup>rd</sup> August 2012 and 24<sup>th</sup> August 2012. In application dated 3<sup>rd</sup> August 2012, the applicant sought to bring on record the firm of **Narangwe & Associates Advocates**, stay of execution, declaration that proceedings of 18<sup>th</sup> April 2012 were null and void and stay of proceedings pending moratorium declared by statutory management of Shield Insurance Company Limited.

3. Before the application was heard the objector filed application dated 24<sup>th</sup> August 2012 seeking to lift the order of attachment of motor vehicle registration number KBN 982N. In the ruling delivered on 17<sup>th</sup> October 2012, the court noted that on 30<sup>th</sup> August 2012, there were three applications in the file upon which parties recorded consent which was adopted by the court.

4. Parties agreed that the motor vehicle be released to the defendant upon payment of kshs.27,400 being storage charges of kshs.7000 and kshs.20,400 money refunded by auctioneers to the passengers at time of attachment of the vehicle. Orders dismissing application dated 3<sup>rd</sup> August 2012 were set aside and it was set for hearing together with objector's application on 13<sup>th</sup> September 2012. The vehicle was released on running attachment and auctioneer's fee to be determined by the court was to be settled by the defendant.

5. In the ruling, the trial magistrate declared the proceedings and hearing of Notice of Motion dated 18<sup>th</sup> April 2012 and its ruling null and void on the basis that high court order staying proceedings was in existence. The court proceeded to stay proceedings on ground of moratorium declared by statutory manager of Blue Shield Insurance Company Limited.

6. Being aggrieved by the above ruling, the appellant filed appeal on the following grounds:-

- i. That the learned magistrate erred in law in nullifying the application dated 18<sup>th</sup> April, 2012 and the eventual Ruling thereof.
- ii. That the learned magistrate in nullifying the application dated 18<sup>th</sup> April, 2012 and the eventual ruling acted ultra vires.
- iii. That the learned magistrate erred in law in allowing the respondent's application dated 3<sup>rd</sup> August, 2012 and eventually staying execution proceedings.

7. The appellant filed written submissions dated 29<sup>th</sup> October 2018. The respondent failed to file submissions despite being given time from 17<sup>th</sup> July 2017 to file written submissions. Parties herein were given 21 days to exchange submissions.

8. The appellant opted to rely on submissions filed. In the submissions filed, the appellant restated grounds of appeal. Appellant gave a summary of proceedings in court as captured above.

9. Appellant's argument is that, the civil procedure rules do not have provisions for setting aside final judgment; and a party aggrieved can either seek review under **Order 45** or appeal against the judgment under **Order 42** of the **Civil Procedure Rules**. Appellant further submitted that, the appellant applied for review of the judgment, which was allowed and argued that the trial magistrate acted ultra vires by nullifying the orders properly entered.

10. Appellant added that, considering the hierarchy of judicial courts, it was unjust and unprocedural for the magistrate to nullify order issued by court of same status; that the court should have issued an order staying execution of the judgment which respondents would have opted to appeal.

11. Appellant cited the case of **Peter Ocholi V Chairman, Board of Management, Afraha High School [2017] eKLR**, where the court held as follows:-

**“In terms of the hierarchical nature of judicial organ in Kenya, the claimant ought to have appealed against the said ruling if he was dissatisfied or felt the court exercised its discretion injudiciously.”**

### **ANALYSIS AND DETERMINATION**

12. On perusal of record of appeal, I note that in the application dated 18<sup>th</sup> April 2012, the plaintiff sought review of judgment delivered by P.M. Mulwa on 1<sup>st</sup> March 2012. Grounds on the face of the application was that the suit was dismissed for failure to produce original death certificate though it was marked for identification and that the police abstract and grant of letters of administration proved the deceased's death. The court allowed the application on 7<sup>th</sup> June 2012, entered judgment for plaintiff and adopted damages worked on by trial court.

13. Defendant filed application dated 3<sup>rd</sup> August 2012 seeking to declare hearing of application dated 18<sup>th</sup> April 2012 and ruling in respect to the application a nullity.

14. There existed High court order staying the proceedings against Blue Shield Insurance or its policy holders during the currency of moratorium which was declared on 16<sup>th</sup> September 2011. Motor vehicle accident report indicate policy number, registration number of the vehicle and date of accident as 14<sup>th</sup> May 2010.

15. There is no doubt that a judgment had been rendered in this case. Review was sought which the court allowed and entered judgment for the plaintiff for sum assessed by the trial magistrate. The application dated 3<sup>rd</sup> August 2012 sought to nullify the judgment entered for the plaintiff; ground being that there was moratorium.

16. There is no indication that moratorium was brought to the attention of the court when it reviewed dismissal orders and entered judgment for the plaintiff/appellant. I have seen it attached to application dated 3<sup>rd</sup> August 2012. The Respondent participated in the hearing of application dated 18<sup>th</sup> April 2012; as stated in the ruling, it is not clear whether existence of moratorium was brought to the attention of the court.

17. My view is that defendant having failed to raise the issue of moratorium during hearing of application dated 14<sup>th</sup> April 2012, the court should have stayed execution of judgment but not nullify it. The court which entered judgment for plaintiff could not be accused of failing to obey orders which were not brought to its attention by the respondent/defendants who participated in the proceedings.

18. The respondents would not have been prejudiced in any way, as the judgment obtained could not be executed in the presence of moratorium, which had been brought to the attention of the court.

### **19. FINAL ORDERS**

1. Order issued on 17<sup>th</sup> October 2012 nullifying judgment of 7<sup>th</sup> June 2012 is set aside.
2. Costs of this appeal to the appellant.

**Judgment dated, signed and delivered at Nakuru this 26<sup>th</sup> day of Sep. 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

**Jeniffer Court Assistant**

**No appearance for Counsel for Appellant**

**No appearance for Counsel for Respondent**