



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 277 OF 2009

CROWN DISTRIBUTORS LTD

JOSEPH KIPKURUI KEINO.....APPLICANT/APPELLANTS

VERSUS

HENRY NJAU NGIGE1ST RESPONDENT

JOSEPH K. MBARIA.....2ND RESPONDENT

(An appeal from the Ruling of the Resident Magistrate dated 3rd day of December 2009 in Nakuru Chief Magistrate's Court Civil case No. 2652 of 2002)

RULING

1. The Notice of Motion application dated 1st December 2016 was brought by the **Appellant under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act**, seeking in the main that:

1. Spent

2. There be an order for stay of proceedings in CMCC's Nakuru Case No. 2652 of 2002 Henry Njau Ngige -vs- Joseph K. Mbaria and Crown Distributors Ltd & Others pending hearing and determination of this application. (spent).

3. That the Learned Magistrate in the CMCC Case No. 2652 of 2002 has no jurisdiction and/or locus standi to set aside, revise or vary the judgment of this court delivered on the 16th December 2015.

4. That the exparte Notice of Motion filed by the Respondent/Plaintiff in the said case be struck out being an abuse of court.

5. That the costs of this application be provided for.

2. Several grounds in support of the application have been stated.

That by this court's judgment delivered on the 16th December 2015 the plaintiff in the Chief Magistrates case was directed to set down the suit for hearing within 60 days failing which it would stand dismissed, that on 27th October 2016 the Honourable Magistrate directed/advised the plaintiff therein to apply to

have the dismissed suit re-instated, and by an *ex parte* Notice of Motion the plaintiff sought orders for reinstatement of the suit.

3. It is stated by the appellant that the Honourable Magistrate had no jurisdiction to set aside or vary the terms of the judgment and therefore the said Notice of Motion is bad in law, and incompetent.

It is sought that the *ex parte* application filed in the lower court be set aside or dismissed. Ms. Tarus Advocate for the appellant has sworn an affidavit in support of the application.

4. In opposing the application, a Replying Affidavit was sworn on the 30th January 2017 by Jane Wambui Ndungu Advocate for the Respondents. She attempts to explain why the suit in the lower court could not be fixed for hearing within 60 days. The case therefore stood dismissed on the 16th June 2016. This fact is not denied.

5. The plaintiff/Respondent filed the *ex parte* application before the trial court seeking to reinstate the suit. First, it is not clear why the application was filed *Ex parte* as there are other parties, the defendant and third parties who are interested parties in both the application and the suit.

By its nature, the application seeks to vary a the High Court ruling which court is superior to the Chief Magistrates Court.

6. The issues that arise in these proceedings is whether a magistrate has jurisdiction to hear and determine an application to set aside or vary a High Court judgment, ruling or order. The **Judicature Act, Chapter 8 Laws of Kenya** sets out the hierarchy of courts and the mode of exercise of jurisdiction by the said courts.

The High Court has supervisory jurisdiction over all lower courts and tribunals. **The Magistrates Courts Act No 26 of 2015, Part II** confers various jurisdiction to a Magistrates Court. It is clearly stated that such court is subordinate to the High Court.

7. By the *Ex parte* application filed by the respondent and plaintiff in the lower court, the Magistrate is being urged to cloth himself with jurisdiction that he does not have.

If the said application were to be heard and orders granted, they would be a nullity and void as anything done without jurisdiction is a nullity. See

See **Owners Of Motor Vessel Lilian “S” -vs- Caltex Oil Kenya Ltd (1989) e KLR I** where the Court of Appeal Judges held that:

“By jurisdiction, is meant the authority which a court has to decide matters that are before it --- where the court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

8. For the above reasons, the *ex parte* application filed in the **Chief Magistrates Court** and dated 28th September 2016 in **Nakuru CMCC No. 2652 of 2002** is incompetent and is struck out with costs.

It follows that the Notice of Motion dated 1st December, 2016 in this court is allowed in terms of Prayers 3, 4 and 5 thereof.

Dated, Signed and Delivered this 20th Day of April 2017

J.N. MULWA

JUDGE