



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 130 OF 2009

WINFRED MUTHEU KIAMUKO.....1ST PLAINTIFF

TITUS MAUNDU NZAMBA (suing as Administrators

of the Estate of Mohamood Mohamed Hussein).....2ND PLAINTIFF

VERSUS

SAMUEL BRAKI ISLAM.....1ST DEFENDANT

MASH BUS SERVICES.....2ND DEFENDANT

AND

MASH EAST AFRICA LIMITED.....OBJECTOR/APPLICANT

RULING

Introduction

Judgment herein was delivered on 7th June, 2012 in favour of the Plaintiffs, who thereafter sought to recover the decretal sum in the sum of Kshs. 9,567,453/= from the Objector. The Objector then filed objection proceedings through the Advocates firm of Oloo & Chatur, in a Notice of Motion application dated 14th January 2015, and a ruling on the said application was delivered herein on 3rd December, 2015 by Jaden J.

The Objector has now filed another application by way of a Notice of Motion dated 18th December 2015, seeking the following outstanding orders that have not been spent:

1. That this court be pleased to allow the Firm of Macharia-Mwangi & Njeru Advocates be granted leave to come on record for the Objector.
2. THAT the Court be pleased to review the ruling/order delivered on 3rd December, 2015 and all consequential orders arising therefrom, and consequently be pleased to make orders further to the orders made on 3rd December, 2015, to the effect that:-
 - a. That the attachment made against motor vehicle registration number KCB 115 A belonging to the Objector/Applicant be raised and:
 - b. That the Plaintiff/Decree holder be restrained from attaching the Objector's/Applicant's

motor vehicle registration number KCB 115 A.

The Objector's Case

The Objector's case is as set out in a supporting and further affidavit sworn by its Director, one Francis Malili, on 18th December 2015 and 19th February 2016 respectively. The Objector stated that judgment having been delivered herein, the leave of this court is mandatory for the firm of Macharia-Mwangi & Njeru Advocates to come on record as Advocates for the Objector. Further, that there has been a discovery of new and important evidence which was not placed before the Court and which would have occasioned different orders being issued by the learned Judge in the ruling delivered on 3rd December 2015, and that it was not possible to produce the said new evidence at the time the order was made.

According to the Objector, the ruling delivered herein on 3rd December 2015 provided that execution cannot proceed against the motor vehicles listed in paragraph 9 and 10 of the ruling, as their respective logbooks or transfer forms are in the name of the Objector. However, that the execution process may proceed in respect of the rest of the proclaimed motor vehicles as per the proclamation of attachment dated 9/01/2015 which was attached, namely motor vehicles registration number KAU 190 V, KCB 115 A, KCA 514 D, KBE 710 F and KBL 800 K, together with the electronics, furniture and scrap metal. The Objector seeks to review the order allowing execution to proceed in respect of the aforesaid movable properties.

The Objector contended that motor vehicle registration number KCB 115 A is registered in the joint names of the Objector and Imperial Bank (under receivership), and he attached a certified copy of the log book evidencing the same. It was further explained that this is on account of Imperial Bank (Under receivership) financing the purchase of the said motor vehicle which is used in the Objector's transport business, with the proceeds therefrom being applied towards repaying the loan facility. Further, that the original log book relating to motor vehicle registration number KCA 115 A is currently held by Imperial Bank (under receivership) until the Objector finalises payment on the loan taken out by it, and cannot therefore be disposed off without the involvement of Imperial Bank (under receivership).

On the electronics, furniture and machinery mentioned in the proclamation of attachment, it is contended that they belong to the Objector which properties are contained in Plot No. IR 209/138/37 Nairobi premises leased to the Objector, and a copy of the lease of the property dated 1/12/2011 was annexed. Further, that the said furniture, electronics, machines and scrap metals were purchased many years ago and it was not possible to produce receipts for each of the items to prove that they are legally owned by the Objector.

According to the Objector, it has legal and equitable interest in motor vehicle registration number KCB 115 A and the properties contained in the leased premises, thus the same cannot be disposed of as they have no connection with the 2nd Defendant whatsoever.

Macharia-Mwangi & Njeru Advocates, the Objectors learned counsel, filed written submissions on the application dated 26th February 2016. It was urged therein that under Order 9 Rule 10 of the Civil Procedure Rules, after judgment has been passed and a party is desirous of engaging another Advocate, such change shall not be effected without leave of the Court. Furthermore, that no objection and/or response had been made opposing the change.

Further, that there are sufficient reasons given from the facts they have provided to warrant the issuance of further orders to the ruling delivered on 3rd December 2015, and reliance was placed on the decisions in **Mutiga Karatu vs Elizabeth Muregi Mathew, Meru HCCC No 157 of 2000** and **Martha Wambui vs Irene Njeri Mwangi & Another, Nairobi HCCA No. 286 of 2014.**

The Plaintiff's Case

The Plaintiff opposed the Objector's application in a replying affidavit sworn on 21st January 2016 by the

2nd Plaintiff, wherein he averred that the court made a sound ruling in the application by the Objector and restrained sale of some goods which they were able to prove ownership, but that they couldn't provide such proof for the rest hence execution and sale should issue. Further, that the application herein and orders sought are *res judicata* as the Court made a ruling on the same on 3/12/2015.

It was also averred that there are no grounds for review of the court orders/ruling, and no logbook copy or receipts for the office furniture, computer and scrap metals has been attached to necessitate the Court to hear the application herein. Further, that the Objector had the opportunity to produce and procure all documents before filing the application for objection proceedings dated 13/1/2015, but refused so to do. In addition, that the lease agreement attached as annexure "FMS" is of no consequence and is no proof of ownership of the proclaimed goods, and the Objector should have produced it in the first objection proceedings.

The Plaintiff's learned Counsel, J.A. Makau Advocates, filed written submissions dated 7th March 2016, wherein it was argued that the Objector has not proven any new ground that warrants the review of the orders of this Court of 3rd December 2015, and that the rightful course is to join Imperial Bank in these proceedings if they have any interest in motor vehicle registration number KCB 115A.

Further, that the lease attached by the Objector does not show that the Objector is the owner of the furniture, electronics, machines and scrap metals mentioned in the notice of attachment dated 9th January 2015. It was also contended that the application by the Objector is intended to delay justice and prevent the Plaintiff from enjoying the fruits of the judgment they were awarded by the Court

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether reasonable grounds have been shown for this Court to review the ruling and orders granted herein on 3rd December 2015 by Jaden J.

The applicable law for setting aside and/or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

"Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order,

may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The said provisions therefore allow for review of a ruling from which no appeal has been preferred or is allowed, and the present application by the Objector seeking review is therefore not *res judicata* for this reason.

I have perused the ruling delivered on 3rd December 2015 by Jaden J, and note that the learned Judge partially allowed the Objector’s application in terms of stopping execution of the judgment herein as against the motor vehicles which had logbooks or transfer forms executed in favour of the Objector. The Objector argued that they had discovered new facts since the said ruling, and relied on a copy of log book for motor vehicle registration number KCB 115A which shows the registered owners to be Imperial Bank Limited and Mash East Africa Limited and date of registration as 12th November 2014; and a lease to it made on 1st December 2011 with respect to plot number IR 209/138/37. These documents were attached as annexures “FM4” and “FM5” respectively, to the Objector’s supporting affidavit sworn by Francis Malili on 18th December 2015.

The material time under Order 45 Rule 1 with regard to the existence of the new evidence is the time when the decree was passed or the order made, but that such evidence was not within a person’s knowledge or could not be produced by him. The logbook for motor vehicle registration number KCB 115A does show that the Objector is a joint owner of the motor vehicle, and that it was in existence at the time of the ruling on 3rd December 2015. The Objector states that the log book was not in its possession as it was with Imperial Bank which financed the purchase of the said motor vehicle. I find this explanation to be reasonable as to why the Objector was not able to produce the said log book for the hearing of its earlier application dated 14th January 2015.

No explanation was however given as to why the lease was not produced at the hearing of the Objector’s application dated. In addition, I concur with the Plaintiff’s submissions that the said lease is not evidence of the furniture, electronics, machines and scrap metals listed in the proclamation of attachment dated 9h January 2015, and there is also no evidence on record that the said items are on the plot known as IR 209/138/37. Lastly, there is also no prayer in the instant application seeking review of the orders given on 3rd December 2016 as regards the said items.

Finally, no objection was raised as to the change of the Objector’s Advocate, which prayer is therefore not contested.

The Objector’s Notice of Motion dated 18th December 2015 is therefore accordingly allowed only to the extent of the following orders:

1. The Firm of Macharia-Mwangi & Njeru Advocates be and is hereby granted leave to come on record as the Advocates for the Objector.
2. The ruling and/or orders delivered and granted on 3rd December, 2015 be and are hereby reviewed only to the extent that a further order is hereby granted that the attachment made against motor vehicle registration number KCB 115 A belonging to the Objector be and is hereby raised, and the Plaintiff be and is hereby restrained from attaching the Objector’s motor vehicle registration number KCB 115 A.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of June 2016.

P. NYAMWEYA

JUDGE