



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC CIVIL APPEAL NO 185 OF 2015

PETER SIMIYU T/A BEYOND AUCTIONEERS.....APPLICANT

-VS-

LAMECK OLUOCHRESPONDENT

R U L I N G

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”

Per MUSINGA JA, in Equity Bank v West Link MBO Limited (Civil application No.78 of 2011)

1. On 23. 3. 2016 when this file was before court for hearing of some pending applications and after listening to the parties on the way forward and how to deal with many pending applications, the court, by way of case management retired to peruse the file and give its directions.

2. The directions were given on 24. 3.2016 and the court after observing that this is a classic example at a case where a party comes to court not to be heard on the merit, but to obtain *ex parte* orders with final effects by stealing and match on the other party (ies), said :-

(a) These proceedings having been denounced by the person named to have commenced them, all proceedings and orders issued herein beginning with those of 29. 12. 2015 Are set aside *ex debito justitiae*.

(b)The *status quo ante* the 29. 12. 2015 as ordered by the lower court on 24. 12.2015 is restored in that the tenant shall be reinstated and granted unhindered access to the suit premises.

(c) Under the Jurisdiction granted to this court under Article 165 (6), the lower court file is hereby called and ordered to be placed together with this file for purposes Of directions being given on the propriety of proceeding therein and for further directions

(d) For the purposes of moving forward, this file is hereby scheduled for the 15.4.-2016 at 11.30 am when all the parties who have filed papers herein including Mr WANDEMA ODINDIKO(advocate) must attend court to participate in the determination of the question

**of whether this matter is properly before this court.
(e) This order shall be extracted by Mr Omari and Mr Anaya and served on all the parties Concerned for purposes of compliance. The service must be effected before close of business on 31.3. 2016.**

3. Those directions, which to me are unequivocal court orders, were read to the parties by my sister Judge Mugure Thande in the Presence of Mr Mwakisha and Mr Oloo for one Aisha Hatimy, an alleged contemnor, Mr BusieKa for Peter Simiyu , the auctioneer and Mr Odongo then acting for one JAMES MA0 RE t/a SAGANA FAST FOODS.

4. According to the court records, as at that date Mr Odongo had filed an application dated 10 .3.2016 by which the said James Maore had sought to be joined to the proceedings and for an order of setting aside and stay of court orders given on 6. 1.2016. However by some design, that application was never pursued nor fixed for hearing as directed by the court on 24.3. 2016. Instead MR LAMECK OLUOCH the respondent then filed an application dated 13.4.2016 and sought to enforce the orders of 24.3.2016 by way of Mr MOAAMED HATIMY being directed to render vacant possession Of the suit premises and render an account of the whereabouts of the applicant's tools of trade allegedly removed from therein. To the court that application did not merit any *ex-parte* orders and was directed to be served for hearing *inter partes*. It was fixed for hearing on the 15. 4. 201 6 but was on that day adjourned to the19.4.2016

5. Come 19. 4-2016, two development occurred:-

(i) Mr. Odongo informed the court that his client had withdrawn the application to set aside and therefore he, Mr Odongo, sought to be excused from further participation in the matter.

(ii) Mr.Omolo informed the court that, Mr Odongo's client, JAMES MAORE had taken possession of the suit premises, without his clients blessings'

On that day the court excused Mr Odongo from further participation and at the prompting by all advocates present, the court directed that the OCS Central Police Station ensures that the premises are vacated and locked under the supervision of MOHAMED HATIMY, the landlord. The matter was then adjourned to be mentioned on 27. 4.2016 to confirm Compliance.

6. That was not to be. On 26. 4-20 1 6, JAMES MAORE filed an application dated the same day and sought review, discharge and setting aside of the orders of 24.3. 2016, striking out the entire miscellaneous application and in the interim stay of the orders of 24. 3.2016. That application came to court on 27.4.2016 when the court in the presence of all the parties directed that the orders of 19.4.2016 being a follow up to those orders of 24.3.2016 be complied with.

It would appear that no compliance was made hence on the 16.8.2016, pursuant to an application by the original Respondent, orders were made citing the interested party for contempt and ordering his arrest so that he be brought to court to show cause why he could not be punished for being in Contempt of court orders.

That party, James Maore, was apparently arrested and brought to court ready to show course and also argue an application dated 1 9. 8. 2016. Since the application had not been served, the interested party was released on bond on terms that he vacates the premises and hands over the keys there to the Deputy Registrar. At the pains of imprisonment the court orders were for the first time Complied with.

8. The court then directed the parties to attend court and offer an address on one point which was considered pending determination. That point was framed as follows:-

**"Who between Lameck Oluoch and James Maore should be in possession of the suit premises
"**

8. When the matter came up on the 12. 10. 2016, all counsel present, except Mr Anaya for Lameck

Oluoch, took the position that there being no pending suit before the court, no orders could be made in this file. On his part Mr Anaya took the position that there was still pending the court orders of 24.3-2016 to be complied with.

9. Mr GiKandi when reminded of those orders then submitted that there having been not a suit properly instituted as known in law, the entire proceedings were a nullity and nothing could rest upon a nullity . Without saying so, Mr Gikandi then submitted that even the orders of 24.3. 2016 having been made in a file headed misc. Appeal, were themselves nullities and therefore Incapable of enforcement as the Court had never been properly moved.

10. As the parties argued what next step needed to be taken, if at all, in this files, Mr Mwakisha reminded the court of the directions given on the 24.3.2016. For that reminder the court must commend that advocate for living to his oath of office. Having revisited, and reread those directions it is not lost to court that it had been directed that the proceedings in this file had been commenced and undertaken with evident design to circumvent the law. That position has not changed and the desire to invoke the inherent powers of the court remain intact.

11. Pursuant to those directions, what now pends for the court to undertake is the perusal of the lower court file. I say only that task pends because it would be an act towards backpedalling to say that those court orders having been given in a file that was neither a suit nor an appeal, as known under Civil Procedure Act, are themselves null. This Court reiterates that the invocation of Sections 3 and 3A Civil Procedure Act was to meet the ends of justice and curtail further abuse of the court process. It has now be said, times innumerable, that the court retains and reserves intrinsic and inherent powers to enable it fulfil its mandate in doing justice to parties before it, the very purpose of the law, and in order to meet the justice or fairness of a particular case or to avoid injustice by abuse of court's process.

12. This court has the duty and will always invoke its inherent jurisdiction in appropriate cases to prevent the abuse of the due process of the court. I find the commentary by the Authors of **Halbury's Laws of England, 4th Edition Volume 37 Para 14** under the heading "***Inherent Jurisdiction of the Court***" at Page 23 to aptly apply as a guide on when this court will invoke its inherent powers. The author says;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

13. The Court of Appeal in **Uhuru Highway Development Ltd – Vs – Central Bank of Kenya & 2 others CA Civil Application No. NAI 140 of 1995 (65/95 UR)** had the opportunity to comment on a similar situation where a litigant failed to disclose material facts to the court. **Omolo J A**, as he then was stated in his ruling:

"Once the learned Judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be."

A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the court.

14. I understand the Court of Appeal to be says that once a party proves an intent to overreach or steal a match at the opponent, he losses the moral and indeed any legal ground to merit sympathy of the court.

Earlier on, Hancox JA, In Wanguhu -VS -Kamau Kania [1984] I KLR 637 said of the inherent power of the court;-

"It is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be an injustice"

15. In this matter, I think special circumstances exist because it is noted that the landlord, although he denies having instructed the auctioneer and the advocate, having failed to get what he considered just before the Business Premises Rent Tribunal, chose to go before the magistrate's court, pretending to be the auctioneer and in the guise of distress for rent, and without disclosing the pendency of the proceedings before the Tribunal, obtained orders crafted as seeking security, to enable an auctioneer levy distress. He then employed those orders to carry out eviction. When the tenant brought the true facts to the attention of the court, that application was speedily abandoned and this particular application filed. Once again Chepkwony, J was never disclosed to the fact that there had been proceedings before the magistrates' court in which similar orders had been sought, obtained and later stayed. Even before me after giving the directions that the tenant be reinstated, Mr James Maore, the interested party, who was represented by counsel when directions were given still went ahead and took possession in violation of those orders. If this is not an obvious abuse of process and outright contempt then I need to be educated more on what is. With due respect to Mr Gikandi, this court cannot fold its hand or just waive them up in the air and say to Mr Hatimy:-

"You have succeeded at outwitting all and indeed parted with possession to the interested party as a tenant, keep your peace and let suits be filed by anybody feeling aggrieved'.

That would be rewarding a party who has obtained an advantage unfairly to benefit from his impropriety. Not the written law I know of would justify or form the foundation of such position being taken by a court of law. It would be a perversion of all concepts of justice. The court has a duty to correct such a wrong at the earliest opportunity and is entitled to move even *suo motto* .

16. The upshot is that the orders of 24-3-2016, having not been challenged or set aside ought to be given effect and must be complied with within 7 days from today. It is ordered that that Mr Mohamed Hatimy, and represented in these proceedings by Mr Omolo, and being the landlord shall personally ensure that the tenant is so reinstated.

17. I have equally perused the lower court file and I have noted that it wasequally instituted with the sole intention to take possession of the premises at all costs, the need for due process in place notwithstanding. Those orders are themselves set aside and nullified. Let this rulling be placed in the lower court file **Mombasa Rmcc Miscellaneous Application No. 256 of 2015** to facilitate the closure of that file.

18. I have taken *suo sponte* steps to terminate those proceedings and I order that each party bears own cost. Unless for purposes of determining the execution or enforcement of this ruling no further application ought to be entertained in this file. It should be deemed concluded.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 17th Day of October 2016.

PATRICK J O OTIENO

JUDGE