



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**MISC. APPLICATION NO. 15 OF 2016**

**JOHN WANAYAMA BENJAMIN.....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The applicant herein JOHN WANYAMA BENJAMIN has filed the Chamber Summons dated 14<sup>th</sup> April, 2016 seeking amongst other things temporary orders of stay of the ruling of Hon. S. Wahome dated 13<sup>th</sup> April, 2016. He also seeks to set aside the said orders and that the lower court file No. Kakamega CMCC No. 70 of 1994 be placed before this court to verify the facts deponed to in his affidavit together with costs.

2. The application is brought under rule 11 of the Advocates Remunerations (Amendment) Order and the Advocates Act Cap 16 of the Laws of Kenya. The application is premised on the grounds on the face of it and supported by the applicants own affidavit dated the 14<sup>th</sup> April, 2016.

3. The application is opposed. The respondents have filed a Notice of Preliminary Objection dated 11<sup>th</sup> May, 2016 and a Replying affidavit sworn on 21<sup>st</sup> April, 2016 and also a supplementary affidavit dated 11<sup>th</sup> May, 2016.

**Submissions.**

4. The application Chamber Summons dated 14<sup>th</sup> April, 2016 and Notice of Preliminary Objection were canvassed orally. The applicant who was acting in person relied on the content of his supporting affidavit dated 14<sup>th</sup> April, 2016 and his further affidavit sworn on 26<sup>th</sup> April, 2016.

5. In response to the Preliminary Objection the applicant submitted that the orders of 11<sup>th</sup> March, 1999 were in his favour and he complied on mode of execution. He filed a Notice of Motion dated 6<sup>th</sup> July, 2015 for execution of the said order.

6. On 24<sup>th</sup> July, 2015 Hon. S. Wahome granted the orders ex parte. On September, 2015 the respondent filed a Notice of Motion to set aside the ex-parte orders which the applicant responded to and the same was determined on 13<sup>th</sup> April, 2016. The applicant submits that he had a judgment in HCCC No. 97 of

1999 where the judge ordered for the discharge of charge for KABRAS/KIVAYWA/515 on 16<sup>th</sup> June, 2015. He claims that Hon. Wahome set aside the orders to execute. He tried to execute in 2001 and 2002. He adds that the Limitation of Actions Act do not apply in this case and that the orders of 11<sup>th</sup> March, 1999 were a permanent injunction. He wants this court to exercise its supervisory powers over the subordinate court since there is no appeal.

7. Mr. Osango for the respondent also relied on the replying affidavit sworn on 21<sup>st</sup> April, the supplementary affidavits and the Preliminary Objection. He explained that they sought to set aside the ex-parte orders in CMCC No. 70/94 where parties were heard. He further claims that there is nothing to be set aside pursuant to the warrant orders of the P.M.

8. The orders are not challenged as there is no appeal thus the instant chamber summons is misplaced and should be struck out. He claims that the orders sought to execute in HCA 97/1997 were nonexistent, the drawn decree was illegal. He claims that the applicant sought to receive over Ksh. 2 million as cost but the same was never awarded now in taxed costs. He adds that the P.M. was right in setting aside the orders as they were unenforceable. The said orders sought to be executed were dated 11<sup>th</sup> March, 1999, and the appellants wanted the same to be executed in 2015 i.e. 12 years after they were granted.

9. On the Preliminary Objection, Mr. Osango submits that the Chamber Summons cannot stand on its own and it should be struck out. He adds that the affidavit by the applicant sworn on 26<sup>th</sup> April, 2016 is post dated and should be struck out. The affidavit is also commissioned by an unqualified person.

### **Determination.**

10. The main issue for determination in this matter is whether to set-aside the orders of the Principal Magistrate dated 13<sup>th</sup> April, 2016 on the grounds set out in the application and the response together with the P.O.

11. Having heard the applicant and the respondent, what is clear is that there was an order granted to the applicant on 11<sup>th</sup> March, 1999. The applicant didn't execute the order until recently i.e. in 2015. This was after twelve years after the orders were granted. The applicant claims that he was not heard on the Notice of Motion dated 5<sup>th</sup> September, 2015 thus his right for fair hearing as enshrined in Article 50 (1) of the Constitution of Kenya 2010 was infringed. I have had a chance to peruse the ruling of the P.M. which is sought to be set aside and do find that the learned magistrate heard both the parties on merit giving his reasons thereof and his findings. He ably captured the sentiments of both the parties herein. He did not consider issues that were not raised by the parties but confined himself on what was laid before him. I find that nothing really moves on the application to set aside the ruling. In any event the option available for the applicant were either to seek review before same court, appeal to High court, impugn the decision via constitutional or judicial review application.

12. The applicant's application also has many defects which this court cannot ignore. The typographical error on dates has also been noted. The applicant did not seek to amend these errors.

13. Be that as it may, this court ought to dispense justice with undue regard to technicalities as provided for under Article 159 of the Constitution.

14. The upshot of all the above is that the applicant's Chamber Summons dated 14<sup>th</sup> April, 2016 lacks merit and is dismissed with costs. The applicant should appeal against the said ruling if he is dissatisfied with the same.

**SIGNED, DATED and DELIVERED** at KAKAMEGA this .....13<sup>TH</sup> .... day of .....DECEMBER,..... 2016.

**C. KARIUKI**

**JUDGE**

**In the presence of:-**

.....App. in person ..... for the Applicant.

.....Osango ..... for the Respondent.

.....Anunda ..... Court Assistant.