



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 35 OF 2014
(FORMERLY KISII HCCA NO. 165 OF 2013)

BETWEEN

JOANES NYAMWA MARWA

T/A IKIMWANYA AUCTIONEERS APPELLANT

AND

GEORGE MATIKO CHACHA 1ST RESPONDENT

LOKAF INVESTMENT LIMITED 2ND RESPONDENT

ROBERT MUMO WASUA 3RD RESPONDENT

(Being an appeal from the Ruling and Order of Hon.D. K. Kemei, SPM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 74 of 2012 dated 17th December 2012)

JUDGMENT

1. The circumstances leading to this appeal are as follows. The 1st respondent was the decree holder while the 2nd and 3rd respondents (“the respondents”) were the judgment debtors. The appellant, an auctioneer, was instructed to proceed with execution of court warrants by way of attachment and sale and an issue arose as to whether the attachment and sale of the respondents’ motor vehicle was proper in view of the fact that by the time the sale was proceeding there was a consent order in place for payment of the decretal sum by instalments and the appellant had been informed not to proceed with sale of the motor vehicle.
2. The respondents moved the court by a notice of motion dated 15th May 2013 in which they sought orders, inter alia, to annul and set aside the sale of the subject motor vehicle. The appellant was joined as an interested party and was directed to file a replying affidavit.
3. When the motion was heard, the appellant was represented by counsel who filed grounds of opposition dated 10th July 2013. The appellant contended that the application was frivolous, vexatious and lacking in merit and that the application had been overtaken by events and that the application was procedurally and substantively bad in law.
4. On 29th July 2013, the learned magistrate allowed the respondents’ application. In effect the attachment and sale of the motor vehicle was set aside. The learned magistrate was convinced that

on the basis of the material before him, the appellant's excuse that he was not given a letter to stop the execution was not convincing since he received telephone communication for the respondents' advocates requesting him to call off the execution process.

5. The appellant was aggrieved by the decision setting aside the sale. He promptly moved the court by an application dated 13th August 2013 in which he sought to review decision delivered on 29th July 2013. The essence of that application was the appellant ought to be allowed to file a replying affidavit. He contended that he failed to file a replying affidavit as his advocate failed to inform him of the court's direction that he ought to have filed the replying affidavit hence at the time of hearing the replying affidavit was not on record. He stated that the affidavit was necessary for him to explain his actions in relation to the sale and that the mistake of his advocate should not be visited on him. The application was opposed on the ground that the appellant had failed to meet the threshold for review set out in **Order 45** of the **Civil Procedure Rules**.
6. The application was dismissed by a ruling dated 6th November 2013. The appellant now appeals from the order dismissing the appellant's application for review on the grounds set out in the memorandum of appeal dated 3rd December 2013. In summary the grounds are that the learned magistrate erred in law and in fact in refusing to review his ruling, that the learned magistrate erred in failing to find that the failure to file a replying affidavit could not be blamed on the appellant and that the learned magistrate was biased as he did not allow the appellant to file his pleadings and to reply to the allegations made against him and for relying on the evidence from one side only. The appellant represented by Mr Marwa, contends that the learned magistrate failed to exercise his discretion properly in dismissing the application. He submitted that the appellant should not be punished for failure to file the replying affidavit particularly in view of the magnitude of the claim.
7. Ms Sagwe, counsel for the respondents, supported the decision of the learned magistrate and submitted that the appellant did not meet the threshold for the grant of orders of review. She pointed out that the appellant was represented by an advocate who elected not to file a replying affidavit. She urged that the proper remedy for the appellant was to appeal against the original order rather than apply for review.
8. This is an appeal against a decision where the learned magistrate exercised his discretion to reject the appellant's application for review under **Order 45** of the **Civil Procedure Rules**. As regards the duty of the appellate court in considering the exercise of discretion, Sir Charles Newbold P., in **Mbogo & Another v Shah [1968] E.A. 93, 95**, held as follows:

[A] Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice .

9. In order to succeed in an application for review, the applicant must meet the threshold required by **Order 45 rule 1 (1)** of the **Civil Procedure Rules** which provides as follows;

45 (1) any person considering himself aggrieved:

a) by a decree or an order from which a 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 of evidence which after the exercise of due diligence was not within his knowledge or would not be produced by him at the time when the decree was passed on the order made or on account of more 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

10. The main issue before the subordinate court was whether the appellant ought to be allowed to file a replying affidavit. The learned magistrate held that the appellant was represented by a competent advocate who, despite leave having been granted to file a replying affidavit, elected to rely on grounds of opposition. He noted that the advocate gave an account on how the execution was carried out and thereafter the court dealt substantively with all the issues. He noted that the conditions for review of an order under **Order 45** of the **Civil Procedure Rules** had not been satisfied hence the application was dismissed.

11. I cannot fault the learned magistrate for the conclusion he reached. There was no error apparent on the face of the record. The appellant did not put forth any information or facts which were not available to him at the time the application was being heard. I would also add that the proposed replying affidavit or the facts upon which the replying affidavit would have been founded were not disclosed to the court to consider whether there was any new material or sufficient cause for the court to exercise its discretion in appellant's favour. What is clear from the record is that the appellant's advocate fully participated in the hearing and put forward the appellant's case. The proper remedy in that instance was to prefer an appeal.

12. I affirm the learned magistrate's decision. The appeal is dismissed with costs.

DATED and DELIVERED at MIGORI this 17th day of April 2015.

D.S. MAJANJA

JUDGE

Mr Marwa instructed by Kerario Marwa and Company Advocates for the appellant.

Ms Sagwe instructed by Ochoki and Company Advocates for the 2nd and 3rd respondents.