



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 243 OF 2012

**IN THE MATTER OF AN APPLICATION BY THE REGISTERED TRUSTEES OF VIVA
RIIKA GROUP AND PETER GAKWA NGENDU FOR ORDERS IN THE NATURE OF
PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT MILIMANI COMMERCIAL
COURTS NAIROBI AND THEOPHILIS MUSYOKI KILATYA IN CMCC NO.9241 OF 2007**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR THE ORDERS IN
THE NATURE OF PROHIBITION AND CERTIORARI**

BETWEEN

REPUBLICAPPLICANT

AND

CHIEF MAGISTRATES COURT - MILIMANI..... RESPONDENT

AND

THEOPHILIS MUSYOKI KILATYA.....1ST INTERESTED PARTY

VIVA RIIKA GROUP2ND INTERESTED PARTY

PETER GAKWA NGENDU3RD INTERESTED PARTY

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 4th July 2012, the *ex parte* applicants herein seek the following orders:

1. **An order of Prohibition – prohibiting the Chief Magistrate's Court at Milimani Commercial**

Courts in Civil Suit No.9241 of 2007 from dealing with the suit in any other manner during the pendency of High Court orders issued on the 1st December 2011 in HCCC No.318 of 2008 (O.S).

2. **An order of certiorari – to call for Civil suit number 9241 of 2007 to be brought before the High Court for purposes of quashing the proceedings judgments or orders that were issued during the stay period granted vide HCCC No.318 of 2008 (O.S)**
3. **Costs of this application.**

Ex Parte Applicant's Case

4. The application is supported by an affidavit sworn by **Peter Gakwa Ngendu**, one of the applicants herein on 11th June 2012.
5. According to the deponent, this suit was instituted by **Theophilis Musyoki Kilatya** in year 2007 seeking special damages as a result of a road traffic accident and judgment was entered ex-parte due to default of defence on the 10th March 2008. The deponent applied to set aside the ex-parte judgment which application was heard and ruling delivered on 30th March 2012 by which the Honourable Principal Magistrate, **Ole Keiwua** granted a conditional stay in
6. It was deposed that at the material time of entry of the judgment and issuance of the decree and certificate of costs dated 3rd March 2008 and 4th March 2008, a moratorium had been declared by the statutory manager under the provisions of Cap 487 Section 67 (c) effectively staying all causes against holders of Policy issued by **Messrs Invesco Assurance Company Ltd** (hereinafter referred to as the Insurance Company), of which the applicant is one of the insured. Subsequently, the High Court vide HCCC No.318/2008 (O.S) on 1st December, 2011 issued stay order against all causes against said Insurance Company and its policy holders and also nullified all proceedings decrees, judgments and executions that had taken place during the moratorium.
7. In the meantime, the plaintiff in civil suit number 9241/2007 applied and obtained warrants of execution which were issued during the existence of the High Court Order and pursuant thereto, instructed the Auctioneering firm of **Kangethe Enterprises** who proclaimed the deponent's assets. As a result, the deponent moved to the Chief Magistrate vide an application dated 21st May 2012 for stay orders pursuant to which interim orders were granted by **Honourable S. Nchoe** on 21st May 2012. However, the matter did not proceed on the 31st May 2012 as it was referred to **Honourable Ole Keiwua** on the 7th June 2012 and interim orders extended. On the 7th June 2012, **Honourable Ole Keiwua** Principal Magistrate stood over the matter to 14th June 2012 and declined to extend the interim orders and directed that the defendant complies with the order for deposit which order, according to the deponent is null and void having been given without reference to the High Court Order dated 1st December 2011.
8. It was therefore contended that the applicants are exposed to attachment due to the action of the **Honourable Ole Keiwua** Principal Magistrate refusing to honour the High Court's order.

Respondent's Case

9. On behalf of the Respondent a replying affidavit was sworn by Lydia Mwangi the Legal officer at M/s Co-operative Insurance Company (K) Ltd now known as CIC Insurance Group, the interested Party's Insurers.
10. According to the deponent, the court file from the Magistrate's Court will clearly demonstrate that the Interested Party has always adjourned the suit herein having been informed of the stay orders that were granted in the High Court. According to him, the default judgment orders were entered prior to the stay of proceedings by **Lady Justice Jessie Lessit** on 30th June 2008 and orders published in the Local Daily Newspapers. It was therefore deposed that all actions taken by the Interested Parties' Advocates on record prior to the grant of the stay orders were within the law and no breach was effected. According to the deponent, upon being served with the Applicant's application dated 21/05/2012, they proceeded to take necessary action to instruct the Auctioneer **M/s Kang'ethe Enterprises** not to take further action who duly obliged. Accordingly, the Applicant was duly represented when seeking orders for stay pending appeal when the court

- directed that the decretal sum be deposited in court and at no time did the Applicants avail the orders exhibited in the supporting affidavit hence neither the court nor the deponent's lawyers on record were seized of the same.
11. In the deponent's view, the Applicant is abusing the court process by rushing to this court to seek stay of proceeding orders whereas the Interested Party has been obeying the orders as demonstrated herein above and only proceeded with the matter as the orders granted by **Hon. Lady Justice Lessit** issued in HCCC No. 318 of 2008 (OS) had lapsed and the Applicant's Insurers had commenced business and is presently a going concern.
 12. To the interested party, the orders sought are premature as there is no danger in the circumstances and the application ought to be dismissed with costs. The deponent further urged the Court to Court to peruse the proceeding in NBI RMCC No.9241 of 2007 to dismiss the Application herein with costs.

Determinations

13. From the documents exhibited to the applicant's verifying affidavit, it is clear that there was an order setting aside decrees, warrants and taxation in matters expressed to be appearing in Schedule A. One of the cases appearing in the said schedule is SPMCC No. 9241 which is the subject of this application. That order was issued on 1st December, 2011.
14. However the warrants for sale of property in the execution of the decree in the said suit was issued on 21st July, 2010 and the proclamation was done on 17th May 2012.
15. It is clear from the foregoing that at the time of the said proclamation, the decree in the said matter had been by an order from a competent court, set aside. That being the case there was no decree in existence arising from the said SPMCC No. 9142 the basis of which execution proceedings could be levied. The said decree having been set aside, all consequential proceedings must also be deemed to have been set aside.
16. In my view, without a decree there was no basis for the Magistrate's Court to direct that the decretal sum be deposited in Court as there was no decree in existence upon which decretal sum could be deposited.
17. In the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

18. In my view a decision by a Magistrate's Court to proceed in a case which has been stayed by the High Court, a superior court with supervisory powers over the Magistrate's Court which is a Court clearly subordinate to the High Court not only amounts to an illegality, but is in excess of the jurisdiction of the Magistrate's Court and amounts to irrationality. The mere fact that the insurance company is back in business cannot validate actions and proceedings which were taken illegally and without jurisdiction without the orders of stay and setting aside being reviewed and vacated.
19. As was stated by **Omolo, JA** in **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2**

Others Civil Appeal No. 238 of 2003:

“The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court’s decisions can only result in unnecessary costs to the parties involved in the litigation.”

20. This position was restated in **Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072** in which the Court held:

“The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd [1944] KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously”.

21. The rationale for this is to be found in **Musinga, J’s** judgement (as he then was) in **Rift Valley Sports Club vs. Patrick James Ocholla [2005] eKLR** in which the learned Judge expressed himself as follows:

“The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so.”

22. One cannot bring this discussion to an end without referring to the wise words of **Sir Charles Newbold** in the case of **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195**. The learned President of the East African Court of Appeal had this to say:

“I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision”.

23. In the premises I grant order prohibiting the Chief Magistrate’s Court at Milimani Commercial Courts in Civil Suit No.9241 of 2007 from dealing with the suit in any other manner during the pendency of High Court orders issued on 1st December 2011 in HCCC No. 318 of 2008 (O.S).

24. With respect to the orders of certiorari sought it is clear that the High Court Milimani High Court Commercial and Admiralty Division had in Civil Case No. 318 of 2008 (OS) set aside inter alia the proceedings, decree, warrants and taxations in SPMCC No. 9241. Accordingly there are no proceedings to be quashed.

25. I will make no order as to costs taking into account the declaration of the moratorium cannot be attributed to the fault of the parties herein.

Dated at Nairobi this day 18th day of February, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Omondi for the 1st interested party and Miss Gweno for the applicant.