REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.35 OF 2011

BETWEEN

KIRINYAGA CONSTRUCTIONLT.....PETITIONER

AND

OSCAR D.BEAUTTAH.....1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRATE -NYERI.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Kirinyaga Construction Ltd is a limited liability company duly registered under the provisions of the **Companies Act, (Cap 486 Laws of Kenya)**. It has filed this Petition claiming that its fundamental rights to a fair trial and access to justice were contravened and grossly violated by the Respondents. In its Petition dated 4th March 2011 it seeks the following orders;

   "(1) A declaration that the Petitioner's fundamental rights for fair and access to justice were contravened and grossly violated by the Respondent herein.

   (2) A declaration that the Petitioner is entitled to a refund of all monies paid up to the Respondent together with interest there on and compensation for the violations and contraventions of its fundamental rights under the aforementioned provisions of the constitution.

   (3) Any further orders, writs, directions, as this honourable Court may consider appropriate.

   (4) Costs of this suit and interests."

Factual Background

2. The facts leading to this Petition are disclosed in the Petition and in the Affidavit of Joseph Waigwa sworn on 4th March 2011, and they are that;

3. The 1st Respondent filed a suit in the Chief Magistrate's Court being ***Oscar Duncan Beauttah v Kirinyaga Construction (K) Ltd, CMCC No. 60 of 2006*** seeking *inter-alia* general damages, *mesne* profits, costs and interests thereof. The Petitioner was served with summons to enter appearance and it entered appearance on 19th April 2006 through its advocates. Sometime in September 2006, it is alleged that without any information and or proof of service, the 2nd Respondent proceeded to hear the said case and judgment was entered against the Petitioner on 17th October 2006 and a decree and certificate of costs issued on 27th October 2006 in favour of the 1st Respondent . Subsequently, the Petitioner instructed its advocates to apply to set aside the *ex-parte* judgment but the said application was dismissed on 5th June 2007.

4. The Petitioner being aggrieved with the said ruling, filed a Memorandum of Appeal dated 22nd June 2007. By a letter dated 7th June 2007, its advocates requested for certified copies of the proceedings and ruling appealed against. An application for stay of execution pending appeal was also filed. The trial Court granted the application for stay on condition that the Petitioner provides security by depositing the decretal sum in Court within 14 days or in the alternative deposit a security of an equivalent amount in Court within 14 days. The Petitioner opted for the alternative security and deposited Kshs.300,000/- as ordered.

5. Before the proceedings could be supplied, the 1st Respondent moved the Court on 17th July 2008 seeking *inter-alia* that the said intended appeal be dismissed for want of prosecution. That Application was placed before Makhandia J *(as he then was)* on 30th November 2008. The Learned Judge did not allow the Application but instead granted the Petitioner time to make arrangements to obtain the proceedings and specifically directed that the Petitioner should be furnished with handwritten proceedings to enable it type the same. The handwritten proceedings were availed as directed but the Petitioner found them illegible and they could only be typed by the secretaries of the 2nd Respondent.

6. The matter was mentioned again on 27th March 2009 and the Court was told that due to backlog at the typing pool at the Chief Magistrate's Court Nyeri, the proceedings were not ready. The Petitioner's advocates indeed informed the Court that they had persuaded one of the secretaries to create time for them and at the time of the mention she had managed to type only 30 pages since the handwritten notes were barely legible and took a lot of time to decipher. The Court then set the matter for a further mention on 26th June 2009.

7. On that day it transpired that only about 60-70 pages of the handwritten notes had been typed and the Court then made an order that;

"Petitioner has 45 days from the date thereof to file and serve a Record of Appeal failure to which the Application dated 17th July 2008 shall stand granted with costs".

Following the above orders, the Petitioner's advocates pursued the proceedings tirelessly but without much success because it was only on 12th August 2009 that uncertified copies of the proceedings and ruling were obtained from the Chief Magistrate's Court. The Petitioner's advocates then filed and served the Record of Appeal on 13th August 2009, three days outside the given period of 45 days. Shortly thereafter the Chief Magistrate's Court notified the Petitioner's advocates that the certified copies of proceedings were ready for collection and they were then collected and the advocates filed and served a Supplementary Record of Appeal on 3rd September 2009.

8. In view of the fact that the Record of Appeal was not filed within the stipulated period of time, the Application that sought dismissal of the appeal for want of prosecution was deemed as granted given the terms of the orders made by Makhandia J on 26th June 2009. As a result, execution proceedings commenced and in the light of the foregoing, the Petitioner sought to review the orders of 26th June 2009. The Application for review was presented before the High Court on 31st March 2010 and on 19th May 2010, Sergon J. dismissed the said Application after hearing both parties and, the consequence was that the Petitioner's appeal came to an end. He therefore filed the present Petition seeking the orders set out above.

The Petitioners case

9. The Petitioner claims that the High Court delivered a decision against it whose immediate consequences have rendered the intended Appeal to be compromised without due process of the law being followed.

10. The Petitioner did not file any written submissions although it had been directed to do so when parties appeared before me on 11th December 2013. But a casual look of the Petition reveals that the Petitioner's case is pegged on the facts above and on the grounds upon which the Petition is founded which are as follows;

> ***"(1) Despite the Petitioner having entered appearance, the 1st Respondent prosecuted his case by way of formal proof and had an ex-parte judgment entered in his favour whereof the Petitioner had never been notified and/or informed as required under the Rules of procedure.***
>
> ***(2) Notwithstanding the subsisting law, no invitation whatsoever, or service by the 2nd Respondent was ever effected and the Court herein allowed the formal proof and assessment of damages by refusing to set aside the ex-parte judgment and/or decree entered on the 17th October, 2006, contrary to the basic statements of the law, to a breach of the basic fundamental rights that safeguard and envisage Petitioner's protection of the law. (sic)***
>
> ***(3) Whereas it was within the jurisdiction of the Honourable Court, to direct and/or issue orders within its inherent powers, the orders issued thereof were not only contrary to the Petitioner's right to the protection of the law without being duly served, but also negates the Petitioner's right as envisaged under the provisions of the Constitution.(sic)***
>
> ***(4) Whereas it was within the frames of the Honourable Court, to issue orders complained of the same amounts to the violation of the Petitioner's right to defend, to which rendered it being penalized without the due process of the law, being followed by the Honourable Court. (sic)"***

Ist Respondent's case

11. In response to the Petition, the 1st Respondent, **Oscar D. Beauttah** filed a Replying Affidavit sworn on 18th March 2011 and written submissions dated 16th January 2014.

12. From his Affidavit, he has repeated the chronology of events in this matter as set out elsewhere above.

13. The crux of the 1st Respondent's case in any event is that the Petitioner has always been heard both at the lower Court and the High Court at Nyeri. He thus contends that the Petitioner has never been condemned unheard and further that the Petitioner followed the right channel in challenging the *ex-parte* judgment and the fact that it has not been able to reverse the said judgment does not make the process unconstitutional.

14. On the issue whether the orders made by Makhandia J were irregular the 1st Respondent argues that the Petitioner has never appealed against the said orders and contends that the issue amounted to a ground of appeal and this Court cannot revisit the same in the guise of a Constitutional Petition. He thus submits that the Petitioner is trying, through the back door, to obtain Court orders from this Court which were never granted by the two judges sitting at the High Court in Nyeri. He relies on the case of ***Jeremiah Muku v Methodist Church of Kenya Registered Trustees & Another, Meru Civil Case No. 80 of 2005*** where Ouko J. held that Constitutional references are not meant to be used for correction of errors of substantive law or procedure committed by Courts in the course of litigation.

15. He thus claims that the Petition is an abuse of the Court process due to the multiple tactics that the Petitioner has deployed in an attempt at obtaining orders that were not granted by judges who had heard similar applications. He relies on an earlier ruling made by Musinga J *(as he then was)* while handling this matter at an interlocutory stage where he stated *inter-alia* that the High court at Nairobi cannot supervise the work of the High Court at Nyeri.

16. He also claims that the Petitioner had failed to inform this Court that there was a pending matter involving the same subject matter before the Court of Appeal at Nyeri against the decision of Sergon J. declining to grant a review of the orders of Makhandia J. and yet it is in that appeal and not in a constitutional reference that its remedy would lie.

17. On the issue of the prayer made by the Petitioner that he is entitled to a refund of all monies paid to the Respondent together with interest, it is the 1st Respondent's argument that the said prayer is an attempt by the Petitioner to overturn the trial Court's decision through a Constitutional Petition instead of adhering to the rule of law by appealing that decision to the High Court in the usual manner.

18. He therefore urges this Court to dismiss the Petition with costs to him and also to order that the amount of money deposited in Court, being Kshs.300,000.00, be released to him.

The 2nd Respondent's case

19. The 2nd Respondent neither filed a response to the Petition nor did he tender written or oral Submissions in support of or in opposition thereof.

Determination

20. There is no doubt that the complaints raised by the Petitioner in the present Petition fall within the ambit of issues canvassed in the High Court at Nyeri in **Nyeri in Civil Appeal No. 49 of 2007**, the genesis of which appears to be the orders made by Makhandia J. on 26th June 2009. I therefore find it improper, and I say so categorically, that the Petitioner would approach this Court seeking to challenge the orders made by another High Court Judge in the guise of a Constitutional Petition because it is trite that this Court has no jurisdiction to do so. Makhandia J. made his orders regarding the matter of the filing of the Record of Appeal and those orders were never appealed from, set aside or varied even when attempts were made to do so before him and later, Sergon J.

21. The Petitioner from the record, on 20th June 2010, one year later, made an Application to the High Court at Nyeri seeking *inter-alia* for an order for stay of execution of the decree pending Appeal, and an order directing that the security deposited on 26th September 2007 in compliance with the order issued on 12th September 2007 be held as security pending Appeal. Sergon J. in determining that Application stated as follows;

"I have considered the divergent arguments made by learned advocates from both sides. It is not in dispute that judgment was entered in favour of the Respondent and against the appellant by Chief Magistrate's Court in which the appellant was ordered to pay Kshs.250,000.00 being general damages and mesne profits respectively plus costs. The appellant applied to set aside the aforesaid judgment but the application was dismissed on 5th June 2007. The appellant preferred this appeal. On 26th June 2009 this Court issued orders of stay of execution of the decree pending Appeal on condition to be met within 45 days. The conditions were not met within the stipulated time. Another application was made to have the time extended to enable the appellant meet the conditions. That application was refused on 19th May 2010, hence it has not filed a notice of appeal to challenge the decision in the Court of Appeal. Pending the hearing of the intended appeal, the Appellant now seeks for the orders set out in the motion dated 2nd June 2010. I have keenly considered the Application and I do not think the same should be allowed. To begin with, the Appellant was given orders of stay of execution pending appeal on condition that it deposits the decretal sum. The Respondent filed an Application dated 17th July 2008 in which he sought to dismiss the appeal for want of prosecution. The hounourable Mr.

Justice Makandia gave the appellant 45 days to prepare and serve the record of appeal. The Appellant did not comply with that order within time but it purported to do so after time fixed had lapsed. This Court found as a matter of fact that the Appeal stood dismissed in its ruling of 19th May 2010. There is evidence that the Appellant has already forwarded cheques to settle the decretal sum to avoid execution. Mr. Kihara has stated from the bar that the appellant did not mean to settle the decretal sum but it wanted to buy time. I am convinced that the appellant has not come to Court in good faith. Its main interest is to delay the just conclusion of this matter.

In the circumstances I do not think I should exercise my discretion in favour of the Appellant. The Appellant is indirectly seeking for the orders he failed to get through the ruling of 19th May 2010. The Motion dated 2nd day of June 2010 is ordered dismissed with costs to the Respondent".

22. In the instant Petition, the crux of the Petitioner's case is that it was never granted an opportunity to present its defence and the Superior Court (Makhandia J.) misdirected itself by granting orders which were also sought in the alternative and which in effect adversely affected the orders granted by the Subordinate Court on 12th September 2007. That the said decision also amounted to a violation of its right to fair trial and access to justice but while determining that issue at the interlocutory stage, Musinga J. *(as he then was)* stated as follows;

"However, that is not the position. It is evident that the Petitioner has made several applications before the Senior Principal Magistrate's Court at Nyeri and the High Court of Kenya at Nyeri. Unfortunately, the outcome of the said applications did not favour the Petitioner herein. The Petitioner cannot argue that it was not afforded an opportunity to be heard".

I am in agreement with the learned Judge and that decision not having been appealed from, set aside or varied is the only decision on the record and which in any event is correct if the facts and the law are properly looked at.

23. Having so find, I will add that this Court is a High Court established under **Article 165(1)** of the **Constitution** and has no jurisdiction over the High Court in Nyeri. This Court and the Judges of the Constitutional and Human Rights Division of the High Court in Nairobi have repeatedly held that they do not have the perceived jurisdiction to correct or supervise the orders, actions and decisions of other Judges of the High Court. See ***Ventaglio International S.A & 2 Others v Registrar of Companies and 4 Others, Petition No. 410 of 2012, Robert Mwangi v Shepherd Catering Ltd & Another, Philip Kipchirchir Moi v Attorney General and Another Petition No. 65 of 2012***.

That school of thought has also previously found favour with Musinga J. who in his Ruling earlier in this matter held as follows;

"With respect to the Petitioner, that kind of averment ought not to have been made before this Court since it amounts to a collateral attack on the said ruling. This Court has the same jurisdiction as the High Court at Nyeri and cannot therefore purport to sit on appeal over the decisions of Sergon and Makhandia JJ. The jurisdiction of a Judge in the Constitutional and Judicial Review Division of the High Court sitting at Nairobi is exactly the same as that of any other Judge in any of the High Court stations who ordinarily hear many constitutional and Judicial Review applications, save that in those other High Court stations there are no structured divisions of the High Court. That is due to the fact that there are not many judges in those stations".

He went on to state as follows;

"I entirely agree with Ouko J. and would add that constitutional references ought not to be used to fill gaps in ordinary civil proceedings or as tools of attack against Judges in other divisions or stations and Magistrates generally. Where a party is aggrieved by a decision the right thing to do is to appeal against that decision before the appropriate Appellate Court. The Appellant herein has filed an Appeal to the Court of Appeal against the decision of Sergon J. and ought to pursue the same.

Lastly, I am not persuaded that any constitutional issue has been raised by the Petitioner herein. I find no merit in this Application and dismiss the same with costs to the Respondents".

The learned Judge was referring to the decision of Ouko J. *(as he then was)* in J**eremiah Muku v Methodist Church of Kenya Registered Trustees (supra)** which was in tandem with his decision above.

24. I am in agreement with the above findings and to my mind, the remedies for errors, if any, made by Judges of the High Court who serve outside Nairobi cannot lie in making applications to the Constitutional and Human Rights Division of the High Court at Nairobi. Those remedies are available in law and include appeal, review, setting aside or even stay of execution. As was held in ***Chokolingo v A.G of Trinidad and Tobago (1981) U.L.R 108*** and also in ***Maharaj v A.G of Trinidad and Tobago (No. 2) (1979) AC 385*** a collateral attack of a judgment through an appeal and later through a constitutional reference would be subversive of the rule of law entrenched in the Constitution itself and that is the same position here because an appeal is also pending before the Court of Appeal at Nyeri on the same issues that are now before me.

25. In addition in ***Ministry of Home Affairs v Bickle and Others (1985) LRC 755*** which was quoted with approval in H***arrison v AG of Trinidad and Tobago (1980) AC 265*** the Court stated as follows;

> ***"The notion that whenever there is a failure of any organ of a Government, a public authority or public officer to comply with the law, this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals under Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those significant freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to involve the jurisdiction of the Court under the sub-section if it is apparent that the allegation is frivolous or vexation or an abuse of the process of the Court as being more solely for the purpose of avoiding the necessity of applying in the normal-way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom".***

26. The foregoing statement is the most accurate description of what the Petitioners have attempted to achieve by filing this Petition. I say no more save to add that this Petition is not only frivolous but also a gross abuse of the Court process and necessary orders will be made shortly.

Conclusion

27. It is obvious by now that I neither see no merit in the Petition save to state that I have my views on whether the Petitioner was properly treated when the delay in procuring typed copies of the proceedings had more to do with illegible hand-written proceedings and backlog of proceedings to be typed than the Petitioner's lack of vigilance. But my views do not matter and the correct place to raise all those issues would be the Court of Appeal where in fact an appeal is pending.

28. In the event and for reasons set out above, the Petition is dismissed.

29. As for the 1st Respondent's prayer that the deposit of Kshs.300,000.00 be released immediately to the 1st Respondent that is not a matter for this Court and should best be addressed either before the High Court at Nyeri or the Court of Appeal at Nyeri.

30.Costs of this Petition are hereby awarded to the 1st Respondent and to be borne by the Petitioner.

31.Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Lampo for 1st Respondent

No appearance for Petitioner

Mr. Sekwe for 1st and 2nd Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE