REPUBLIC OF KENYA

High Court at Kisii

Civil Miscellaneous Application 66 of 2010

JOSEPH O. ONGUA ……. APPLICANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD. ……..…….. RESPONDENT

RULING

1. What is before me is the Notice of Motion dated 2nd August 2011 and filed in court on 3rd August 2011 seeking orders that there being a mistake or error apparent on the face of the record, this court be pleased to review that part of its ruling dated 30th June 2011 in which it was held that the issues raised in the application dated 7th June 2010 were res judicata and instead allow the application as prayed therein. The applicant also prays that the costs of the applications be borne by the respondent-judgment debtor in any event. The application which is expressed to be brought under **Order 45 rules 1, 2, 3** and**5**of the **Civil Procedure Rules**and**sections 1A, 1B** and**3A**of the **Civil Procedure Act, Cap 21 Laws of Kenya**, is premised on 8 grounds set out on the face thereof:-

1. Pursuant to a judgment granted on 18th March 2008, the lower court in CMCC No.62 of 2004 Joseph O. Ongua –vs- South Nyanza Sugar Company, the Respondent did apply and obtained a stay of execution of the decree pending appeal on condition that it deposits the full decretal sum in a joint interest earning account within 30 days.

2. There was no appeal in existence at the time the said order was made on 16th September 2009.

3. The respondent consequently only deposited the principal sum of Kshs.420,390/= and not the full decretal sum.

4. The applicant judgment creditor then did file an application dated 8th December 2009 to be allowed to execute the decree as the respondent had failed to comply with the order of the court to deposit the full decretal sum. The said application to be allowed to execute the decree was refused on 14th April 2010 by the lower court.

5. Aggrieved by the order of stay of execution granted on 16th September 2009, the applicant judgment creditor filed a notice of motion herein dated 8th December 2009 under Order XLI Rule 4 of the Civil Procedure Rules to set it aside.

6. This Honourable Court did consider the application and agreed with the applicant that without an

appeal stay pending appeal cannot be granted, but dismissed the said application on the grounds that it was res judicata.

7. There is mistake or error apparent on the face of the record as the application dated 8th December 2009 filed in the lower court, dealt with record as the issues of the application and not the same issue raised in the application before this court dated 7th June 2010, which sought to set aside the stay of execution of order pending appeal granted by the lower court on 16th September 2009, for reasons inter alia lacks jurisdiction.

8. the mistake or error apparent on the face of the record led to the application dated 7th June 2010, being dismissed as res judicata when it [was] completely different jurisdiction of the court had been worked misleading different issues i.e. execution for default and setting aside a stay order by the High Court by a party aggrieved by order.

2. The application is also supported by the sworn affidavit dated 2nd April 2011 of Ezekiel Oduk, an advocate of this honourable court having the conduct of this matter, on behalf of the plaintiff. The deponent refers to the lower court judgment in **Kisii CMCC NO.62 of 2004 – Joseph Ongua –vs- South Nyanza Sugar Company Ltd**in which the court found in favour of the applicant herein. The respondent did not appeal the judgment though it obtained a conditional stay pending the hearing of an application for leave to appeal out of time. That the respondent did not fulfill the condition for the stay which was to deposit the full decretal sum into a joint interest earning account within 30 days from the date of the order which was on 16th September 2009; that the respondent deposited only the principal sum.

3. By an application dated 8th December 2009, the applicant took out a motion seeking:-

(a) to be allowed to proceed to execute the decree herein until satisfaction thereof;

(b) to have the sum of Kshs.420,390/= being part of the decretal sum deposited ----- be released ----- in partial satisfaction of the decree."

4. The application was canvassed before Hon. Mr. Justice Asike Makhandia, J. (as he then was) and he rendered a ruling dated 30th June 2011, a copy of which is annexed to the instant application. The learned Judge found as a fact that the respondent herein deposited only the principal sum instead of depositing the full decretal amount as ordered by the court. The Hon. Judge also found that the application preferred by the applicant then was res judicata on grounds that the applicant had been to the lower court twice on the same application and as such the applicant could not renew the same application in the appellate court.
5. It is this ruling of my brother Hon. Mr. Justice Makhandia which has aggrieved the applicant and brought him back to this court on the instant application. The application is however opposed on the grounds:-

1. That this court lacks jurisdiction to entertain the said application as the issues raised therein are res judicata and this honourable is functus officio as regards the earlier application.

2. That to entertain the present application will amount to this court sitting on its own appeal.

3. That there is no new and important matter that has been brought to the attention of court to warrant review of the court decision.

4. That there is no error apparent on the face of the record as all issues were considered by the court leading to the ruling dated 30th June 2011.

5. That the application is incurably defective, vexatious, scandalous and otherwise an abuse of the court process.

6. That the applicant is guilty of laches the application having been filed on 3rd August 2011 and served on the respondent on 20th June 2012.

7. That the jurisdiction of the court has not been properly invoked as there is an appeal being Kisii HCCCA No.316 of 2006 between the parties herein.

6. At the hearing of the application on 2nd May 2013, only Mr. Oduk, counsel for the applicant appeared, though the court had been informed during the time of call-over that a Mr. Ojuro was on the way to the court to oppose the application.

7. Counsel for the applicant submitted that there was an error apparent on the face of the record on grounds that by the time of filing application for stay, there was no appeal filed and that to date, no appeal has been filed. Further, that the respondent was in breach of the conditional stay order because instead of depositing the full decretal amount, the respondent deposited only the principal sum and ignored the costs and interest, and that in the circumstances, the applicant's application which was struck out ought to have been allowed. Counsel argued that contrary to the findings of the learned judge, the application that was before him was not similar to the application that was before the lower court. Counsel wants this court to issue an order to have the lower court order granting stay set aside. He also asked for costs of this application and of the other applications both before this court and the lower court.

8. I have now read through the ruling by my learned brother Makhandia, J. I have also carefully considered the submissions by counsel for the applicant and also read the grounds filed on 27th June 2012 in opposition to the application. For the applicant to succeed on this application, he must prove to the court that:-

a) There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or the order was made; or

b) there is some mistake or error apparent on the face of the record; or

c) there is other sufficient reason to warrant a review.

9. The arguments put forward on behalf of the applicant on the instant application are, in my understanding, that the learned judge made an error in law in concluding that the application that was before him was res judicata. Counsel submits that this conclusion by the judge is an error apparent on the face of the record.

10. The definition of the term res judicata is found in **section 7** of the **Civil Procedure Act, Cap 21 Laws of Kenya**. The section reads as follows:

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

11. Among the explanations of the provisions of **section 7** as above stated is explanation number (1) which defines **"former suit"** as a suit which has been decided before the suit in question whether or not it was instituted before it. In the instant application, the notice of motion dated 7th June 2010 which was determined by Makhandia J on 30th June 2011 can rightly be called a **"former suit"** just like the 2 applications filed in the lower court namely Notice of Motion dated 8th December 2009 by which the applicant sought to be allowed to execute the decree herein. **Explanation (4) to section 7** of the**Civil Procedure Act** is to the effect that –

"Any matter which might and ought to have been made ground of defence or attack in such former

suit shall be deemed to have been a matter directly and substantially in issue in such suit."

12. The above are the matters which my learned brother Makhandia J must have considered before he rendered the ruling dated 30th June 2011, which ruling the applicant now prays that I review. The question that I must answer is whether the issue herein is one of review of appeal, and whether the matters now placed before me are matters which might or ought to have been made grounds of attack before Makhandia, J.

13. Taking the facts of this case side by side with the submissions by counsel, and the ruling rendered by Makhandia J on 30th June 2011, I am of the considered view that if I were to allow the instant application I would be sitting on appeal on a matter decided by a court of concurrent jurisdiction. The issue that arose on the ruling of 30th June 2011 was one of interpretation of the law which in my view should have been taken to the Court of Appeal as a ground of appeal. I do not think that the applicant has demonstrated to this court that there is new and important matters or evidence which could not be availed to him, despite due diligence, before delivery of the ruling dated 30th June 2011. The applicant put before Makhandia J arguments similar to the ones he has put before me, and rightly speaking this application is also *res judicata* the application decided by Makhandia J. In any event, there are matters which ought to have been placed before the Judge.

14. In any event, the apparent mistake or error apparent on the face of the record is a matter of interpretation, and it is only the Court of Appeal which can say whether or not the interpretation made by Makhandia J was correct or not correct. That is not for me. For me to do so, would be to sit on appeal on the matter. The Notice of Motion dated 2nd August 2011 is accordingly dismissed with no order as to costs.

Dated and delivered at Kisii this 30th day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Oduk (absent) for the Plaintiff/Applicant

Mr. Ojuro (absent) for the Respondent

Mr. Bibu - Court Clerk