



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 105 OF 2011

REPUBLICAPPLICANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY1ST RESPONDENT

KENYA AIRPORTS AUTHORITY2ND RESPONDENT

EX-PARTE

TIMOTHY NDUVI MUTUNGI

RULING

This ruling is in respect of two applications. The first application was brought by Timothy Mutungi Nduvi, the ex parte Applicant and is dated 24th July, 2013. In the application which is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act the Applicant seeks orders as follows:-

“1. THAT this Honourable Court be pleased to order that the kshs.150,000/= deposited in court by the 2nd Respondent pursuant the court order given by Honourable Justice Majanja on 22nd March, 2013 be released to the ex-parte Applicant as part payment of the costs payable by the 2nd Respondent to the ex-parte Applicant.

2. THAT costs of the application be granted to the Ex-parte Applicant.”

The application is supported by grounds on its face and the Applicant’s affidavit sworn on 24th July, 2013.

Briefly, it is the Applicant’s case that on 17th June, 2013 consent was entered between him and the Kenya Airports Authority, the 2nd Respondent, in which the costs of these proceedings were taxed at kshs.463, 925. It is the Applicant’s argument that there is no stay against the said execution and he is therefore entitled to the costs. The Applicant asserted that the order issued by Majanja, J on 22nd March, 2013 was issued pending the hearing of an application presented in court by the 2nd Respondent on 21st March, 2013. He contends that the said application was compromised through the consent order of 17th June, 2013 and the sum of kshs.150,000/- deposited in court pursuant to Majanja, J’s order should be released to him.

The 2nd Respondent opposed the application through a replying affidavit sworn on 31st July, 2013 by its Acting Chief Legal Officer Mr. Victor Arika. It is the 2nd Respondent's case that the application is premised upon an intention to execute a decree arising from a judgement which it intends to appeal. The 2nd Respondent disclosed that it has already filed an application for stay of execution and proceedings in the Court of Appeal and the said application is coming up for hearing on 25th September, 2013. The 2nd Respondent argues that releasing the said money would be prejudicial to and/or tantamount to prejudicing the application before the Court of Appeal. The 2nd Respondent argues that the Applicant failed to disclose in his application that it had already attached its motor vehicle in clear contravention of Section 35 of the Kenya Airports Authority Act (cap 395). I will come back to this application later in this ruling.

The 2nd application was brought by the 2nd Respondent. The application is dated 31st July, 2013 and is premised on Section 35 of the Kenya Airports Authority (Cap 395) Paragraph II (i) and (2) of the Advocates (Remuneration) Order (L.N. 50 of 2009) and all other enabling provisions of the law. In the said application the 2nd Respondent prays for orders that:-

“(a) The purported attachment of the Applicant’s motor vehicle registration number KAT 277 on the 30th July, 277 on the 30th July, 2013, basis of a purported proclamation by M/s Fantasy Auctioneers dated 21st March, 2013, be set aside, and/or be declared illegal, unprocedural null, and void ab-initio.

(b)The ex-parte applicant and/or its servants or agents; and the said auctioneers be ordered to forthwith release and/or reinstate the said motor vehicle to the Applicant herein.

(c) Pending the hearing and determination of the Application for (inter-alia) stay of execution filed in the Court of Appeal, there be stay of further proceedings in this matter, and/or stay of execution of the Judgment of this court and all other orders relating thereto.”

This application is supported by the grounds on its face and the supporting affidavit sworn by the 2nd Respondent's Acting Chief Legal Officer Mr. Victor Arika on 31st July, 2013.

In summary, the 2nd Respondent's case is based on three grounds namely:-

- a. That the attachment of its motor vehicle registration number KAT 277X is illegal because no attempt was made to comply with the provisions of Section 35 of the Kenya Airports Authority Act (Cap 395)
- b. That the ex-parte Applicant has not complied with the laws relating to attachment of property;
- c. That attachment should not have been effected considering that the 2nd Respondent has already filed an application in the Court of Appeal seeking leave to file an appeal against the judgment of this court out of time.

In opposition to the said application, the ex-parte Applicant filed grounds of opposition dated 12th August, 2013. According to the ex-parte Applicant, the issue of costs was settled on 17th June, 2013 and the 2nd Respondent's application for stay of execution and proceedings has no legal basis and the same is therefore an abuse of the court process.

The ex-parte Applicant submits that he has complied with the provisions of the Auctioneers Act Cap 526 and any small lapses in compliance with the said law amounts to technicalities which are curable by dint of Article 159(2)(d) of the Constitution. Thirdly the ex-parte Applicant argues that the provisions of Articles 27, 48, 50 and 159 of the Constitution overrides Section 35 of the Kenya Airports Authority Act in respect of attachment and the sale of the 2nd Respondent's assets. It is the ex-parte Applicant's case

therefore that Section 35 of the Kenya Airports Authority Act is unconstitutional and hence null and void. Finally, the ex-parte Applicant submits that this court is functus officio and it cannot grant stay of execution and/or stay of proceedings or any prayers in the 2nd Respondent's application in view of the consent order of 17th June, 2013.

I will start by considering the ex-parte Applicant's application dated 24th July, 2013. On 17th June, 2013 consent was entered between the ex-parte Applicant and the respondents and the main outcome of that consent was that the application for stay of this court's judgment and leave to appeal out of time would be escalated to the Court of Appeal. The 2nd Respondent has indeed indicated that the necessary application has been filed in the Court of Appeal and the same is coming up for hearing on 25th September, 2013. At the moment, there is no order staying the execution of the judgment of this court. The ex-parte Applicant had filed two applications on 24th July, 2013. One of the applications was aimed at committing the respondents' senior officers to civil jail for contempt of court for failing to comply with this court's judgment. When the application came up for hearing on 14th August, 2013 this court granted a temporary adjournment to the respondents awaiting the proceedings of the Court of Appeal on 25th September, 2013. Otherwise there is no stay against the decision of this court and there is therefore no reason for stopping the ex-parte Applicant from executing for costs. There is no evidence that if the decision of this court is overturned by the Court of Appeal the ex-parte Applicant will not be in a position to refund the costs already paid. I therefore allow the application and order that the kshs.150,000/= deposited in court by the 2nd Respondent as security for the ex-parte Applicant's costs be released to the ex-parte Applicant forthwith.

As concerns the 2nd Respondent's application, I note several grounds have been raised in support of the application. I will start by addressing the main ground namely that the attachment of its motor vehicle contravened the provisions of Section 35 of the Kenya Airports authority Act. The said Section provides that:-

“35. Notwithstanding anything to the contrary in any law-

(a) where any judgement or order has been obtained against the Authority, no execution or attachment, or process in the nature thereof, shall be issued against the immovable property of the Authority or any of its vehicles, vessels, aircraft or its other operating equipment, machinery, fixtures or fittings; but the managing director shall cause to be paid out of the revenue of the Authority such amount as may, by the judgement or order, be awarded against the Authority to the person entitled thereto;

(b) no immovable property of the Authority or any of its vehicles, vessels, aircrafts or its other operating equipment, machinery, fixtures or fittings, shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the managing director.”

The said Section is quite clear that no attachment shall issue against the vehicles of the 2nd Respondent. The law, however, directs the managing director of the 2nd Respondent to pay any amount as may, by the judgment or order, be awarded against the 2nd Respondent to the person entitled thereto. For attachment to take place, the managing director should give permission in writing. The meaning of this provision is that it is near impossible to attach the immovable or moveable property of the 2nd Respondent.

The ex-parte Applicant argues that the said Section contravenes Articles 27, 48, 50 and 159 of the Constitution. Among the principles established by the quoted Articles are:-

- a. Justice shall be done to all irrespective of status;
- b. Every person is equal before the law and has the right to equal protection and equal benefits of the law.
- c. The state shall ensure access to justice for all persons; and

- d. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or an independent or impartial tribunal or body.

The ex-parte Applicant cited the said principles to show that Section 35 of the Airports Authority Act is unconstitutional. The 2nd Respondent insists that Section 35 is good law and it was meant to cushion the operations of the 2nd Respondent from attachments so that it can concentrate on its core objectives. It must be noted that Section 7(1) of the Sixth Schedule of the Constitution gives this court authority to align the law that existed before the Constitution to the tenets of the Constitution by providing that:-

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

Such power should not be exercised lightly. There is need to really establish that a particular provision of the law is not in tandem with the Constitution before aligning it with the Constitution or declaring it unconstitutional. From the face of it and with the evidence placed before me, I find nothing unconstitutional in Section 35 of the Kenya Airports Authority Act. Having arrived at this finding, it follows that the attachment of the 2nd Respondent’s motor vehicle was therefore unlawful. I need not consider the other grounds in support of the application. The application is therefore allowed in respect of prayers No. (a)&(b). It is therefore declared that the attachment of the 2nd Respondent’s motor vehicle registration No. KAT 277X by Fantasy Auctioneers is illegal. The said motor vehicle shall be released forthwith and without any conditions to the 2nd Respondent. Prayer No. (c) fails since allowing it would amount to setting aside the consent order of 17th June, 2013 through the back door.

I order each party to meet own costs in respect of the two applications. As for the auctioneer’s costs, it is ordered that the same shall be met by the ex-parte Applicant.

Dated, signed and delivered at Nairobi this 28th day of August, 2013

W. K. KORIR,

JUDGE