



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Petition 275 of 2012

TABITHA MORAA MOKAYAAPPLICANT

VERSUS

SAMSON EKONGO ASIACHIRESPONDENT

RULING

Introduction

1. In her application by way of Originating Notice of Motion dated the 28th of June 2012 which is supported by the applicant's affidavit of the same date and expressed to be brought pursuant to the provisions of Article 20, 21, 22, 23, 27, 47 and 50(1) of the Constitution and section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, the applicant **Tabitha Moraa Mokaya** seeks, among others, an order:
 - (a) **THAT** this Honourable court do issue an interim conservatory order restraining the respondents and or their agents or employees from threatening, harassing, purporting to proclaim or attach or in any way infringing on the applicant's constitutional right to fair administrative action and fair hearing pending the hearing and determination of this application.
2. The respondent filed an affidavit in opposition to the application sworn on the 2nd of July 2012 by **Samson Ekongo Asiachi**. The application for conservatory orders was argued before me on 12th July 2012.
3. The gist of the applicant's case is that her right to property and to fair administrative action as well as the right to a hearing have been infringed or were in danger of being infringed as a result of an execution that was being levied against her. The execution arose out of Chief Magistrate's Civil Case No. 10033 of 2003 filed against her by the respondent.
4. According to Ms. Omwenga for the applicant, the respondent had brought the suit against her following a road accident involving motor vehicle registration number KAP 745N in which the respondent was travelling as a fare paying passenger on 18th June 2003. The motor vehicle had been registered in the applicant's name but it was under a beneficial owner, a Mr. Josephat Ratemo Nyarama, at the time of the accident. The alleged beneficial owner had, according to the applicant, insured the motor vehicle with United Insurance Company Limited.

5. Ms. Omwenga submitted that United Insurance Company Limited was placed under statutory management on the 15th of July 2005 and moratorium orders were issued by the High Court staying all proceedings against the company. In support of her allegations, the applicant produced copies of orders dated 27th October 2009 and 10th September 2011.
6. It was the applicant's case that despite the express orders of moratorium issued by the superior court, the Magistrate's Court proceeded with **Civil Case No. 10033 of 2003** and pronounced judgment against the applicant. Aggrieved by this judgement the applicant had made an application dated 9th December 2011 to the Magistrate's Court that passed judgment against her to review and or set aside the judgment, but the application was dismissed.
7. As a result, the respondent through his agent M/s Nairobi Channels Auctioneers has commenced execution by proclaiming and attaching the applicant's property comprising of motor vehicles registration number KBH 742Q, KAZ 939L and KAZ 027G.
8. The applicant contends that she has been unable to institute any declaratory suit compelling Ms United Insurance Company to effect payments since the moratorium orders are still in force. She therefore contended that her constitutional right not to be arbitrarily deprived of her property were infringed because of an erroneous and illegal decree for various reasons, Firstly, she contends that any liability against an insured motor vehicle should be satisfied by the insurance company. Secondly, she argued that one year had lapsed since judgment was entered and the respondent cannot now execute without taking out notices to show cause, and lastly, the proceedings in the primary suit were null and void and the respondent could not execute and/ or benefit from an illegal action. The applicant contended further that she was entitled to a fair hearing before the court in order to ensure fair administrative action. Ms Omwenga relied on the Nigerian case of Samaila Umaru –v- the State (2008) LPELR –CA/A/153/C/2005 and asked the court to re-open her case.
9. Mr. Oluoch for the respondent conceded that CMCC No. 10033 of 2003 had been filed against the applicant and Athi River Mining Limited. The suit was heard and determined in favour of the respondent on the 10th of January, 2011. He submitted that the applicant had been represented by a counsel in that matter. She had not raised the objection to the lower court about the alleged unlawfulness of the proceedings, nor did she call any witnesses.
10. The respondent contended that after the judgment, the applicant failed to settle the decretal sum as stipulated in the judgement, but filed two applications, one in the High Court being Miscellaneous Civil Application No 292 of 2011 dated 7th July 2011 seeking enlargement of time to enable her file a cross-appeal of the lower court's judgement and an application by way of Notice of Motion also dated 7th July 2011 in the Chief Magistrate's Court seeking stay of execution pending the hearing of the High Court application, as well as stay of execution pending her intended appeal.
11. According to the respondent, the application filed the two applications six months after the delivery of judgment against her and only when the auctioneers had issued a Notice of Proclamation on her assets dated 29th June 2011. The High Court (Mwera J.) in a ruling made on 28th September 2011, allowed the applicant to file an appeal out of time so long as she paid the respondent half the decretal sum within twenty one days. The applicant failed to comply with the orders of the court and accordingly the leave granted lapsed.
12. The respondent also submitted that the Chief Magistrate's Court had on 31st October 2011 granted the applicant stay of execution pending her intended appeal provided she complied with the High Court orders. She did not comply with either the orders of the High Court or of the Chief Magistrate's Court but instead, following the issuance of the above orders in her favour, the applicant again went quiet and took no action until the 9th of December 2011 when she was served with a notification of sale. She then rushed to court and filed an application dated 9th December 2011 seeking stay of execution, lifting of the attachment, unconditional release of the attached motor vehicle and review varying and/ or setting aside of the judgment of the Chief Magistrate's Court. She obtained the ex-parte orders staying execution and

mandating the release of the attached motor vehicle by the auctioneers forthwith. These ex-parte orders remained in force until 26th April 2012 when the application was dismissed.

13. Mr. Oluoch submitted that after this the applicant went quiet again and took no action until another proclamation was issued against her on the 22nd of June 2012 which provoked her into filing the application now before the court alleging violation of constitutional rights. The respondent has set out in his affidavit the proceedings before the lower court and the applications before the High Court and lower court as well as the orders made in favour of the applicant.

14. I have set out in some detail the respective submissions of the parties with regard to the application for conservatory orders by the applicant. The application is brought with a view to conserving the status quo pending the hearing of the Originating Notice of Motion. The applicant would merit a conservatory order if she is able to show that there has been or there is a threatened violation of her constitutional rights. The applicant alleges violation of the right to property, right to a hearing and fair administrative action. The question is whether the facts set out above disclose a prima facie case of violation or threatened violation of the applicant's rights.

15. The applicant impugns the proceedings in the Chief Magistrate's Court as having violated her rights under the Constitution. However, it is clear from all the documents annexed to the respondent's replying affidavit, and it has not been denied by the applicant, that she was duly represented by counsel in the lower court and she was therefore duly heard by the court. After the entry of judgment against her, she applied to the High Court and was granted conditional stay, but she failed to meet the orders of the court and the orders lapsed. She had also, simultaneously with her application to the High Court, filed an application before the court that had issued judgment against her, obtained stay orders on condition that she complies with the orders of the High Court, but again she failed to meet the conditions set by the court. It is noteworthy that the existence of the above orders had not been disclosed or even alluded to by the applicant.

16. In any event, the applicant has not denied that she made the applications referred to by the respondent, nor has she offered any explanation as to why she did not comply with the orders of the court. She has been heard, time and again, and orders issued in her favour, but she has chosen not to comply with the orders of the court. The case of Samaila Umaru -v- the State that she relies on will not be of avail to her.

17. From all the facts before this court, there has been no violation of the applicant's rights. What is before the court is an application by a party who seeks to avoid by all means meeting her obligations in accordance with a judgment of a court of competent jurisdiction, arrived at upon hearing all the parties. This application is, in my view, yet another attempt to deny the respondent the fruits of his judgment. The applicant has been filing applications every time an attempt to execute has been made, and then promptly abandoning the matter once the immediate danger of execution has passed. To grant any orders in favour of the applicant and indeed to entertain this application in its entirety is therefore to permit an abuse of the court process.

18. What the applicant is aggrieved by is a judgment of a court of competent jurisdiction. Such a judgment cannot form the basis of a constitutional reference, for as the court observed in the case of **Chokolingo -v- Attorney General of Trinidad and Tobago (1981) 1 ALL ER 244**, relied on by the respondent, citing with approval the decision in the case of in **Maharaj -v- Attorney General of Trinidad and Tobago (No. 2) [1978] ALL ER 670 at 679**.

'.....no human right or fundamental freedom..... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error.'

19. The applicant has a right of appeal against the decision of the lower court, a right she should have

exercised. The constitutional court cannot be a general substitute for the normal procedures in cases where those procedures are available somewhere else. See **Booth Irrigation –v- Mombasa Water Products Ltd, HCC Misc 1052 of 2004.**

20. This application discloses no violation of a constitutional right and is quite clearly a blatant abuse of the court process. It is therefore dismissed and the entire Originating Notice of Motion dated 22nd June 2012 struck out with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 31st day of July 2012.

**MUMBI NGUGI
JUDGE**