No. 2824

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL PETITION NO. 35 OF 2010

IN THE MATTER OF SECTION 34(1) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER SECTION 75 OF THE CONSTITUTION

BETWEEN

EVANS ENGOKE ALUNGA.....PETITIONER

AND

HEZRON OTOCHI NYAMBANE
THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER (D.C.I.O) MIGORI DISTRICT
THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

RULING

The applicant petitioned this court for a declaration that the seizure of motor vehicle KAH 242L lorry by the respondents was illegal and contravened his constitutional right to acquire, own and possess property. An order for the release of the said motor vehicle, 120 bags of maize grain, spare wheel, trucking jerk and a wheel spanner that were in the said lorry, a declaration that his constitutional rights to own and use property had been infringed upon by the respondents and was thus entitled to damages. The petition was opposed.

Musinga J. heard the petition interpartes and in ruling delivered on 2nd July, 2010 dismissed the petition with costs to the respondents holding thus:

"…In view of the foregoing, the order that was made by the Chief Magistrate on 27th July, 2009 directing that the lorry be kept in the custody of the OCS, Migori police station pending further orders of this court, was justified. I cannot therefore make a declaration to the effect that the seizure of the lorry by the 2nd respondent was illegal and contravened the petitioner's constitutional right to acquire, own and possess property. The Constitution of Kenya protects private rights to property that have been acquired lawfully but not otherwise. The 1st respondent's rights to the lorry which were still subject to court proceedings ought to have been safeguarded as well. I am also unable to grant prayers (b) and (c) as sought by the petitioner. I dismiss the petition with costs to the respondents…".

The applicant appears not to have been happy with the outcome above. Accordingly on 22nd September, 2010 he filed an application by way of Notice of Motion seeking in the main that the order made on 2nd July, 2010 dismissing the petition be reviewed, varied or set aside and in place thereof orders be made in terms that:

- **Motor vehicle KAH 241L be released to the applicant.**

- **120 bags of maize aboard the said vehicle together with the spare wheel, trucking jerk and a wheel spanner be released to the applicant.**

Secondly, that this court in exercise of its supervisory jurisdiction do call for and peruse the court record in respect of **Kisii CMCCC No. 88 of 2007, Julius Momanyi, Ndege –vs- Hezron Otochi Nyambane**, to aid it in making its determination. Finally, the applicant prayed for costs.

The application was expressed to be brought pursuant to section1A, 1B, 3, 3A and 63(e) of the **Civil Procedure Act** and the then order XLIV rule 1 of the **Civil Procedure Rules**. The grounds in support of the application are that the court's ruling aforesaid did not address the issue of release of 120 bags of maize, spare wheel, trucking jerk and wheel spanner that were in the lorry when it was seized, thus there was an error apparent on the face of the record, there was no order extracted and served upon pave auctioneers stopping them from selling the motor vehicle, the attachment and sale of the motor vehicle was thus regular and therefore the auctioneer passed on good title. The motor vehicle having been sold on 5th June, 2009 and returns on the sale filed in court on 10th June, 2009, the application dated 17th June, 2009 seeking for the lorry to be released to the 1st respondent upon furnishing of security should not have been entertained at all as there was no motor vehicle to be released. Depositing the money in court on 23rd June, 2009 by the 1st respondent well after the motor vehicle had been sold on 5th June, 2009 was an act in futility and conspiracy to defeat justice. Sufficient reason therefore exists for the court's ruling to be reviewed and varied. Had **Musinga J.** perused the court record in respect of **Kisii CMCCC No. 88 of 2007**, he would not have made the orders that he made on 2nd July, 2010. This was therefore an apt case for this court to review its orders made on 2nd July, 2010 and the application had been presented without unreasonable delay.

The affidavit in support of the application gives the background of the dispute. The same have been amply set out in the ruling of **Musinga J.** dated 2nd July, 2010. Suffice to add that the applicant was the registered owner of motor vehicle registration number KAH 242L hereinafter ***"the motor vehicle"*** which he purchased from one, **Patrice Mulei Alunga** on 10th July, 2009. At the time the motor vehicle was sold to him, he did not have notice of any order affecting the sale of the same in a public auction or even Notice of defective title. At the time of the seizure of the motor vehicle by the 2nd respondent it had aboard 120 bags of maize, spare wheel, tracking jerk and wheel spanner. Again at the time of seizure aforesaid he had not been served with any order nor was he a party to **CMCCC No. 88 of 2007**. Pursuant to the said seizure, the applicant filed the instant petition challenging the seizure as he had acquired ownership of the motor vehicle legally because:-

- **Warrants of attachment and sale were issued to Pave auctioneers on 20th April, 2009 and on 21st Aril, 2009 they attached and proclaimed the subject motor vehicle. On 29th May, 2009 the subject motor vehicle was attached and sale by public auction scheduled for 5th June, 2009.**

- **On 2nd June, 2009 before the sale was conducted, the 1st respondent obtained orders staying the sale and release of the motor vehicle to himself which orders were again stayed by yet another application.**

- **Since pave auctioneers were not served with the orders issued on 2nd June, 2009, they proceeded and sold the subject motor vehicle on 5th June, 2009.**

The auctioneer having not been served with any court order post-poning the sale or effecting the warrants in force, the sale carried out was therefore regular, legal and proper.

Accordingly, the title that passed to the purchaser, **Patrice Mulei Alunga** was proper and the court was duty bound to protect such title. As far as he was concerned, the auctioneer did not disobey any court orders and more particularly those issued on 2nd June, 2009 as he was never served with them. The auctioneer was all along acting on the basis of the warrants of attachment and sale issued by the court. The subject motor vehicle ought therefore to be released to him.

There is a replying affidavit by the 1st respondent filed in court on 12th November, 2010. However I am unable to tell whether the same was in response to the application since the 1st respondent states therein that it is in reply to the supporting affidavit of the applicant sworn on 16th September, 2010. The affidavit in support of the application was however sworn on 16th September, 2010. However to the extent that it deals with the events of 2nd June, 2009 and subsequent thereto, I am inclined to believe that it was filed in response to the application. Where pertinent the 1st respondent depones that upon obtaining the extracted order of 2nd June, 2009 he in the company of three other people including his driver went to the auctioneer's yard at Stella lodge in Migori where he found the auctioneer's workers among them, one, **Mr. Kaiya** and informed him the purpose of their visit. He thereafter served the said **Kaiya** with the order. Thereafter he demanded the release of the motor vehicle. The auctioneer, one, **Mr. Alfred Sagwe Mdeizi** was contacted on his mobile phone and the 1st respondent was thereafter informed that the auctioneer was to contact, his advocate, **Mr. Minda** before the vehicle could be released to him. He waited the whole day for the communication to no avail. He again came back the following day and again was told by the auctioneer's employees to wait for the auctioneer. At about 3.00p.m, the auctioneer's employees informed him that another order had been issued by the court staying the earlier order until 16th June, 2009 which he subsequently confirmed from his lawyer. However the application could not be heard interpartes on 16th June, 2009 nor were the interim orders of stay extended. On 17th June, 2009 he applied to have the motor vehicle released to him upon furnishing security in court for due performance of the decree which application was allowed and he duly complied with the order of the court by depositing in court the entire decretal sum due. This order was served on the OCS, Migori police station to enforce but the auctioneer refused to release the motor vehicle. When he together with the OCS left the auctioneer's yard to seek police reinforcement the auctioneer and or his employees drove away the motor vehicle from the yard. He was however pursued by the police officers and when they got up with them, the auctioneer's agents escaped into the bush. The motor vehicle was subsequently towed to Migori police station. At the police station the OCS informed the respondent that he had been served with yet another order directing that he releases the motor vehicle to another person purported to be a purchaser of the same. Before either party could apply for the court to determine the ownership of the motor vehicle, the purported purchaser mischievously applied to court in a different court file without disclosing the intricacies involved and the existence of the orders in **Kisii CMCCC No. 88 of 2007** and with intent to

steal a match on the 1st respondent obtained ex-parte orders for the release of the motor vehicle to him. Using the said order, the OCS released the motor vehicle to him. Following an application filed by the respondent an order was made directing that the motor vehicle be kept in the custody of the OCS. When the vehicle was seized, it had no goods at all. That the issues raised in the instant application are similar to those raised in the petition which were dealt with on merit. Therefore the application is misconceived, vexatious, scandalous and otherwise an abuse of the court process.

When the application came up for interpartes hearing on 30th November, 2010, parties agreed to canvass the same by way of written submissions. Subsequently, the submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

Ideally, this application should have been handled by **Musinga J**. who delivered the ruling sought to be impugned. Indeed he initially handled the application. However, he soon relocated from this station on transfer before he could conclude the application. It is on the basis of the foregoing that the matter landed before me.

Having gone through the record of the proceedings so far, I have no doubt at all in my mind that the applicant is not without blemish in this whole charade. He is not the innocent victim as he would want everyone to belief. His conduct leaves a lot to be desired. He together with the auctioneer acted with reckless abandon and mischief. They will have to leave with the consequences. Of course a court of equity frowns on such conduct. No doubt the auctioneer was served with the order of 2nd June, 2009. The 1st respondent has deponed to that fact which fact has not been controverted by the applicant. The applicant has deponed that had **Musinga J.** perused **Kisii CMCCC No. 88 of 2007,** he would not have made the aforesaid order. I suppose that what the applicant is saying is that the judge would have been able to see and appreciate that the order sought to be impugned had not been served on the auctioneer. However this is neither here or there. The 1st respondent had already deponed that the order had actually been served on the auctioneer. In any event, if that was the cornerstone of the applicant's position, why did he not ask the court at the time to call for file and peruse it so as to satisfy itself on the matter of service. If the applicant had exercised due diligence as expected of him in court proceedings, he would easily have availed the court file and or the information. That being the case it cannot be said that failure by the court to call for and peruse the file in respect of **Kisii CMCCC No. 88 of 2007** is such ground as would invite this court to review its earlier decision. The same goes for the 120 bags of maize, spare wheel, trucking jerk and wheel spanner. These are not new and important matters that have just been discovered by the applicant to warrant a review. They were always there but for the lack of due diligence on the part of the applicant they were not brought to therefore.

A party aggrieved by a decision of the court may apply for review on the grounds that there is discovery of new and important matter, there is a mistake or error apparent on the face of the record or for any other sufficient reason although, the applicant seem to rely on the ground that there is a mistake or error or apparent on the face of the record. I do to discern such an error though. This application cannot be supported by any of the above reasons, although the applicant seems to rely on the ground that there is a mistake or error apparent on the face of the record; I do not discern such an error though. As I have already indicated, service of the order of 2nd June, 2009 or lack of it on the auctioneer is not a new and important matter or evidence which if the applicant had exercised due diligence was not within his knowledge or could not have been produced by him at the time when petition was heard and ruling made.

The court ruled that the 1st respondent rights to the motor vehicle which was still subject to court proceedings ought to have been safeguarded as well and the subsequent seizure of the motor vehicle was not illegal nor did it contravene the constitutional right to acquire, own and possess property by the applicant. Therefore the decision given by the subordinate court on 27th July, 2009 directing that the motor vehicle be kept in the custody of the OCS, Migori pending further order was justified for the

reasons that the auctioneer did not pass a good title because the sale was in breach of a court order which was within his knowledge or which he ought to have been aware of. Secondly, that the application for vesting order should have been served and made by way of originating summons. All these were matters of law. The judge simply held that where litigation is pending, equity cannot permit any of the litigating parties or those who derive title under them to alienate any property that is subject to the dispute or litigation. This is the doctrine of ***les pendens***. The petition was dismissed on these points of law, that is to say, the Doctrine of ***les pendens*** and the irregularity of the vesting order. By this application, this court is simply being asked to reconsider whether or not the doctrine of ***les pendens*** was applicable in the circumstances and whether the vesting orders were properly issued. The issues with regard to 120 bags of maize, spare wheel, trucking jerk and wheel spanner are really side issues. In any event, those are issues which the applicant should have canvassed before the trial judge if he had undertaken due diligence. Further it does appear that the court did not deem it necessary to determine the said issues because it had already held that the applicant had not obtained a good title to the lorry.

For the applicant to invite me to reconsider whether or not the doctrine of ***les pendens*** was applicable in the circumstances and whether vesting order was obtained regularly, the applicant is really asking me to sit on appeal, of the learned judge's decision. This is not permissible in law. That again cannot be error or omission apparent on the face of the record. If the applicant is dissatisfied with the Judge's decision, his remedy lies in an appeal and not review. It is trite law that a court cannot review its decision made on points of law. As stated by the Court of Appeal in the case of **National Bank of Kenya Ltd –vs- Ndugu Njau C.A No. 211 of 1996 (UR)**. ***"…A review may be granted whenever the court considers that it is necessary to correct an apparent error or omissions on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review…".*** Yet this is exactly what the applicant wants this court to do.

For all these reasons I do not find any merit in this application and I hereby dismiss it with costs.

Ruling dated, signed and **delivered** at Kisii this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE