



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**MISC. CIVIL APPLICATION NO. 79 OF 2009.**

**IN THE MATTER OF AN APPLICATION BY DR. NICHOLAS WAWERU WAMBUGU FOR  
JUDICIAL REVIEW ORDERS OF CERTIORARI.**

**BETWEEN**

**DR. NICHOLAS WAWERU WAMBUGU.....APPLICANT.**

**AND**

**CHIEF MAGISTRATE'S COURT.....RESPONDENT.  
DAVID KIMANI GITHUKI.....INTERESTED PARTY.**

**R U L I N G.**

1. This notice of motion is brought pursuant to the provisions of order 53 (1) of the Civil Procedure Rules. The *ex parte* applicant is seeking for an order of certiorari to remove to this court and quash a consent order dated 2<sup>nd</sup> February, 2009 in CMCC NO. 315 OF 2002. He also sought for an order of prohibition against his prosecution by committal to civil jail on account of debts owing to the interested party. This application is premised on the grounds stated on the body of the application the facts contained in the verifying affidavit sworn by Dr. Nicholas Waweru Wambugu on 19<sup>th</sup> October, 2009 and the statutory statement.

2. The brief summary of this matter is that; the *ex parte* applicant **Dr. Nicholas Waweru Wambugu**, claim that he is also a director of a limited liability company known as **Dr. Wambugu and Sons Engineering and Investment Co. Ltd.** That company is indebted to the 2<sup>nd</sup> respondent a sum of Ksh. 179, 656/= out of which the company has paid Ksh. 100,000/= in part settlement. The applicant complained that the subordinate court acted beyond its jurisdiction and lifted the veil of a limited liability company and committed the *ex parte* applicant to civil jail for failure to pay the debt owned by a limited liability company. The applicant further complains that after being committed to civil jail, his then advocate acted without instructions and signed a consent dated 2<sup>nd</sup> February, 2009 thereby negotiating to release the *ex parte* applicant from civil jail on the following conditions:-

“By consent

1. *The judgment debtor be released from Civil jail upon executing a personal bond of Ksh. 150,000/= with a surety of a similar amount.*
2. *The judgment debtor has so far paid a total of Ksh. 50,000/= leaving a balance of Ksh.*

130,6609/=

3. *The judgment debtor to liquidate the balance of the decretal sum by monthly installments of Ksh. 20,000/= payable w.e.f. 28<sup>th</sup> February, 2009 and on the 28<sup>th</sup> day of subsequent months until payment in full.*

4. *In default, execution to issue forthwith as against the judgment debtor and the surety.*

3. The *ex parte* applicant who is acting in person submitted that he was not a party to the **Kitale CMC NO. 315/2002** and judgment could not have been executed against him. Secondly, the purported consent signed by **M/s. George Wambura** had no legal effect as it purported to negotiate the release of the *ex parte* applicant from the civil jail which committal was in the first place an illegality. The advocates did not have instructions to sign the consent on behalf of the applicant; the conditions set therein are also unfavorable, unfair and not binding. The respondent has not followed the right procedure to seek satisfaction of the judgment and decree and committal to civil jail was an abuse of the court process.

4. This application was opposed by Mr. Ingosi, learned counsel for the 2<sup>nd</sup> respondent. It was submitted that the notice of motion is incompetent because it was filed without the leave of the court. Secondly, even if the leave of the court had been obtained, the order sought to be quashed was made on 2<sup>nd</sup> February, 2009 while the application seeking for leave to institute judicial review proceedings was filed on 19<sup>th</sup> October, 2009 which is outside the six months period required under the provision of order 53 Rule 2 of the Civil Procedure Rules. Moreover the notice to the Registrar was not filed one day prior to day when the application was filed. Lastly, it was submitted that the applicant should have applied to set aside the consent order before the same court that issued it. Thus counsel submitted this application is an abuse for the court process.

5. The above contains the summary of the salient issues that were raised for and against this application. This application seeks to quash a consent order entered into in **Kitale CMCC NO. 315 of 2002**. This case was between **Dr, Wambugu & Sons Engineering and Investments Ltd** and the interested party. Under the provisions of Order 53 (1), it is provided that no application for an order of Mandamus, prohibition or certiorari shall be made unless leave is granted. It is further provided that an application for leave should be made *ex parte* before a Judge the *ex parte* application is supposed to give notice of the application for leave on the preceding day to the Registrar.

6. The application for leave should not be made later than six months after the order that is sought to be quashed. The application that is on record by way of chamber summons which purportedly sought the leave of the court is dated 19<sup>th</sup> October, 2009 and bearing the court stamp of 22<sup>nd</sup> October, 2009. This notice of motion is also not clear on when leave was granted. It is titled "*Pursuant to leave granted on 6<sup>th</sup> July, 2009 by the Honorable Mr. Justice Nicholas Ombija on 16<sup>th</sup> October, 2009.*" Could Ombija- J grant leave twice on the 6<sup>th</sup> July and on the 16<sup>th</sup> October 2009?

7. The applicant has not exhibited a copy of the order but going with the date of the chamber summons that was filed to seek leave, it is more probable than not, that no leave was granted as provided for under Order 53 of the Civil Procedure Rules. Moreover, the order sought to be quashed was issued or dated 2<sup>nd</sup> February, 2009. The application seeking for judicial review ought to have been filed on or before 2<sup>nd</sup> August, 2009. Accordingly much as this court sympathizes with the *ex parte* applicant, his application is not amenable to orders under Order 53.

8. On the merit of his application, it is trite that the remedies under judicial review realm of administrative law are granted on the basis of clear evidence of abuse of power, excess in exercise of jurisdiction or on the grounds that the rules of natural justice were not observed by the inferior tribunal that made the order sought to be quashed. The *ex parte* applicant seeks to quash a consent order which was entered into and recorded by his Advocate. Is that a matter for judicial review, or it gives rise to a civil suit between the *ex parte* applicant against his advocate for professional negligence or whatever other claim the applicant may have against his lawyer. The consent order did not emanate from court; the court merely did the administrative thing of recording it.

**9.** For the foregoing reasons, this application is struck out for being incompetent and lacking in merits. Considering the nature of the applicant's prayers, I am inclined to order each party to bear their own costs.

**Ruling read and signed on 3<sup>rd</sup> December, 2010.**

**MARTHA KOOME.  
JUDGE.**