REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CONSTITUTIONAL APPLICATION 450 OF 2008

IN THE MATTER OF: AN APPLICATION UNDER SECTION 65(2) OF THE CONSTITUTION OF

KENYA

AND

IN THE MATTER OF: PROCEEDINGS BEFORE THE SENIOR PRINCIPAL MAGISTRATES COURT

IN CMCC EJ 692 OF 2001.

BETWEEN

CMC MOTOR GROUP LIMITED ……..…….. 1ST APPLICANT

CMC HOLDINGS LIMITED ……..……..…..… 2ND APPLICANT

THE SENIOR PRINCIPAL MAGISTRATE

(MILIMANI COMMERCIAL COURTS) …...…....….. RESPONDENT

PETER MWANTHI ……... INTERESTED PARTY

JUDGMENT

Before the court is an Originating Notice of Motion dated the 23rd day of July, 2008 brought pursuant to S. 65(2) of the Constitution of Kenya. It is supported by an affidavit of one *Abisai Ivan Mutobi* dated 22nd July, 2009 and the grounds on the face of the Application.

The application is seeking for orders as follows, that:-

(i) The Judgment and decree issued by the Subordinate Court in Nairobi C.M.C.C. EJ 692 of 2001 on 7th July, be set aside and a regular trial of the suit be held before a court to be appointed by this Honourable Court.

(ii) The Order and ruling issued by the Subordinate Court in Nairobi C.M.C.C. EJ 692 of 2001 on 25th May, 2008 closing the applicants' case be quashed and/or set aside.

(iii) A declaration do issue that the refusal by the Senior Principal Magistrate, *E. N. Maina* **to**

hear the applicants' application dated 3rd June, 2008 prior to delivering Judgment constituteS substantial unfairness and did deny the applicant a fair hearing.

(iv) Depending determination of this suit, all further proceedings including execution of the impugned Judgment and decree in C. M C. C. E J 692 2 of 2001 be stayed on such terms as this Honourable court may determine.

(v) Costs of the motion be provided.

The Respondent and the Interested Party have vehemently opposed the application and have filed documents to that effect. The Respondent filed grounds of opposition on the 9th of October, 2008 and a replying affidavit on the 8th of December, 2008. On his part the Interested Party filed a replying affidavit dated 13th October, 2008.

The applicants were represented by ***Mr. Fred Ngatia***, the Respondent by ***Mr. Menge*** of the Attorney General's Chambers & the Interested Party by ***Mr. Kibe Muigai.***

The brief facts of the case are that the Interested Party filed suit on the 18th of September, 2001 by way of a Plaint being **C. M. C.C. EJ 692 of 2000**. Judgment in default of appearance was entered on 26th October 2001. However on the application of the 2nd applicant the exparte Judgment was set aside. On the 10th April, 2002, the 2nd applicant filed its Defence and Counter-Claim and on the 7th of October, 2002 it applied to have the 1st applicant enjoined as a party which orders were granted. On being enjoined the 1st applicant filed a defence and counter claim. On the 5th of June, 2008 the Interested Party amended his plaint, where he claimed for the sum of **Kshs.34,000/=** plus interest at 25% per month from 31st May, 2000 until payment as against the 1st Defendant, and jointly and severally from the defendants the sum of **Kshs.310.000/=** with interest at 25% per month from 30th May, 2000 until payment in full.

The hearing of the suit commenced on 15th April, 2008, when the Interested Party adduced evidence in chief. The matter was adjourned to the 2nd of May 2008, for cross-examination. Thereafter the case was to continue on 23rd May, 2008 for the defence case. At a call over in the morning of the said date the matter was slated for hearing for 10.00 a.m. At about 10.10 a.m. the Respondent closed the case due to the applicants' failure to adduce evidence. Neither the applicants' witnesses nor their counsel were in court at the material time. ***Mr. Macharia***, counsel for the applicants is said to have stepped out to look for the applicants' witnesses. The matter was mentioned on 4th of June, 2008, for purposes of receiving written submission. The applicants did not file their submissions but instead on the 3rd of June, 2008, they filed an application seeking to have the court order of 23rd May, 2003 set aside so as to defend the suit and prosecute their counter claim. The application was not heard and Judgment was entered on 7th July, 2008. The decree was issued and the Interested Party commenced execution. **It is at this stage that the** applicants moved this court under S. 65 (2) of The Constitution.

The counsel for the applicants ***Mr. Fred Ngatia*** contends that the applicants were denied a fair hearing within a reasonable time within the meaning of S. 77(9) of the Constitution. That the circumstances of the case were such that the alleged delay of 10 minutes on the part of the applicants was not a delay to warrant the actions of the respondent, given that the interested party had been indolent for more than 2 years before the hearing took off. That 10 minutes is not too long a delay for a party to be shut out of its own case. Further that the respondent refused to reopen the applicants' case despite an application seeking to vary the orders closing the applicants' from defending the suit and pursuing the counterclaim. The applicants contend further that the respondent was partisan and had a wrong attitude as a judicial officer. They have filed this Constitutional application on the concept of fair hearing as the respondent ignored their defence & counter claim on record.

Mr. Menge for the Respondent in opposition submitted that the application does not raise any constitutional issues and is therefore not a proper matter for a constitutional reference, that the application

is brought in bad faith, is an abuse of court process, and is an attempt to avoid execution, as the applicants do not have any defence to the interested party's claim. Further, if indeed, the applicants are aggrieved by the Respondent's decision the proper avenue to channel their grievances is through an appeal. That the Respondent had no interest in the suit before her and was partisan in the way she conducted the same. That such applications ought to be discouraged.

Mr. Kibe Mungai for the Interested Party on his part submitted that the application is incurably defective and is an abuse of the court process. That there are no proceedings capable of being supervised within the meaning of S.65 (2) of the constitution as read with S.25 & 34 of the Civil Procedure Act (Cap 21) and therefore this court has no jurisdiction to entertain this application. Further that the proper procedure for bringing an application grounded on S. 77 (9) of the Constitution is by way of reference and not Judicial review.

We have considered the application before us, all submissions by learned counsel and the authorities cited.

The application is brought pursuant to section 65(2) of the Constitution of Kenya which grants the High Court power to supervise Subordinate Courts & Court Martials. The applicants have invoked Section 65(2) of the Constitution in seeking remedy for an alleged breach of their Constitutional rights to a fair hearing under Section 77(9) of the Constitution of Kenya.

The issues arising for the courts' consideration are:-

1. Whether the court can invoke its Supervisory Jurisdiction under Section 65(2) of the Constitution to intervene in the circumstances of this case where judgment has already been entered;

2. Whether there has been a breach of the applicants' Constitutional rights, and if so whether the remedy lies in a Constitutional application;

3. Whether the court has been moved under the proper procedure.

Section 65(2) provides:-

"***The High Court shall have jurisdiction to supervise any Civil or Criminal proceedings before a Subordinate court or court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by such courts***"

The question for consideration is whether there are any proceedings currently before the subordinate court, capable of being supervised as indeed judgment was delivered on the 7th of July, 2008. What is now pending is execution of the decree. We find that, since judgment was entered, there are no proceedings currently capable of being supervised. It appears to us that the applicants being dissatisfied by the judgment are seeking to re-open the case. If the applicants were indeed dissatisfied with the conduct of the proceedings, it was open to them at that stage (but before judgment), to move this court. They did not.

The second question for the court's consideration is whether there has been a breach of the applicants' Constitutional right namely breach of the applicants right to a fair hearing and whether the remedy lies in a constitutional application. It is important in considering this issue for the court to determine whether or not the applicants had other remedies or avenues available to rectify or remedy their grievance under other laws. In this regard we are minded that it has been held severally that Constitutional jurisdiction should not be resorted to where ordinary law provides for reliefs that can be resorted to by litigants, as to do so would be to trivialize the Constitutional jurisdiction which ought to be confined to purely constitutional matters.

In *RODGERS MWEMA NZIOKA VS. THE ATTORNEY GENERAL & 8 OTHERS. PETITION*

NO.613 OF 2006. **Nyamu J held; in part**

"**where a party deliberately avoids to pursue the Statutory remedies for compensation or any other remedy (as has happened in this case and where specific remedies are set out in the Mining Act and also given a specific right of access to this court) and he instead purports to invoke Section 84 of the Constitution I find that such a move constitutes abuse of the court process and also trivializes the Constitutional Jurisdiction. Vindication of any breach of contractual rights or alleged decree can be articulated as a private right in the courts of the land. Section 84 was clearly intended for vindication of pure fundamental rights and friendless violation which in turn necessarily never constitutes cause of action else where."**

In arriving at the above holding Nyamu J made reference to the important case of ***HARRIKISSON*** vs. ***ATTORNEY GENERAL (1979) 3. W.L.R 63*** where the Privy Council stated:-

"***The notion that wherever there is failure by an organ of the Government or a public authority or public officer to comply with the Law this necessarily entails the contravention of some human rights or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court under Section 6, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of this court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for purpose of avoiding the necessity of applying the normal way for the appropriate Judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms."***

We shall first consider whether there are other provisions of the law that deal with the grievances being advanced in the application before us. S. 65 & 78 of the Civil Procedure Act provides for appeals from Subordinate Courts to the High Court Order XLI provides for the Procedure to be followed in the event of an appeal.

S. 65(1) provides:-

"***Except where otherwise expressly provided by this Act and subject to such provisions as to the furnishing of security as may be prescribed, an appeal shall be to the High Court-***

(a) -------

(b) ***From the original decree or part of a decree of a subordinate court, other than a Magistrate's court of the third class, on a question of law or fact***."

S.78 provides:-

"1. **Subject to such conditions and Limitation as may be prescribed, an appellate court shall have power:-**

(a) To determine a case finally

(b) To remand a case

(c) To frame issues and refer them for trial

(d)To take additional evidence or to require the evidence to be taken.

(e) To order a new trial"

2. ***Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."***

The aforesaid provisions of the Civil Procedure Act give the High Court wide powers to deal with appeals preferred from the Subordinate Court, which powers include remitting matters back for retrial, calling evidence and dealing with matters with finality. In Re Application by ***BANADUR (1986*) *L.R.C. CONST.297 at 298*** the court stated:-

"***The Constitution is not a general substitute for the normal procedure for invoking Judicial control of administrative action. Where infringement of rights can found a claim under substantive law, the proper cause is to bring the claim under the Law and not under the Constitution***."

The same Principle was applied in ***GEORGE WAITHAKA GITURU vs. THE ATTORNEY GENERAL MISC. APPLICATION NO. 578/2008,*** where the applicant did not pursue an appeal and made an application invoking the Constitutional Jurisdiction. The court declined to grant Constitutional orders.

It is a cardinal principle of Natural Justice that every party to a suit must be given a fair hearing. The said Principle is indeed enshrined in Section 77 of our Constitution However, it is our considered view that the applicants' grievances could be adequately remedied through an appeal as provided under the Civil Procedure Act. No. reason has been given as to why the applicants being aggrieved by the Judgment did not appeal against the same and opted at the stage of execution to make this application. We are also of the view that this court cannot invoke its supervisory jurisdiction as there are no proceedings capable of being supervised.

The final and 3rd issue for our consideration is whether the applicants moved the court under the proper procedure. The applicants moved this court by way of an Originating Summons under section 65(2) of the Constitution seeking to invoke the Supervisory Jurisdiction of the court. ***Mr. Ngatia*** for the applicants submitted that this was done procedurally. It appears to us that the procedure adopted was done under S. 2 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedural Rules No.2006 (Legal Notice No.6 of 2006).

Mr. Kibe for the Interested Party on his part contended that since the applicants' case is that they were denied a fair hearing within a reasonable time within the meaning of S. 77 (9) of the Constitution, they ought to have filed a petition S.11 & 12 of the Legal Notice No.6 of 2006 referred above states:-

"***S. 11 Where contravention of any Fundamental Rights and Freedoms of an Individual Sections 70 t0 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.***

S.12 "An Application under Rule 11 shall be made by way of a petition as set out in form D in the schedule to these rules"

We do agree with ***Mr. Kibe*** that indeed where contravention of Fundamental rights is alleged as is the case here the correct procedure is to file a petition.

For the reasons given above, we decline to grant the application and dismiss the same with costs.

Dated and delivered at Nairobi this 30th day of September, 2009.

R. P. V. WENDOH

JUDGE

GEORGE DULU

JUDGE

ALI-ARONI

JUDGE

Advocates

Mr. Fred Ngatia for Applicants

Mr. Menge for the Respondent

Mr. Kibe Muigai for Interested party

Court Clerks: Muturi

David

Njoroge