



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 467 of 2007**

**JOSEPH NDUNGU KINYA .....APPLICANT**

**VERSUS**

**PETER IRUNGU MWANGI & 3 OTHERS .....RESPONDENT**

**RULING**

This is an appellate proceeding. The Memorandum of appeal is dated 31<sup>st</sup> May 2007. The appellant is named as Joseph Ndung'u Kinya. Whereas the Respondents are named as Peter Irungu Mwangi, Joseph Mwangi Thuo and Michael M. Njoroge.

The application subject of this ruling is the one dated 31.7.07 and filed the same date. It is presented by the appellant. It had 8 prayers in it. On the hearing date, Counsel informed the Court that he was abandoning prayers 3-7 with costs to the 1<sup>st</sup> and intended respondent. That left prayers 1, 2 and 8. Prayer 1 is spent. Prayer 2 is to the effect that the intended 4<sup>th</sup> Respondent, Simon Maina Kimani, herein be enjoined as a party to the suit. Whereas prayer 8 relates to provision for costs which should be in the cause.

The grounds in support are in the body of the application, annexures, to the supporting affidavit, oral submissions and case law. The application is brought under Order 1 rule 10(2) of the Civil Procedure Code, Order XXXIX Rules 1, 2 and 7 and 9 of the Civil Procedure Code and Section 3 A of the Civil Procedure Act and all other enabling provisions of the law.

The sum total of the grounds in support is that:-

- (1) The applicant is the registered owner of motor vehicle registration number KAN 622N. It was unlawfully attached in pursuance to orders issued in Murang'a RMCC 57/2004, on 8<sup>th</sup> January 2007. The said objection proceedings were heard on merit and disposed of by way of dismissal. The applicants' counsel applied for stay of execution orders pending appeal which were issued on 31.5.2007.
- (2) This gave rise to a replying affidavit from the respondent served on 21.6.07 to the effect that the said vehicle had been auctioned on 31.5.2007.
- (3) Upon search at the Registrar of Motor vehicles offices, he has learned then, that the vehicle had not yet been registered in the name of a 3<sup>rd</sup> party.
- (4) They contend that the said sale was unlawful since the Auctioneers were required to advertise the

vehicle for sale within 7 days as provided for in the Auctioneers rules which they did not do.

(5) Private investigations have revealed that the vehicle is now registered in the name of Simon Maina Kimani the intended 4<sup>th</sup> Respondent to this application.

(6) That in view of number 1,2,3,4, and 5 above they have made out a case to warrant the orders sought herein. More so when the application is not opposed.

Counsel of the 1<sup>st</sup> Respondent has opposed the application on the ground that:-

(1) The sale has been made absolute by the lower court and so it can only be challenged by way of a substantive suit.

(2) This being an appellate proceeding, there is no way a party who was not party to the lower court proceedings can be joined to the appeal as Order 4 rule 17 only allows those who were party to the lower court proceedings to be brought on board.

Counsel for the intended 4<sup>th</sup> respondent also maintained that joinder is not possible as the intended party was not party to the lower court proceedings.

In response Counsel for the applicant stated that the provisions of order 1 rule 10(2) applies as it provides that at any stage of the proceedings and they do not distinguish a primary suit and an appeal. All that is required is for the court to be satisfied that the person ought to be joined.

The courts', assessment of the facts herein is that the application presents both procedural and legal issues. The procedural issue relates to when a new party can be joined to appellate proceedings. The legal issue also relates to the same thing firstly and secondly to the effect of the auction sale.

Order 1 rule 10 (1) reads (1) *“where it is doubtful whether it has been instituted in the name of the right plaintiff the court may at any stage of the suit if satisfied that the suit has a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*

(3) *The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, of any party improperly jointed, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added”*

The salient features of these provisions are as follows:-

(i) The marginal note reads substitution and addition of parties.

(ii) Order 1 rule (10) (i) deals with a suit.

(iii) The subject of order 1 rule 10 (1) is a suit.

(iv) Order 1 rule 10(2) also deals with a suit

(v) The subject of Order 1 rule 10(2) is either a plaintiff or a defendant.

By virtue of the foregoing findings, order 1 rule 10 deals with a suit and not appellate proceedings, as it relates to parties commonly described for proceedings in their original form.

Section 3A of the Civil Procedure Act has been cited. This Court has judicial notice that it is now trite law that it only applies where there is no provision catering for that particular situation since the complaint arises from proceedings which had reached the execution stage, this court is obligated to scrutinize the relevant provisions of order 2 Civil Procedure Rule firstly. Secondly, since the current proceedings are in an appellate file, the courts attention is also directed to the provisions of Order 41 Civil Procedure Rules relating to appeals.

A scrutiny of Order 21 Civil Procedure Rules reveals that rule 53 allows for objection to attachment which as soon as the notice is served it operates as a stay of execution until disposed off, a process the applicant says he exhausted in the lower court and lost. Once exhaustion of the attachment procedures, in order 21 rule 55 were exhausted and conclusively determined, they ushered in the execution provisions namely order 21 rules 59-68 of the Civil Procedure Rules. From the applicants own deponent, the attachment collapsed, sale ordered, stay ordered, but order served after the sale, property sold by public auction, he alleges the sale was improper as the property was not advertised for sale. Complaint that sale was improper brings to the fore the provisions of order 21 rule 69 Civil Procedure Rule. It states “*No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or if the person is the purchaser for the recovery of the specific property and for the compensation in default of such recovery*”.

Order 21 rule 69, is clear that the remedy for a party aggrieved by an irregularly conducted Auction lies in filing a suit for the recovery of the same or for compensation. The respondents are therefore right in what they are saying that the applicant is not only seeking a wrong remedy, but he has also come to a wrong forum.

Turning to the relevant appellate provisions, Order 41 rule 17 Civil Procedure Rules Reads “*where it appears to the court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred; but who has not been made a party to the appeal is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent*”.

The power donated to the court is limited to the joining of persons who were partial to the lower court proceedings. This court has judicial notice of the fact that parties to the lower court proceedings are plaintiff, defendant and 3<sup>rd</sup> party. The applicant was neither of those.

This provisions in order 41 rule 17 has to be contrasted with rule 76 of the Court of Appeal Rules which states “*76 (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.*

*Provided that the Court may on application which may be made ex parte, within seven days after lodging the notice of appeal direct that service need not be effected on any person who took no part in the proceedings in the superior court*”

In this provision the Court of Appeal has express liberty either to act suo moto or on application by either party to the appeal or an application of a stranger so long as he is interested in the appeal. This court had occasion to consider a similar scenario in the ruling delivered on 13<sup>th</sup> day of December 2007, in the case of CAPITAL MARKETS AUTHORITY VERSUS BOC KENYA NAIROBI, HCCC NO. 240 OF 2007. The rules are set out at page 37 of the said ruling from line 11 from the bottom. Case Law on the application of rule 76 is found at page 38 of the said ruling. At line 2 from the top there is cited the case of KENYA COMMERCIAL BANK OF AFRICA LTD VERSUS ISAAC KAMAU NDIRANGU NAIROBI CA. 157 OF 1991. The brief facts are that the 3<sup>rd</sup> party who had purchased property sold in pursuance to a realization of debenture security had been adversely affected by an order divesting him of that property issued in proceedings between the mortgagor and mortgagee to which he was not a party and to which though aware of the proceedings, he did not bother to apply to be joined as a party. The bank lost in the superior court proceedings, and the bank appealed to the Court of Appeal. The Court made an order that the record of appeal be served on RICHARD MAINA the buyer of the disputed

property.

At line 5 from the bottom, there is cited the case of **MWANZI ROAD PROPERTIES LTD VERSUS MUCHIRI AND ANOTHER** [1996] LLR 440 (NAI.CA 69/96). The applicant applied to be joined to the proceedings after judgment had been given on the ground that it was the registered proprietor of the suit property. On appeal to the Court of Appeal, the court of Appeal confirmed the right of an affected party though not party to the superior courts' proceedings to file an appeal to the Court of Appeal or apply to be a party to the Court of Appeal proceedings.

At page 39 of the said ruling line 8 from the top, this court made observations that “.....*this superior court, and the Court of Appeal are all creatures of statutes. The creating statutes may donate the power of self regulation in order to create room for autonomy and flexibility in the discharge of its functions. That the Court of Appeal has the Constitution, Judicature Act Cap 8 Laws of Kenya and the Appellate jurisdiction Act Cap.9 of the Laws of Kenya as the Parent Act Section 3(2) of Cap.9 provides*”. For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction offered by this Act, the Court of Appeal shall have in addition to any other power authority and jurisdiction conferred by this Act, the powers, Authority and jurisdiction vested in the High Court. Section 5(1) of the same Act provides that the rules committee may make rules of Court for regulating the practice and procedure of the Court of Appeal with respect to appeals and in connection with such an appeal for regulating the practice and procedure of the High Court.

At page 40 line 7 from the top this same court noted that “*Section 81(1) of the same Act (Cap.21 Laws of Kenya) provides for the creation of a rules committee to make rules to provide for any matters relating to the procedure of civil courts*”. At line 9 from the bottom on page 40 the Court made observations that

*“The Court of Appeal Acted within the provisions of the parent Act to self regulate itself and found it fit to create avenues for affected parties to access its seat of justice through rules 74(1) 75 and 76(1). In this Courts opinion, the reason for doing so is also obvious because firstly it is the final Court of the Land in this jurisdiction and when its final decision is handed out, all rights, duties and obligations regarding the subject matter of any proceedings before it is sealed and the rules of Res judicata take effect barring subsequent adjudication on the issue in any other forum. Further, the same parent Act vide Section 3(2) thereof donates original jurisdiction as powers of the High Court to it. It can re hear the parties and finally determine issues between them inclusive of those not dealt with by the High Court. Likewise the High Court in the exercise of its Civil jurisdiction operates within the Civil Procedure Act and the rules made there, under which rules, do not allow a right to subordinate courts or tribunals for that matter to intervene in the exercise of its appellate jurisdiction”*.

In addition to the foregoing, it is worth mentioning the provisions of Section 3A of the Civil Procedure Act which reads “*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the Court*”.

It is now trite law that Section 3A of the Civil Procedure Act has no application where the particular situation has been catered for. This was demonstrated by Kneller Ag. JA as he then was in the case of **WANJAU VERSUS MURAYA** [1982] KLR 276 where it was held *inter alia* that Section 3A of the Civil Procedure (Cap.21) although saving the inherent powers of the Court to make such orders as may be necessary for the ends of justice, or to prevent the abuse of the power of court, should not be cited where there is an appropriate section or order and rule to cover the relief sought.

Applying that to the facts herein, it is clear that the Court cannot invoke Section 3A Civil Procedure Act Cap.21 Laws of Kenya to aid the applicant because there is sufficient provision to cover the situation presented to Court as per the provisions of Order 41 rule 17 Civil Procedure Rules.

Further this court cannot assume the powers of the Court of Appeal donated by rule 76 of the Court of Appeal rules as these are denoted specifically by the parent Act of the Court of Appeal. The Court therefore adopts its finding in the Capital Markets case (supra) at page 41 line 1 from the bottom to the

effect that “*there is no jurisdiction to intervene in the manner sought even though the Court of appeal procedures on these provisions are specifically meant for Court of Appeal procedures. This Court as a superior Court subordinate to the Court of Appeal cannot import those procedures as that will amount to trespass to the Court of Appeal procedures*”.

Another aspect of this ruling which should not be overlooked is the fact that learned Counsel, for the applicant is an experienced lawyer of some standing. He ought to have read the rules and then construed them accordingly. Had he done so, this matter would not have found its way on to the judicial shelves and taken toll of scarce judicial time. It therefore falls into the category of cases where the solicitor or advocate responsible for the filing and prosecution of the frivolous processes is called upon to meet the costs of the proceedings.

This Court had occasion to consider this problem in its ruling delivered on the 15<sup>th</sup> day of February, 2008 in the case of ELISHA JACOB MUSOMA VERSUS SEEMFOD HOLDINGS LTD NAIROBI HCCC NO. 275 OF 2003. At page 17 of the said ruling, line 7 from the top, the Court, had occasion to refer to the case of MASTER JAMES MUCHAI VERSUS THE AGA KHAN HOSPITAL AND ANOTHER, NAIROBI HCC NO. 2037/L984 decided by Porter J. on 14.4.85 where by the Court has power to make an order requiring the solicitor to pay costs of the litigation personally if it is satisfied that the costs had been incurred unreasonably or improperly or had been wasted by failure to conduct the proceedings with reasonable competence and expedition.

The net result of the foregoing assessment is that the applicants application dated 31<sup>st</sup> July 2007 and filed the same 31.7.07, prayer 2 thereof fails on the following grounds:-

- (1) proceedings having arisen from objection proceedings and as at the time the applicant came to Court, the auction had taken place, the proper remedy to the applicant lay in the relevant provisions namely Order 21 rule 69 where the aggrieved party is enjoined to file suit for the recovery of the property or damages.
- (2) Order 41 rule 17 Civil Procedure Rules specifically provides that the High Court sitting in its appellate jurisdiction only has power to join parties who were parties to the proceedings to the appeal. There is no jurisdiction to join any other party to the appellate proceedings who was not party to the lower Court proceedings.
- (3) Section 3A of the Civil Procedure Act cannot be called into play to aid the applicant as it is only called into play where there is no specific provision covering the particular situation being inquired into. Herein the bone of contention is well covered by the provisions of order 41 rule 17 Civil Procedure Rules.
- (4) The type of power or jurisdiction sought to be invoked herein are available only to the Court of Appeal vide Section 3(2) of the appellate jurisdiction Act and rule 76 of the Court of Appeal rules. There is no provision for those powers to be employed by the superior court in its appellate jurisdiction.
- (5) Since Counsel for the applicant was capable of construing order 21 rule 69, Order 41 rule 17 Civil Procedure Rules, Construe the same, and then conclude that jurisdiction invoked is not available, he is therefore a proper candidate for ordering that he should pay costs personally.

The application is ordered dismissed with costs to the Respondents to it to be paid personally by the Counsel.

**DATED, READ AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2008.**

**R.N. NAMBUYE**

**JUDGE**