Kangethe v Kiarie (Civil Appeal E006 of 2024)
[2025] KEHC 4944 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CIVIL APPEAL E006 OF 2024

JN NJAGI, J

APRIL 24, 2025

BETWEEN

BONIFACE KAMAU KANGETHE ..... APPELLANT

AND

SUSAN WAITHERA KIARIE ..... RESPONDENT

RULING

1. The Appellant/App herein has filed an application dated 30th December 2024 seeking the following orders:

    1. Spent
    2. Spent
    3. Spent
    4. That the Garnishee Nisi Order issued on 17th December 2024 in relation to Safaricom Limited in the name of Trident Insurance Company Ltd pay bill No. 985850 or any other bank account held by the garnishee on behalf of Trident Insurance Company Ltd be reviewed and set aside.
    5. That the costs of the application be provided for.

2. The application was supported by grounds stated on the face of the application and by the supporting affidavit of James Onyoro, the legal officer of Applicant`s insured, Trident Insurance Company Ltd. The grounds in support thereof are that this court, Githinji J. on the 16th December 2024, issued a stay of execution of the consent judgment in Hola CMCC No. E034 of 2023 and stay of proceedings of declaratory suits arising therefrom-pending hearing and determination of the appeal herein. However, that the Respondent being aware of the said proceedings proceeded on the 17th December 2024 to apply for and obtained garnishee Order Nisi at Hola magistrate`s court to garnishee the insurer`s Mpesa pay bill No. 985850 and other bank accounts in execution of the orders duly stayed herein by Githinji

J. That the accounts have been suspended with the ripple effect that the insurer cannot transact and or honour its commitment to third parties. That unless the application is granted and the said orders are set aside, a great injustice will be occasioned to the Applicant.

3. It was the case for the Applicant that the Respondent disregarded the proceedings at the High Court Garsen and deliberately did not disclose to the magistrate`s court material facts when obtaining the garnishee orders. Therefore, that the orders were obtained irregularly and prematurely against the High Court orders.

4. The application was opposed by the Respondent vide his counsel`s submissions dated 31st March 2025.

Submissions

5. The Applicant filed submissions dated 27th March, 2025 through the firm of Wesonga Wamalwa & Kariuki Associates. They pointed out that this court by its ruling dated 16th December, 2024 directed that there be stay of execution of the consent judgment as well as the declaratory proceedings in Hola CMCC No. 052 of 2024, E056 of 2024, E062 of 2024, E067 of 2024, E074 of 2024 and E101 of 2024 pending the hearing and determination of this appeal. That both counsels for the Applicant and the Respondent participated in the proceedings. That the matter was set for ruling on 10th December 2024 in the presence of both counsels but the court was not sitting on that day and parties were informed that the same would be delivered on 16th December 2024 on which date the court issued the conditional stay orders which conditions the Applicant subsequently complied with.

6. Counsel for the Applicant submitted that the garnishee orders were obtained by concealing material facts on the orders of this court issued on 16th December 2024 staying the subject declaratory suits that were before the lower court. That the lower court can be excused for the orders issued as material facts were not brought to its attention before the orders were made.

7. It was submitted that this court has power to review orders issued by the lower court erroneously as court orders are not issued in vain. Reliance was placed in the case of Wildlife Lodges Ltd v County Council of Nrok and another (2005) 2 EA 344 (HCK) where it was held that:

> It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.

8. Also cited was the case of Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Exparte David Mugo Mwangi) (2018) eKLR where it was stated that:

> It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.

9. It was submitted that no appeal and or review has been brought against the orders of this court issued on 16th December 2024 and as such all parties are bound by the terms of the order.

10. On jurisdiction, the Applicant submitted that Article 165(6) of *the Constitution* grants this court power to supervise subordinate courts and therefore that the court should lift the garnishee orders issued in total disregard of the existing orders of this court.

11. The Applicant defended his filing of the application at the lower court dated 20th December 2024 and urged this court to grant the prayers sought.

12. Mr. Wambua Kilonzo for the Respondent on the other hand submitted that the orders being sought to be reviewed were issued by the trial court in Hola and as such, the prayer for review can only be granted by the same court. Counsel relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 (1) of the Civil Procedure Rules in regard to review of judgments, decrees and orders of the court and submitted that this court cannot give itself powers to review orders of the lower court in that this would be acting ultra vires.

13. It was the submission of the Respondent that the Appellant filed a similar application at the trial court dated 20th December, 2024 seeking similar orders as in the present application. That the said application is pending determination and therefore this court lacks jurisdiction to determine this application since the application violates the provisions of Section 6 of the *Civil Procedure Act* which bars a court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The respondent in this respect relied on the case of Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties), where the Supreme Court held the following on the issue of sub judice:

> ....The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.

14. The Respondent submitted that the subordinate court at Hola has jurisdiction to review its own orders and thus the appellant`s action of instituting a similar application in the High Court and the lower court is outright abuse of the court process and the sub judice rule.

15. It was submitted that the ruling of the High Court was coming up on 10/12/2024 but the court did not sit on that day but no directions were given on pending judgments and rulings. Neither did the Applicant inform the Respondent of the intended ruling date of 16/12/2024. That the Respondent was not present in court when the High Court issued the orders dated 16th December 2024 nor were they served with an extracted order of the court. That the Applicant had been granted stay of execution for 14 days vide a ruling delivered on 3/12/2024 which stay lapsed on 16/12/2024. Therefore, that there were no stay orders in place at the time the garnishee proceedings were commenced and as such execution through garnishee proceedings was properly commenced.

16. The Respondent urged the court to dismiss the application.

Analysis and determination

17. I have considered the grounds advanced in support of the application and the submissions by the respective counsels for the parties. The issues for determination are:

    (1) Whether the application is defective in that it ought to have been filed at the lower court that issued the garnishee orders.

    (2) Whether the application is sub judice.

18. The application is indicated to have been filed under the provisions of the "*Judicature Act* Cap 8, The High Court (Practice and Procedure Rules (Part 1 and 3), Civil procedure Rules and other enabling provisions of the law." The applicant did not cite the rule(s) of the Civil Procedure nor the enabling provisions of the law under which the application was made. It was however clear from prayer 4 of the Notice of Motion dated 30/12/2024 that the applicant was seeking for "review and setting aside" of the garnishee order nisi issued on 17th December 2024. The issue is whether it is this court or the trail court that should deal with the review application.

19. The Respondent argued that it is the court that issued the garnishee orders that has power to review the orders sought and not this court. Reliance was placed on Order 45 (1) of the Civil Procedure Rules that provides for review of court judgments, decrees and orders.

20. The Applicant on the other hand argued that the garnishee orders were issued when there were High Court orders staying execution of the decree of the lower court. That this court by dint of Article 165(6) of *the Constitution* has supervisory power over subordinate courts and that being so it has power to review orders of a subordinate court that are issued in direct conflict of High Court orders.

21. Order 45 rule 1 of the Civil Procedure Rules, 2010 provides as follows:

    (1) Any person considering himself aggrieved—

        (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

        (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

    (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

22. Order 45 rule 2 (1) of the same provides as follows:

    2. To whom applications for review may be made [Order 45, rule 2]

        (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of

the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

> [Section 80 of the *Civil Procedure Act* gives the court unfettered discretion to review of its decision. Section 80 provides as follows: -"Any person who considers himself aggrieved—a.by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; orb.by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."
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> 40. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 sets out the grounds for review and provides as follows: -"1.(1)Any person considering himself aggrieved—a.by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; orb.by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."
>
> 41. Section 80 of the *Civil Procedure Act* gives the power of review whereas Order 45 sets out the rules which restricts the grounds for review to the following grounds:a.Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;b.On account of some mistake or error apparent on the face of the record; orc.For any other sufficient reason]

23. My understanding of the above provisions is that a court can only deal with a review application where there are two pre-existing factors:

    (1) where an appeal is allowed but from which no appeal has been preferred against a decree or order, or

    (2) where no appeal is allowed by the law.

24. In this case the garnishee orders were made on the 17th December 2024. There has been no appeal preferred against the said orders.

25. Though counsel for the Applicant argued that this court has power to review the garnishee orders that were obtained improperly without the Respondent disclosing to the trial court that the High Court had issued stay orders against execution of the decree of the lower court, he did not state with any clarity the law under which they were seeking for review of the trial court`s orders by this court. Counsel made reference to the supervisory powers of the High Court under Article 165(6) of *the Constitution* of

Kenya, 2010. However, the supervisory powers of the High Court are employed to correct legal errors and mistakes committed by a subordinate court. There is no such complaint in this matter. More so, the same cannot be resorted to where there is a law providing the procedure to be followed in a given situation. In this case the law under Order 45 of the Civil Procedure Rules provides for review of a court`s order by the court that made the order where there is no appeal preferred against the order. That being the case, it is my view that that is the law that the Applicant should have employed in this matter.

26. The Applicant based his application on the ground that the Respondent did not disclose all the material facts to the trial court when he made the application for garnishee orders. The review application was therefore based on the ground that there was sufficient cause to review the orders. Rule 45(2) provides that a review application based upon some ground other than the discovery of new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed. This, in my view, clearly shows that it is the trial court that has the power to hear the review application.

27. The Respondent submitted that the matter is sub judice. In my view, the rule does not apply in this matter as it is the magistrate`s court that was properly seized of the matter. The Applicant should proceed with the application that was filed at the lower court.

28. The upshot is that I do not find merit in the application dated 30th December 2024. The same is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2025

J. N. NJAGI

JUDGE

In the presence of:

.....for the Applicant/Appellant

.....for Respondent

Court Assistant - Ndonye