REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL CASE NO. 4 OF 2019

MICHAEL OBADHA..PLAINTIFF/APPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED..........DEFENDANT/RESPONDENT

AND

LILIAN ATIENO OMORO..1ST INTERESTED PARTY

RUTH MASAWA..2ND INTERESTED PARTY

RUTH MUHONJA...3RD INTERESTED PARTY

VITALIS KIPNGETICH RONO...4TH INTERESTED PARTY

RULING

Introduction

1. This ruling determines the applicant's Notice of Motion dated 27th May 2021 brought under the provisions of **Order 51 Rule 1 and Order 50 Rule 4 of the Civil Procedure Rules as well as Section 1A, 1B and 3A of the Civil Procedure Act** in which the applicant seeks the following orders;

a) Spent

b) That pending the hearing and determination of this application, there be an interim stay of intended executions of the judgements in Ukwala PMCC Nos 55,56,85,86,87,88,89,90,91,92,93,94 and 127/2018 and all other matters arising from the accident involving KBV 211X on the 8th June 2018 at Got Nanga.

c) That orders made by this Honourable court on the 22nd day of September 2020 be reviewed and set aside.

d) That orders made by this Honourable court on 16th day of December 2019 granting stay to the execution of decrees be reinstated.

e) That the court do grant a nearer hearing date for the main suit for the purposes of formal proof.

f) That the cost of this application be provided for.

g) That any other relief that this Honourable court may deem fit to grant.

2. It is the applicant's case that the Honourable court granted conditional stay orders to the applicant on the 16th day of December 2019 which required the applicant to meet certain conditions to facilitate disposal of this suit, the conditions being:

a) To make good any dishonoured cheque within 30 days from the day of the ruling

b) To pay the interested parties/decree holders all the cleared further court fees in the matters within the same period and

c) To pay each of the interested parties throw away costs of Kshs. 10,000 within the same period.

3. The applicant states that upon compliance, on the 21st January 2020, his advocate informed him that court processes were suspended during the period between 21st January – 22nd September 2020 only for him to learn that the matter had proceeded on several occasions during which time the orders issued on 16th December 2019 were vacated and his bank accounts at Stanbic Bank frozen by the interested parties vide a garnishee order.

4. It is the applicant's case that the default judgement was entered against him on the 3rd February 2021 and formal proof set for 10th August 2021.

5. The applicant states that he later learnt that his advocate on record had quit and relocated to Uganda but the firm that had conduct of his cases had not followed up on the progress of the suit and accordingly, the failure of the advocate to act in the best interest of the client should not be visited on the client.

6. The applicant's further assertion is that he has since been served with several proclamations specifically in case number Ukwala PMCC 55 & 56 of 2018 that are erroneous and misleading as the plaintiffs in both those matters are seeking Kshs. 3,116,941 which amounts to a doubling of the decretal sum whereas that amount was only awarded in Ukwala PMCC 55 of 2018.

7. It is the applicant's case that the aforementioned proclamation led to the impoundment of motor vehicle KBV 211X by the 2nd Interested Party yet the case number and the award belonged to the 1st Interested Party.

8. The applicant states that his declaratory suit has high chances of success and the interested parties will not be prejudiced in anyway as they can be compensated by way of costs whereas allowing the interested parties to proceed with attachment will occasion the applicant massive loss.

9. The applicant further states that some of the cases in Ukwala PMCC 102,106 and 111 of 2018 have been found to be fraudulent with the plaintiffs therein having been charged and investigations ongoing.

10. The applicant filed a further affidavit on the 9th July 2021 in which the he deposed that his application met the threshold for grant of orders sought as he had explained the circumstances that led to the setting aside of orders dated 16th December 2020. The applicant further denied being behind the objection filed by his wife in Ukwala PMCC 55 of 2018.

11. The applicant further deposed that he was not frustrating the settlement of the case but rather was at the fore in seeking a resolution in the matter as by law it is the insurer who ought to settle the claim.

Interested Parties' Case

12. Opposing the application by the applicant/plaintiff, the Interested Parties through their advocate Mr. Calistus Nyegenye filed a replying affidavit sworn on the 14th June 2021 and filed on the same day in court stating that the application dated 27th May 2021 was misplaced, an abuse of court process and brought in bad faith with the aim of frustrating the interested parties from executing their judgements.

13. It is the interested parties' contention that the applicant has failed to meet the legal requirements to warrant the court to review and set aside the orders of 22nd September 2020 which were made on merit after the court was informed that the applicant and his counsel had been served and failed to appear in court.

14. It is the interested parties' case that it is more than 9 months since the court issued the orders the applicant is seeking to have reviewed and set aside and as such he cannot feign ignorance as he instructed his wife to file objections to the attachment of motor vehicles KBV 211X, KAU 728P and KBY 767K all registered under his name, which objection was dismissed on the 6th May 2021.

15. The interested parties state that it is not true that the applicant has been kept in the dark by his previous advocate as he had full knowledge of all happenings in the lower court as he was always served with the requisite documents by the interested parties.

16. The interested parties further aver in contention that it is not true that the claims by the applicant regarding forged claims are valid as none of the interested parties has ever been charged or arrested in connection with the allegations being made by the applicant.

17. The interested parties further state that the applicant cannot claim to be indemnified by the defendant before he settles the decrees against him as it is not clear what he intends to claim as no losses have been incurred by himself.

18. It is the interested parties case that the applicant only awakes from his slumber whenever the interested parties move to execute their decrees and further that the applicant is relying on a typographical error in the warrants of attachment to claim that the warrants were faulty.

19. The interested parties through their advocate filed a supplementary affidavit sworn on the 8th July 2021 and filed on the same date in which they stated that the court in dismissing the objection filed by the applicant's wife noted that the applicant was out to frustrate the efforts of the 1st interested party. It was further deposed that the interested parties herein are decree holders in Ukwala PMCC No. 55,56,64 and 127 of 2018 and not all the matters as listed by the applicant.

Applicant's Submissions

20. The application was canvassed by way of written submissions. According to the applicant, this court has jurisdiction to review the orders granted to the interested parties. He relied on the case of **CCD v ENB, PKN, VD & BU [2018] eKLR.** It was further submitted that the application meets the threshold for grant of orders sought as the applicant herein raises issues which if not taken into account will lead him to incur losses. The applicant further submitted that he had complied with the orders of 16th December 2019 and had every intention of concluding the suit.

21. The applicant further submitted that he has presented the court with facts about the conduct of the interested parties in obtaining questionable warrants of attachment in PMCC 55 & 56 of 2018 in their efforts to benefit twice.

22. It was further submitted that the fraudulent claims arising from the accident involving motor vehicle KBV 211X which are subject of ongoing prosecutions and investigations ought not to be stopped by the interested parties as this would be tantamount to interfering with lawful duties of investigative agencies which thus necessitate the reinstatement of orders dated the 16th December 2019.

23. The applicant further submitted that he was not aware of the court proceedings during the period from 21st January 2020 to 22nd September 2020 and that he made efforts to restart the proceedings after realizing his advocate had absconded court.

24. The applicant submitted that this court ought to halt the execution in all the 21 cases against him until the instant suit is heard and determined and further allow the investigations that are ongoing to be complete as the execution has the potential to bankrupt the applicant yet he was properly insured.

Interested Parties' Submission

25. It was submitted on behalf of the interested parties that the applicant has not met the legal threshold to warrant review of the orders of the court made on the 22nd September 2020. The interested parties submitted further that the court ought to reject the applicant's assertion that his previous counsel did not inform him of the developments in this matter as he had a duty to follow up on his matter and further as he was served with all the court documents as required by law.

26. Further submission was that the applicant cannot claim not to be aware of the developments in the instant matter yet he participated in the garnishee application dated 26th October 2020 as was noted by the lower court in its ruling dated 5th May 2021 and further as the applicant claimed that together with the agents of the defendant they investigated the authenticity of the interested parties claim against him.

27. It was submitted that the unreasonable delay of 9 months which the applicant took to file the application herein is unjustifiable and was occasioned because the applicant's wife had filed an objection in Ukwala PMCC No 55 of 2018 which was dismissed and immediately after its dismissal the applicant filed the instant application.

28. It was submitted that the applicant ought not to rely on typographical error on the warrants, which have since been rectified in the notices to show cause, as he had a chance to approach the lower court and seek clarification but failed to do so.

29. The interested parties submit that the applicant has approached court with unclean hands as he has previously issued dishonoured cheques and conspired with the wife to defeat justice.

Analysis & Determination.

30. I have considered the application by the applicant/ plaintiff, the opposition thereto and the submissions by both parties' advocates and the authorities relied on. In my view, the main issue for determination is whether the applicant's application has any merit.

31. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules give to this court the power of review, but such power must be exercised within the framework of Section 80 Civil Procedure Act and Order 45 Rule 1. Section 80 of the Civil Procedure Act provides:

> ***80. Any person who considers himself aggrieved-***
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> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
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> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

32. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides:

> ***"45 Rule 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; 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

33. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules lay down the jurisdiction and scope of review. They limit 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, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay*.

34. In the instant suit, the applicant seeks review and setting aside of the courts orders granted on 22/9/2020 on the grounds among others that his advocate failed to attend court during the period between 21st January – 22nd September 2020 and did not inform him and as such the mistake of the advocate should not be visited on him, that subsequent investigations reveal that the claim by the interested parties may be fraudulent and that there are ongoing investigations and prosecutions.

35. The question faced by this court is **whether the reasons advanced by the applicant merit review of this court's orders of 22/9/2020**. In **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal stated:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"***

36. See also **Francis Njoroge v Stephen Maina Kamore [2018] eKLR**.

37. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that:

> ***"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-***
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> ***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."***
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> ***We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.***
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> ***We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:***
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> ***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"***

38. I have considered the reasons given by the applicant for seeking an order of review. It is noteworthy that the orders the applicant seeks to review were granted after the court noted the applicant's laxity in prosecuting his own case. The court noted the several times the applicant and his advocate had been served but failed to attend court.

39. Further to this, this court prior to making its decision on the 22/9/2020 noted the prejudice occasioned on the interested parties who are decree holders in the lower court suits by the pendency of the instant suit. The applicant now places this blame on his advocate's foot and asserts that the same should not be visited upon him.

40. This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty owed to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In espousing this position counsel for the Respondent relied on the case of **Belinda Murai & 6 Others v Amos Wainaina [1978] KLR where Madan JA** (as he then was) defined what constitutes a mistake as follows:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate." *[own emphasis]*

41. Similarly in **Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103 at 1040 Apaloo J/A** as he then was stated thus:-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit". *[own emphasis]*

42. However, in **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, the Court of Appeal observed:

"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

43. In the above case however, the court also stated that legal business should be conducted efficiently and thus this court can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

44. The applicant further alluded to ongoing investigations and prosecutions as a result of fraudulent claims instituted from the accident involving motor vehicle KBV 211X. The applicant failed to provide substantial evidence of the allegations against the interested parties herein. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in Section 107(1)(2) of the Evidence Act that provides thus:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

45. Section 112 of the Evidence Act provides that:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

46. Furthermore, albeit the applicant claims that he was not aware of what was happening in this suit, he readily deposes that his bank accounts were frozen through Garnishee proceedings in the lower court and that he was served severally with proclamations. In addition, it is clear that he participated in the objection to attachment of the Motor vehicles registered in his name as filed by his wife. The question is, why did he approach this court on his own accord to establish why his property were being attached yet as he states, he had complied with all orders issued by this court? It is worth noting that albeit the applicant complied with orders to enable stay of execution of decrees in the lower court, the order for setting down this suit for hearing was not complied with. It was his duty to expedite the hearing of this suit and not to obtain stay orders which order was discretionary and then proceed to slumber as the interested parties who are decree holders wait forever. In my humble view, the applicant had obtained stay with the intention of denying the applicants the fruits of their lawful judgment. He now claims that the interested parties are fraudulent ad that they are facing prosecution over these accident cases yet he could not avail any evidence of such investigations or even a charge sheet. This court further observes that the application is coming nine months after the orders impugned which is inordinate and unexplained delay. The applicant has not denied that he participated in the execution proceedings in the lower court where garnishee proceedings were conducted and a ruling delivered on 5/5/2021. Furthermore, he has not appealed against any of the many rulings made by the lower court including the objection to execution application made by his wife in SPM CC No. 55 of 2018. The allegations that there are errors in the warrants of attachment is not a matter to be entertained in these proceedings as this suit is not an appeal but an original suit. Any errors or issues with the manner in which the lower court is handling execution proceedings can only be dealt with in an appeal.

47. This court is well aware that the applicant participated in the proceedings giving rise to the stay orders issued by this court and therefore he cannot claim that he is a stranger o these proceedings. I find no sufficient cause for grant of the orders sought.

48. Accordingly, the applicant having failed to meet the legal threshold for grant of orders of review, I find the application dated 27 th May 2021 lacking in merit and proceed to dismiss it with costs to the interested parties.

49. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF SEPTEMBER, 2021

R.E. ABURILI

JUDGE