



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 80 OF 2017

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT/1ST RESPONDENT

VERSUS

EZEKIEL ODUK.....2ND RESPONDENT

OSCAR OTIENO ODONGO

T/A ODONGO INVESTMENT AUCTIONEERS...INTERESTED PARTY/APPLICANT

RULING

The application dated 18/9/2019 was filed by Oscar Otieno Odongo T/A Odongo Investment Auctioneers, the applicant herein seeks the following orders:-

- a) The court be pleased to enjoin the applicant herein to the proceedings of this file for the purposes of this application only;**
- b) The court do review, expunge, vary and/or set aside the submission and/or paragraphs of the ruling dated 8/9/2019, particularly the paragraphs adversely mentioning the applicant;**
- c) Such further and/or other orders be made as the courts may be deemed fit and expedient;**
- d) That the costs of the application be born by the appellant/1st respondent and/or his advocates.**

The application is based on seven (7) grounds appearing on the face thereof and is supported by the Supporting Affidavit of **Oscar Otieno Odongo**, sworn on 18/9/2019.

The grounds upon which the application is premised are thus:-

- a. That the court proceeded to make a finding(s) affecting the applicant's integrity as an officer of the court without according and/or giving the applicant an opportunity to be heard;**
- b. That the ruling of 8/8/2019 touching on the applicant's conduct in executing warrants of attachment and sale in this matter and sister file MIGORI HCCA No. 81 of 2017 were made pursuant to a deliberate misleading submission by the appellant/1st respondent;**
- c. That the integrity and duty of the court is going to be eroded should the misleading submissions and findings touching on the applicant are not reviewed, expunged and/or set aside;**
- d. That the applicant shall suffer irreparable character and professional loss if the said limb of the submission describing the applicant as an officer of the court obstructing justice is not expunged, set aside, varied and/or reviewed.**
- e. That the applicant's costs in executing warrants of attachment and sale issued in this matter on the 4/4/2019 have never been discussed, agreed and/or paid by the appellant/1st respondent as alleged/alluded to.**

The applicant deponed that he was issued with warrants of attachment of sale of the 1st respondent's movable property in Migori CMCC No. 54 of 2015 and 2429 of 2015; that the 1st respondent was the judgement debtor while the 2nd respondent was the decree-holder; that the 1st respondent was served with a copy of the proclamation and a fee note and he obtained an interim order of stay; that the stay was in relation to

the pending appeals in Migori HCCA No. 80 & 81 of 2017; that the applicant filed bills for assessments of costs vide Migori Misc. Applications nos. 18 & 19 of 2017 but the 1st respondent did not defend the applications; that the applicant instituted garnishee proceedings attaching the 1st respondent's bank accounts in National Bank of Kenya Awendo Branch and Kenya Commercial Bank Migori Branch; that the 1st respondent did not file an application to set aside the ex-parte proceedings but chose to appeal to the High Court vide Migori HCCA No. 34 & 35 of 2019.

On 28/5/2019 when the aforementioned applications came for hearing, Mr. Marvin Odero counsel for the 1st respondent and the applicant therein recorded a consent; that the 1st respondent has made partial payments but the payments do not relate to the appeal files in HCCA No. 80 & 81 of 2017; that upon conclusion of the appeals herein, the applicant was issued with fresh warrants of attachment and the sale of the 1st respondent's movable property dated 4/4/2019; that the applicant served the proclamation notices upon the 1st respondent on 9/4/2019; that the 1st respondent did not pay the decretal sums but hid the proclaimed properties by locking them inside her premises; that the applicant mounted the application seeking to attach the properties and orders were accordingly issued on 13/5/2019; that the applicant has not obtained any fees on account of the warrants issued in this matter to compromise the execution processers to derail or obstruct the course of justice as alluded to by the 1st respondent; that the said sentiments were made in bad faith seeking to tarnish the name of the applicant; that the applicant risks to have his licence cancelled by the Auctioneers and Licencing Board and suffer great loss for a misconduct which he did not commit.

The application was opposed. The 1st respondent filed a replying affidavit sworn and filed by Marvin Odero Advocate dated 30/10/2019 and filed evenly. He deponed that he is an Advocate of the High Court of Kenya having the conduct of this matter on behalf of the 1st respondent; that an application by the 1st respondent dated 21/5/2019 was heard orally on 29/5/2019 and the issue of who would bear the costs of the execution proceedings taken out against the 1st respondent arose; that on 28/5/2019, the 1st respondent and the applicant appeared before court for the hearing of an application dated 23/5/2019 in Migori HCCA No. 34 of 2019 for stay of execution and/or proceedings for the recovery of the taxed costs issued by the subordinate court in favour of the applicant dated 8/5/2019 in Misc Civil Application No. 18 of 2019; that on the same date, a consent was recorded by both parties in Migori HCCA No. 34 of 2019 to the effect that the fees of executing the decree of the lower court in Migori CMCC No. 2429 of 2016 be substituted from Kshs. 1,225,087.20/= to Kshs. 460,000/= all inclusive; that the said costs were to be paid in two instalments of Kshs. 230,000/= that is on 10/6/2019 and on or before 10/7/2019; that the garnishee orders made on the 1st respondent's bank accounts on 22/5/2019 in Misc Civil Application No. 18 of 2019 to be vacated but in default of the payment, the garnishee order would then stand reinstated; that each party in Migori HCCA No. 34 of 2019 would bear its own costs.

The 1st respondent further deponed that on 28/5/2019, they recorded a consent in Migori HCCA No. 35 of 2019 to the effect that the assessment of the applicant's fees of executing the decree issued in the lower court in Migori CMCC Misc Civil Application No. 19 of 2019 in the sum of Kshs. 3,460,046.80/= be substituted with the sum of Kshs. 920,000/=. The said sum was to be paid in two equal instalments of Kshs. 460,000/= each payable on 10/6/2019 and on or before 10/7/2019; that the garnishee order made on the 1st respondent's bank accounts on 22/4/2019 would be vacated forthwith and in default of the payments, the garnishee orders would then be reinstated; that each party would bear its own costs. The 1st respondent deponed that the issue of who would bear the costs of the execution proceedings in Migori CMCC No. 2429 of 2015 and 54 of 2016 was already moot and since the 1st respondent agreed to pay the applicant's fees and after the appeals were determined, the decrees substituted the subordinate court decree; that at no time in the proceedings of 29/5/2019 did Counsel inform the court that the applicant had been paid the agreed fees of Kshs. 920,000/= and Kshs. 460,000/=. Instead, an agreement had been reached and recorded the previous day; that by a cheque dated 24/6/2019 the 1st respondent paid the applicant the first instalment of a total of Kshs. 690,000/=; that by the judgement delivered by this court on 12/3/2019, this court allowed the substantive appeal and substituted the decree of the trial court which awarded the 2nd respondent Kshs. 11,939,595/= with an award of Kshs. 8,924,731.10/= interest and costs of the lower court; that the appeal in Migori HCCA No. 81 of 2017 was allowed and the lower court decree of Kshs. 4,017,060/= was substituted with a decree for Kshs. 2,840,835.10/= with interest thereon and the costs of the lower court; that to the extent that these appeals were allowed, it is the decree of the subordinate court once substituted, which is to be executed against the judgement debtor in the decree of the subordinate court as there was no award of costs in the appeal hence there is nothing which could be executed against the 1st respondent; that in the proceedings of 29/5/2019, the applicant executed the decrees of the subordinate court before they were set aside and substituted with the respective appellate decrees and thereafter the applicant also executed the relevant appellate decrees inclusive of the decree herein against the 1st respondent although such execution proceedings were unlawful and irregular; that when Counsel submitted on the issue of the applicant's costs, he meant fees for executing the respective decrees of the trial court; that the court disapproved in its ruling the kind of arrangement entered into between the 1st respondent and the applicant for settling the auctioneer's fees and costs which ordinarily must be recovered alongside the judgement sum. It cannot be said that because there were execution processes in the suits before the subordinate court and in these appeals, then the applicant was entitled to receive his costs and fees before the 2nd respondent could be paid. The deponent asked this court to dismiss the application with costs.

I have carefully considered the applicant's notice of motion dated 18/9/2019, the 1st respondent's replying affidavit and the rival submissions which I shall not reproduce as they reiterate the positions taken by the applicant and the 1st respondent in the application and the replying affidavit respectively.

The issues for determination are:-

- a. Whether the applicant can be joined to these proceedings as an interested party?**
- b. Whether the court should review, expunge, vary and/or set aside the;**
- c. Whether some paragraphs in the ruling of 8/9/2019 adversely mention the applicant that is in paragraphs 5, 9, 20, 21, and 22;**
- d. Whether the said paragraphs should be expunged or set aside**

On the first issue, one of the provisions of the law which the applicant ought to have relied upon is **Order 10 Rule 1** of the Civil Procedure Rules, 2010, which provide as follows on joinder of parties:-

“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, order that the name of any party improperly joined, 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

For one to be joined in proceedings as an interested party, the parameters are ‘whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.’

The Court of Appeal in **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** in considering the application brought under Order 10 Rule 1 of the Civil Procedure Rules held:-

“The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit.”

In **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR** the court observed as much when it held:-

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.”

The applicant prayed to be joined to these proceedings as an interested party for the sole purpose of clarifying what transpired that led the court making certain findings in the ruling delivered by Mrima J on 8/9/2019 as the applicant alleges, touched on his character in his professional capacity and which may injure his business as an auctioneer.

The Court of Appeal in **Mombasa Civil Appeal No. 15 of 2015 JMK Vs MWM & Another (2015) eKLR** in considering an application appealed from the superior court seeking similar orders as the ones before this court, held:-

“The appellant however has not applied solely to be added as a party to the suit; he has also applied for review and setting aside of the judgement of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgement of the Industrial Court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard...”

There being no objection on the part of the 1st and 2nd respondents for the applicant/interested party to be joined to these proceedings the court would. I allow the prayer for the joinder of the applicant as a party to this suit.

This application is brought amongst others, under Order 45 Civil Procedure Rules which provides for review. Order 45 Rule 1 and 2 provide as follows:-

i) 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.

The court has unfettered discretion to review order as it thinks fit on sufficient reason being given for review of the decision. However, the said discretion should be exercised judiciously and not capriciously.

In **Civil Appeal No. 211 of 1996, National Bank of Kenya vs= Ndungu Njau**, the Court of Appeal held that:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the

part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be sufficient ground for now that another judge could have taken a different view on the matter nor can it be a ground for review that the court proceed on an incorrect expression of the law.”

The court will review an order if there is discovery of new and important matter or evidence which was not within the applicants knowledge or an error apparent on the face of the record, or for any other sufficient cause.

The applicant contends that some paragraph’s of the ruling of Mrima J dated 8/9/2019 are likely to injure his reputation as an auctioneer and that is why he seeks a review or expunging of the same.

In the Court of Appeal, decision in **JMK Vs MWM & Another (supra)** relied on the UK decision of **Reynolds v Times Newspapers Ltd (1999) 4ALL ER 609**, Lord Nicholls held:-

“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well – being; whom to employ or work for, whom to do business with or to vote for, once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever especially if there is no opportunity to vindicate one’s reputation.”

I have duly considered the ruling dated 8/9/2019 delivered by Mrima J. The applicant has prayed that paragraphs 5, 9, 19, 20, 21 and 22 be expunged, I reproduce them verbatim as herein under:-

(5)The Applicant also informed the Court that the Auctioneer fees attendant upon the attachment were settled vide Migori High Court Misc. Civil Application No. 35 of 2019 at Kshs. 920,000/=.

(9) Counsel for the Applicant also applied that the outcome of the application to apply in Civil Appeal No. 81 of 2017 save that the Auctioneer in that appeal was instead paid Kshs. 460,000/= as fees courtesy of Migori High Court Misc. Civil Application No. 34 of 2019.

(19)Having considered the aforesaid conditions there is an issue which came up at the hearing worth mentioning. It is the fact that the Applicant paid the Auctioneer fees which accrued as a result of the attachment in this matter. The Respondent deponed that the Applicant is in a sustained trail to frustrate the realization of the fruits of the judgment and it has opted to not only appeal but to also compromise the Court process by satisfying the Auctioneer fees and costs well before the Auctioneer undertook his duty in realization of the judgment.

(20) On the issue of the Applicant settling the Auctioneer fees and costs beforehand, I must state that the process of execution is in essence initiated by the Court itself by issuing Warrants of Attachment and Sale to an Auctioneer. The Auctioneer therefore takes the position of an agent of the Court with a clear mandate to execute the decree within a specified period.

(21) From the outset it may appear to be a normal and harmless transaction between the Auctioneer and the judgment debtor, but it raises several legal questions. For instance, in this case the Applicant has been so categorical that there is no contract between the Respondent and itself and that it is not in any way liable to make good any of the Respondent’s demands. That is the position the Applicant has taken in the matter and resulted to the appeal before this Court and the pending appeal before the Court of Appeal. That being so, the Applicant goes ahead to satisfy the fees and the costs of the Auctioneer in circumstances which remain unknown to the instructing Court. What happens if the appeal succeeds and the Applicant is absolved of any liability? Truly, the possibility of other suits arising is real. Is the Applicant silently admitting liability?

(22)This is my position on the matter: Ideally, the auctioneer fees and costs must be recovered alongside the judgement sums. In the event the judgement debtor opts to settle the Auctioneer fees and costs before satisfying the decree then that should not in any way forestall the execution process unless with the intervention of the court which issued the warrants. An auctioneer who received his/her fees and costs in advance fails to proceed on with further execution of the decree stands on the way of a court process and brings his/her conduct into sharp focus inter alia Article 10 of the Constitution. Indeed, in appropriate instances such an auctioneer may be in contempt of court. An auctioneer must always stand true to the calling to aid in administration of justice by focusing on faster determination of matters referred to him/her in line with inter alia Article 159 (2) (b) of the Constitution, the overriding objective in Section 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya among other laws.”

The applicant/interested party contends that Counsel for the 1st respondent misled the court that the payments made were in relation to the Appeals in Migori HCCA 80 & 81 of 2017. Counsel for the 1st respondent has denied the allegation and urged that when he submitted on the issue of the applicant’s costs, he meant fees for executing the respective decrees of the trial court in HCC No. 34 and 35 of 2020; that it is the kind of arrangement entered into between the 1st respondent and the applicant to settle the auctioneer’s fees prior to payment of the judgement sum to the 2nd Respondent that was disapproved by the court.

I agree that, the interpretation of paragraph 9 of the ruling seems to make a direct inference that the fees of Kshs. 460,000/= were paid to the auctioneer in Migori Civil Appeal No. 81 of 2017 courtesy of Migori High Court Misc. Civil Application No. 34 of 2019. Therein lies the apprehension of the applicant.

However, it is not in dispute that the parties herein entered into a consent on 28/5/2019 on the payment of the auctioneer’s fees in Migori HCCA Nos. 34 & 35 of 2019 for Kshs. 460,000/= and Kshs. 920,000/= respectively and partial payments thereof were made in HCCA No. 34 and 35 of 2019 which were appeals against the Auctioneer’s Bill of Costs arising from, Misc No. 18 of 2019 and 19 of 2019.

Both the Applicant and 1st Respondent have made it clear that the appeals, in which the auctioneer's fees were agreed on and partially paid were from the taxed costs and certificates of costs awarded in Migori Chief Magistrate's Court Misc. Civil Applications No. 18 & 19 which gave rise to appeals in Migori HCCA Nos. 34 & 35 respectively but not in Migori HCCA Nos. 80 & 81 of 2017. However, the suits all originate (appeals and miscellaneous applications) from CMCC 2429 OF 2015 and 54 of 2015 where the Decree Holder is the 2nd Respondent.

In the impugned Ruling, the judge disproved the fact that the Auctioneer's fees and costs were paid or partially paid to the applicant. The learned Judge did not absolve the 1st respondent and he questioned its actions of paying the auctioneers' fees before the Decree holder was paid (2nd Respondent) and whether the 1st respondent were silently admitting liability, yet these are pending appeals.

The consent on costs and payment was made before the decree holder / Applicant had been paid any part of this decretal sum. That fact is not denied. That is the act that the court disproved. The only error on record is that the court indicated that the costs were paid in HCCA NO. 81 of 2020 as opposed to 34 and 35 of 2019. But the fact remains that payment has been made or partially made to the applicant in the appeals rising from the miscellaneous applications arising in the same suits i.e. CMCC No. 2429 of 2015 and No. 54 of 2015 and that payment was irregular. I find there to be no error on the face of the record that would need to be reviewed. In any event, if the court were to expunge the impugned paragraphs, what would happen to the rest of the ruling of the court. In my view, even if the complaint had any merit, it could only be dealt with on appeal.

I appreciate that the application was filed timeously. However, the prayer for review is not merited and it is hereby dismissed (prayer (b)). For whatever it is worth, prayer (a) for joinder was not opposed and is granted (prayer (a)). Each party will bear their own costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 5TH DAY OF OCTOBER, 2021.

R. WENDOH

JUDGE

JUDGMENT DELIVERED IN THE PRESENCE OF

NO APPEARANCE FOR THE APPLICANT

MR. OKEYO HOLDING BRIEF MR. ODERO FOR THE 1ST RESPONDENT.

.....FOR THE 2ND RESPONDENT.

NYAUKE COURT ASSISTANT.