



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL SUIT NO. 2 OF 2021**

**(FORMERLY NAIVASHA HIGH COURT CIVIL SUIT NO. 1 OF 2020)**

**(FORMERLY NAROK HIGH COURT NO. 4 OF 2015)**

**(CORAM: F.M. GIKONYO J.)**

**WYCLIFFE MWAVALI ONDARI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**COUNTY COUNCIL OF NAROK.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KESIKE OLE WOTUNI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

**Twists and turns**

[1] This case has been characterized by twists and turns, some only ranging from pull and push between counsels to complaints against the trial court to recusal of the trial judge, to uncertainty of court orders to request akin to clarification of the court orders issued on 6<sup>th</sup> February, 2018. Nonetheless, I do not wish to reproduce the specific turns and twists- they are discernible from the record.

[2] The center of controversy seems to be the ruling of the court (Bwonwongá J) delivered on 6<sup>th</sup> February, 2018. Although not specifically stated in the said ruling, it is discernible from the record that the ruling is in respect of the Defendants/Applicants Notice of Motion dated 30<sup>th</sup> January, 2018 which sought the following orders:

**i. spent**

**ii. THAT the honourable court do order an interim stay of execution of the judgement and decree dated 20<sup>th</sup> November, 2017 emanating from the consent entered on 1<sup>st</sup> November, 2017, pending the hearing and determination of this application.**

**iii. THAT the consent order illegitimately entered on 1<sup>st</sup> November 2017 and recorded as a judgment of this honorable court on 20<sup>th</sup> November, 2017 between the plaintiff and the defendants' former advocate on record and all other subsequent proceedings and consequential orders be reviewed and set aside.**

**iv. THAT the costs of this application be in the cause.**

[3] The relevant part of the ruling is reproduced below:

**In the light of the affidavit evidence and the rival submissions of both counsel, I find the following to be the issues for determination**

**1. Whether or not this court is *functus officio***

**2. Whether or not this court has jurisdiction to review the impugned judgement.**

3. Whether or not the defendants have made out a case for the grant of an order of stay of execution.

4. Who bears the costs of this application?

Issue No. 1 and 2

I have considered the preliminary objection of counsel for the plaintiff that this court has no jurisdiction to review its judgement and decree. I find that the court is empowered by section 80 (a) of the Civil Procedure Act [Cap 21] Laws of Kenya to review its judgement and decree. There are further enabling provisions in Order 45 of the 2010 Criminal Procedure Rules, which similarly authorize this court to review its judgement and decree for sufficient good cause amongst other grounds.

I find from the unopposed affidavit evidence that the defendants have shown sufficient good cause to review the consent judgement. There are enabling provisions in Order 45 of the 2010 Civil Procedure Rules. In the circumstances, I find that this court has jurisdiction to review its judgement. I further find that this court has not become *functus officio*. I therefore find in favour of the defendants that there is jurisdiction in this court to review the impugned judgement.

Issue No. 3

I find from the unopposed affidavit evidence that the plaintiff/respondent is in the process of executing the decree following the entry of a consent judgement. I find that the execution is imminent. In the circumstances, I find that unless an order of stay of execution is granted, the defendants are likely to suffer substantial damage. I therefore find that the defendant/applicant have made out a case for grant of an order of stay of execution pending the hearing and determination of this application.

Issue No. 4

I have considered the issue of cost and I find that costs of this application would be costs in cause.

Ruling delivered in open court on this 6<sup>th</sup> day of February, 2018 in the presence of Ms Muigai for the plaintiff and Mr. Kamwaro holding brief for Mr. Kemboi for the defendants.

J. M. Bwonwonga

Judge

6/2/2018

[4] The interpretation of this ruling by the legal counsel for the defendants is that his application was allowed and the consent judgment was reviewed and set aside. He is of the view that the suit should now be set down for hearing.

[5] The legal counsel for the plaintiff takes a different view of the ruling. According to her, the consent judgement was not reviewed or set aside. Therefore, parties should argue the application dated 30<sup>th</sup> January 2018.

[6] Quite disparate views and interpretation. I am aware that court's decision should be expressly clear. Notably, however, is that the ruling clearly set out the issues and also made clear findings on the issues. Of greater and specific importance herein is the finding that: -

**I find from the unopposed affidavit evidence that the defendants have shown sufficient good cause to review the consent judgement. There are enabling provisions in Order 45 of the 2010 Civil Procedure Rules. In the circumstances, I find that this court has jurisdiction to review its judgement. I further find that this court has not become *functus officio*. I therefore find in favour of the defendants that there is jurisdiction in this court to review the impugned judgement.**

[7] And, ultimately, the court found costs of the application to be in the cause. Costs follow the event.

[8] Despite these findings which in law are determinations by the court supported by evidence, divergent interpretation still persists. The legal counsels have invited the court to interpret these findings. The invitation to interpret these findings could be mistaken for sitting on appeal over the decision of a court of concurrent jurisdiction. There is also a further dilemma; that my interpretation is not final and may not bring closure to this long-drawn tussles between counsels. I only regret that, the more time is taken to resolve this issue, the greater the delay becomes, and the more depressing the case will become to the parties especially the plaintiff who has had to wait to realize his remedy for such a long time. Unless parties bite the bullet and come this realization, the end of these proceedings is not in sight. I will nonetheless, provide my interpretation which may be tested in the Court of Appeal, for it is better a wrong decision than none at all. I say these things for I am fully aware that failure to make a decision is a ground for appeal.

[9] In light thereof, my view is that the findings by the judge were definite determinations of the framed issues on the basis of the evidence provided. They lead to an inescapable conclusion that; (i) the application dated 30<sup>th</sup> January 2018 was determined; (ii) the consent judgement was reviewed and set aside; and (ii) stay of execution was ordered. If parties agree to this interpretation, the court will fast-track this case in line with the overriding principle of the court.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021

.....

**F. GIKONYO M**

**JUDGE**

**In the presence of:**

1. Ms. Muigai for Plaintiff/Applicant
2. Kere for Respondent
3. Kasaso - CA