



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 34 OF 2019

AM alias AM

(Minor suing through mother and next friend

HYM) PLAINTIFF

VERSUS

YUASA MOTORS LIMITED 1ST DEFENDANT

FRANCIS GACHIRI KIARIE 2ND DEFENDANT

JOASH OYARO NYANG'AU 3RD DEFENDANT

AND

SAMUEL MUGARO T/A

MISA AUCTIONEERINTERESTED PARTY

CORAM: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the Plaintiff and interested party

Chepkwony Advocate for the Defendant

RULING

The applicant filed a notice of motion dated 19.9.2019 pursuant to Section 1A, 1B and 3A, Order 9 Rule 9, Order 45 Rule 1 (b) Order 51 of the Civil Procedure Rules seeking the following orders:

- (1) That the application be hereby certified as urgent and that the same be heard ex-parte in the first instance.***
- (2) That there be an interim stay of further execution as against the Judgment and Decree entered in Malindi CMCC Civil Case No. 249 of 2017 pending the hearing and determination of this application inter-parties.***
- (3) That Malindi Civil Case No. 249 of 2017 be placed before this court for analysis and perusal.***
- (4) That Judgment and decree emanating from Malindi CMCC Case No. 249 of 2017 be set aside pending the hearing and determination of the application.***
- (5) That the Honourable Court be pleased be set aside the Judgment granted herein; and have the said Judgment as against the 1st defendant thereby set aside and have the 1st defendant's name expunged forthright from the suit as having been erroneously enjoined therein;***
- (6) That this Honourable Court be pleased to order that M/S Misa M. Auctioneers disclose their statements of client account for the period of March to August 2019 pending the hearing and determination of his application.***

(7) That this Honourable Court be pleased to order that M/S. Misa M. Auctioneers to present their KRA returns for the period of March to August 2019 pending the hearing and determination of this application.

(8) That this Honourable Court be pleased to order that M/S. Misa M. Auctioneers to provide all information relating to the alleged auction that took place on 18th April 2019 and in the alternative, this Honourable Court be pleased to order that M/S. Misa M. Auctioneers to provide all information relating to the alleged auction that took place on 18th April 2019 together with all the bids and ID numbers of those who participated in the alleged auction pending the hearing and determination of this application.

(9) That this Honourable Court be pleased to order that M/S. Misa M. Auctioneers bear the costs of the illegal/irregular auction that took place on 18th April 2019.

(10) That this Honourable Court be pleased to order that all the successful bidders in the auction that is alleged to have taken place on 18th April 2019 appear before this Honourable for cross examination.

(11) That this Honourable Court be pleased to order that Marsden Osiomo Advocate and Erick Kokul Advocate appear before this Honourable Court for cross examination.

(12) That the sale of 1st defendant's assets namely motor vehicle Registration Numbers KCS 969N, KCS 468Q, KCM 412F be hereby raised and/or lifted and that the said assets be released forthright to the 1st defendant with no orders as to costs.

In support of the motion are grounds on the face of the motion and an affidavit by **Mohammed Ashiq**.

Resisting the application is a replying affidavit by Learned counsel dated 28.10.2019. In the replying affidavit Learned counsel seeks the notice of motion to be expunged for reasons that it is bad in Law for being incompetent, frivolous, vexatious, scandalous, Res judicata, lacks merit, misconceived and ill advised. According to the respondent to declare and set aside the Judgment of the lower court in **CMCC 249 OF 2017** in absence of an appeal would be an action in futility and instituted before a court without jurisdiction.

Further, the Learned counsel averred that the matter in issue is directly and substantially in issue, in the previously instituted suit being referred to by the applicant.

Pending the pronouncement of the decision both counsels filed brief written submissions on the various issues on the basis of affidavit evidence respectively filed on matters arising.

Simultaneously, Learned counsel for the respondent filed a notice of preliminary objection dated 15.10.2019 in terms of Section 6 of the Civil Procedure Act. In Learned counsel's submissions with regard to the preliminary objection on the impugned proceedings in **CMCC NO. 249 OF 2017** and subsequent motion as filed and the relief sought are matters which this court lacks jurisdiction. Learned counsel placed reliance in the decisions of **owners of motor vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1986 KLR, Mukisa Biscuits Co. Ltd {1969} EA 69, Equity Bank Ltd v Bruce v Bruce Mutie Mutuku t/a Diana Tour & Travel Mombasa HCA NO. 13 OF 2016, Japheth Ogendo Owuor v Akuom O. Leonard & Co. Eldoret HCC NO. 74 OF 2002, Francis Kariuki Kinja v Fironze Construction Company Ltd Nakuru HCC NO. 198 OF 2003, Jagjit Singh Kalsi v Biashara Bank (K) Ltd Nairobi HCC MISC. CIVIL NO. 518 OF 2000 (OS).**

Whilst on this other counsel for the applicant invited the court to be guided by the principles in **Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR, Tom Ojienda & Associates v Land Commission & Another [2019] eKLR.**

In a nutshell, counsel for the applicant contends that there are plausible grounds upon which to grant the orders prayed for in the notice of motion.

So from the above arguments and affidavits this court has a preliminary objection generated by the interested party whereas the applicant motion is the one in issue. On appraisal of the motion and preliminary objection, the identity of the matter can be narrowed to one key issue; Has the applicant met the threshold in Law to be granted by this court, the reliefs sought in the motion. Would the answer be in the preliminary objection raised by the respondent counsel?

Analysis and Determination

Broadly speaking, the applicant in the notice of motion is seeking various orders but more prominently is the order for recall of the record in **Malindi CMCC NO. 249 OF 2017** for purpose of this court satisfying itself with the legality, propriety and correctness of the proceedings.

The Law

The defendant provisions that promptly answers the question raised by the applicant are provided for in Article 165 (6) (7) of the Constitution. In subsection (6) it is provided that the High Court has supervisory jurisdiction over the subordinate courts and other any person, body or authority exercising a judicial quasi or judicial function.

(7) For the purpose of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body, or authority and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Given the facial textuality structure the call for the record of a statutory body such as the Magistrate Court is to satisfy the requirements for purposes of determining the real question in issue besides the already material in the affidavit evidence.

This court found a valuable line of persuasion in the case of **R v Northchamber Compensation Appeal Tribunal, Ex-parte Shaw {1952} IKB 338** the English Court stated:

“The Court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the Law. The control is exercised by means of a power to quash any determination by the tribunal, which on the face of it offends against the Law. The King’s Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so.”

The challenge is to get the balance right between exercising supervisory power of revision and appellate jurisdiction. This is due to the fact that the constitution and corresponding enabling statutes allocate judicial power to various systems of court in Kenya. It only supposes that the mandate given to inferior tribunals and subordinate courts, may in certain cases error in exercise of that jurisdiction to correct the error, mistake illegally and irregularity which need not be a subject of appeal.

In the landmark case of **Anisimic {1969} 2 AC 147 Lord Diplock** pointed out that:

“Where parliament confers on an administrative tribunal or authority power to decide questions defined by the Act conferring the power, parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for Courts of Law to resolve in fulfilment of their constitutional role as the interpreters of the written Law and expanders of the Common Law and rules of equity, so, if the administrative tribunals or authorities have asked themselves the wrong question, and answer that, they have done something that the Act does not empower them to do and their decision is a nullity.”

When the High Court exercises supervisory jurisdiction over the tribunal or subordinate courts its indeed regulating a unique mandate of those institutions to exercise judicial or quasi judicial discretion in the decision making process.

For an excellent exposition is what **Chief Justice Chan** said in the case of **Law Society of Singapore v Yan Gual Neo Phyliss {2008} 2SCR 239**:

“That all legal powers, even a constitutional power have legal limits. The notion of a subjective or unfiltered discretion is contrary to the rule of Law.”

In order for a claim to be justiciable under the supervisory jurisdiction of the High Court under Article 165 (6) and (7) of the constitution rests on the imperative that every power is to be exercised judiciously and reasonably.

The other important principle to apply for the general purpose and propriety of the provisions is to be found in **R v Anderson Ex-parte Ipec Air Pty Ltd {1965} 1/3 CLR 177, 189 Justice Kitto** stated:

“A discretion alluded by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion, according to Law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.”

In **Wednesbury Corporation case 1948 1 KB 223** the court described the approach on whether statutory discretion was exercised reasonably where it held:

“Whether, a decision matter be regarded, by reference to the scope and purpose of the statute, as having committed, a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion with it each case be that the decision maker has been unreasonable in a legal sense.”

One other view, the exercise of the courts discretion should be confined to discharge its duties as a court of justice during the proceedings seems to me to encompass the following:

- (a) Lawfulness – That the judicial decision was authorized by the statute or the constitution.***
- (b) Rationality – That in making the decision he or she applied the legal rules consistent to all those whom the rules apply allowing for different outcomes where there are different differences between cases fairness.***
- (c) That the judicial decisions reached was fair, impartial in fact and appearance and a proper opportunity to persons affected to be heard good faith.***
- (d) The judicial decision must be made honestly and with conscientious attention to the risk required of the decision maker.”***

I have given due consideration to the submissions by Learned counsel for the applicant on her dissatisfaction in the manner the trial Magistrate handled the pending proceedings in **CMCC NO. 249 OF 2017**. The review of the record shows that the Learned trial Magistrate

had at her disposal issues to do with the proclamation attachment and sale of motor-vehicles **KCS 969N, KCS 468Q and KCM 412F**. The decision making process and procedure steps taken followed by the decision shows no specific errors of fact or Law that warrant a revision in terms of supervisory jurisdiction. There might be situations that directions contained in the proceedings can be seen as manifesting irregularity or illegality to justify. The courts jurisdiction in one way or another but it's impossible to verify that in the impugned decision.

There is no doubt that executions of the decree has commenced against the Judgment debtor vide instructions issued to Misa Auctioneers. The contention that the Auctioneer be compelled to provide all information relating to the alleged auction of 18.4.2019 and in the alternative provide all details of the bids and bidders in the auction is not easy to conceive as a subject matter of revisionary jurisdiction. The applicant counsel went further to question the Kenya Revenue status of Misa Auctioneers between the period of March to August 2019.

It is trite Law that before the court can grant orders under revisionary jurisdiction under Section 1A, 3A of the Civil Procedure Act. The applicant should satisfy the court has the jurisdiction. It seems by the orders in the stated motion, the applicant is seeking remedies on what already has been done or what the court has specifically passed on the merits. If certain state of facts as presented before this court do not exist and the trial court went ahead to determine the issue, then of course the court may be asked to revisit the matter under Section 80 of the Civil Procedure Act.

Similarly, the orders of the trial court being complained of by the applicant in the subject matter at hand are not capable of being issued without satisfying the formulated test in **Hanks v Minister of Housing and Local Government {1962} WLR 1482, (See also Shah v Mbogo {1968} EA. 93 Child Welfare Society of Kenya v R Ex-parte child in focus Kenya Ag {2017} eKLR** where **J. Megan** regard set the following criterion:

“If it be shown that an authority exercising a power has taken into account a relevant factor something which it should not properly take into account in deciding whether or not to exercise power, then the exercise of the power, normally at least is bad, similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is or ought to be known to it, and which it ought to have taken into account, the exercise of the power is normally bad.”

It is therefore not enough to state on oath in an affidavit some averments to try to point out that an exercise of discretion of a trial court as being irregular or illegal without proper facts on the basis of which a clear decision can be reached on appeal.

In my view, the disclosures made before this court have not portrayed the Learned trial Magistrate as lacking conduct in her exercise of discretion in the circumstances of the case between the applicant and the respondent. The applicant even on those reasons lost the motion without further ado.

However, regarding the preliminary objection raised by the respondent on jurisdiction raised under Section 6 of the Civil Procedure Act. It is a requirement of the Law that:

“No court shall proceed with the trial or any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the parties, or between parties under whom they or any of them claim.....”

In addition to Section 6 of the Act the argument in the case of **R v Registrar of Societies Kenya & 2 others Ex-parte Moses Kirima & 2 others {2017} eKLR**

“Therefore, for the principle to apply certain conditions precedent must be shown to exist first, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit. Proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and such suit, proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant relief claimed.”

It does appear from the record that this matter is being pursued vigorously before the Chief Magistrates Court. Likewise, some of the remedies being applied for fall squarely within the mandate and jurisdiction of that court which the applicant with no apparent reasons is running from this court.

Lord Denning in MacFoy v United African Co. Ltd {1961} 3 W.L.R. 1405 once said that:

“Any purported exercise of any function being without any legal or constitutional authority was null and void and of no effect. If an act is void, it is in Law a nullity. It is not only bad but bad. There is no need for an order of the court to make it right you cannot. Put something on nothing and expect it to stay there. It will collapse.”

In the instant motion, it raises issues principally which among them are still alive and within the jurisdiction of the trial court. I have in mind, the exercise of statutory mandate on instructions issued to Misa, M – Auctioneers, on whether he exceeded the provisions of the Law on proclamation, attachment and sale. By the provisions of the rules, the Auctioneer as a court officer has a legal obligation to account from end to end on execution of the instructions to do certain acts on behalf of a successful party to enforce a valid order or decree of the court. On the other hand, the arguments on misjoinder of a party and the proceedings being purported to give rise to an attachment founded on ex-parte Judgment, if that be properly thought of it would dawn on the applicant, that the jurisdiction to set aside or confirm the ex-parte Judgment is yet to abate.

In my opinion those issues are first to be taken up before that court. The point that I need to emphasize at this stage, is that our Law preserves the distinction on jurisdiction on matters which are a reserve of the high and those still maintainable at the trial court. It follows from what I have said that the applicant is in breach of the doctrine of exhaustion to take an issue before a forum which appropriately constitutionally and

statutorily has not ripened.

That as of now, simply signifies that the line, direction, path, move or way chosen by the applicant is of course not able to take him to the desired destination. A Judge of competent jurisdiction still remains that court which the applicant is avoiding to decide all matters that there are according to Law.

I have, hopefully given full expression to the issues of concern raised by the applicant unfortunately for me it follows looking at the matter all-round the notice dated 19.9.2019 is lost with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mulwa holding brief for Wambua Kilonzo Advocate for the plaintiff
2. Mr. Atiang holding brief for Chepkwony Advocate for the defendants