



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 28 OF 2019

COAST WATER SERVICES BOARD.....APPELLANT

VERSUS

REHEMA CHARO KAHINDI & KACHE

CHARE MRAMBA (Legal representatives of the estate of

FREDRICK CHARO KADENGE (DECEASED).....1ST RESPONDENT

ORIENTAL CONSTRUCTION AND CO. LTD.....2ND RESPONDENT

(Being an appeal from the Ruling delivered by Hon. Dr. Julie Oseko, on the 28th March, 2019 in Malindi CMCC NO. 250 OF 2016)

BETWEEN

REHEMA CHARO KAHINDI & KACHE

CHARE MRAMBA (Legal representatives of the estate of

FREDRICK CHARO KADENGE (DECEASED).....PLAINTIFF/RESPONDENT

VERSUS

COAST WATER SERVICES BOARD.....1ST DEFENDANT/APPLICANT

ORIENTAL CONSTRUCTION AND CO. LTD...2ND DEFENDANT/RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Muturi Gakuo & Kibara Advocates for the Appellant

Wambua Kilonzo Advocates for the 1st respondent

JUDGMENT

That ruling being challenged by the appellant is instructive in its way with the statement by **Lord Mansfield in R v Wilkes {1770} Burn 2527 at 2539** on judicial discretion.

“Discretion when applied to a court of justice means sound discretion guided by Law. It must not be arbitrary, vague, fanciful, but legal and regular. The discretion of a Judge is the Law of tyrants. It is always unknown. It is different in different men. It is casual, and depends upon Constitution, temper, passion, in the best it is often times caprice. In the worst it is every vice, fully and passion to which human nature is liable.”

In this appeal, the appellant has appealed to this court against the ruling of the **Chief Magistrate Hon. Dr. Oseko** delivered on 28.3.2019 in which she made the following orders:

(1). The court will order release of motor vehicle registration KBZ 139D.

(2). The motor vehicle KBG 887C shall not be released until the court determines that application.

Being aggrieved with the orders through legal counsel **Muturi Gakuo**, the appellant filed a Memorandum of Appeal dated 3rd June 2019 seeking a reversal of the orders based on the following grounds:

(1). That the Learned trial Magistrate erred in law and in fact by failing to appreciate that on 5th September 2018, the appellant was served with two (2) Notifications of Sale attaching KBZ 137D and KBG 887C.

(2). That the Learned trial Magistrate erred in law and in fact by failing to consider that both motor vehicles were attached on the same day before making the said Ruling.

(3). That the Learned trial Magistrate erred in law and in fact in holding that Motor Vehicle Registration Number KBZ 137D was the only vehicle impounded during the pendency of the stay order issued on 18th December 2017.

(4). That the Learned Magistrate erred in law by finding that Motor Vehicle KBG 887G is the only subject of the Amended Notice of Motion Application dated 17th September 2018.

(5). That the Learned trial Magistrate failed to read, evaluate and analyze the evidence as a whole hence made finding of fact that misrepresented, misapprehended and distorted the evidence on record.

On appeal both **Mr. Muturi Gakuo** for the appellant and **Mr. Wambua** for the respondent filed written submissions which I fully acknowledge as against the position taken by each one of them in this matter.

Litigation history

On 1.11.2016, the respondent filed a civil claim against the appellants alleging that on or about 15.5.2016 along Lamu – Malindi Road at Kwa Ndomo area while the deceased was lawfully riding a bicycle, the 2nd appellant authorized driver, manager and or agent so negligently drove, managed and or controlled motor vehicle registration number KBT – 034B that the same lost control and hit the bicycle from behind as a result whereof the deceased sustained fatal injuries.

From the above the respondent blamed the 2nd appellant driver, servant or agent for negligence as specifically pleaded under paragraph 5 of the plaint. The claim in dispute included prayers for general and special damages, under the Law Reform Miscellaneous Reform Act and Fatal Accident Act.

On 19.1.2017, a request for Judgment under Order 10 Rule 9 of the Civil Procedure was made and granted in favour of the respondent for non appearance and or defence to the claim. A further final decision in the form of a Judgment of the court was pronounced on 23.10.2017 enforcing the claim in the following terms.

<i>(a). Pain and suffering</i>	<i>Kshs.100,000/=</i>
<i>(b). Loss of expectation of life</i>	<i>Kshs. 150,000/=</i>
<i>(c). Special damages</i>	<i>Kshs. 36,850/=</i>
<i>(d). Funeral expenses</i>	<i>Kshs. 50,000/=</i>
Total	<i>Kshs.1,152,850/= plus costs and interest</i>

Subject to the Judgment execution proceedings was commenced in earnest by way of attachment and sale of movable properties as discerned from the proclamation of **Misa M. Auctioneers** dated 11th December 2017. The impugned Ruling was an outcome of the notice of motion dated 4.9.2018 seeking inter alia – stay of execution of the warrants pursuant to the ex-parte Judgment entered on 24.10.2017 and any consequential orders.

As observed, the appeal filed is on the questionable proclamations attachment and notifications of sale on 5.9.2018. The issue dealt with is whether the Learned trial Magistrate was right in granting the orders for the respondent as against the appellants.

Determination

This segment of the appeal ideally is questioning the exercise of discretion of the trial court. The doctrine of judicial discretion as **Desmith** defines it,

“is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.” (See SA Desmith and J M

In the same area of Law **Keith Hawkins** in the use of legal discretion, perspective from **Law and social science (1992, 11,11)** he observed as follows:

“discretionary decisions are those where the Judge has an area of autonomy free from strict legal rules, in which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case. Discretion is the space between legal rules in which legal actors may exercise a choice in speaking of autonomy and choice, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles or by reference to a list of relevant factors to be considered. While discretion permeates both the Common Law and many, if not most, statutory instruments discretionary powers are never absolute and must also be exercised within, a broader legal and social context.”

A similar situation seems to have arisen in the recent decision of the Supreme Court, in **Parliamentary Service Commission v Martin Nyaga Wambora & 31 others {2018} eKLR** which dictum provides the content and the manner in which discretionary powers may be exercised by Judges. The standards set was inspiration drawn the traditionally set guidelines in **Mbogo & another v Shah {1968} EA 93 – at 96**. In its language the Supreme decision mirrored the following principles, that directly or indirectly would inference a review of exercise of discretion:

- (i). A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this court.**
- (ii). Review of exercise of discretion is not a right, but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court.**
- (iii). An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his or her application.**
- (iv). In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.**
- (v). During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.**
- (vi). The applicant has to satisfactorily demonstrate that the Judges misdirected themselves in exercise of discretion and**
 - (a). As a result a wrong decision was arrived at.**
 - (b). It is manifest from the decision as a whole that the Judge has been clearly wrong and as a result there has been an apparent injustice.”**

These principles will explain that a careful inquiry is needed before an appellate court could certainly be at a position to interfere and review the decision of an inferior tribunal or court. The court is called upon by these guidelines to seek a balanced approach seeing to it that there is fairness on both sides impacted by the exercise of discretion and pertinent decision.

Looking at this appeal, Learned counsel complains on the alternatives taken by the Learned trial Magistrate to compound the case on some contentious issues on proclamation, attachment and notification of sale involving two motor vehicles registration number KBZ 137D and KBG 887C. Indeed, in the ruling motor vehicle KBZ attachment was lifted by her order while KBG – subject matter of the application was detained to await further directions and orders of the court.

This was simple application which conferred a general discretion to the court in accordance with affidavit evidence laying to rest any notion that there was an irregularity and impropriety with the order to call upon this superior court to act.

For this court to accede to the appellants contention, the exercise of a judicial act on discretion has to be viewed in the context of the celebrated case of **Anisminic Ltd v Foreign Compensation Commission {1969} 1 ALL ER 208 2AC 147** where **Lord Reid** stated thus:

“There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature, that its decision is a nullity. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the questions remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account, or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to or for decisions without connecting any of these errors, it is as much entitled to decide the question wrongly as it is to decide it rightly.”

For this court the ultimate question then would be which side between the appellant and the respondent failed to approach the problem correctly or failed to establish her or its case, that discretion may be said to be wrong.

First, this was an interlocutory matter dealing with proclamation, attachment and sale of goods pursuant to instructions issued to satisfy the decretal sum arising out of a court decree. Therefore the Learned trial Magistrate duty arose as seen from the record to consider prima facie case under the Auctioneers Act and alluded Rules and Regulations. If therefore, the Auctioneer did what by Law he was not entitled to do, the bounds of jurisdiction conferred upon the trial court was to be invoked to come to the aid of the applicant.

If in exercise of discretion, the court may be in doubt as to the sufficiency of evidence on the issues in contestation, as a matter of discretion, the court may or will decide the claim on the balance of convenience. In coming to the decision which is being impeached on appeal, I have not been told exactly the errors, misdirection, irregularity, impropriety or illegality of the process in the decision making rendering it a matter for review.

The Learned trial Magistrate came up with the right conclusion. Her view of the circumstances of the case was on the whole sound. It cannot be said that whatever the merits of the decision it was not arrived at what **J. C. Hutcheson** calls judicial hunch. This was then framed in a famous Article **The Judgment intuitive: the function of ‘Hunch’** in **Judicial decision 1929, 14 Cornell Law Review 274 at 278** where a respected American Judge, writing in the realistic tradition described how he decided cases.

“I after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the jump spark connection between question and decision and at the point where the path is darkest for the judicial feet, sheds its light along the way. Again hard words have been written about the act of judging, by Judges i.e, don’t tell me about the Law, I want to know the facts and where the equities lie. That works for these people. It is my instinct that counts. How does it hit me and get feeling?” (See J Frank what the courts do in fact (1932) 26 Illinois Law Review 645 – at 655.

Out of the many words and phrases alleged on consideration or non-consideration of facts of the dispute largely the real question on each decision turns on the interpretation of the particular constitutional principles and the statute conferring the discretionary power.

Accordingly, the gravamen of the decision rotates around the claim, evidence, statutory provisions and supplementary jurisprudence and the exercise of power intra or ultravires the jurisdiction of judicial or quasi tribunal.

To this extent, I find no ground exists for interfering with the ruling of the trial court. So, I do concur and without hesitation, the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Emukule holding brief for Muturi Gakuo for the appellant
2. Mr. Komora holding brief for Kilonzo for the respondent