



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U, J

MISC. CIVIL APPLICATION NO. 111 OF 2019

VINCENT ONKOBA MASWARI.....APPLICANT

VERSUS

JACKLINE BARONGO ASIAGO (Sued as legal representative of

JOHN ORIRI AYIERA1ST RESPONDENT

JASON AGUTA NYANGWARA.....2ND RESPONDENT

RULING

1. By way of a notice of motion dated 25/7/2019 Vincent Onkoba Maswari (applicant) moved this court for orders;

i. Spent

ii. Spent

iii. That pending hearing and final determination of the originating summons herein, there be issued an order of stay, staying the execution of the decree in KISII CMCC NO. 285 OF 2011: JOHN ORIRI AYIERA –VS- ALFRED MDEIZI T/A PAVE AUCTIONEERS & 3 OTHERS.

iv. Costs of this application be provided for.

2. The application is premised on grounds that;

i. The applicant has filed an application to the court to call for the original records of KISII CMCC NO. 285 OF 2011: JOHN ORIRI AYIERA –VS- ALFRED MDEIZI T/A PAVE AUCTIONEERS & 3 OTHERS with a view to review the proceedings of the Subordinate Court in exercise of its powers of revision under Article 165(6) of the Constitution of Kenya.

ii. In view of the pending application for revision under Article 165(6) of the Constitution, there is need to stay further proceedings in KISII CMCC NO. 258 OF 2011 which is the subject of the application for review to maintain the substratum of the suit herein.

iii. There are pending execution proceedings in the said KISII CMCC NO. 258 OF 2011 which if not stayed may render the suit herein nugatory.

iv. It is in the interest of justice that the application herein be heard and determined on priority basis.

3. The application is further supported by the affidavit of the applicant sworn on the 25/7/2019.

4. The gist of the application, the grounds and affidavit in support is that Judgement was entered against the 2nd respondent herein in Kisii CMCC No. 285 of 2011. The 1st respondent who was the decree holder in Kisii CMCC No. 285 of 2011 successfully applied for the committal of the 2nd respondent to civil jail and on the 25/7/2017, the 2nd respondent was committed to civil jail.

5. The 2nd respondent, a relative of the applicant approached the applicant to stand surety for him as he made arrangements to pay the

decretal sum and the applicant agreed to deposit his title No. LR NO. Majoge/Boochi/4580 as security for the due performance of the decree on the understanding that;

a) The 2nd respondent/judgement debtor was to liquidate the decretal sum by;

(i) Paying Kshs. 150,000 on or before 15.02.2018.

(ii) Kshs. 150,000 on or before the 10th of every succeeding month w.e.f 10.06.2018 till settlement in full.

b) There was a further agreement that in default of payment of any of the instalments as above, the security was to be auctioned.

6. The said consent was adopted in court and on the basis of the consent, the 2nd respondent was released from civil jail. He however defaulted in payments as per the consent. The applicant avers that he did not understand the legal issues involved when he signed the agreement. He blames the advocates for the parties for taking advantage of him making him sign an agreement which would make him pay for a decree he was not part of.

7. The applicant lodged an application dated 26.7.2018 challenging the agreement. The 2nd respondent opposed the said application and in a ruling dated 28/11/2018 Hon. Nathan Shiundu, SPM partly held;

- **The consent in question was duly filed and signed by Asati Anyona Advocates, Nyatundo & Co. Advocates and Vincent Onkoba Maswari.**
- **The parties then went ahead and adopted the consent in court on the 8.12.2017 before Hon. Onjoro and confirmed that the terms of consent had been complied with.**
- **It is upon the adoption of this consent that the respondent was released from civil jail after the applicant had deposited the security.**

8. The applicant seeks a revision of the ruling of the learned magistrate dated 28.11.2018 since he (the applicant) did not participate in the proceedings when the subject consent dated 8.12.2017 was adopted in court and he was therefore not accorded a fair hearing as required under Article 50 of the Constitution. The court ought to have required his presence.

9. The application is opposed. First off the blocks was Dennis Manono Nyatundo, Advocate for the 1st respondent who in a replying affidavit states that the matter on which the application is premised is neither an appeal nor an action for review under Order 45 of the Civil Procedure Rules and the application herein fails to meet the conditions on cited provisions. The originating summons is dismissed as an abuse of the court process since the applicant has not exhausted the available options open to him.

10. The 2nd respondent has in a replying affidavit sworn on 30/9/2019 averred that Order 42 Rule 6 and Order 45 Rule 1(a) of the Civil Procedure Rules do not apply as there is no appeal from the subordinate court or any Order to be reviewed. It is urged that the applicant voluntarily signed the consent and that it was not necessary for him to appear in court on 8/12/2017 as alleged. It is stated that the applicant filed an application for review in the same court which was dismissed.

11. The application was canvassed by way of written submissions and the 1st respondent's and applicant's submissions are on record.

12. I have had occasion to consider the application, the grounds raised, the affidavits in support and the replying affidavits. I have had due regard to the learned submissions of counsel. Of determination is whether the application and the originating summons are properly before the court and based on the finding thereon, what orders are to issue.

13. For inexplicable reasons, the applicant by his own admission secured the release of the 2nd respondent from civil jail by signing an agreement that offered his property as the security for payment of sums due from the 2nd respondent to the 1st respondent.

14. In a strange twist the 2nd respondent did not pay and in an interesting turn of events even opposed the applicant's attempt to have the agreement set aside.

15. Which brings me to the issues now at hand. As I understand it the application at hand seeks the exercise of the powers of revision that this court has over subordinate courts. Has this power been properly invoked?

16. Before court is an applicant who got himself entangled in a litigation he was initially not a party to by signing an agreement that involved the securing of the decretal sum using his title LR NO. Majoge/Boochi/4580 as security for the due performance of the decree. This agreement was adopted as a consent of the parties on 8.12.2017.

17. The applicant moved the trial court to vitiate the consent vide his application dated 26.7.2018. That application was dismissed vide the ruling of court dated 28/11/2018.

18. The said application having been dismissed, it was open to the applicant to challenge the said findings either through a review or appeal against the said ruling. The applicant has instead sought to come to this court under the supervisory powers of the High Court under Article 165(6) of the Constitution.

19. **Article 165(6) & (7) of the Constitution** confers supervisory jurisdiction on the High Court over subordinate courts.

In my view, this power, however, is not a carte blanche for the High Court to run roughshod over proceedings before subordinate courts for any manner of infractions. The same cannot be invoked against all conclusions of Law and fact by the subordinate court that may be in error. The supervisory jurisdiction under the Constitution must be clearly distinguished from the review and/or appellate jurisdiction of the High Court.

20. The supervisory role of the High Court does not extend to hearing reviews of the Subordinate Courts or hearing appeals through the back door. Any party aggrieved by the orders of the Subordinate Court where due process has been followed by the Subordinate Court when performing its functions has a remedy of review in the court that passed the order or decree or on appeal before the High Court.

21. Mwongo J in **Boniface Muli –vs- Hannington Musyoki & Kenya Power & Lighting (Interested party)** had this to say on the supervisory jurisdiction of the court;

“8. In my view, the supervisory jurisdiction of the High Court in respect of subordinate courts is that the High Court will observe, assess and ensure that the subordinate courts or tribunals are properly performing the functions for which they are established. Supervisory jurisdiction does not mean that the High Court will take over and supplant itself into a role that is to be played by a subordinate court or tribunal.

9. *The Concise Oxford English Dictionary defines “supervise” as follows:*

“Observe and direct the execution (of a task or activity) or the work of (a person)”

Under the LTSCHE Act Chapter 301, the form of supervision granted to the court is by way of an appeal against any determination or order of a tribunal made on a reference. It is clear from the documentation and arguments made that the reference made by the applicant to the BPRT was subjected to a determination of some sort on 17th August 2012 by the tribunal. The order or determination by the Tribunal is not before this court. And this court cannot be used to go around or beyond the Tribunal via the High Court’s constitutional supervisory jurisdiction.

10. As earlier stated, I hold that the High Court’s supervisory jurisdiction encompasses the power of general superintendent over subordinate courts and tribunals. Through it superior courts keep subordinate courts and tribunals within their prescribed sphere and prevent usurpation. As such, the court agrees with counsel for the Respondent objector that the supervisory jurisdiction of the High Court refers to the court’s power to oversee tribunals’ actions for mistake, error or mis-procedure and the like.”

22. The issue whether the consent was valid was subjected to a determination and a reasoned ruling delivered on the 28/11/2018. The only avenue open to the applicant is to seek a review of that ruling in the trial court or to lodge an appeal as per the law provided.

23. With the result that the application dated 25/7/2019 is without merit. It is dismissed. I have considered the circumstances of this case, it is only fair and just that each party bear its own costs

Dated and Delivered at Kisii this 13th day of May, 2020.

A.K NDUNG’U

JUDGE