



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY DIVISION

CLAIM NO.4 OF 2017

JAMAL MOHAMED BANDIRA.....CLAIMANT

VERSUS

THE OWNERS OF MOTOR VESSEL NASIBU....RESPONDENT

RULING

1. The application I have been called upon to determine is dated **13th March, 2020** brought pursuant to **Sections 1, 1A, 3A and 63 (d), (e)** all of the **Civil Procedure Act** and **Article 159** of the **Constitution of Kenya**. In the application, the Applicant prays for the following orders:

a. Spent.

b. That a Stay of Execution obtained ex-parte on the 7th November, 2019 Staying the Execution pursuant to a Judgment delivered by Honourable Lady Justice Njoki Mwangi on 13th December, 2019 was obtained in a manner that is unwarranted, unjustifiable, unlawful thus breaching the Rule of Law and Civil Procedure Rules and is hence inequitable, be declared as a null and void and be vacated, expunged in its entirety, set aside and dismissed immediately as the subject matter was exhaustively dealt with and the same (Marine Vessel, Nasibu) was officially released in July, 2019 and the matter officially finalized and it cannot be re-visited or the case re-opened or other order be issued as a ship cannot be arrested twice leave alone this fake, and unfounded claim concerning the said subject matter.

c. The Stay of Execution which was in any event improperly and un-procedurally obtained is now being used as a means of frustrating the Decree Holder and is an impediment to enjoy the fruits of its legal and lawfully obtained Judgment and Decree.

d. That the costs of this application be borne by the Claimant.

2. The application is supported by the grounds on its face and the **Affidavit** of **Mumin Ali Mumin**, the Respondent/Applicant's Managing Director. He deponed that the **Judgment** was delivered in this matter by the Hon. Lady Justice Njoki on the **13th December, 2018** in the presence of the Claimant/Judgment Debtor's advocate and Stay was not sought at that time but they opted to file a **Notice of Appeal**.

3. The Applicant then proceeded to tax its **Bill of Costs** and a **Certificate of Taxation** was issued on **7th November, 2019**. On the same day (**7th November, 2019**), the Deputy Registrar issued Orders of Stay which were granted ex-parte in favour of the Claimant/Decree Holder on **4th November, 2019** by this court.

4. The Applicant now laments that those Stay Orders were improperly granted and are geared towards prejudicing the Applicant and frustrate any attempt by the Applicant in realizing the fruits of a lawfully obtained Judgment.

5. Similarly, the Applicant whinges that the Stay Orders were issued by a court which was not seized with the facts of the case given that the matter had proceeded before other courts and there is a possibility that the court

was misled in granting the Stay Orders.

6. In any event, the Applicant avers that the ex-parte interim orders for Stay granted by this court were meant to last for 14 days just as any other ex-parte interim order. The court further ordered that the application for Stay be heard on a priority basis but upto date, the application has not been listed for hearing hence defeating the essence of expeditious disposal of the matter.

7. According to the Applicant, the Stay Orders were granted after the subject **Motor Vessel** was released and the Vessel cannot deliberately be re-arrested. As such the Judgment which was rendered by the Trial Court is valid and enforceable there being no order overruling it. The Applicant has subsequently applied for attachment warrants but the Deputy Registrar has refused to sign the same under the justification that the Stay Orders cannot be brushed away. From the foregoing, it is therefore sought that the court does lift the Stay Orders which are preventing the Applicant from enjoying the fruits of the said Judgment.

8. In response to the application, the Claimant/Respondent filed a **Replying Affidavit** he swore on **15th September, 2020** and filed on even date. His case is relatively simple. He asserts that the application is frivolous and a waste of judicial time in view of the Court of Appeal's determination vide **Mombasa Civil Appeal No.23 of 2019** between the parties. In its Judgment, the Court of Appeal vacated the High Court Judgment and Decree that had been delivered in favour of the Applicant for **Kshs.10,290,000/=**. As such, this court lacks jurisdiction to issue orders in contradiction of the Court of Appeal decision aforementioned.

9. The application proceeded for hearing on **29th September, 2020** where the parties orally highlighted their respective positions.

Analysis and Determination

10. I have considered the application, the response filed thereof as well as the oral submissions made by the respective parties. The court record reflects that on **16th March, 2020** this court allowed the application in terms of **prayer No. 1 and 2** of the application. In a more strict sense, the court vacated the interim orders of Stay granted on **4th July, 2019**.

11. What remains pending before the court is **prayers No.(3) and (4)**. **Prayer No.(3)** is a reiteration that the Stay Orders were improperly obtained and the same is an impediment to the enjoyment of the fruits of its legally obtained Judgment. **Prayer No.(4)** is with regard to costs of the application. The only issue for consideration therefore, is whether those orders can issue.

12. In view of the above, the Respondent has brought to the attention of this court that there is a **Court of Appeal Judgment** which was delivered on **8th May, 2020** repealing the High Court Judgment which had been made in favour of the Applicant. As such there is nothing to execute as the Applicant seeks.

13. In response thereof, the Applicant alleged that the **Court of Appeal's Judgment** is not signed and is only extracted from the website. Further, that at the time of Taxation, the Court of Appeal's decision was not there and above all, the Judgment was delivered after the subject **Motor Vessel** had been lawfully released by the High Court. That, it therefore follows that the Court of Appeal's decision was arrived at without following due procedure. Finally, the Applicant has sought this court to reconstitute the Judgment that was delivered by the High Court in this Matter.

14. In my view, and with due respect to the Applicant, the prayers sought have been overtaken by events. Where there is a decision by a court of higher hierarchy, the same is binding on this court. The temporary Stay Orders were issued to enable the Claimant prosecute its Appeal.

15. I have thoroughly examined the Court of Appeal Judgment delivered with regard to this matter and hence ascertain that having been posted on the Kenya Law Reports Website, the same is genuine. The Judgment repealed this court's Judgment which had been delivered in favour of the Applicant. To this end, I agree with the submission by **Mr. Mogaka** that there is nothing for the Applicant to execute at the moment because once a Judgment is repealed, the same is treated as if the same never existed. As such, the court cannot reconstitute the Judgment that was delivered in favour of the Applicant.

16. On the same note, this court lacks jurisdiction to vacate the Judgment of the Court of Appeal or either seek to determine whether the Court of Appeal reached its Judgment in due observance of the requisite procedure. This is a matter that exclusively lies for determination either through Review by the Court of Appeal or an Appeal to a higher court, which in this case is the Supreme Court.

18. In view of my finding aforesaid, I do hereby dismiss the Application dated **13th March, 2020** as the same has been overtaken by events. As regards costs, this court directs each party to bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 11TH day of NOVEMBER, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE