



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

JUDICIAL REVIEW NO. 7 OF 2017

IN THE MATTER OF AN APPLICATION BY VAN DEN BERG (K) LIMITED TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR THE ORDERS OF CERTIORARI AND PROHIBITION CASES

AND

IN THE MATTER OF ARTICLES 25 (C), 47 AND 50 OF THE CONSTITUTION

BETWEEN

REPUBLIC.....1ST APPLICANT

VERSUS

PATRICK NAMANO OLOO.....1ST RESPONDENT

THE CHIEF MAGISTRATE’S COURT NAIVASHA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

VAN DEN BERG (K) LIMITED.....EXPARTE APPLICANT

JUDGMENT

Background

1. The Ex parte applicant brought this application under urgency on 30th August 2017, seeking orders that:

“a) Leave be granted to the Applicant herein to apply for Judicial Review Orders, to wit:

i) An Order of certiorari issues removing to the High Court to quash the decision of the Resident Magistrate’s issued on the 23rd August, 2017, to allow execution to proceed against the Applicant in the matter CMCC 172 of 2011 Patrick Namano Oloo vs Van Den Berg (K) Limited in total breach of the stay order issued on the 21st February, 2013 by Justice Anyara Emukule;

ii) An Order of certiorari issues removing to the High Court to quash the proclamation issued by the agents of the 1st Respondent G.I. KARIUKI T/A DIRECT “O” AUCTIONEERS, to sell by way of public auction or otherwise, disposing off the moveable PROPERTIES OF THE APPLICANT: office tables, office chairs, office computers, photocopier, Laptops, water dispenser, Motor Vehicle KAU 643G Pick-Up and any other moveable property;

iii) An order of Prohibition issues removing to the High Court to prohibit the 1st Respondent, his agents, or assigns or any person claiming through them from further instituting execution proceedings in the CMCC 172 of 2011 Patrick Namano Oloo vs Van Den Berg (K) Limited pending the determination of High Court Civil Suit Number 322 of 2012 Van Den Berg (K) Limited vs Concord Insurance Company Limited;

b) The grant of leave herein do operate as a stay of execution of the decision of the 2nd Respondent's decision issued on the 23rd August, 2017 grant on order allowing the property of the Applicant to be sold in total disregard of the stay order issued on the 21st February, 2013, including stay of any proceedings before the Chief Magistrate's Court allowing the 1st Respondent, his agents, or assigns or any person claiming through them to sell the property of the Applicant, until the determination of this Application or until such further Orders are made in that regard by this Honourable Court;

c) Costs and further incidentals to this Application be provided for; and

d) Such further or other relief as the Honourable Court may deem just and expedient to grant."

2. On the same day the application was certified urgent and the following orders were issued:

"2(i) An Order of certiorari issues removing to the High Court to quash the decision of the Resident Magistrate's issued on the 23rd August, 2017 to allow execution to proceed against the Applicant in the matter CMCC 172 of 2011 Patrick Namano Oloo vs Van Den Berg (K) Limited, in total breach of the stay order issued on the 21st February, 2013 by Justice Anyara Emukule;

(ii) An Order of certiorari removing to the High Court to quash the proclamation issued by the agents of the 1st Respondent G.I. Kariuki t/a Direct "O" Auctioneers, to sell by way of public auction or otherwise, disposing off the moveable properties of the Applicant: office tables, office chairs, office computers, photocopier, laptops, water dispenser, motor vehicle KAU 643G Pick/Up and any other moveable property;

(iii) An order of Prohibition be and is hereby issued removing to the High Court to prohibit the 1st Respondent, his agents, or assigns or any person claiming through them from further instituting execution proceedings in the CMCC 172 of 2011 Patrick Namano Oloo vs Van Den Berg (K) Limited pending the determination of High Court Civil Suit Number 322 of 2012 Van Den Berg (K) Limited vs Concord Insurance Company Limited;

3. The background to the matter is as follows. The 1st Respondent obtained judgment on 27th June 2012, in a personal injuries case in **SPMCC 172 of 2011** and was awarded Kshs 500,000/= and costs of Kshs 5,000/=. Meanwhile, the Ex parte applicant alleges, it had a suit on the High Court in **HCCC No. 322 of 2012 Van Den Berg (K) Ltd v Concord Insurance Co. Ltd** seeking indemnity from paying legal expenses and risks from the 1st Respondent and 142 other parties in disparate suits. In that suit, Emukule J issued an order for stay of all proceedings in respect of all the pending suits against the applicant.

4. The applicant asserts that the aforesaid stay was issued on 2nd October, 2014. It included and covered all auctioneering proceedings such as those that proceeded after the judgment in the lower court in **Naivasha SPMCC No. 172 of 2011** before the learned Principal Magistrate E. Boke.

5. On 23rd August, 2017 the Respondents through Direct "O" Auctioneers issued a proclamation and warrant of attachment in **SPMCC 172 of 2011** for execution of a decree dated 23rd August 2017. The applicant attached these as "**JR1**" in his application. The warrants are in execution of the judgment of E. Boke, PM for the judgment debt of Shs 505,000/= as shown in "**JR3**" in the application.

Applicant's Submissions

6. The applicant's application is premised on a two pronged approach. Firstly, it argues that in light of the stay orders issued by the High Court in **HCCC 322 of 2012 Nakuru** against all proceedings in **SPMCC 172 of 2011**, the proclamation proceedings were illegal and should be quashed. Secondly, that in issuing the proclamation proceedings, **Order 22 Rule 6** of the **Civil Procedure Rules** was violated in that no application for execution was made by the decree holder. Accordingly that the proclamation was founded on breach of procedure.

7. In respect of the first prong, the applicant relied on **Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA** where it was held that a body acts illegally:

".....when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality."

8. In respect of the second prong of their submissions, the applicant relied on **Equity Bank Ltd v. Capital Construction Ltd & 3 Others [2014] eKLR**. In that case the procedure for an application for execution of a decree was set out. The court stated that such procedure:

"Is provided under Order 22 Rule 6 of the Civil Procedure Rules. These provisions read with Order 22 Rule 7 (2) of the Civil Procedure Rules gives the requirement for an application for execution of a decree....."

9. The applicant asserts that it was not served with any application under **Order 22 Rule 6 or 7** of the **Civil Procedure Rules**. In particular, the applicant argues at paragraph 20 of its submissions that:

"20. The application for execution ought to state the following:

a) *the number of the suit.*

b) *the names of the parties.*

c) *the date of the decree.*

d) *it should indicate whether an appeal has been filed.*

e) *whether payment or other adjustments have been subsequently made in court.*

f) *Whether there are any orders (sic) have been made subsequent to the decree, the amount of interest due decrease (sic) the amount of cost of any (sic) the name of the person against (sic) the execution is sought.*

10. However, I note on perusal of paragraph 20(f) of the submissions, above, the applicant has mischaracterised and misstated **Order 22 Rule 7 (2) (f)**. That Rule of the Order does not require an applicant to state what *orders* have been made subsequent to the decree. What is in fact required under **Rule 7 (2) (f) Civil Procedure Rules** is for a party applying to state what previous applications have been made for the execution of the decree, the dates of such applications and their results

Respondents' Submissions

11. The 1st Respondent countered the applicant's application as an abuse of the court process. He argued that after issuance of the judgment in **SPMCC No. 172** of 2011, the applicant on 25th July, 2012 filed **Civil Appeal No. 134 of 2012** specifically against the said judgment.

12. At the same time, the Applicant sought a stay of the said judgment. Stay was granted on condition that the Applicant do deposit Kshs 150,000/= into court as security for the payment of the decree. However, the said appeal was thereafter not prosecuted. Consequently, it was dismissed five years later, on 17th January 2017 by Mulwa, J. The 1st Respondent attached a copy of the court order as "**PNO II**"

13. After dismissal of the appeal, the 1st Respondent's advocate wrote to the applicant requesting payment of the decretal sum as shown in the letter attached and marked **PNO II**. The 1st Respondent received no reply to his letter. The Applicant has not denied receiving the said letter.

14. Finally, the 1st Respondent submits that the present case is not one in respect of which judicial review lies. Instead, he urges the applicant should have challenged the warrants before the court that issued them. He relies on **Republic v Retirement Benefits Appeal Tribunal & 2 Others [2014] eKLR**. Further, that the 1st Respondent was never served with the order issued by Emukule J on 1st February, 2013 in **HCCC 322 of 2012**. Finally, counsel argued that the warrants were first issued by the lower court in 2012, but were stayed after an application pending appeal in the High Court in **HC Civil Appeal 134 of 2012**. Thus, that the present warrants were a re-issue of the previously stayed warrants.

15. The 2nd and 3rd Respondent's submissions were essentially that: the lower court in **CMCC 172 of 2011** issued orders for execution; that on 31st August, 2012 the 1st Respondent applied for warrants of attachment and sale which were issued the same day; that the 1st Respondent applied for and was re-issued the warrants for sale on 23rd August 2017 and that the 1st Respondent was acting within its statutory mandate.

Analysis and Determination

16. The issues that arise in this matter are:

a) Whether the 1st Respondent improperly proclaimed against the Applicant.

b) Whether Judicial Review lies in this case.

Whether the proclamation was improper or unprocedural

17. It is not in dispute that the genesis of the present application is the judgment of E. Boke then PM in **SPMCC 172 of 2011**. The judgment determined the Applicant as liable to pay Kshs 500,000/= in general damages and Kshs 5,000/= in special damages on 27th June, 2012. It is also not in dispute that on 31st August, 2012, the judgment creditor applied for and was issued with warrants of attachment in the lower court. In the meantime, on 25th July 2012 the Applicant – as judgment debtor – filed an appeal under urgency against the said judgment in **HCCA No. 134 of 2012**. It obtained from the High Court an ex parte stay of execution. The order of stay, issued by Wendoh J, is dated 30th July, 2012.

18. For five years the applicant did not prosecute the appeal, but enjoyed the stay order issued upon appeal. On failure to prosecute the appeal, it was dismissed on 17th January, 2017 by Mulwa J. Upon the said dismissal, the stay of execution automatically lapsed and abated.

19. In separate unconnected proceedings the Applicant filed a generic case on 21st February, 2012 involving 64 suits in **Van Den Berg (K) Ltd v Concord Insurance Company Limited HCCC No. 322 of 2012** in Nakuru. The suit was against over sixty parties that had employee and work related accident claims. One of the cases was **SPMCC No. 172 of 2011** involving the parties herein. Emukule J,

granted ex parte orders staying all proceedings in the said suits including **SPMCC No. 172 of 2011**. It was ordered that the application be served on the respondents therein.

20. The 1st Respondent has asserted, and it is not controverted, that he was not served with this application. No evidence of service was annexed to the Judicial Review application. In light of those circumstances, it would be stretching justice too far to expect the 1st Respondent to know of the existence of the stay order. In any event, there was an earlier stay order in the suit the subject of the judgment debt obtained by the Applicant on account of the appeal filed against the judgment. To that extent, the stay in force against the execution by the 1st Respondent issued by Wendoh J was the proper High Court stay which the 1st Respondent was aware of. I find that the generic order for stay of proceedings issued by Emukule J on 21st February, 2013, to the extent that it is not shown to have been served on the 1st Respondent, was superfluous and of no binding effect on the 1st Respondent.

21. Accordingly, the 1st Respondent cannot be faulted for reviving the execution proceedings when the appeal against the judgment was dismissed. As noted, the stay issued by Wendoh J which bound the parties automatically abated. I have carefully perused **Order 22 Rules 6 and 7** of the Civil Procedure Rules. **Order 22 Rule 7 (2) f** deals with the situation where, as in this case, there was a previous order for execution. The provision states that the application must provide particulars of the following:

“7(2)

(f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications and their results.”

22. The Applicant complains that no such application was served on it yet the 1st Respondent was allowed to execute against it.

23. The 1st Respondent asserts at paragraph 6 and 7 of his Replying Affidavit that he wrote a demand letter to the Applicant on 7th April 2017 after the appeal was dismissed for non-prosecution. That the letter was not responded to and therefore:-

“7.since the applicant ignored my advocate’s letter asking for payment, the only way I could get paid was to commence execution which was done and warrants were issued procedurally.”

24. The 1st Respondent’s counsel’s letter of 7th April, 2017 exhibited as “**PNO III**” is addressed to the Applicant’s advocates. It states in part:

“NAKURU HCCA NO. 134 OF 2012

Van Den Berg (K) Ltd v Patrick Namano Oloo

.....Your appeal was dismissed on 17th January, 2017

Let us now have your settlement of the Judgment of the lower court of

Kshs 505,000/=

Plus interest *Kshs 318,000/=*

Costs of the lower court *Kshs 58,655/=* *Kshs*
830,805/=

Costs of Appeal

Instruction fees *Kshs 49,000/=*

Getting up for appeal *Kshs 40,000/=*

Court fees *Kshs 400/=*

Court Attendances *(15/2/13*

6/3/13, 25/7/14, 17/1/17@ 5,040Kshs *_20,160/=* *KShs 109,560/=*

Total *Kshs 940,365/=*

Kindly let us have your client’s settlement cheque to avoid execution.”

25. The Applicants did not respond to the above letter. Further, they have neither disputed its existence nor that it was received by them. In my view, their silence was premised on the secret weapon of the generic order of stay of proceedings issued in **HCC 322 of 2012** by Emukule J. That order was neither served on the 1st Respondent, nor had the existence of the Applicant's appeal and stay of execution of proceedings in **CMCC 322 of 2011** been brought to the attention of Emukule J.

26. I find that the Applicant's conduct was mischievous to the extent that there was concealment of information, and failure to serve the orders in **HCC 322 of 2012** upon the 1st Respondent. I also find that the Applicant had notice of the recommenced execution proceedings.

27. With regard to the Applicant's generic suit to stay proceedings in the one hundred and forty three on-going matters, I find that the failure of the Applicant to bring to the court's attention the orders of Wendoh J staying the execution was an abuse of the court process. It resulted in issuance of two disparate orders of the High Court: the former staying execution the latter staying the proceedings concerning the same subject matter. This flies in the face of **Section 6 of the Civil Procedure Act** which provides:-

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue directly and substantially is in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

28. In light of the foregoing provision and the discussion on the Civil Procedure Act, I am satisfied that the 1st Respondent was justified to re-institute the execution proceedings. I am also satisfied that the 1st Respondent notified the Applicant of the same in writing. It was incumbent upon the Applicant, after receiving the said notice, to challenge the proposed execution in that suit.

Whether Judicial Review lies in this case

29. The Applicant availed a series of authorities on Judicial Review which I have perused. At paragraph 11 of its submissions it correctly states:

"11.....it is true that Judicial Review is concerned with the legality of the decision making process."

The Applicant cited the case of **Council of Civil Service Unions v Minister of State for Civil Service [1994] 3 ALL ER 935** where the English court stated:-

"the basis of judicial review could be highlighted under the principle hands, namely, illegality procedural impropriety and irrationality."

30. In **Republic v Public Procurement Administrative Review Ltd Nbi HC Misc. Application No. 1235 of 1998**, Nyamu J restated the three grounds of intervention in Judicial Review and added:-

".....the intervention has been extended by the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."

31. In paragraph 17 of its submissions, the Applicant alleged that the illegality committed was that the lower court entered a decision to favour of the 1st Respondent despite the existence of a stay. As already noted, however, it has not been shown that the order for stay of proceedings had been served on either the lower court or the 1st Respondent. In such circumstances, a party not shown to have been served with an order cannot be obliged or expected to obey it.

32. In paragraphs 25 and 26 of the submissions, the Applicant's complaint concerns irrationality and unreasonableness. It is alleged by the Applicant that the stay of proceedings in **HCC 322 of 2012** was disregarded. Further, that the 1st Respondent instituted execution proceedings without informing the court of the order of stay, and hence the lower court had no jurisdiction to further the matter by way of execution proceedings. This argument, like the previous argument under paragraph 17 of the submissions, fails on the ground of failure to demonstrate service.

33. In paragraph 28 of the submissions the Applicant makes reference to an order from Nakuru High Court dated 21st February, 2017, but no such order has been exhibited. I presume that the Applicant is referring to the order of 21st February, 2013 (Exhibit JR4), which was extended by Wendoh J on 15th March 2013, 16th April, 2013 and 28th June, 2013 and finally in a ruling by Wendoh, J, delivered on 2nd October, 2014. As earlier pointed out, the proceedings in **HCC 322 of 2012** are in conflict with the High Court appellate proceedings in **HCC Appeal No. 134 of 2012** concerning the same decree issued by the lower court in **CMCC No. 172 of 2011**. The suit in **HCC 322 of 2012** involved the Applicant as the plaintiff and Concord Insurance Company Ltd as defendant in relation to, inter alia, the proceedings relating to **CMCC No. 172 of 2011**. The 1st Respondent was neither made a party to that suit (even as an interested party) nor is it demonstrated or alleged that he was served with the orders emanating therefrom.

34. With regard to breach of procedure alleged in paragraph 29 of the submissions, the Applicant alleges that the failure to serve the execution proceedings amounts to a breach of its constitutional rights to be heard and to fair administrative action. As already pointed out, the 1st Respondent's advocates exhibited a letter they wrote to the Applicant's advocates warning that they wanted to execute. The letter is not denied, and it went unanswered. The Applicant, in my view had notice, and was obliged to act upon the letter in the suit and in the court where execution proceedings were taking place.

35. In all these respects and for all the above reasons, I agree with the 1st Respondent that judicial review in the circumstances highlighted herein, cannot avail any remedy to the Applicant. The decision of the lower court to allow execution cannot be impugned.

36. In light of all the foregoing the judicial review application fails and is hereby dismissed with costs. The interim orders given by this court on 31st August, 2017 are hereby discharged.

37. Orders Accordingly.

Dated and Delivered at Naivasha this 8th Day of April, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No Representation for Ojienda for the Applicant
2. Owuor for the 1st Respondent
3. Owuor holding brief for Ondieki for the 2nd and 3rd Respondent

Court Clerk – Quinter Ogutu