



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 33 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

IN THE MATTER OF: EXECUTION OF THE WARRANTS ISSUED IN MOMBASA KADHI'S COURT CASE NO. 173 OF 2011: FIRDAUS SIWA SUMO V ABUBAKER MOHAMED AL AMIN

IN THE MATTER OF: ARTICLES 10, 28, 29, 47, 48, 50, 159 & 165 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE AUCTIONEERS ACT, CAP 256 OF THE LAWS OF KENYA, AUCTIONEERS RULES NO. 5 OF 1996, THE CIVIL PROCEDURE ACT AND CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: A JUDICIAL REVIEW APPLICATION BY

ABUBAKER MOHAMED AL AMIN.....APPLICANT

VERSUS

HON. KADHI'S COURT, MOMBASA LAW COURTS.....1ST RESPONDENT

SURE AUCTIONEERS.....2ND RESPONDENT

AND

FIRDAUS SIWA SUMO.....INTERESTED PARTY

JUDGMENT

1. In the Application before me dated, By a Notice of Motion dated 28.5.18, **Abubaker Mohamed al Amin**, the Applicant herein seeks the following judicial review orders:

1. ***Spent.***

2. ***THAT*** this Court be pleased to grant the Applicant leave to apply for the order of Certiorari to remove into this Court for purposes of quashing the decision contained in the warrants of attachment of sale issued by the 1st Respondent to the 2nd Respondent pursuant to a judgment made in Mombasa Kadhi's Court Civil Case No. 173 of 2011; *Firdaus Siwa Somo v. Abubakar Mohamed Al Amin* whereby the 2nd Respondent was authorized to sale by public auction the Applicant's property known as Plot No. MSA/BLOCK XLVII/41 in a public auction. Further, a consequential order be made setting aside all the actions taken by the 2nd Respondent in pursuance of the said warrant.

3. ***THAT*** the grant of leave to apply for the Judicial Review Order sought herein should operate as a stay of the intended sale of the Applicant's property known as MSA/BLOCK XLVII/41 by the 2nd Respondent on 30th May, 2018.

4. ***THAT*** the costs of this application be provided for.

2. The undisputed facts herein are that the Applicant and **Firdaus Siwa Sumo** the Interested Party, were the Defendant and Plaintiff respectively in **Mombasa Kadhi's Court Case No. 173 OF 2011: Firdaus Siwa Sumo v Abubaker Mohamed al Amin**. The 1st Respondent, the Kadhi's Court, delivered Judgment in favour of the Interested Party for Kshs. 6,925,000/= on 27.3.17. A warrant of

attachment (the warrant) was issued by the Kadhi's Court and given to the 2nd Respondent for purposes of execution. By a notice in the Star newspaper of 16.5.18, Sure Auctioneers the 2nd Respondent advertised the Applicant's property known as MSA/Block XLVII/41, (the property) for sale by public auction on 30.5.18.

3. The Applicant contends that the intended auction sale of the Applicant's property is tainted with the following grave illegalities:

- The warrants issued by the 1st Respondent did not contain a reserve price for the property on a professional valuation carried out not more than 12 months prior to the proposed sale as provided for under **Rule 11 (b) (x) of the Auctioneers Rules.**
- The 1st Respondent issued warrants of execution to the Interested Party before the taxation of the costs payable contrary to the provisions of Order 21 Rule 7, 9 and 13 of the Civil Procedure Rules and Section 94 of the Civil Procedure Act.
- The 2nd Respondent has carried out a current valuation before the intended sale in violation to the provisions of **Rule 11 (b) (x) of the Auctioneers Rules.**
- The 2nd Respondent has not served the Applicant with a notification of sale as provided for under Rule 15 (b) and (c) of the Auctioneers Rules.

4. The Interested Party raised a Preliminary Objection (PO) dated 29.5.18. The first objection is that the firm of Gikandi & Co. Advocates lack *locus standi* to file the application on behalf of the Applicant and hence the application is bad in law and an abuse of the Court process. The second objection is that the judgment and/or decision to be quashed was made more than 6 months before the filing of the Application and hence no leave can be granted.

5. The 2nd Respondent in a Replying Affidavit sworn by Bernard Gichuki Mwangi contends that he complied with all the rules, regulations as well as processes relating to execution. He avers that he was instructed by the 1st Respondent through the Interested Party to execute the warrants which were issued on 16.2.18. He registered a prohibitory order issued on 16.2.18 against the title in respect of the property. The settling of Terms of Sale dated 9.2.18 was filed on 16.2.18. He stated that he obtained a valuation report for the property dated 18.4.18. According to the 2nd Respondent as the Decree being executed arises from the Kadhi's Court, no taxation of costs is necessary, as the costs are assessed by the Honourable Court. He claims to have so far incurred expenses amounting to Kshs. 240,392/= and his fees stands at Kshs. 875,300/= as set out in the 45 days Redemption notice dated 20.2.18.

6. The 2nd Respondent prayed that the Court considers and secures his costs and expenses as an Auctioneer as well as an Officer executing lawful Court process. He has no interest in the subject matter, as an Officer of the Court. He further prayed that he be allowed to conclude the instructions, alternatively the Applicant be ordered to pay his costs occasioned by the staying of the execution process

7. I have considered the submissions by the parties as well as the authorities cited. On the preliminary objection, it was submitted for the Interested Party that the Application was filed on 28.5.18 while the judgment was delivered on 27.3.17, over 1 year after which is outside the 6 month period set by law. Order 53 Rule 2 of the Civil Procedure Rules provides:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

8. The foregoing provision is explicit that leave shall not be granted to apply for an order of certiorari unless the application for leave is filed not later than 6 months after the date of the proceeding. Although the judgment was delivered on 27.3.17, the Applicant has made it abundantly clear that she seeks to challenge the warrant of attachment which was issued on 16.2.18. Accordingly I concur with the Applicant that the Application having been filed on 28.5.18 was filed within the time prescribed by Order 53 Rule 2 of the Civil Procedure Rules.

9. On the objection that M/s Gikandi & Co Advocates came on record for the Applicant without leave of the Court. Order 9 Rule 9 of the Civil Procedure Rules provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. The foregoing provision makes it clear that any advocate intending to come on record for a party in a matter after judgment has been passed may only do so with leave of the Court or upon the filing of consent between such advocate and the advocate for he wishes to replace. This provision in my view is however not applicable in a fresh matter such as an appeal or indeed a judicial review application such as the present matter. In an appeal or in judicial review proceedings, there is no judgment to invite the application of Order 9 Rule 9.

11. It should be noted that Order 9 Rule 9 of the Civil Procedure Rules was intended not to protect one party against another but to safeguard advocates' legal fees from mischievous clients who sought to shortchange them avoided upon delivery of judgment. In Gateway Insurance

The provisions of Order 9 rule 9 of the Civil Procedure Rules were given meaning to by Koome, J (as she then was) in Ahamed Mohamud Adam vs. Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998, where the Learned Judge expressed herself as hereunder:

“The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words it was meant to secure the interest of the advocate who acted for the party up to the judgement.”

12. Accordingly, I find the preliminary objection by the Interested Party wanting in merit.

13. For the Applicant, it was submitted that the Applicant is entitled to be granted leave to ventilate his grievance in a Court of law. He also contends that this Court has supervisory jurisdiction over subordinate Courts. The Applicant further contends that non-compliance with any part of the law regarding the issuance of the warrant of attachment renders the entire process null and void. The 2nd Respondent on the other hand submitted that the Applicant ought to have sought relief in the Kadhi’s Court being the Court executing the decree.

14. Article 47 of the Constitution of Kenya, 2010 guarantees to the Applicant and indeed to all persons the right to fair administrative action. Clause (1) thereof provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 50 of the Constitution secures for the Applicant the right to a fair hearing. Clause (1) provides:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

15. The right of the Applicant to fair administrative action and a fair hearing cannot be gainsaid. While invoking the provisions of Article 47 of the Constitution, the Applicant must bear in mind the provisions of the Fair Administrative Action Act which was enacted to give effect to Article 47 of the Constitution. Section 9(2) of the Act provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

16. It is imperative that before a party moves to this Court to seek review of a decision of a body subordinate to it, such party shall first exhaust the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law. Section 9(3) of the Act goes on to provide that the Court shall, if it is not satisfied that the remedies referred to in sub-Section (2) have been exhausted, direct that such party first exhausts such remedy before instituting proceedings in this Court.

17. The Civil Procedure Act which is a written law, has provided the mechanism for addressing any question relating to execution of a decree. Section 34(1) provides:

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

18. A reading of the foregoing provision indicates that the propriety of the impugned warrant of attachment, a question relating to the execution of the decree ought to be determined by the Court executing the decree, in this case the Kadhi’s Court. The provision which is couched in mandatory terms further prohibits the filing of a separate suit for the purpose of determination of a question relating to execution of a decree. The Application herein which seeks leave to file judicial review proceedings relating to the execution of the decree in Kadhi’s Court Case No. Civil Case No. 173 of 2011 clearly contravenes Section 34(1) of the Civil Procedure Act as well as Section 9(2) of the Fair Administrative Action Act. My view therefore is that this Application is an abuse of the Court process.

19. Further our Courts have held time and again that judicial review is a remedy of last resort. Where an alternative remedy exists, a party must convince the Court that judicial review is the more efficacious, beneficial and convenient alternative remedy and only the existence of exceptional circumstances will warrant a departure, from this principle.

20. On this, I follow Wendoh, J in Republic v National Environment Management Authority Ex-Parte Sound Equipment Limited [2010] Eklr where she stated:

There is a wealth of authority that where there is an alternative remedy, the Applicant seeking leave of the court to commence Judicial Review proceedings must disclose that there is an alternative remedy and should demonstrate the exceptional circumstances under which he seeks Judicial Review instead of the remedy provided by statute.

The learned Judge further cited the following holding in R v Birmingham City Council ex parte Ferrero Ltd (1993) 1 ALL ER 530:

“where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only

exceptionally that Judicial Review would be granted. In determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers was the real issue to be determined and whether statutory appeal procedure was suitable to determine it”.

21. The above decision of Wendo, J was affirmed by the Court of Appeal in Republic v National Environmental Management Authority [2011] eKLR where the Court stated:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.

22. Section 34(1) of the Civil Procedure Act has made provision for determination of any question arising between the parties to a suit relating to the execution of a decree therein. Any question must therefore be redressed in accordance with that provision. No material has been placed before me indicating that exceptional circumstances do in fact exist to warrant the judicial review orders sought. Our Courts have further consistently held that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of any relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

23. Similarly in the oft cited case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, the Court of Appeal had this to say:

We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts.

24. By analogy, the Kadhi’s Court being the executing Court was the first port of call for the Applicant. It was imperative for the Applicant to exhaust the set redress mechanism in the Kadhi’s Court before seeking to invoke the judicial review jurisdiction of this Court. Additionally, the grant of the leave sought to file judicial review proceedings will preempt Civil Appeal No. 48 of 2018 filed by the Applicant seeking the setting aside of the judgment of the Kadhi’s Court, the subject of the impugned warrant of attachment will result in parallel proceedings with possible conflicting decisions. This in my view is an abuse of the Court process. In the end, I find no merit in the Application dated 28.5.18 and the same is dismissed with costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of May 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the 1st Respondent**

..... **for the 2nd Respondent**

..... **for the Interested Party**

..... **Court Assistant**