



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 51 OF 2018

BIN JUMA OMAR (suing as the personal representative

of the Estate of Ismael M. Sholo).....APPELLANT

VERSUS

TAHMEED COACH LIMITED.....1ST RESPONDENT

NASSORO HAMDU AHMED.....2ND RESPONDENT

TAHMEED EXPRESS LIMITED.....3RD RESPONDENT

RULING

1. There is pending before the court two notice of applications one dated 4th February, 2019 by *James Kiruni t/a Jakimu Auctioneers* and other dated March, 2019 by the 3rd Respondent, *Tahmeed Express Limited*.

2. The auctioneer's application seeks to dispose of movable property, being two vehicles registration numbers **KBT 452F and KBT 536U** attached during execution of the decree emanating from the Resident Magistrate's court at Mariakani Civil suit no. 28 of 2015. Whilst that of the 3rd Respondent seeks a review of this court's finding and orders issued on 6th December, 2018.

Background

3. The appellant was the plaintiff and the decree-holder in the case before the Mariakani Court and having commenced the execution process found themselves in an objector's proceedings as the respondent. The 3rd Respondent in the instant case was the objector and succeeded in having the attached assets released to itself.

4. The ruling on the objector's proceeding is the subject of the pending appeal. In the interim period a stay pending appeal was filed by the appellant staying the orders on the objection proceedings. It is this stay order that is being challenged via the application for review.

5. The application by the 3rd Respondent is for the following summarized order:

a) Spent

b) Review of orders dated 6th December, 2018

c) The attached assets be released to the 3rd Respondent with no order as to costs.

d) OCS to assist in execution of these orders/provide security with no order as to as to costs and/or levelled auctioneer's charges.

e) Costs of this application be in the cause.

6. The application is predicated upon grounds that **Order 42 Rule 2(b)** of the Civil Procedure Rules indicates the party expected to offer security for costs; this court found that the 3rd Respondent was insincere as the logbooks attached to the 3rd Respondent's reply were in

respect of KBT 451F and KBS 372D which differed with vehicles held by the aforementioned auctioneer being KBT 452F and KBT 536U, that in fact the correct position is that objector had filed two objection proceedings dated 13th September, 2018 in reference to KBT 452F and KBT 536U and the other dated 13th July, 2018 referring to KBT 451F and KBS 372D;

7. The application is founded upon further grounds couched as follows: the court erred in finding that a search prior to the attachment indicated that the attached vehicles belonged to the Respondent; as there was a transfer of ownership of the vehicles effected two weeks prior to the attachment that is on 30th August, 2018 to 13th September, 2018, it hence the record obtained by the appellant would not have reflected the transfer; that this same issue was deliberated upon and pronounced by the Mariakani Court on 7th November, 2018; this issue ought to have been contemplated at the substantive hearing of the appeal and not as a ground for retention of the 3rd Respondent's assets or as a ground of the stay; that the discretionary powers of the court under Section 3A is invoked.

The Applicant's Case

8. The application is supported by the affidavit of *Nassoro Khalfan Said*. It is averred that the court misdirected itself on the import of **order 42 rule 2(b)**, on the issue of the copy of search as to the ownership of the vehicles and the person to pay the security when it reached its conclusion.

The Appellant's Case

9. The Appellant has opposed the application for review by filing grounds of opposition that the application for review suffers from laches; it is an abuse of process; it goes against the grain **article 15 a(b)** of the Constitution; it is a further attempt by the respondents to circumvent the issue of providing security as ordered by the court; further, the issues raised can only be canvassed at the hearing of the appeal; no new evidence has been discovered; there is no apparent error; on the face of the record the appellant being the successful litigant ought to be allowed to expeditiously enjoy the fruits of the judgement.

The Auctioneer's Application

10. The auctioneer's application seeks the following summarized orders:

a) (spent)

b) That the 3rd Respondent be ordered to deposit the decretal sum in court, pay auctioneer's fees inclusive of storage charges within 7 days of service of these orders and take with its buses.

c) That failure to comply with prayer No.(2) the auctioneer be allowed to dispose of the vehicles by public auction and the proceedings less the auctioneer's charges, storage fees and insurance charges be deposited in court within 7 days of the auctioneer.

d) Any other order as deemed fit.

e) Costs be provided for.

11. The auctioneer's application is premised in the grounds that he is the one in possession of the vehicles the subject of the appeal; that the vehicles are deteriorating due to weather conditions associated with the area consists of salty moisture being Mombasa; the storage fees are being incurred daily and are now outstanding and the 3rd Respondent had been given the option of having the vehicles released to themselves upon deposit of the decretal sum and the payment of the auctioneer's charges. The appellant has complied with the condition of filing the record of appeal.

12. It is also stated that the 3rd Respondent will not suffer prejudice as monies realized will be released to it if the appeal fails; the Appellant and 3rd Respondent will have a win-win situation as the appellant will have value of the decretal sum and the 3rd Respondent vehicles in good condition; there is no other place to store the vehicles within the jurisdiction of the court; unless the orders are granted, the Appellant and 3rd Respondent will suffer irreparable damages; that this approach is the only avenue provided in law.

The 3rd Respondent's Case

13. The auctioneer's application is opposed by the 3rd Respondent via grounds of opposition that it is an ill-conceived, frivolous, vexatious, incompetent, application that is an abuse of court process and unsustainable in law, the orders sought cannot be granted as the auctioneer is neither a party at the appeal nor in respect of the execution proceedings.

14. In addition, it is stated that by dint of the auctioneer's license the auctioneer ought to have storage facility for unrestricted use pending determination of the issues touching on the execution; the 3rd Respondent not being the Appellant nor the judgement-debtor ought not be compelled to provide the security for the due execution of any order affecting the Appellant; the orders sought in the application presume that the appeal shall succeed and/or that the 3rd Respondent is responsible for the auctioneer's costs irrespective; the application does not disclose a reasonable basis for the invocation of the court's discretionary powers.

Submissions

15. The applications have also been ventilated by way of written submissions. The 3rd Respondent is aggrieved by the order to pay into the court the aforementioned amount in order for its vehicles to be released. The 3rd Respondent urges that there is a mistake or an error apparent on the face of record. It is pointed out that it is trite that security ought to be furnished by the person seeking stay pending appeal and that the 3rd Respondent was not a party to the suit leading to the execution proceedings. It has also suffered substantial loss as it continues to lose business by virtue of the detention of the vehicles in question in flagrant breach of the law as execution proceedings are yet to be issued by the court.

16. It further urges that the auctioneer lacks locus standi to make the application and in any case the auctioneer cannot claim payment or compensation incurred in respect of its own independent arrangements not involving the 3rd Respondent. It is also urged that auctioneer is obligated by **Section 12** of the Auctioneers Act as read with **Rule 3 sub-rule (2)(d)** and **3** of the Auctioneers Rules to have a premises that is sufficient for storage or make alternative arrangements for safe custody of the attached goods.

17. Additionally, it is urged that the execution proceedings are yet to be determined as there was the unconditional stay of execution pending the filing of appeal within 45 days. Consequently, the auctioneer is solely responsible for any charges and fees so far incurred. It is emphasized that the third respondent stands to suffer substantial loss as the auctioneer has failed to provide safe custody of the vehicles.

18. The 3rd Respondent placed reliance on the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another (2006)1 EA 243* referred to *Gerald Iha Thoya v Registrar of Land, Kilifi & 2 Others (2018) eKLR* for the applicable test for review on the basis of an apparent error on the face of record.

19. The Appellant has submitted that the remedy to pursue is to appeal against the decision when one alleges that an incorrect procedure was applied or the court misapprehended the law or fact or that there was a wrong exercise of discretion. To buttress this position, the Appellant relies on the finding of *National Bank of Kenya Limited v Ndungu Njau (1997) eKLR*.

20. The Appellant has further urged that as per the decision in *Abasi Belinda vs Fredrick Kangwamu & Another (1963) E.A P.557*, an erroneous view of evidence or law is a ground for appeal but not for review as is the case herein.

21. It is argued that the 3rd Respondent is guilty of laches and the delay in bringing the application is inordinate as the ruling delivered on 6th December, 2018 and the review application filed on 5th March, 2019. The Appellant points at the decision of *Abdulrahman Adam Hassan vs National Bank of Kenya Ltd High Civil Case No. 446 of 2001*.

22. The Appellant submits further that the 3rd Respondent aims at clouding the issues and that this court cannot seat in appeal of a decision by a judge of concurrent jurisdiction. The Auctioneer did not file submission in respect of the applications.

23. The court's discretionary powers under order 42 rule 6 were exercised and the ruling delivered on 6th December, 2018 allowed a stay of the execution of the ruling delivered by the trial court on 7th November, 2008 pending the appeal. It was further ordered that the attached vehicles, the subject of the appeal, remain in place pending the hearing and determination of the appeal or the issuance of further orders.

24. In addition, the court ordered that the vehicles be released to the 3rd Respondent on condition that it deposits Kshs. 3, 530,000.00 and pays the auctioneer's charges. The appellant was required as per the ruling to file the record of appeal within 45 days which was filed on 17th January, 2019 within the time provided.

The law

25. This court's jurisdiction to review its own previous decisions under the laws of Kenya is derived from section 80 of the Civil Procedure Act which stipulates as follows:

“Section 80. Review

Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

26. Further, **Order 45** encapsulates the grounds upon which this court may endeavor to review its own previous decision or judgement. It states as follows:

[Order 45, rule 1.] Application for review of decree or order.

1) “ Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or

evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

27. It is abundantly clear from the foregoing provisions of law that the power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised where there are other sufficient reasons and as a matter of law the application must have been made without undue delay.

28. However, it may not be exercised on the ground that the decision was erroneous on merits. That would constitute the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by inferior or the Subordinate Court.

29. The position for setting aside or modifying a court’s judgements/ruling would appear to be no different in both Zimbabwe and South Africa even though both countries apply both common law principles and Roman-Dutch Law. Some helpful comments to that effect by the Court of Appeal of Tanzania in the Transport Equipment Case (supra) which quotes the leading textbook by HERBSTEIN & VAN WANES: **The Civil Practice of the Superior Courts in South Africa, 3rd Edition:**

“A final judgement being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure.”

30. In view of the above provision of law, there can therefore be no room for argument concerning the authority or power of this court to review its own judgements within the scope and ambit of **section 80** of the Civil Procedure Act and **Order 45(1)** of the Civil Procedure Rules.

31. The main issue for determination herein is whether the Applicant has established any of the above mentioned grounds to warrant review of the orders passed by this court. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“...In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”(emphasis mine)”.

32. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that:

“In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

We do not find it necessary to comment on the exercise of Court’s discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesit, J. was correct, it was however based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J. We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

33. The Court of Appeal **National Bank of Kenya Limited vs Ndungu Njau** indicated that:

“.....if he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law”

Discussion and Analysis

34. In view of the foregoing position of law, the 3rd Respondent's contention is that despite him having the right of appeal, it has preferred to seek review of the Order of this court for the reason that there is a mistake or error apparent on the face of record. According to the 3rd Respondent, this is exhibited in ruling issued on the 6th of December which gave the Appellant an unconditional stay and further directed the 3rd Respondent to furnish security.

35. The Respondent's contention in this regard is that it is not the appellant/applicant in the instant appeal and neither was it the judgement debtor in the trial Court. He relied on **order 42 rule 6(2)** which in his view places the obligation on the appellant to furnish security.

36. The 3rd Respondent therefore submitted that substantial loss has already been occasioned to it as it continues to lose business by virtue of detention of its two vehicles by the Auctioneer in flagrant breach of the law as execution proceedings are yet to issue by this Honourable Court.

37. The Appellant opposed the position taken by the 3rd Respondent. It was argued that an appeal has already been filed which is pending determination hence an application for review cannot be preferred. It was further argued that the alleged error on the face of the ruling of this court cannot and be ground for review as by law envisaged. According to the Appellant, the order to be complied with is on page 14 of the ruling which refers to the conditional release of the attached vehicles and the said vehicles are known to all parties in this appeal.

38. I noted that there is an appeal that is pending before this court which is yet to be heard and determined. The Appellant filed the said appeal against the 3rd Respondent's objection proceedings. I have perused the memorandum of appeal filed by the Appellant herein. One of the main issues in contention encapsulated therein is that the 1st Respondent and 2nd Respondent to tuck away the vehicles to avoid execution. Thus, the transfer was fraudulent and intended to avoid execution of the decree.

39. The foregoing, demonstrates that there are serious triable issues emanating from the pending appeal. Further, I do bear in mind that the buses in possession of the Auctioneers are held as security to satisfy the judgement of the trial court.

40. In this regard, the same cannot be sold as urged by the Auctioneers before the hearing and determination of the appeal filed by the appellant herein. Allowing the buses to be sold would render the pending appeal nugatory. Thus the Auctioneers application seeking to dispose of the busses is untenable and in the premises cannot be grounded as a relief by this Court.

41. The path the Auctioneers should take is to file its bill of cost which ought to be taxed and be paid as per the direction of the previous decision of this court.

42. I decline to issue and allow the application for review brought by 3rd Respondent as it did not satisfy the three principles set out under **section 80** of the Civil Procedure Act. In the instant matter, the 3rd Respondent alleged error on the face of record. I find that the same has not met the threshold for the issuance of such orders. The 3rd Respondent bears the burden to pay security in lieu of the security for the busses pending hearing and determination of the appeal. On this limb, I have no reason to vacate from this court's earlier finding.

43. However, my tentative view, there are special and exceptional circumstances by the distinctive feature of the property which I think this court needs to take into consideration. I resort to **section 3A** of the *Civil Procedure Act*, which simply reserves the Court's inherent jurisdiction.

44. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process.

45. Useful guidance is found in ***Industrial & Commercial Development Corporation vs. Otachi* [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in ***Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971*** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers.

46. In light of the foregoing and in the interest of justice, I have noted that the assets in question, which happened to be busses are by their nature movables which have a potentiality of rapid depreciation and wastage, moreso when they are not in use for a long period of time. The averments by the auctioneer on harsh weather conditions and lack of appropriate storage facilities remain uncontroverted.

47. The subject matter of the appeal ought to be preserved in a manner that will not render the appeal nugatory. I bear in mind the unique features of these proceedings before this court where the 3rd Respondent was not a party to the original suit of the lower court. As far as the objection proceedings and subsequent ruling by the trial court are concerned there is authority under **order 42** of the Civil Procedure Rules for the High Court to determine the issue. In an action on wrongful attachment it would be essential for the appellant to show that the judgment debtor was the registered owner of the impugned motor vehicles and that any alienation or transfer to the new owners was fraudulent to defeat the course of justice. Therefore contrary to the 3rd respondents submissions the appellant is quite in order to adduce evidence on appeal in support of her claim to the ruling made before the lower court.

48. One other thing is that the Law and Practice in Kenya on this kind of claims turns on a judgment being settled by the insurer of the offending Motor-vehicle. It is not certain at this stage whether the judgment debtors Motor vehicle was in compliance with the provisions of insurance (Motor vehicles third party Risks (Cap 405 of the Laws of Kenya).

49. I'm satisfied that the submission and detention of the logbooks by the objector to this court will work as a mitigation in lieu of holding the busses at the auctioneer's yard as it will appropriately be a lesser risk to avoid consequential laws pending the hearing and determination of the appeal.

50. In my view it is competent on the above analysis to give effect to the principle that in adjudicating disputes, the application of law, should be just and the courts duty is to further the ends of justice. Weighing one factor after another I make the following orders that;

a) In this case the 3rd Respondent failed to proof allegation of any procedural error on the face of the record nor discovery of new matter or evidence under section 80 of the Civil Procedure Act and order 45 Rule 1 of the Civil Procedure Rules for exercise of discretion to be extended in its favor. In view of the foregoing and on the well-founded objective that the role of the court is to decide the rights of the parties and not to punish them whenever there are doubts to the issues in controversy. In this regard I do exercise discretion and allow the following orders;

(b) As regards the preservation of the subject of the appeal, a restriction be entered by the registrar of motor vehicles at the National Transport and Safety Authority (NTSA) to simultaneously conserve an alienation, transfer or intermeddling with the said assets by the registered owner until further orders of the court.

c) I hereby, order the 3rd Respondent to deposit the logbooks for motor vehicles registration no. KBT 452F and KBT 536U to the Deputy Registrar of the Court as security pending the outcome of the pending appeal forthwith.

d) A restriction be entered by the National Transport and Safety Authority that no transfer or dealings with vehicles registration no. KBT 452F and KBT 536U.

e) The order be served upon the National Transport and Safety Authority declaring that motor vehicles registration no. KBT 452F and KBT 536U are within the jurisdiction of the court in a matter pending before it, with an undertaking from the 3rd Respondent that they should not intermeddle with the said vehicles until the appeal is finalized.

f) The 3rd Respondent to hold the assets in trust of the court until the matter is dispensed with on appeal.

g) The appellant to have 10 days to file and serve the record of appeal.

h) The respondent to the appeal to have 7 days to file a rejoinder to the issues raised in the appeal.

i) Each counsel to prepare talking points as a basis for the oral submissions during the hearing of the appeal.

j) Interpartes hearing of the appeal be scheduled on 27th June 2019.

k) The Auctioneers storage charges be quantified by the Deputy Registrar on or before 10th of June 2019 with a view of payment being made before actual release of the buses.

l) Further mention on 13th June 2019 to monitor compliance.

m) Each party to be at Liberty to apply.

n) The cost of this application to abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered at Malindi this 4th day of June, 2019.

James Kiringi for the Auctioneer-present