



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 30 OF 2019

EZEKIEL KEMUE ORINA.....APPELLANT/APPLICANT

VERSUS

ASKA NYABOKE KOBIRO.....1ST RESPONDENT

BERNARD ONKOBA T/A

BETICO AUCTIONEERS.....2ND RESPONDENT / INTERESTED PARTY

HEGEONS AUCTIONEERS..3RD RESPONDENT/ INTERESTED PARTY

(Being an appeal from the order of Hon. S.N. Makila SRM given on 22nd February, 2019 in Kisii CMCC No. 192 of 2013)

RULING

1. The appellant/applicant herein has moved this court by a Notice of Motion dated 30th April 2019 for orders that;

1) *Spent...*

2) This honorable court be pleased to order the respondents herein pay further court fee in **CMCC No. 192 of 2013**;

3) The honorable court be pleased to review its order directing the applicant to pay further court [fees] in **Civil Appeal No. 30 of 2019**;

4) The honorable court be pleased to annul the decree prepared by the Chief Magistrate's Court on the 8th of November, 2016 in **CMCC No. 192 of 2013** for being improper;

5) The honorable court be pleased to grant the applicant leave to amend his memorandum of appeal;

6) Costs for this application be borne by the respondents

IN THE ALTERNATIVE, if the application is not allowed, the honorable [court] be pleased to stay the Civil Appeal No. 30 of 2019 to enable the applicant to apply for leave to file judicial review for orders of certiorari to quash the order of the 2nd respondent made on 8th of November 2016 in **CMCC No. 192 of 2013**.

2. In support of his application, the applicant swore an affidavit on 30th April, 2019. He avers that on 11th April, 2019, this court ordered him to pay further court fees amounting to Kshs. 20,225/=. He does not see why he should pay the fees yet the decree holder was not asked to pay the fee in the court below. He contends that the filing of a civil case requires the payment of filing fees and failure to do so renders the decree incompetent as there was no competent suit filed before the subordinate court. He states that he has perused the lower court file and there is nothing on record to show that the decree holder was exempted from paying further court fees. He says the taxing officer ought to have collected tax in 2016 when the decree was issued and he should not be made to pay the same. He therefore urges this court to order the 1st respondent to pay the fee.

3. On 2nd May 2019, the 1st respondent filed grounds of opposition to the application urging the court to dismiss it for lack of merit. The respondent contends that the application is res-judicata as the applicant had filed a similar application in **Miscellaneous Application No. 51 of 2019** dated 14th April, 2019 and further contends that the orders being sought cannot be attained in a single application.

4. The appellant relied on his affidavit at the hearing of this matter whereas counsel for the 1st respondent restated the grounds of opposition filed in response to the application.

5. The appellant's main complaint is that he has been asked to pay further court fees before this court can issue directions on the hearing of his appeal. As noted by the 1st respondent, the appellant had filed a similar application in Miscellaneous Application No. 51 of 2019 dated 14th April, 2019 but the court ordered him to file the application in this matter. The matter was not heard.

6. Payment of court fees is a prerequisite to institution of civil suits. This requirement is backed by **Article 48** of the Constitution which provides that;

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

7. The payment of court fees is assessed in accordance with the **Schedule to part IX of The High Court (Practice and Procedure) Rules** made pursuant to **Section 10** of the **Judicature Act** (Cap 8 Laws of Kenya). **Rule 3** thereof provides for the assessment of plaints or counterclaims.

8. In the original suit, the 1st respondent filed a claim for *inter-alia* general damages as compensation for severe body injuries she sustained as a result of a road traffic accident. For non- liquidated claims, the assessment of further court fees is based on the sum awarded by the court in its final determination. The 1st respondent paid the assessed fee before filing her plaint but was required to further court fees prior to the issuance of the decree. This requirement is provided for in **Order 21 Rule 20** of the **Civil Procedure Rules** which states;

*20. The registrar, or in the case of a subordinate court, the presiding magistrate shall upon written request made by the parties or any of them, **and upon payment of requisite fees**, furnish certified copies of the judgment and decree:*

Provided that nothing in this rule shall preclude the registrar or the presiding magistrate from furnishing such copies to any person upon sufficient cause being shown for such request. (Emphasis added)

9. I have perused the lower court file, and it clear that the 1st respondent paid further court fees of **Kshs. 19,929/= on the 14th July 2017**, upon making her application for execution of the decree. There is therefore no need for the applicant to pay additional fees as requiring him to do so.

10. The appellant also sought leave to amend his memorandum of appeal. Such amendments are governed by **Order 42 Rule 3** of the **Civil Procedure Rules** which provides that the appellant/ applicant "*may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.*" Though the applicant does not indicate the manner in which he would like to amend the appeal, he is entitled by the said provision to amend his appeal without leave as this court has not yet given directions on how the appeal should be heard.

11. In the event this court was inclined to dismiss the application, the applicant asked the court to stay these proceedings to enable him apply for leave to file for judicial review orders of certiorari to quash the order of the 2nd respondent made on 8th of November 2016 in **CMCC No. 192 of 2013**.

12. Having perused the record, I note that the orders the appellant contends were issued by the 2nd respondent on 8th November 2016 are warrants of attachment and sale which were issued on the said date. The 2nd respondent applied and was granted the warrants of sale of property by the court. The same was not an order made by the 2nd respondent and cannot be challenged by way of judicial review as the applicant suggests. Judicial review is a mechanism through which courts can review administrative actions and in this case, none was made by the 2nd respondent. Moreover, the applicant has not shown what prejudice he stands to suffer if this appeal proceeds to hearing.

13. For the reasons given above, the appellant's application is successful in terms of prayer 3 only. There shall be no orders as to costs as the application is only partially successful. Direction on the hearing of the appeal shall be given in court after delivery of this Ruling.

Dated, signed and delivered at Kisii this 12th day of July 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant/ Applicant In person

1st Respondent Absent

2nd Respondent Absent

3rd Respondent Absent

