



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 358 OF 2017

HITEN SHANTILAL SHAH & 2 OTHERSAPPLICANT

VERSUS

KENNEDY MILTON NTHIGA.....RESPONDENT

RULING

PRELIMINARY OBJECTION

The applicant on the preliminary objection of 13th August 2019 sought orders;

- 1. That the issues raised by the said application are *res judicata*, and have been effectively canvassed and finally determined upon by this Court vide its Ruling of 1st July 2019;**
- 2. That the Application dated 11th July, 2019 is neither an appeal nor a reference against the decisions of the Deputy Registrar to commit the Judgment Debtors to civil jail or respecting his opinion on the health of otherwise of the 1st Judgment Debtor;**
- 3. That there is no appeal lodged against the decree of this court, and the allegations being improperly joined are superfluous, misplaced, an afterthought and cannot be canvassed in the absence of a substantive Memorandum of Appeal;**
- 4. That the Application dated 11th July, 2019 is bad in law.**

The Preliminary Objection is against the Notice of Motion filed on 22nd July 2019 which sought the following orders;

- a. That pending hearing and determination of this application, the 1st judgment debtor be released from Civil Jail on the condition that they remain within and submit themselves to the jurisdiction of this Honorable Court when called upon to do so.
- b. That pending hearing and determination of this application, the 2nd judgment debtor be released from Civil Jail on the condition that they remain within and submit themselves to the jurisdiction of this Honorable Court when called upon to do so.
- c. That pending hearing and determination of this application, the 3rd judgment debtor be released from Civil Jail on the condition that they remain within and submit themselves to the jurisdiction of this Honorable Court when called upon to do so.
- d. That the Decree Holder be prohibited from further incarceration of the Applicant in Civil prison.
- e. That such other orders as are expedient to be made.

The application is supported by the following grounds:

- a. That on or about 27th May, 2019 the 1st, 2nd and 3rd judgment debtors were committed to civil jail upon presentation for being indebted the decretal amount of Kshs.37,949,685 awarded to the decree holder;**

b. That unless the 2nd judgment debtor is released from civil jail, his condition will continue to deteriorate which is detrimental to his health as he is of old age;

c. The Judgment debtors were not served with the notice to show cause as to why they should not be committed to civil jail, which is blatant violation of their right to due process;

d. That in view of the circumstances above, the judgment debtors wish to challenge the suit and file an application seeking to appeal out of time;

ORAL SUBMISSIONS

The Applicant in the Preliminary Objection opposed the hearing and determination of the application of 11th July 2019 as the matter raised is *res judicata* as the issue with regard to the 2nd judgment debtor medical condition was canvassed and fully determined by the Ruling of 1st July 2019 which found that the 2nd judgment debtor's medical condition was attended to and controlled.

The medical report relied on during these proceedings is the same report which was attached to the instant application. No new evidence, error apparent on the face of the record and no allegation of new circumstances, dissatisfaction with the Court order and/or a party aggrieved by the orders has been raised.

A reference, a review or appeal has not been filed in this Court or the Trial Court.

The application of 11th July 2019 is bad in law as there a laid down procedure of approaching the Court which has not been followed.

Therefore this Court lacks jurisdiction to hear and determine the impugned application.

Counsel annexed various cases on the issue of *res judicata* and filing of review or appeal before the Trial Court or this Court.

In *Republic Procurement Administration Review Board & another (Interested Party Optic Technologies Kenya LTD) Ex-parte County Assembly of Busia [2017] eKLR*, Justice R. E Aburili pronounced herself as follows;

“Justice looks at both ways as the rules of procedure are meant to regulate administration of justice and are meant not to assist the indolent. Filing of an application outside the stipulated statutory timelines cannot be a mere technicality curable under Article 159 (2) of the Constitution, and neither does Article 159 (2) (d) oust mandatory provisions of the law which allows the application of any other written law with regard to the limitation of time for instituting judicial review proceedings”

The bottom line of this limb is that this court lacks jurisdiction to entertain the present application. As the court held *in Owners of Motro Vessel (Lilian) –vs- Caltex Oil (Kenya) Ltd. [1989] 1KLR*:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence.”

In the case of *Abraham Lenaula Lenkeu –vs- Charles Katekeyo Nkaru [2016] eKLR*, on Article 50 (1) on the right to fair hearing and Article 159 (d) on the principle that justice shall be administered without undue regard to procedural technicalities. In a matter that was brought to the High Court in the absence of a Memorandum of Appeal, the court ruled;

“It is clear that in the matter of justice the case for the appellant's claim was not ripe for the court to exercise appellant jurisdiction under section 78 of the Civil procedure Act. The necessary conditions for exercising the power of jurisdiction under the Civil Procedure Act and Rules have not arisen as the dispute between the parties is properly before the lower court. The procedure provided for on the issues arising out of the judgment, decree or order for the appellant court to be seized of jurisdiction of the matter is not available to the appellant at this stage as of right.”

Counsel for Respondent in the P.O. stated that what is raised must comply with. The requirements of a Preliminary Objection that is it must be a pure point of law and is based on agreed facts.

The application of 11th July 2019 is competent before Court by virtue of **Section 57 Civil Procedure Act**

The application of 11th July 2019 should be dealt with by the High Court and not the Deputy Registrar. This is a different application from the application before the Deputy Registrar. Which was an application to extend the committal to civil jail for the 3 judgment debtors. Counsel for 2nd & 3rd judgment debtors associated himself with oral submissions for 1st judgment debtor. Counsel for the Applicant in the P.O. in reply informed the Court that **Section 43 (3) (b) of CPA 2010** refers to High Court or Committal Court and hence the matter ought to be heard in the Committal Court first and then by the High Court.

The application of 11th July 2019 was filed 1 week after the Ruing of 1st July 2019 and no new issue, circumstances or evidence was raised. The application is an appeal before this Court nor a review filed before the Committal Court.

DETERMINATION

The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696**. At page 700, Law, JA stated that:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

PLANTIFF DECREE-HOLDER'S REPLYING AFFIDAVIT

The rest of the Plaintiff/Decree-holder's Replying Affidavit basically dwells on his being owed money by the defendants/applicants and the difficulties he has and/or he is undergoing towards the realization of the said outstanding debt.

The said Replying Affidavit further makes reference to a ruling of the Court of 1st July 2019. Neither the Judicial Officer nor the Court which gave the said ruling is stated in the affidavit. A certified copy of the said ruling of 1st July 2019 has not been annexed thereto as guidance to the Honorable Court. In any case the present P.O. had been withdrawn at the behest of the Plaintiff/Decree-Holder's Counsel.

The said Defendant's/Application Notice of Motion of 11th July 2019 is premised on the Provisions of **Section 3A, 38 as read with 43 and 63 (e) of the Civil Procedure Act, Cap. 21 and Orders 9 Rule 10, 22 Rules 31 and 35 of the Civil Procedure Rules 2010**. These Sections and Provisions of the law confer unfettered jurisdiction upon the High Court to hear and determine the matters raised therein. An application under the said substantive provisions of the Civil Procedure Act, can only be heard by a High Court Judge and not Deputy Registrar.

It is the duty therefore, of the Plaintiff-Decree-holder/Respondent to fully satisfy the Honorable Court that the Motion of 11th July, 2019 has previously been litigated over and determined by a competent Court and a decision given thereto. It is clear that upon perusal of the P.O as read together with the accompanying Replying Affidavit sworn by the plaintiff/respondent, no point(s) of law have been raised to warrant the upholding of the Preliminary Objection.

The issue of Res Judicata was ably articulated in the High Court case of **ANM – vs- PMN [NRB HCCC No. 14 of 2015 Family Division]**. The said High Court decision elicited the parameters and the actual test for the exercise of the legal provisions of **Section 7 of the Civil Procedure Act, Cap. 21** which the current P.O. is premised on.

ISSUE(S)

After consideration of the able submissions by Counsel on the matter the Court considers only 1 issue for determination;

Is the Application of 11th July 2019 competent before Court?

Are the issues raised herein similar/identical to what was canvassed before the Committing Court?

Is the medical report annexed the same one as considered during the hearing and determination of proceedings that culminated with the orders of 1st July 2019?

This Court states as follows;

All execution proceedings of decrees from this Division are processed by Deputy Registrars of Commercial Division of the High Court.

In the instant case there numerous proceedings on the germane issue of the 2nd Judgment debtor's health/medical condition where medical reports have been presented before the Committing Court which made its findings.

For this Court to adjudicate on the instant application, then an appeal ought to preferred and/or a reference of the Committing Court's orders. In the absence of an appeal, this Court cannot deal with the same.

The application of 11th July 2019 has prayers sought from this Court that were not sought before the Committing Court ; the Applicant sought leave to file an appeal out of time; that falls squarely before this Court for hearing and determination.

With regard to **Section 43 of Civil Procedure Act**; the Committing Court and the High Court have jurisdiction to adjudicate matters regarding judgment debtor's committal to civil jail in light of the person's medical condition and/or status.

This provision is in addition to provisions of lodging an appeal as prescribed by **Order 42 CPR 2010** and provisions of a review as stipulated by **Order 45 CPR 2010**

The procedure under **Section 43 CPA** is not laid out and cannot be housed with that of an appeal or review.

This means that an aggrieved party may lodge relevant claim before Committing Court or the High Court.

In the instant case; for good order, since the committal of the judgment debtors is/was by the Committing Court which carries out execution the relevant application may be lodged in the said Court. I note from committal proceedings the medical/health issue especially with regard to the 2nd judgment debtor was never addressed as a standalone issue but as part of the execution proceedings. I also note that Committing Court was announced as *functus officio*. With respect this Court disagrees on the basis of a review of orders may be lodged by parties once after the Ruling.

Therefore; to the extent the application of 11th July 2019 was to have this Court adjudicate the issues raised and determined before the Committing/Trial Court; the Preliminary Objection is upheld.

To the extent that the Application raises matters that ought to be canvassed in this Court; that part of the application remains live for hearing and determination.

The exercise of **Section 43 of Civil Procedure Act** is one to be canvassed before either the Committing Court or the High Court as is not part of the Appeal or Review process. No specific process/procedure is outlined and hence it is available vide an application before either of the Court. Since it is the principle of law that that matter originates from the original Court and then to the next Court in terms of jurisdiction; for good order, the said application may first be lodged before the Committing Court.

This matter is not *res judicata* either before the Committing Court or this Court.

DISPOSITION

- 1. The Preliminary Objection is partly upheld against the application of 11th July 2019; in the absence of an appeal or reference filed to the Ruling of the Committing Court of 1st July 2019;**
- 2. The issue of seeking leave to file an application to lodge an appeal out of time in the application of 11th July 2019 is upheld and remains pending for hearing and determination.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 7TH OCTOBER 2019.

M. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MAOSA FOR THE APPLICANT

MR. MUTUKU FOR THE RESPONDENT - ABSENT

MR.MBAABU FOR THE 2ND 73RD RESPONDENTS

MS JASMINE – COURT ASSISTANT