



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC CIVIL APPLICATION NO. 259 OF 2017**

**HUNTERS SHIP CHANDLERS GENERAL CARGO LTD ..... APPLICANT**

**VERSUS**

**JAMAL MTARANYA ..... RESPONDENT**

**RULING**

1. On 30<sup>th</sup> October, 2017, the respondent herein filed a Notice of Preliminary Objection against the application dated 16th October, 2017. The notice of preliminary objection raises the following grounds:-

- (i) That the High Court has no powers to grant the reliefs sought in the application except in exercise of either its appellate jurisdiction or constitutional mandate;
- (ii) That the application is incurably defective for failing to invoke the appropriate jurisdiction of the High Court;
- (iii) That there is no appeal filed neither is there a Constitutional Petition filed to invoke the appropriate exercise of the jurisdiction of the High court in the matters raised in the application; and
- (iv) That the application ought and must be dismissed with costs for lacking a jurisdictional basis.

2. The application that forms the subject of the preliminary objection is premised on the provisions of Articles 48, 50 and 159(2)(e) of the Constitution of Kenya, Sections 3A, 1A and 1B of the Civil Procedure Act, Order 9 rules 9, 10, 11, Order 10 rule 11, Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules. It seeks orders for stay of proceedings, Judgment and imminent execution in SRMCC No. 916 of 2010, Jamal Mtaranya vs Hunters Ship Chandlers General Cargo pending the hearing and determination of the applicant's application and the moratorium issued by the High Court in respect to Blue Shield Insurance Co. Ltd (Under Statutory Management). It also seeks orders for the setting aside of the proceedings and consequential judgment in the said case. Costs are also prayed for.

3. Counsel for the respondent filed his submissions on the notice of preliminary objection on 21<sup>st</sup> November, 2017 and Counsel for the applicant filed his on 24<sup>th</sup> November, 2017.

4. The respondent's Counsel indicated that the application dated 16<sup>th</sup> October, 2017 has been brought under an omnibus of legal provisions all of which do not justify why the High Court should interfere with the proceedings in a subordinate court which has competent jurisdiction to handle the suit before it. With regard to the Constitutional provisions relied on by the applicant, particularly Articles 48, 50 and 159(2)(e) of the Constitution of Kenya, Counsel stated that Articles 48 and 50 of the Constitution are provisions under the Bill of Rights with regard to protection of the rights and fundamental freedoms. It was submitted that there was no relief sought that was constitutional in nature.

5. The respondent's submissions further stated that for one to seek constitutional reliefs under the Bill of rights, one has to file a petition, citing with clarity the constitutional provisions infringed and state the specific constitutional relief sought.

6. In regard to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Counsel stated that the provisions relate to saving and the inherent powers of the court, objectives of the Civil Procedure Act and the duty of the court. It was submitted that it is not open to the High Court to walk into the arena of what transpired in the lower court at will and interfere with the proceedings therein, without being moved to act in an appropriate jurisdictional capacity.

7. It was argued that no appeal has been filed against any decision of the court seized of SRMCC No. 916 of 2010 and no application for Judicial Review calling for the quashing of the said orders or for any other action under the said writs has been made.

8. It was submitted that Order 9 rules 9, 10 and 11 relied upon by the applicant relate to effecting of change of Advocates by order of the court or by consent and the power to act in person or through a new Advocate, after Judgment has been passed. It was submitted that the said provisions are not relevant to the application filed by the applicant as no relief is sought in the Notice of Motion dated 16th October, 2017 to that effect.

9. Counsel for the respondent argued that applications under Order 22 rule 22 of the Civil Procedure Rules, 2010 are filed before the trial court and cannot at the first instance be filed in the High Court. He further indicated that the High Court hears applications for stay of execution in exercise of its appellate jurisdiction.

10. With regard to the issue the moratorium, it was submitted that it should have been raised before the Hon. Magistrate seized with the hearing of SRMCC No. 916 of 2010. This court was referred to annexure JM-2 attached to the applicant's affidavit which shows that the moratorium was declared on 16<sup>th</sup> September, 2011 for a period of 12 months but there was no evidence that it was extended. Counsel prayed for the preliminary objection to be upheld.

11. The applicant's Counsel in his written submissions opposed the preliminary objection by submitting that his application dated 16th October, 2017 is the only available avenue to enable it to stay further proceedings, consequent judgment and/ or impending execution of warrants of attachment and sale of movable property.

12. It was further submitted that Blue Shield Insurance Company Ltd., which had insured the applicant had been placed under statutory management and a moratorium declared by the High Court, which issued a blanket stay of proceedings and execution of all matters pending in court in respect of the said company and insured persons and that this court is bound by the said decision.

13. It was also submitted that the applicant was never informed about the suit in the lower court by its previous Advocate, M/s Wahome and Co. Advocates.

### **ANALYSIS AND DETERMINATION**

The issue for determination is if the preliminary objection should be sustained.

14. The relevance of the provisions of Order 9 rules 9, 10 and 11 of the Civil Procedure Rules to the application dated 16<sup>th</sup> October, 2017 have not been brought to the fore by the Counsel for the applicant. There is no prayer for the applicant to change its Advocate or to act in person through an order of the court.

15. The applicant has also cited the provisions of Order 10 rule 11 of the Civil Procedure Rules which provide that where Judgment has been entered under the said order, the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just. The said provisions empower a court that has entered an *ex parte* Judgment to set it aside, at the first instance. The court that was seized of SRMCC No. 916 of 2010 was the subordinate court and it is the one that had the powers at the first instance, to set aside the *ex parte* Judgment.

16. It is only upon the failure of such a court to grant such orders that a litigant can move to the High Court by way of appeal to seek orders to set aside the *ex parte* Judgment entered in the subordinate court.

17. Order 22 rule 22 (1) of the Civil Procedure Rules provides as follows:-

***"The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to stay the execution, or for any other order relating to the decree to the execution which might have been made by the court of the first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto."***

18. In order for the applicant to have benefited from the orders of stay of execution, he should have moved this court under the provisions of Order 46 rule 2 of the Civil Procedure Rules which provide as follows:-

***"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."***

***(2) No order for stay of execution shall be made under subrule (1) unless –***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

***(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”***

19. I do agree with Counsel for the respondent that this court has not been properly moved for an application for stay of execution, as no appeal has been filed from the orders of the lower court.

20. On the issue the moratorium, the said issue could have been argued before this court if there was appeal filed and an application for stay of execution brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules.

21. Having made a finding on the above, the provisions of Articles 48, 50 and 159(2)(4) cannot apply in a vacuum. Moreover it is the right of every party to be heard when it moves the court through a proper legal process.

22. This court therefore holds that the application dated 16th October, 2017 is so defective that it cannot be sustained. If anything, it is an abuse of the court process. The Court of Appeal in **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd and 2 Others** [2009] eKLR stated as follows on what constitutes abuse of the court process:-

***“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”*** (emphasis added).

23. This court hereby upholds the preliminary objection dated 30th October, 2017. The result is that the Notice of Motion dated 16th October, 2017 is struck out for being incompetent. I award costs of the preliminary objection to the respondent herein.

**DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of May, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the applicant

Mr. Alwenya for the respondent

Mr. Oliver Musundi - Court Assistant