



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NOS. 3 & 17 OF 2001

MICHAEL MUNGAI.....APPLICANT/COMPLAINANT (DEFENDANT)

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED.....1ST RESPONDENT (INTRUDER)

KENYA BUILDING SOCIETY.....2ND RESPONDENT (INTRUDER)

TAIFA AUCTIONEERS.....3RD RESPONDENT (INTRUDER)

CHRISTOPHER AVISA.....4TH RESPONDENT (INTRUDER)

KENYA COMMERCIAL BANK.....5TH RESPONDENT (INTRUDER)

CLEOPHAS OGUTU & OTHERS.....6TH RESPONDENTS (INTRUDERS)

RULING

1. The application before me is the Notice of Motion dated 16th March 2018 in which the applicant *Mr. Michael Mungai* who appears in person seeks omnibus orders for the execution and enforcement of undisclosed court orders and decrees against the 1st to 6th respondents also described as intruders who have been named as *Housing Finance Company (K) Limited, Kenya Building Society, Taifa Auctioneers, Christopher Avisia, Kenya Commercial Bank/KPCU; Cleophas Ogutu and others.*
2. From the body of the application, it is apparent that the orders sought to be executed were those that were issued in several suits heard by this court, the Court of Appeal and even the Supreme Court. They are identified as HCCA No. 335 of 1997; Court of Appeal Civil Application No. 288 of 2008; HCCC Nos. 17, 3 and 1026 of 2001; JR No. 9 of 2015 and HCCC No. 779 of 2009.
3. The application is premised on grounds stated on its face and is supported by an affidavit sworn by the applicant on 16th March 2018 to which he attached a huge bundle of documents.
4. The application is opposed by the 1st, 4th and 5th respondents through the notice of preliminary objection dated 13th April 2018. The preliminary objection was filed by the 4th and 5th respondents but the 1st respondent chose to rely on it in opposing the motion. The other respondents did not participate in the hearing of the motion.
5. I have carefully considered the application, the applicant's lengthy supporting affidavit and the huge documentation annexed thereto alongside the oral submissions made in support and in opposition to the motion. Mr. Mungai argued his application in person while learned counsel *Mr. Ayieko* appeared for the 1st respondent. Learned counsel *Mr. Munyua* represented the 4th and 5th respondents.
6. I have taken time to laboriously study the voluminous court records related to the various suits involving the applicant which were heard and determined by the High Court. I have also read the Court of Appeal decision in Civil Application No. 288 of 2008 and the ruling delivered by the Supreme Court on 26th January 2017.
7. From the material placed before this court and from the applicant's oral submissions, it is apparent that the main order which the applicant is asking the court to enforce is the order issued by *Hon. Mbogholi J* in HCCA No. 335 of 1997 when determining the applicant's appeal against the decision made by the lower court in Divorce Petition No. 122 of 1997. The divorce cause had been instituted by *Nancy Wanjeri Mungai*, the applicant's estranged wife.
8. In the decision challenged on appeal, the trial court had ordered the applicant to vacate the house erected on *LR No. Nairobi/Block*

111/530 then used as the couples matrimonial home (hereinafter the suit property) in default of which he was to be evicted. The applicant was successful in the appeal as the learned judge ordered that the *status quo* preceding the issuance of the impugned orders be maintained until final determination of the divorce cause. The applicant was also granted costs of the appeal.

9. The costs of the appeal were taxed at Kshs.311,290. From the record, the applicant made two applications seeking to enforce execution of the decree for costs which culminated into the orders issued by *Hon. Okwengu J* (as she then was) on 13th May 2008 in which the learned judge ordered that the applicant be paid the sum of KShs.353,379.25 out of funds held in a joint account operated by the applicant and *Nancy Wanjeri* in Housing Finance Company (K) Limited (HFCK), the Garnishee even though this amount was slightly more than the amount of taxed costs which was Kshs.311,290. It is apparent from the court record that the decree was satisfied by HFCK as can be ascertained from the record of proceedings of 2nd July 2008 in HCCA No. 335 of 1997.

10. Even after payment of the aforesaid amount, the applicant did not stop there. He filed several other applications some by way of letters against some of the respondents named in the instant application which were the subject of this court's ruling delivered on 23rd March 2010 by *Hon. Okwengu J*. In that ruling, the court held *inter alia* that the applicant could only execute the decree of costs against *Nancy Wanjeri* who was the respondent in the aforesaid appeal and not against the named respondents who were not parties to the appeal. It is pertinent to note that the said *Nancy Wanjeri*, the respondent in the appeal is not named as one of the respondents in this application.

11. As noted earlier, there is evidence to show that the decree on costs has already been satisfied. I therefore find it difficult to understand why the applicant moved this court in the instant application seeking *inter alia* enforcement of the same decree. But even if the decree had not been satisfied, I agree with the submissions made by *Mr. Ayieko* and *Mr. Munyua* and with the aforesaid decision of *Justice Okwengu* that as the respondents were not parties to the appeal in HCC 335 of 1997, the decree on costs cannot be enforced against them.

12. With respect to the prayer that the respondents be compelled to give the applicant free access and enjoyment of the suit property, it is instructive to note that the suit property was the subject of proceedings in the originating summons in which the instant application was filed and in HCCC No. 1026 of 2001.

The suit property had been acquired by the applicant and his estranged wife during the subsistence of their marriage. It was used as security for a loan advanced to the applicant and his former wife by HFCK. They defaulted in servicing the loan and the suit property was sold by public auction on 28th June 2001 to the 4th respondent who was financed by the Kenya Commercial Bank (5th respondent). The applicant challenged the sale in HCCC No. 1026 of 2001 in which he sought *inter alia*, a declaration that the said sale was illegal. The records in that case shows that after a full hearing, the applicant's suit was on 22nd January 2015 dismissed with costs to the 1st respondent who was the 1st defendant in the suit.

13. It is also clear from the court record that the suit in which the instant application is anchored namely HCCC Nos. 3 and 17 of 2001 were dismissed by *Hon. Musyoka J* on 14th June 2013 for being an abuse of the court process, lack of prosecution and duplication. The applicant was directed to have his counterclaim fixed for hearing. The counter claim was however dismissed with no orders as to costs on 19th December 2005.

14. Quite apart from the mode the applicant chose to seek enforcement and execution of the orders he alleges were issued in his favour by various courts which I must say is very irregular and unprocedural in many ways, I have no doubt in my mind given my foregoing findings and observations that there is no order in force issued by this court which is capable of being enforced against any of the respondents in this application. In fact, apart from the orders issued in HCCA No. 335 of 1997 which have been discussed above, all the suits and applications filed by the applicant in this court including JR No. 9 of 2015 have either been dismissed or struck out. Consequently, all the matters that have been raised in the instant application relating to matters filed in this court have been conclusively determined in previous applications and I thus agree with the 1st, 4th and 5th respondents that these matters are now *res judicata*.

15. The applicant had also sought enforcement of the orders made by the Court of Appeal in Civil Application No. 288 of 2008 and the Supreme Court's decision in SCR No. 9 of 2015. My reading of the two decisions reveals that the Court of Appeal dismissed the application filed before it with costs to the respondents while the Supreme Court struck out the applicant's application also with costs to the respondents. It is worth noting that some of the respondents in those cases included the respondents in this application. Even if the two superior courts had issued any orders which were favourable to the applicant, this court would not have had any jurisdiction to order execution of any such orders principally because court orders can only be enforced by the court in which they are issued.

16. I believe I have said enough to demonstrate that the Notice of Motion dated 16th March 2018 is not only devoid of merit but is also an abuse of the court process. It is consequently dismissed with costs to the 1st, 4th and 5th respondents.

17. In conclusion, I wish to fully adopt the holding by my brother *Justice Sergon* in a ruling delivered on 6th April 2018 in HCCA No.335 of 1997 in which the learned judge expressed himself as follows:

“It is abundantly clear that this matter has been conclusively determined by this court, therefore, this court is now functus official. If well advised, the appellant's remedy lies elsewhere and not before this court. Consequently, no further applications should be entertained without leave of the court”.

In my view, this holding holds true to all the matters filed by the applicant in this court and should apply to all of them.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 11th day of October 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mungai the applicant present in person

Ms Awuor holding brief for Mr. Munyua for the 4th and 5th respondents

No appearance for the 1st respondent

Mr. Fidel: Court Assistant