



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPL. NO. 43 OF 2016

**IN THE MATTER OF: AN APPLICATION BY HASHIM SALIM GHAHIM FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI**

AND

IN THE MATTER OF: THE RESIDENT MAGISTRATE'S COURT ACT

BETWEEN

HASHIM SALIM GHAHIM.....APPLICANT

VERSUS

HON. N. NJAGI AND H. NYAKWEMBA, THE SENIOR PRINCIPAL MAGISTRATE

PRINCIPAL MAGISTRATE - MOMBASA.....RESPONDENTS

AND

RAMADHAN MOHAMED ALI.....INTERESTED PARTY

JUDGMENT

1. On 2nd June, 2016 the exparte applicant filed an application by way of Notice of Motion under the provisions of Section 8 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 of the Civil Procedure Rules seeking the following orders:-

(i) An order of certiorari to issue to remove to this court for purpose of quashing forthwith the order for stay of execution issued on 5th May, 2016 and order for status quo being maintained issued on 27th May, 2016 and other subsequent orders issued in favour of the interested party in RMCC Misc. Application No. 79 of 2016; and

(ii) Costs of the application.

2. The exparte applicant had previously, on 30th May, 2016 filed a Chamber Summons in which he sought leave to apply for orders of certiorari. He was granted leave which was to operate as stay of further proceedings in RMCC Misc. application No. 79 of 2016, Mombasa and in particular, the order for stay of execution issued on 5th May, 2016 and order for status quo being maintained issued on 27th May, 2016.

3. Counsel on record filed their written submissions which they highlighted.

EXPARTE APPLICANT'S SUBMISSIONS

4. Mr. Omwenga, Learned Counsel stated that the suit in issue was first filed in the Business Premises Rent Tribunal (BPRT). The interested party thereafter appealed in the High Court and lost. He then moved to the Court of Appeal where he lost on 22nd April, 2016. On 5th May, 2016, he moved to the lower court and obtained orders for stay of execution which were thereafter discharged but the 2nd respondent reinstated the orders on 27th May, 2016 and that is the reason why they have moved this court to quash the proceedings of the lower court.

5. Counsel submitted that although orders for stay of execution had been granted in the High Court and Court of Appeal, they automatically elapsed by virtue of the interested party losing the appeals. He argued that the application was *res judicata* as similar applications had been heard by the High Court and Court of Appeal. Counsel relied on the cases of **Margaret Njoki Migwi vs Barclays Bank of Kenya**, Nyeri Civil Appeal No. 68 of 2015 and **Theresa Constabir and Alka Roshanlal Harbanslal Sharma & Another**, Malindi Civil Appeal No. 44 of 2014 to fortify his submissions.

6. Mr. Omwenga argued that the lower court had no jurisdiction to hear the matter and this court has powers to quash the proceedings in the said court. He referred this court to paragraph 5 of the exparte applicant's replying affidavit. Counsel further argued that since 26th April, 2016 the interested party has not moved the Court of Appeal or the Supreme Court to issue orders for stay of execution. In his view, the filing of an application in the lower court after the Court of Appeal had dealt with it was an abuse of the court process. He prayed for his application to be allowed.

SUBMISSIONS BY THE RESPONDENTS

7. Mr. Makuto Learned Counsel for the respondents submitted that section 14(1) of the Landlord Tenant (Shops Hotels and Catering Establishments) Act, (Cap 301) grants the lower court a limited jurisdiction for purposes of execution of orders of the BPRT. He explained that a decision of the BPRT becomes enforceable since a decree is issued by the subordinate court. Such power is subject to the right of appeal to the Environment and Land Court (ELC) under Section 15(1) of the provisions of Cap 301. He added that the decision of the ELC is final under those provisions and that Appeal No. 64 before the Court of Appeal, by the same parties, was decided along those lines. He stated that Mr. Gikandi then filed an appeal to the Supreme Court but nothing has been forthcoming.

8. He further submitted that under the provisions of Order 22 rule 24 of the Civil Procedure rules, the Court of Appeal and High Court decisions are binding on the Subordinate Court, hence the said court had no jurisdiction to grant orders for stay of execution. Counsel referred the Court to the provisions of Order 42 rule 6(1) of the Civil Procedure rules, which provide that a court that renders a decision that is appealed from or the Court to which an appeal has been filed can grant orders for stay of execution.

INTERESTED PARTY'S SUBMISSIONS

9. Mr. Gikandi Learned Counsel for the interested party opposed the application. He indicated that he filed written submissions and a replying affidavit. He argued that the orders being sought are too wide and not particularized, for the reason that the court has been asked to quash an order for stay of execution issued on 5th May, 2016, the orders for status quo being maintained issued on 27th May, 2016 and any other orders issued in favour of the interested party in the lower court.

10. He stated that the provisions of Order 53 rule 7(1) of the Civil Procedure rules are in mandatory terms and are to the effect that an order duly verified by an affidavit of the Registrar should be filed. Counsel submitted that the exparte applicant cannot question any orders that have not been verified by affidavit. He stated that he had filed a Notice of Appeal to the Supreme Court and the same had not been struck out.

11. Mr. Gikandi argued that the *exparte* applicant wants to evict a tenant who has been in occupation of the premises for 30 years. He informed the court that he was relying on the authorities he had cited in his written submissions. He stated that the court is subject to the provisions of Articles 10, 47 and 50 of the Constitution on fairness, as such, the status quo should be maintained, as his client is enjoying orders that were issued at the *exparte* stage.

12. Counsel submitted that Judicial Review looks at the judicial making process not the legality of the decision thus the process followed by the interested party was correct. He further stated that the application filed in the subordinate court has not been heard as the *exparte* applicant rushed to this court. He prayed for the application to be dismissed with costs.

EXPARTE APPLICANT'S REJOINDER

13. With regard to the provisions of Order 53 rule 7(1) of the Civil Procedure rules cited by Mr. Gikandi, Mr. Omwenga invited the court to look at the provisions of Order 51 rule 10(2) of the Civil Procedure rules which states that no application shall be defeated for want of form. He further stated that the orders they seek to quash are attached to the application and are self explanatory.

ANALYSIS AND DETERMINATION

14. The issues for determination are:-

- (i) If the proceedings before the subordinate court are *res judicata*;
- (ii) If the respondents had jurisdiction to issue the orders of 5th May, 2016 and 27th May, 2016; and
- (iii) Whether the orders issued by the subordinate Court should be quashed.

15. In order to ascertain if the *exparte* applicant is entitled to the orders sought, I have perused the documents attached to his verifying affidavit accompanying the Chamber Summons dated 30th May, 2016 seeking leave to file a substantive application for orders of certiorari. It contains a judgment dated 15th February, 2013 in Mombasa BPRT case No. 222 of 2012 whereby the chairperson BPRT gave orders terminating the tenancy of the interested party, in the *exparte* applicant's premises. He was required to hand over vacant possession by 1st April, 2013.

16. The interested party appealed against that decision in Mombasa High Court Civil Appeal No. 32 of 2013. Judges Emukule and Kasango rendered themselves on 10th July, 2015 whereby they upheld the decision of the BPRT and dismissed the appeal.

17. The interested party proceeded to the Court of Appeal in Mombasa Civil Appeal No. 64 of 2015 whereby the appeal was dismissed on 22nd April, 2016.

18. This court notes that the interested party was granted orders for stay of execution in both the High Court and the Court of Appeal pending the disposal of the appeals filed in the said courts. When the interested party lost the appeal in the Court of Appeal, he moved to the Subordinate Court in Mombasa SRMCC NO. 79 OF 2016, Ramadhan Mohammed Ali vs Hashim Salim Ghahim in an application dated 26th April, 2017. He sought orders to the following effect-

- "1.
- 2. That pending the hearing of this application filed herein, there be a stay of execution of the judgment delivered on 15th February, 2013 by the Business Premises Rent Tribunal, Reference No. 222 of 2012.
- 3. That pending the hearing and determination of the appeal filed in the Supreme Court, there be

stay of execution of the judgment delivered on 15th February, 2013 by the Business Premises Rent Tribunal, Reference No. 222 of 2012.

4....."

19. Mr. Omwenga for the exparte applicant submitted that the application filed before the subordinate court was *res judicata*. The doctrine of *res judicata* in Kenyan law is provided in Section 7 of the Civil Procedure Act. It states as follows:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

20. The principles to be considered in a case addressing the issue of *res judicata* were well laid out in the case of **Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others**, (2010) eKLR, as follows:-

(i) the matter in issue is identical in both suits;

(ii) the parties in the suit are the same;

(iii) sameness of the title/claim;

(iv) concurrence of jurisdiction; and

(v) finality of the previous decision.

21. It is apparent that what the applications relating to the question of *res judicata* have in common are the names of the parties and the prayers sought being for stay of execution. It is evident that the prayers sought and orders granted previously were for stay of execution pending the hearing of the appeals in the High Court and Court of Appeal. The application before the Subordinate Court however, was for stay of execution pending the hearing and determination of the appeal filed in the Supreme Court. My considered finding is that the application filed in the Subordinate Court was not *res judicata* as no other court had dealt with an application for stay of execution pending the hearing of the appeal before the Supreme Court.

22. Order 42 rule 6(1) of the Civil Procedure rules provides as follows:-

"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 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 other 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 an order set aside".

23. It is not disputed that the interested party's appeals had been heard and dismissed by the High Court and the Court of Appeal. In a strange turn of events, the interested party thereafter filed an application for stay of execution in the subordinate court. The question that begs an answer is if the respondents who preside in Subordinate Courts had jurisdiction to issue the orders they granted the exparte applicant.

24. In the case of **Boniface Waweru Mbiyu vs Mary Njeri & Another** [2005] eKLR, Ojwang J, (as he then was) stated as follows:-

“...The entry point into any Court proceeding is jurisdiction. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question... Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel...”

25. The Supreme Court had the opportunity of expressing itself on the issue of jurisdiction in the case of **Samwel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** when it stated that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*”

26. The respondents after reading the contents of the application filed in the subordinate court should have stopped in their tracks and considered if they actually had the jurisdiction to entertain an application seeking stay of execution in a matter where a notice of appeal had been filed in the Supreme Court. They should have posed to wonder why a party should move a Subordinate Court and not the Court of Appeal or the Supreme Court itself with an application of that nature. The 1st respondent however readily issued the orders for stay of execution on 5th of May, 2016. The said orders were discharged on 12th May, 2016. The interested party then moved to the 2nd respondent's court on the 27th of May, 2016 who issued orders for status quo being maintained. It is my finding that by virtue of the provisions of Order 42 rule 6(1) of the Civil Procedure rules, the respondents had no jurisdiction conferred upon them to deal with an application seeking stay of execution pending the hearing of an appeal in the Supreme Court. I agree with the submissions of Messrs Omwenga and Makuto on this point. I therefore hold that the respondents acted in excess of their jurisdiction when they issued the orders the subject of this application.

27. The interested party equally failed to pay due regard to the hierarchy of courts and instead of going full circle with his application for stay of execution, he applied reverse gear mid-stream by deviating from the provisions of Order 42 rule 6(1) of the Civil Procedure rules hence heading on a collision course with the *exparte* applicant.

28. Counsel for the interested party cited the provisions of Order 22 rule 22(1) of the Civil Procedure rules that apply to the execution of decrees and orders, to justify the application filed in the subordinate court. The said provisions state 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 or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

29. He also cited the provisions of Order 22 rule 25 of the Civil Procedure rules that state:-

"Where a suit is pending in any Court against the holder of a decree of such Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

30. In my view, the foregoing rules were not meant to bring about ambiguity in the implementation of the law or meant to engage the courts in a cycle whereby applications for stay of execution would be filed in any court without paying heed to the provisions of Order 42 rule (6)1 of the Civil Procedure rules. If this was to be encouraged and entertained litigation would never come to an end. I need not re-emphasize that at all times an application for stay of execution must be filed in a court that is seized with jurisdiction to hear it.

31. The third issue for consideration is if this court should issue orders of certiorari as prayed in the application dated 30th May, 2016. Mr. Gikandi for the interested party raised a pertinent point which this court should deal with first when addressing this issue. He invited the court to consider the provisions of Order 53 rule 7(1) of the Civil Procedure rules which provide as follows:-

"In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court."(emphasis added).

32. What is required by the said provision is that before the hearing of the Notice of Motion seeking orders of certiorari, a copy of the decision sought to be quashed should be lodged with the Registrar or for an account to be given for the failure to do so. This is meant to prove to the Court that there is a decision in existence which can be quashed so that the Court does not end up quashing a decision which is non-existent. There is no requirement that the decision in issue be lodged at the time of the application for leave, as it can be lodged at any time before the hearing of the Notice of Motion. In the instant case, a photocopy of the order of 5th May, 2016 issued by Hon. Njagi is attached as annexure HSG2 to the ex parte applicant's verifying affidavit. A photocopy of the hand written order for the status quo being maintained that was issued on 27th May, 2016 by Hon. Nyakweba, is also attached to the verifying affidavit.

33. Mr. Omwenga did not explain his failure to comply with the provisions of Order 53 rule 7(1) of the Civil Procedure rules. In response to the foregoing he cited the provisions of Order 51 rule 10(2) of the Civil Procedure rules which state that no application shall be defeated for want of form.

34. When faced with a similar issue with regard to non-compliance with the provisions of Order 53 rule 7(1) of the Civil Procedure rules, Emukule J. in the case of Republic & Another v Kadhi's Court Mombasa Ex-parte F A H [2015] eKLR had the following to say:-

"The Applicant did file a copy of the order in her Supporting Affidavit sworn on 10th March, 2015. The order is marked FH-6. In any event, Article 22(3)(d) and 159(2)(d) bears on the court not to place undue regard to procedural technicalities. The Interested Party's submission for dismissal on this ground therefore fails."

35. Taking into account that the Counsel for the ex parte applicant attached copies of the impugned orders to the verifying affidavit, I invoke the provisions of Article 159(2)(d) of the Constitution of Kenya and decline to strike out the present application on the basis of a procedural technicality.

36. On the issue of certiorari, I make reference to the case of Republic vs. Attorney-General & 4 Others, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR, where the court said :-

“Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether a decision-maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in judicial review proceedings to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved...”

37. I have considered the pleadings on record, the submissions of the Counsel and the authorities cited in support of their arguments. Following my finding that the respondents lacked requisite jurisdiction to grant the orders in issue, the inevitable conclusion is as follows:-

(i) An order of certiorari is hereby issued to bring into this Court and quash forthwith the order for stay of execution issued on 5th May, 2016 and the order for status quo being maintained issued on 27th May, 2016 issued in favour of the interested party in Mombasa RMCC Miscellaneous Application No. 79 of 2016;

(ii) Costs are awarded to the exparte applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omwenga for the exparte applicant

Mr. Makuto for the respondents

Mr. Gikandi for the interested party

Oliver Musundi - Court Assistant