



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL SUIT NO. 8 OF 2014 (OS)

REGINE BUTT APPLICANT

VERSUS

HAROON BUTT 1ST RESPONDENT

AKHTAR BUTT2NDRESPONDENT

RULING

1. The Respondents herein have by way of a Preliminary Objection dated 24.8.15 objected to the Notice of Motion dated 7.8.15 filed under Certificate of Urgency on 11.8.15 by the Applicant herein. The Applicant seeks the following Orders:

- a. Spent;
- b. Akhtar Butt, Haroon Butt, Walter Abundo and Joseph Kiplagat be committed to prison for 6 months or such other period as this Honourable Court shall determine for contempt of the decision/orders of the High Court (the Hon. Justice E. Murtiithi) dated 15.6.15.
- c. Pending the hearing of prayer (b) for committal herein, Akhtar Butt and Haroon Butt be ordered to purge the suit contempt and in so doing to return all matrimonial property, household goods and effects including beds and beddings, furniture, kitchen equipment, utensils, electronics, children's belongings and effects and to remove strangers/goons they have put in possession, remove temporary physical alterations to the property and allow the Applicant and her children access, possession and occupation of their matrimonial home on all that property known as MN/1/1371, Mkomani Road, Mombasa as ordered by the High Court (the Hon. Justice E. Murtiithi) dated 15.6.15.
- d. The Honourable Court be pleased to issue such other or further order as it shall deem just in the circumstances.
- e. Costs.

2. The Preliminary Objection is seeking the striking out and dismissal of the Application on the grounds that:

- a. This Honourable Court lacks the requisite jurisdiction to entertain, hear and/or determine the

application.

- b. The Application is premature, misconceived, vexatious and a flagrant abuse of the due process of this Honourable Court for having been filed contrary to the mandatory requirements of the law.

3. The Respondents filed Malindi Civil Application No. 31 of 2015 (UR 29) in the Court of Appeal seeking stay of execution of the said orders of the High Court but the Court of Appeal dismissed the same on 31.7.15 and reaffirmed the orders issued by the High Court. The Court of Appeal further directed the 1st Respondent to move out of the suit premises to her earlier residence forthwith or the estate of the deceased gets her some residence elsewhere and takes care of her as the deceased had done in his lifetime.

4. The Preliminary Objection was canvassed by way of oral and written submissions which I have duly considered.

The Respondents' Case

5. The main thrust of the Respondent's Preliminary Objection is that the order that the Applicant seeks to have enforced is the order of the Court of Appeal and as such this Court lacks jurisdiction to enforce an order of the Court of Appeal.

6. In their written submissions filed on 30.9.15, the Respondents submitted that under Article 165 of the Constitution of Kenya, this Court only has supervisory jurisdiction over subordinate courts and not over a superior court. They submitted that the determination of the Court of Appeal took precedence over the Ruling of this Court and that "therefore if there were any orders capable of enforcement they were those of the Court of Appeal and not those of the High Court". That this Court lacks the jurisdiction to enforce orders of the Court of Appeal as sought by the Applicant and as such it must down its tools. In his oral submissions before me, Mr. Agwara for the Respondents submitted that the Ruling of Muriithi J was challenged by the Respondents in the Court of Appeal and a Ruling was delivered on 31.7.15. It is his submission that the Court of Appeal in its Ruling gave fresh orders and the High Court cannot be asked by a party to enforce the orders of the Court of Appeal. The present Application was tantamount to asking the High Court to supervise the Court of Appeal. That the application for contempt should be made in the Court of Appeal.

The Applicant's case

7. Mr. Kaluma for the Applicant on his part submitted that Mr. Agwara had misconceived the law and its application. That the prayers sought in the Application relate to the orders of the High Court and not of the Court of Appeal. That what the Respondents sought in the Court of Appeal was a stay of the orders of the High Court. That the Application for stay was dismissed and therefore the orders the Respondent sought to stay must be enforced. In his view, the Preliminary Objection was just another scheme by the Respondents to delay justice. That a Preliminary Objection must be on a pure clear point of law but that was what was before the Court was a mere vague statement that this Court lacked jurisdiction but does not state how.

Determination

8. I have considered the Application and the Affidavit in Support thereof as well as the Preliminary Objection. I have also considered the authorities cited by Mr. Agwara to buttress the Preliminary Objection. Mr. Agwara did not address the Court on the second limb of the Preliminary Objection and focused only on the aspect of the jurisdiction of this Court. The issue for determination therefore is whether the court is vested with the jurisdiction to hear and determine the contempt application in view of the Preliminary Objection.

9. The Respondents being aggrieved by the orders of Muriithi, J. challenged the same in the Court of Appeal. They filed a Notice of Appeal and an application for stay of execution of the said orders of Muriithi, J. and of further proceedings in the matter herein pending the hearing and determination of the

intended Appeal. The issue before the Court of Appeal was not the appeal itself but the application for stay of execution and of further proceedings. The Application for stay of execution and of further proceedings was dismissed by the Court of Appeal. In dismissing the Application for stay, the Court of Appeal did not in any way disturb the orders of the High Court issued on 15.6.15. The same remain intact.

10. The gist of the Preliminary Objection filed by the Respondents is that the Applicant is asking the High Court to supervise the Court of Appeal. A reading of the Application will show that prayer (b) seeks the committal of the Respondents and the 2 police officers to prison for a period of 6 months or such period as this Honourable Court shall determine for contempt of the decision/orders of the High Court (the Hon. Justice E. Murtiithi) dated 15.6.15(emphasis mine). It is clear from the Application that the orders sought to be enforced are the orders of the High Court and not of the Court of Appeal.

11. The Respondents cited the Court of Appeal case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR** and **In the Matter of an Application by Gurbaresh Singh & Sons Limited Misc. Civil Case No. 50 of 1983**. These 2 authorities however lay down the statutory basis of contempt of court law in so far as the High Court and the Court of Appeal are concerned as well as the procedure. They do not address the issue of the jurisdiction of the High Court in enforcing the orders of the Court of Appeal.

12. I am satisfied that this Court has jurisdiction to entertain the Application herein as it seeks the enforcement of orders issued by this Court and not by the Court of Appeal. This Court in my view is the correct forum for this Application.

13. On the contention by the Applicant that the Preliminary Objection does not raise a pure point of law, I disagree. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** Law JA in the case of rendered himself thus:

“So far as I’m aware, 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,(emphasis mine) 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.”

The Respondents’ objection to the jurisdiction of this Court to hear and determine the Application herein is a pure point of law. However there is a rider. Sir Charles Newbold in the same case said:

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

This is evidently a clear case of improper raising of a preliminary objection and has done nothing but to unnecessarily delay the matter herein and increase costs.

14. In the result, I find that the Preliminary Objection raised by the Respondents lacks merit and the same is hereby dismissed with costs. The application dated 7.8.15 to be fixed for hearing *inter partes* on priority basis.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of November, 2015.

M. Thande

Judge

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**