



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 172 OF 2015

1. PEARL BEACH HOTEL LIMITED

2. AL NOOR KANJI.....PETITIONERS

VERSUS

1. KENNETH STANLEY HAJI

2. THE COUNTY GOVERNMENT OF MOMBASA

3. THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....RESPONDENTS

RULING

1. By a Chamber Summons dated 25th September, 2018 made under Order 9 Rule 9 and 11, Order 22 Rule 22 and Order 45(1) of the Civil Procedure Rules and Rule 11(2) and (4) of the Advocates (Remuneration) Order the Petitioners/Applicants seek orders:

1. That the instant summons be certified as urgent and heard ex-parte in the first instance.

2. That pending the hearing and determination of this Application this Honourable Court be pleased to stay warrant of execution of a decree for money issued herein on 12th June 2018.

3. That the firm of Conrad Maloba Advocates be granted leave to come on record on behalf of the petitioners/applicants in place of the firm of Amalemba & Associates Advocates.

4. That this Honourable Court be pleased to review, vary and or set aside the ruling delivered on 25th May, 2018.

5. That the costs of this application be in the cause.

2. The application is based on the grounds of the face of the application supported by the affidavit of Conrad Maloba Advocate sworn on 25th September 2018.

3. Prayers 1 and 3 of the application are spent and what is left for determination are prayers 2, 4 and 5. Briefly, it is the applicant's contention that by a ruling dated 16th November, 2017 the Hon. D. Wasike, D.R. directed the applicant to pay the 1st Respondent costs in the amount of Kshs.8,524,090.00 and that the 1st Respondent has already instructed a firm of Auctioneers, Messrs Kithemu Auctioneers who have moved to proclaim the Applicant's property in execution of the certificate of costs issued pursuant to the said ruling. That by an application dated 2nd January 2018 the applicant moved to court and obtained stay orders against the intended proclamation. The matter came up for hearing before this court on 20th March 2018 when parties argued the application. At the conclusion, the parties entered into a partial consent for the payment of uncontested sums in the Bill of Costs in the sum of Kshs.1,500,000.00. The applicant was unable to pay the said sum of Kshs.1,500,000.00. On 23rd April 2018 the court was made aware that the applicant had not complied with the partial consent and reserved a ruling for 3rd July 2018 on the main application dated 2nd January 2018. The 1st respondent however filed an ex-parte application dated 25th May 2018 seeking to set aside the stay orders and the application was granted on the same day.

4. It is the applicant's contention that it was never served with the application dated 24th May 2018 and was surprised to be served with

fresh copies of notices of proclamation dated 19th June 2018 from Messrs Kithemu Auctioneers. That on perusal of the court file, it was established that the court had varied the earlier orders of 23rd April 2018 that reserved the delivery of the ruling on 3rd July 2018 in the absence of the applicant.

5. The applicant avers that failure to comply with the consent entered before the court did not nullify merit of the submissions and validity of the application dated 2nd January 2018. That failure to comply with the consent order would entitle the Respondents an opportunity to execute the consent order and not nullify the application dated 2nd January 2018. The application of 2nd January 2018 sought orders to extend the time for which the petitioners would file and challenge the ruling of the Deputy Registrar within the provisions of the Advocates Remuneration order. They aver that the Act provides for a further right of appeal in the event a party is aggrieved by such a ruling, in the circumstances delivery of the ruling of the application dated 2nd January 2018 is vital to the process. The applicants argue that the court is bestowed with the powers to grant such orders *ex debito justiae* and to avert an injustice being occasioned, adding that no prejudice will be suffered by the 1st Respondent should the orders sought herein be granted.

6. The application is opposed by the 1st Respondent. The 1st Respondent filed grounds of opposition dated 12th October 2018 in which they contend inter alia that the application is misconceived, fatally defective, bad in law, incompetent and otherwise gross abuse of the court process. That this court lacks jurisdiction to entertain the application as it offends Section 7 of the Civil Procedure Act. The 1st Respondent state that the court downed its tools on 17th September, 2018 and became functus officio the moment it pronounced its ruling and that a court cannot sit to re-open issues that have been heard and determined with finality by court of competent jurisdiction. It is their contention that the applicants have neither tabled any cogent evidence nor met the legal threshold for review as provided in order 45 Rule 1 of the Civil Procedure Rules to warrant review of the ruling delivered on 25th May 2018. They further contend that the orders sought in the application are unenforceable and the applicant is seeking for this court to sit on appeal and issue orders in vain. That the application is brought with the sole intention to delay the quick and just conclusion of this case and to frustrate the 1st Respondent from enjoying the fruits of his valid judgment.

7. I have considered the application and the submissions made as well as the authorities cited. In my considered opinion the key issues that emerge for determination are whether the applicant has satisfied the grounds for review and whether stay order should be granted.

8. Section 80 of the Civil procedure Act provides as follows:

“Any person who considers himself aggrieved –

a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed by this Act, may apply for review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules states as follows:

“ 1 (1) Any person considering himself aggrieved –

a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is hereby allowed, and who from the discovery or new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. In the case of National Bank of Kenya Ltd –v- Ndungu Njau (1997)eKLR the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review. ”

10. In the instant case, the application is made on the grounds that the applicant was never served with the application dated 24th May 2018 and that the orders of 24th May 2018 were granted ex-parte. The record shows that by an application dated 2nd January 2018 the applicant moved the court and obtained stays orders. The matter came up for hearing on 20th March 2018 when the parties argued on the main application and at the conclusion entered into a partial consent for the payment of uncontested sum of Kshs.1,500,000/=. The same was to be paid on or before 19th April, 2018. The applicant did not comply and this fact was brought to the attention of the court on 24th April 2018 when the matter came up for mention to confirm compliance. I then fixed the application dated 2nd January 2018 for ruling on 3rd July 2018 pursuant to a request made by the advocate who appeared for the 1st Respondent during the mention. The record further shows that on 25th May 2018 the 1st Respondent brought an application dated 24th May 2018 principally seeking an order for review, variation and setting aside of the court’s order fixing the matter for ruling of the chamber summons application dated 2nd January 2018 on 3rd July 2018, and that the said application stands dismissed. The court granted the orders, albeit ex-parte.

11. It is now the applicant's contention that the ruling in respect of the application dated 2nd January 2018 is vital to the process of challenging the ruling of the Deputy Registrar within the provisions of the Advocates Remuneration Order which provides for a further right of appeal. The applicant further contends that failure to comply with the consent entered before court did not nullify the merit of the submission and validity of the application dated 2nd January 2018.

12. Having heard submissions of the parties and having set a date for ruling in respect of the application dated 2nd January 2018, I find that it was necessary to deliver the ruling as set to allow any party that may be aggrieved take further step as appropriate and in accordance with the law. To the extent that the ruling set to be reviewed was delivered on 25th May 2018 when already there was a ruling scheduled for 3rd July 2018, I am persuaded that the applicant has satisfied the conditions for review. Moreover, the order of 25th May, 2018 was made in the absence of the applicant.

13. I find that the applicant has demonstrated that indeed there was an error or mistake apparent on the face of the record as the court had set a date for ruling on 3rd July 2018. In my view this is a sufficient reason to allow the application for review.

14. In the light of all these and in exercising my discretion, I find and hold that there is sufficient cause why I should review my ruling and order of 25th May 2018. The same is hereby set aside.

15. In the result, I find that the chamber summons dated 25th September 2018 is allowed in terms of prayers 4 thereof. Each party to bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Maloba for Petitioner Akanga for Nyongesa for 1st Respondent

No appearance for 2nd and 3rd Respondents

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19