



**Sea Angel Service Station Limited v Albanus Kyongoi Mule t/a Kanyangi Complex  
(Civil Appeal 134 of 2019) [2022] KECA 1107 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1107 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 134 OF 2019  
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**SEA ANGEL SERVICE STATION LIMITED ..... APPELLANT**

**AND**

**ALBANUS KYONGOI MULE T/A KANYANGI COMPLEX ..... RESPONDENT**

*(An appeal against the ruling delivered by the High Court at Mombasa (Njoki Mwangi J.) on 8th February 2019 in Mombasa Miscellaneous Application No. 370 of 2018)*

**JUDGMENT**

1. The appellant herein, Sea Angel Service Station Limited, lodged an appeal against a ruling delivered on February 8, 2019 by the High Court (Njoki Mwangi J.), that reviewed and set aside an order made on December 10, 2018 in Mombasa CMCC No.1723 of 2007 committing Albanus Kyongoi Mule T/A Kanyangi Complex (the Respondent herein) to civil jail. The Appellant, in its Memorandum of Appeal dated 23<sup>rd</sup> September 2019, challenges the said ruling on two main grounds, namely, that the High Court erred in finding that it had supervisory jurisdiction under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* to review the orders made in Mombasa CMCC No. 1723 of 2007, and erred in setting aside the orders for committal to civil jail that had been issued by the trial magistrate therein.
2. The Respondent was the judgment debtor in Mombasa CMCC No. 1723 of 2007, and had, through a Notice of Motion application dated December 24, 2018 filed in the High Court, sought orders that the proceedings in Mombasa CMCC No. 1723 of 2007 be stayed; the orders made therein on 10<sup>th</sup> December 2018 committing him to civil jail be reviewed and set aside; and that he be released and allowed to raise the decretal sum of Kshs 1,215,245/=. The Appellant opposed the said application on the ground that it had been brought under the wrong provisions of the law, and that the Appellant had commenced several execution proceedings which were defeated due to threats of violence by the Respondent, as a result of which the trial Court in execution of the decree committed the Respondent



to civil jail on 10<sup>th</sup> December 2018. The Appellant was however willing to accept a proposal made by the Respondent to pay half the decretal sum and settle the outstanding sum by payment of monthly instalment of Kshs 100,000/=.

3. The High Court, after hearing the parties, found that it had supervisory jurisdiction under Article 165 (6) and (7) of the Constitution, section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules to review the lower court's ruling dated 10<sup>th</sup> December 2018. Further, that the requirements of Order 21 Rule 35 of the Civil Procedure Rules (sic) were not complied with when committing the Respondent to civil jail, since he had presented himself before the lower court in obedience to the Notice to Show Cause issued therein, and even make proposals on the mode of payment of the amounts due. The High Court consequently reviewed and set aside the orders made in Mombasa CMCC 1723 of 2007 committing the Respondent to civil jail, and each party was ordered to bear their own costs of the application.
4. We heard the appeal virtually on 17<sup>th</sup> May 2022, and learned counsel Mr. Gikandi holding brief for Mr. Atancha, the learned counsel for the Appellant, relied on written submissions dated 25<sup>th</sup> April 2022 filed by the said Appellant's counsel. Learned counsel Mr. Munyasya appeared for the Respondent and highlighted his written submissions dated 22<sup>nd</sup> February 2022. This being a second appeal from the decision of the trial Court in Mombasa CMCC No. 1723 of 2007, we are restricted to determining points of law and not of fact as set out in section 72(1) of the Civil Procedure Act, and explained by this Court (Waki, Karanja & Kiage JJ.A) in the case of Stanley N Muriithi & another vs Bernard Munene Ithiga [2016] eKLR as follows:

“...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

5. The Appellant's counsel's case is that the High Court erred in law and in fact by entertaining the Respondent's application, as there was evidence that the Appellant had made all efforts to execute the subject decree, and the issues raised therein could only be considered in an appeal. Therefore, that Article 165 (7) of the Constitution was erroneously invoked by the High Court in exercising its supervisory jurisdiction, there being an alternative remedy of an appeal. The Counsel for the Respondent on his part submitted that Article 165 (6) and (7) of the Constitution enabled the High Court to intervene and arrest what it properly considered to be a travesty of justice that oppressively curtailed the Respondent's freedom of movement and ability to generate funds with which to pay the judgment debt in favour of the Appellant. Further that the Appellant had not demonstrated that the High Court considered extraneous matters or failed to consider relevant matters in reaching its decision.
6. We note that the application that was before the High Court sought to review, vary and set aside the orders made on 10<sup>th</sup> December 2018 in Mombasa CMCC No. 1723 of 2007, and was indicated as having been brought pursuant to “Article 165(7) of the Constitution, section 26 (1) and 3 of the High Court Organization & Administration Act, sections 3, 3A, and 63 of the Civil Procedure Act, Order 51 Rule 1 and Order 22 Rule 52 of the Civil Procedure Rules and all enabling provisions of the law”. The High Court, after considering the pleadings and submissions made before it on the application,



found that that the issue for determination was whether the Applicant had made out a good case to justify grant of the orders for review.

7. The High Court thereupon examined the provisions of Article 165(6) and (7) of the Constitution on the High Court's supervisory jurisdiction, the grounds for review under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, and the provisions of section 34(1) of the Civil Procedure Act on the execution of decrees by a court, and proceeded to hold as follows:

“Having considered the submissions made and the applicable provisions of the law and authorities, it is my finding that the respondent herein has not in any way satisfied the terms of requirements of Order 21 Rule 35 (sic) of the Civil Procedure Rules since the applicant presented himself before the lower court in obedience to the Notice to Show Cause and even made proposals on the mode of payment of the amount due.”

8. The main issue in this appeal is whether the High Court applied the proper law and principles in reviewing and setting aside the orders of the trial Court that committed the Respondent to civil jail in Mombasa CMCC No. 1723 of 2007. The term “review” in the context of a court's powers has two meanings ascribed to it in the Black's Law Dictionary, Ninth Edition at page 1434. The first is “consideration, inspection or re-examination of a subject or thing”, while the second is “the plenary power to direct and instruct an agent or subordinate, including the right to remand, modify or vacate any action by the agent or subordinate or to act directly in place of the agent or subordinate”. Judicial review is specifically defined at page 924 thereof as the court's power to review the actions of other branches or levels of government, especially the power to invalidate legislative and executive actions as being unconstitutional, or the courts review of a lower court's or an administrative body's factual or legal findings.
9. It is notable that under the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, an application for review of a ruling or judgment under the said provisions must be made to the court which passed the decree or made the order, which in this case was the trial Court in Mombasa CMCC No. 1723 of 2007. The said provisions were therefore not applicable to the circumstances of the application before the High Court, and the grounds thereunder could not be applied.
10. It appears that the High Court treated the application before it as one of judicial review, and noted that the provisions of Article 165(6) and (7) of the Constitution of Kenya granted it supervisory jurisdiction over subordinate courts, and empowered it to call for the record of any proceedings before any subordinate court or person, body or authority and make any orders or give any directions it considers appropriate to ensure fair administration of justice. It is notable in this respect that the powers granted to the High Court under Article 165(7) flow from, and have to be read in conjunction with the provisions of Article 165(6). The two sub articles provide as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration.”



11. The review jurisdiction of the High Court granted by Article 165(6) and (7) of the *Constitution* can be exercised in various ways, including by way of constitutional adjudication, judicial review applications or by appeals. It is also notable that different laws and procedures apply to the various types of reviews, which are dependent on the nature of grievance that is sought to be remedied, and the permissible grounds of review are consequently also varied. Therefore, while Article 165 (6) and (7) provides for the powers of the High Court to review lower court's decision, the manner of this review is further regulated by other laws which require to be complied with.
12. It is in this respect not evident from the impugned decision of the High Court which of the various laws and procedures that enable the exercise of its supervisory jurisdiction of the High Court were applied. As shown hereinabove, the Respondent's application did not cite any of the applicable laws or procedures for review either by petition, judicial review or appeal. On the face of it, the application which was brought by way of a Notice of Motion, appeared to be an application for judicial review. However, certain requirements required to be fulfilled in this respect in terms of the substantive elements of the claim, the procedure to be followed, and the available remedies under the applicable laws, principally being Order 53 of the Civil Procedure Rules and section 9 of the *Fair Administrative Action Act*.
13. This defect notwithstanding, we do acknowledge that the High Court did have jurisdiction to review the decision made by the subordinate Court, which decision was also amenable to judicial review having been made in exercise of a statutory powers granted under Order 22 Rule 35 of the Civil Procedure Rules, (which was mistakenly referred to by the High Court as Order 21 Rule 35). It has been restated severally that the main touchstones for determining whether a decision falls within the Court's supervisory jurisdiction are that the source of the decision maker's authority and power is a constitutional or statutory provision, or that the decision has a public character. (See *De Smith's Judicial Review*, Sixth Edition paragraph 3-018 and *Judicial Review: Principles and Procedures* (2013 Edition) by Jonathan Auburn et al , at paragraphs 2-10 to 2-28 ).
14. It is also notable that the High Court set aside the orders made by the subordinate Court in Mombasa CMCC 1723 of 2007 on the ground that the Respondent had presented himself to the trial court in response to the notice to show cause and indicated his willingness to settle the judgment debt. These facts were not contested by the Appellant, and would therefore gave rise to grounds of illegality, procedural unfairness, irrationality, failure to take into account relevant considerations and unreasonableness on the part of the subordinate Court, which grounds are set out in section 7(2) of the *Fair Administrative Action Act*, which justified the setting aside of the said orders. It is also important to point out that the Appellant did not provide a record of the relevant proceedings of the subordinate Court. The High Court's decision was therefore to this extent not erroneous, but we reiterate that it would have been prudent for the said Court to specify the laws and grounds of judicial review that applied.
15. Lastly, on the argument by the Appellant that there was an alternative remedy of an appeal that was available, it is indeed the correct position that judicial review should be a remedy of last resort under section 9(2) of the *Fair Administrative Action Act*, which requires parties to first exhaust internal mechanisms for appeal or review, and the remedies available under any other written law. It is in this regard notable that leave was required to appeal the order made by the subordinate Court in Mombasa CMCC 1723 of 2007, pursuant to the provisions of section 75(1)(g) of the *Civil Procedure Act*, which specifically provides that there is no right of appeal from orders of arrest or detention made in execution of a decree. In addition, Order 43(1) of the Civil Procedure Rules provides that an appeal shall lie as of right under the provisions of section 75 (1) (h) of the *Civil Procedure Act* only from execution decrees made pursuant to Order 22, Rules 25, 57, 61 (3) and 73 of the Civil Procedure Rules, and no right of



appeal is therefore provided for decisions made pursuant to Order 22 Rule 35 of the Civil Procedure Rules. It cannot therefore be argued that there was a specific and available remedy of an appeal against the decision made by the subordinate Court, and, therefore, an application for judicial review could be properly instituted in the circumstances.

16. We therefore come to the conclusion that even though there may have been lapses in the form and procedure of bringing the subject application to the High Court, this was not fatal, since a procedural technicality can be exempted in the interests of substantive justice pursuant to the provisions of Article 159 (2) of the Constitution. In addition, the said lapses ought to have been raised as a preliminary point by the Appellant, who, having proceeded and participated in the hearing of the application, is deemed to have waived and accepted any defects therein, and cannot now raise them as an original point of determination on appeal. Lastly, the omissions by the High Court in its decision in terms of identification of the specific applicable laws and grounds of review are largely as a result of the defects in the application, and it is our view that while such an omission should not be encouraged, it is excusable in the circumstances of this appeal.
17. We accordingly dismiss this appeal. However, in light of the Respondent's contribution to the grounds giving rise to this appeal, we order that each party shall bear their own costs of the appeal.
18. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**

