



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M. K. KOOME, HANNAH OKWENGU &

PROF. J. ODEK, J.J.A.)

CIVIL APPLICATION NO. NAI 140 OF 2015 (UR 114/2015)

BETWEEN

KIMANI GACHUHI.....1ST APPLICANT

PETER MBUTHIA GACHUHI.....2ND APPLICANT

AND

EVANGELICAL MISSION FOR AFRICA.....1ST RESPONDENT

CINDY SANYU OKOVA.....2ND RESPONDENT

(Application for interpretation of the orders of the Court issued by the Court of Appeal on 29th January, 2016

relating to an application for stay of execution and proceedings and for an order of injunction

under Rule (5)(2)(b) of the Court of Appeal Rules, 2010 pending the hearing and

determination of an intended appeal from the Ruling and/or Order of the

High Court of Kenya, Nairobi (E. K. O. Ogola, J) dated 19th May, 2015)

in

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO. 479 OF 2014

BETWEEN

EVANGELICAL MISSION FOR AFRICA.....1ST CLAIMANT

CINDY SANYU OKOVA.....2ND CLAIMANT

AND

KIMANI GACHUHI.....1ST RESPONDENT

PETER MBUTHIA GACHUHI.....2ND RESPONDENT

RULING OF THE COURT

[1] **Kimani Gachuhi** and **Peter Mbuthia Gachuhi** the 1st and 2nd applicant respectively, have had a long-standing dispute with the respondents **Evangelical Mission for Africa** and **Cindy Sanyu Okova**. The subject of the dispute is a property known as LR No. 2951/84 (suit property). The dispute was referred to arbitration and an arbitration award was made, but this was challenged in the High Court. In a judgment dated 19th May 2015, the High Court set aside the arbitral award.

[2] The applicants filed a Notice of Appeal, and by a notice of motion dated 28th May 2015 brought under **Rule 5(2(b))** of the **Court Rules**, sought orders of stay of execution of the High Court judgment as well as an injunction restraining the respondents from, *inter alia*, carrying out any developments, construction or improvement of the suit property. On their part, the respondents filed a motion seeking to strike out the applicants' Notice of Appeal on the grounds that the notice was incompetent and an abuse of the court process, as there is no right of appeal that lies to the Court of Appeal in regard to an arbitral award set aside under **section 35** of the **Arbitration Act**.

[3] On 29th January 2016, this Court made orders: dismissing the respondents' application for striking out the applicants' Notice of Appeal; allowing the applicants' motion for stay of execution; and issuing an injunction in terms of prayers 2, 3, and 4 of the applicants' motion. These orders were the subject of the application made by the applicants on 17th January 2018, wherein the applicants sought amongst other things to have a finding made that the respondents were in contempt of the orders of 29th January 2016.

[4] In a ruling delivered on 20th July 2018, this Court (differently constituted), dismissed the applicants' motion for committal of respondents for contempt of court, holding that the order of 29th January 2016 was ambiguous, and that the allegation of contempt of court had not been proved to the required standard.

[5] By a notice of motion dated 6th August, 2018, the applicants; have moved this Court for orders, *inter alia*, that this Court be pleased to clarify the orders that were made on 29th January 2016, and in particular, Order No. 4 so as to remove any ambiguity as found by this Court in the ruling delivered of 20th July 2018; and that in the alternative the Court be pleased to review and set aside the ruling and order made on 20th July 2018.

[6] In support of the motion, the 2nd applicant relied on his supporting affidavit sworn on 6th August 2018, a supplementary affidavit sworn on 4th September 2018, and the grounds stated on the face of the motion. Mr. Kamau Karori, learned counsel appearing for the 2nd applicant also made oral submissions in support of the motion. In a nutshell, the 2nd applicant maintains that the orders issued on 29th January 2016 were issued by the Court in response to the risk or threat posed by the respondents in a bid to alter the character of the suit property by way of construction; that the orders issued were all encompassing and stopped all activities that had the effect of altering the situation on the ground, including the expansion of the school; and that the purpose of the order was to preserve the suit property during the pendency of the appeal, filed by the applicants against the High Court judgment.

[7] It was argued that the respondents clearly understood the orders of 29th January 2016 and had confirmed that it was not undertaking any construction; that the ruling made by the Court on 20th July 2018 had failed to take into account the circumstances of the case, and had exposed the suit property to unauthorized construction and or development. Hence, there was need to clarify the order of 29th January 2016, and or set aside the order of 20th July 2018, so as to eliminate the excuse of ambiguity.

[8] **Mr Macharia**, learned counsel who appeared for the 1st applicant maintained that it was understood by all the parties that the order issued on 29th January 2016 was for restraining further construction on the suit property. Counsel referred to the affidavit that was sworn by the 2nd applicant in support of the motion dated 28th May 2015, wherein it was apparent that the applicants were seeking to stop any construction other than structures of a temporary nature that the respondents were permitted to put up, through the license issued to them by the applicants.

[9] In regard to the order of *status quo*, Mr. Macharia pointed out that there was no ambiguity as the respondent understood what the *status quo* meant. Counsel referred to **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015]** eKLR, wherein this Court stated as follows:

“Status quo in normal English parlance means the present situation, the way things stand as at a time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time the order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the court order.”

[10] Counsel also referred to ***British Columbia Teachers Federation vs British Columbia 2011 VCSC 2013***, a Canadian decision where it was held that the court has inherent jurisdiction to clarify an order where there is latent ambiguity in the terms of the order pronounced by the court. It was further submitted that the court has inherent power to review its orders to correct an error and ensure that justice is done to all.

[11] **Mr. Ahmednasir**, learned counsel who appeared for the respondents opposed the applicants' motion relying on a replying affidavit sworn by Hawaock IM, the Secretary to the 1st respondent's Board of Directors. Counsel maintained that the applicants' motion was an abuse of the court process as it was intended to delay the settlement of the dispute.

[12] In regard to the order made on 29th January 2016, counsel maintained that the principal word in the order was “alter”, the *status quo*. Counsel posited that there was no ambiguity in the order issued by the court on 29th January 2016; that in the ruling of 20th July 2018, the court was dealing with contextual ambiguity relating to the contempt proceedings; that the *status quo* was actually the school; and that the

respondents could build more classrooms and still be within the order of 29th January 2016.

[13] In addition, counsel submitted that the order of 20th July 2018 is subject of a substantive appeal and therefore the court cannot alter it; that alteration of the order would prejudice the respondents in their appeal; that this Court as constituted could not attack the order of 20th July 2018 that was made by a different bench; and that the application for contempt of court was made on the basis that there was no ambiguity in the order alleged to have been contravened. Counsel therefore urged the Court to dismiss the applicants' motion.

[14] In reply to the respondents submissions, Mr. Kamau Karori reiterated that the order made on 29th January 2016 was to stop any further activity; that the critical words in the order were "and" and "or"; that the dispute between the parties was not a user dispute, but a dispute over ownership of the suit property and that the court had powers to review its own orders in the interest of justice.

[15] Counsel urged the court that the argument that the ambiguity was contextual was never raised nor is it correct. In response to the contention that the application was intended to delay the cause of justice, Mr. Karori pointed out that it was the respondents' who had sought an order staying the hearing of the appeal, pending the determination of an appeal in the Supreme Court against the decision of the Court of Appeal in Nyutu Agrovet Limited vs Airtel Networks Limited [2015] eKLR. In addition, that the filing of the applicants' motion was necessitated by the respondents' conduct.

Counsel urged the court to issue the orders sought in the motion so as to protect the subject matter of the appeal.

[16] The applicants' motion dated 6th August 2018 raises two broad issues, first, is the interpretation and or clarification of the orders made by this Court on 29th January 2016, and secondly, whether this Court can review or set aside the ruling made by the Court on 20th July 2018.

[17] In regard to the orders made on 29th January 2016, the Court in its ruling expressly allowed the applicants' motion dated 28th May 2015 in Civil Application No. 140 of 2015, and issued orders of stay of execution and injunction as prayed in prayers 2, 3, 4 & 5 of the motion. To remove doubt, on the prayers that were granted we set out prayers 2, 3, 4 & 5 verbatim as contained in the motion:

"2. That this Honourable Court be pleased to stay the order made by the Honourable Mr. Justice E. K. O. Ogola on the 19th May 2015 directing the parties to undertake a second round of arbitration pending the hearing and determination of the applicants' intended appeal against a portion of the said ruling;

3. That this Honourable Court be pleased to issue an order of injunction restraining the 1st respondent, its principals, agents, servants, employees or any other person from excavating, developing or carrying out any construction or improvements and/or undertaking any activities that alter the status quo on all that parcel of land known as L.R. No. 2951/84 the subject of these proceedings pending the hearing and determination of the applicants' intended appeal against a portion of the ruling delivered on 19th May 2015;

4. That this Honourable Court be pleased to issue an order of injunction restraining the 1st respondent, its principals, agents, servants, employees or any other person from denying the applicants', their servants or agents access to all that parcel of land known as L. R. No. 2951/84 pending the hearing and determination of an intended appeal against a portion of the ruling by the Honourable Justice E. K. O. Ogola on 19th May 2015;

5. That this Honourable Court be pleased to order a stay of execution of the decree/order resulting from the ruling delivered on 19th May 2015 and any other consequential orders arising therefrom, pending the hearing and determination of an intended appeal against a portion of the ruling by the Honourable Justice E. K. O. Ogola on 19th May 2015 in H.C. Misc. Civil Application No. 470 of 2014."

[18] The prayers granted by the Court were extracted and certified by a Deputy Registrar of the Court. Of interest in regard to the issue at hand is prayer No. 3 & 4 in the application that were extracted in the order as follows:

"It is ordered –

1. ...

2. ...

3. ...

4. The 1st respondent, its principals, agents, servants, employees or any other person be and are hereby restrained from excavating, developing or carrying out any construction or improvements and/or undertaking any activities that alter the status quo on all that parcel of land known as L.R.No.2951/84 the subject of these proceedings pending the hearing and determination of the applicants' intended appeal against a portion of the said ruling delivered on 19th May 2015; (emphasis added)

5. The 1st respondent, its principals, agents, servants, employees or any persons be and are hereby restrained from denying the applicants' their servants or agents access to all that parcel of land known as L.R. No.2951/84 the subject of these proceedings pending the hearing and determination of the applicants intended appeal against a portion of the said ruling delivered on 19th May 2015."

[19] From the above, it is evident that the crux of the matter is the expression “**restrained from excavating, developing or carrying out any construction or improvements and/or undertaking any activities that alter the status quo on all that parcel of land known as L.R.No.2951/84.**”

[20] In arguing the motion before us, the parties appeared to be in agreement that there was no ambiguity in the order, but counsel for the respondent maintained that the finding made by the Court on 20th July 2018 that there was ambiguity, was correct because the Court was dealing with contextual ambiguity relating to the contempt proceedings that was before it. Counsel explained that there was no contempt of the order made on 29th January 2016, because the *status quo* actually referred to in the order, was the use of the suit property as a school and therefore the respondent could build more classrooms if need be and still be within the order of 29th January 2016.

[21] This application has put us in an awkward position because although the order of 29th January 2016 was made by the current bench as constituted, the order of 20th July 2018 was made by a different bench. In issuing the orders of 20th July 2018 the Court was dealing with a specific contempt proceedings before it, which contempt proceedings was relating to the order of 29th January 2016. In our view, as far as the order of 29th January 2016 was concerned, it was clear and the parties are agreed that there was no ambiguity in the order.

[22] In simple language the order restrained the respondents from carrying out any construction or improvement on the suit property.

Any doubt in this regard is resolved by paragraph 30 of the ruling of 29th January, 2016 wherein the Court stated:

“It was not disputed that the suit property is in the possession of the respondent. Allegations were made regarding the respondents intention to alter the character of the land through construction. These allegations were not denied and obviously if the applicants were to succeed in their appeal after such alterations the applicant will be prejudiced. Thus, there is need to preserve the subject of the appeal in order to ensure a just and effective determination of the appeal.” (Emphasis added).

[23] It is clear that the concern of the Court in issuing the order dated 29th January 2016 was to preserve the suit property as it was, so that the character of the property is not altered through construction. In that regard, the use of the word “*status quo*” referred to the state of the suit property which was to be preserved as it was, and not to the use of the property as a school as argued by the respondents’ counsel.

[24] With regard to the alleged contextual ambiguity, the application dated 17th January 2018 was dealing with an application for contempt of court. This required the Court to satisfy itself that the alleged contemnor did that which the Court had directed should not be done. Unfortunately, the Court (as constituted) did not seem to be clear on what the Court had directed should not be done.

[25] In the notice of motion dated 6th August 2018, we were urged to clarify the order made on 29th January, 2016 so as to remove any ambiguity as found in the ruling delivered on 20th July 2018. Since the parties are agreed and it is clear to us that there is no ambiguity in the order of 29th January 2016, we are of the view that the order speaks for itself, but will for the avoidance of doubt reiterate that the order made on 29th January 2016 clearly restrained the carrying out of any development, construction or improvement of the suit property.

[26] As regards the alternative prayer to review and set aside the order made on 20th July 2018, the order arose from a ruling made by this Court (though differently constituted). Under **Rule 35** of the **Court Rules**, this Court has powers of review limited to correcting arithmetical or clerical errors in a judgment or ruling arising from an accidental slip or omission. As it is clear that the order of 20th July 2018 was the result of a considered decision by the Court, Rule 35 of the Court Rules is not applicable.

[27] The applicants have invoked the inherent powers of the Court in seeking review of the orders. In **Benjo Amalgamated Limited and another vs Kenya Commercial Bank limited [2014]** eKLR, this Court considered whether it has residual jurisdiction to review its own decision and concluded thus:

“It is our finding that this Court not being the final court has residual jurisdiction to review its decision to which there is no appeal to correct errors of law that occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it would serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

[28] We note that the ruling from which the order of 20th July 2018 emanates, is already subject of an appeal before the Supreme Court. The application before us would therefore not meet the stringent conditions set out for the exercise of this Court’s residual powers in reviewing its previous decision as stated in the Benjo decision (Supra). Besides, it would not be proper for this Court as constituted to go into a discourse concerning the merits of the order granted by the Court (differently constituted). This may have the undesirable result of one Bench sitting on appeal against the decision of another Bench in the same Court. The applicants can pursue their redress in the Supreme Court. For these reasons, we decline to grant the alternative prayer.

[29] The upshot of the above is that we clarify the order of 29th January 2016 to the extent stated in this ruling, and reiterate that the order restrained the carrying out of any development, construction or improvement of the suit property.

We direct that costs of this application shall be in the appeal.

Orders accordingly.

DATED and delivered at Nairobi this 12th day of October, 2018.

M. K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

PROF. J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR