



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 175 OF 2014

BETWEEN

DANIEL MAINGI MUCHIRI.....APPELLANT

AND

JUBILEE INSURANCE CO. LTD.....RESPONDENT

(An appeal from the Ruling and Orders of the High Court of

Kenya at Nairobi (Onyancha, J) dated 18th June, 2014

in

H. C. C. A. No. 195 of 2014

JUDGMENT OF THE COURT

1. This is the second relay leg of the quintet of appeals arising from ***HCCA No. 195 of 2014***. The appeal questions the order of ***Onyancha, J.*** recorded on 18th June, 2014 and is a logical follow up on the orders of 6th June, 2014, the subject matter of Appeal No 174/2014.

2. The proceedings of that day are short and may be reproduced:

“18/6/2014

Coram: Hon. Onyancha J

Adline – court clerk

Luseno for appellant

Ngoge for Respondent

Luseno: Appellant has deposited in court ksh.1,417,611/-. On 16th June, 2014. I have been served with response to the application. Pray give leave to file supplementary affidavit, if

necessary. We seek help to obtain a typed and certified copy of lower court Ruling and proceedings.

D A ONYANCHA

JUDGE

Ngoge: the condition upon which interim stay was granted has not been fully complied with. Auctioneer charges amounting to ksh.170,761/- have not been deposited.

The orders of 6th June, 2014 were given without jurisdiction. This court need not assist parties to get proceedings.

Matter is under certificate and court may give us a near date.

D A ONYANCHA

JUDGE

Luseno: We think this court has a right and power to expedite process under Section 1A and 1B of the Civil Procedure Rules. Decree (at page 175 of replying Affidavit) No figures indicated. We got the figure from the proclamation. We did our best. Auctioneers costs may be paid after consulting my client.

D A ONYANCHA

JUDGE

Order

- 1. Hearing inter partes of application dated 6th June, 2014 on 23rd June, 2014.*
- 2. Applicant given leave to file and serve a supplementary affidavit if necessary, within 4 days.*
- 3. Deputy Registrar to make request to lower court to avail typed proceedings and Ruling before 20th July, 2014.*
- 4. Interim Orders extended to 23rd July, 2014.*

D A ONYANCHA

JUDGE

18/6/2014".

3. Once again 11 grounds of appeal couched, in the words of the appellant's counsel, as a constitutional petition for violation of human rights are set out to question those orders. We have sufficiently dealt with the constitutional issues elsewhere (CA 138/2015 and 136/2015), and will simply apply our findings to this appeal with the result that those constitutional issues are rejected. The unsolicited statement made from the bar by learned counsel for the appellant, **Mr. P. Ngoge**, that he is an internationally recognized human rights defender and has every right to seek vindication of violation of human rights before any court without following any set of Rules because they are subservient to the Constitution, is unfortunate and, in our view, would be a recipe for disorder and uncertainty in the law and procedure, if allowed to fester.

4. In summary, Onyancha, J. is assailed for extending the '*final orders*' he issued on 6th June, 2014 on the pretext that they were interim; failing to write a considered ruling before extending the orders; extending the *ex parte* orders despite non-compliance by the respondent; extending non-existent orders without the jurisdiction to do so; insulating the respondent from meeting statutory obligations; extending the orders before admitting the appeal which was frivolous and a mere smokescreen; issuing orders under the wrong procedural rule; and fixing the *inter partes* hearing of the application when he had issued final orders on 6th June, 2014. It is prayed that the orders issued on 18th June, 2014 be discharged and set aside, and that the memorandum of appeal filed by the respondent be struck out. In brief oral submissions covering all the grounds, Mr. Ngoge submitted that the conditions for the *ex parte* order of stay were not satisfied because the auctioneer's charges had not been paid, hence no reason to extend the order.

5. In response, learned counsel, **Mr. Luseno** clarified that the matter before Onyancha, J. on 18th June, 2014 was a 'mention' to confirm whether the orders issued on 6th June, 2014 had been complied with and to give directions on the application for stay. He further clarified that the auctioneer's charges were not part of the conditions of the *ex parte* order since the attachment was made later on 9th June, 2014 and the charges had not been agreed on. He pointed out that the declaratory decree issued against the respondent on 28th May, 2014 did not contain any amounts and the respondent had to rely on the decretal amount stated on the warrants of attachment. Counsel defended the orders of Onyancha, J. submitting that they were in exercise of the court's discretion.

6. We have considered the issues raised by the appellant and we think, with respect, that they arise out of a misreading or misunderstanding of the record. It is not correct to say, as the appellant's counsel does, that the application for stay of execution was coming up for *inter partes* hearing on 18th June, 2014. The order issued on 6th June, 2014 clearly stated that the application will be for "***Mention inter partes on 18th June, 2014.***" That was a reasonable order considering that there were conditions imposed for compliance and it was necessary to confirm compliance and determine whether the application would proceed to hearing or be dismissed forthwith. Counsel for both parties were present before the court and as appears from the proceedings reproduced above, an argument as to whether there was compliance due to non-payment of the auctioneer's charges arose. Counsel for the appellant also wanted to raise issues on the constitutionality of the *ex parte* orders issued on 6th June, 2014. In turn counsel for the respondent explained that the auctioneer's charges were not part of the conditions for compliance. He wanted to file a supplementary affidavit to respond to the issues raised in the lengthy affidavit filed by the appellant on 12th June, 2014 in reply to the application. Faced with those contentions, the learned Judge fixed the matter for hearing *inter partes* and extended the order for stay of execution.

7. We say in those circumstances that the court had the jurisdiction and the discretionary power to make the impugned orders. The inherent jurisdiction of courts is not created by legal provisions. Such provisions as **sections 3** of the **Civil Procedure Act (CPA)** and **3 (1)** of the **Appellate Jurisdiction Act, (AJA)** and the relevant rules thereunder, merely preserve the inherent power. So do **sections 1A** and **1B** of the CPA and **3A** and **3B** of AJA, which augment it. The High Court in the case of **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** made pertinent observations, which we agree with, that:

"the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences."

8. We also think the orders were properly made since the court had no jurisdiction to hear submissions and issue a reasoned ruling on a 'mention' date, which is a cardinal rule of practice. Considering the issue in the case of **Republic vs. Anti- Counterfeit Agency & 2 Others Ex-Parte Surgippharm Limited [2014] eKLR** Odunga, J. followed several authorities, including some from this Court, stating as follows:-

"First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing. In Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others, Civil Appeal No. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in AG vs. Simon Ogila Civil Appeal No. 242 of 2000 (supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly in Peter Nzioki & Another vs. Aron Kivuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank vs. N J. B. Hawala Civil Application No. 240 of 1997."

„What emerges from the foregoing jurisprudence is that the Court, without the consent of the parties could not lawfully dismiss the application’." (indented)

9. And so it is in this case. The orders made gave the opportunity to the parties to agitate their respective cases on 23rd June, 2014 for the court to issue a considered ruling. It was a just order in the circumstances. We have said enough to satisfy ourselves that the complaints raised in this appeal are devoid of merit. We accordingly order that the appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR