



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, (PCA), OUKO & MURGOR JJ.A)

CIVIL APPLICATION NO. NAI 26 OF 2012 (UR 18/2012)

BETWEEN

GEORGE GIKUBU MBUTHIA APPELLANT

AND

PETER NJERU MUGO 1ST RESPONDENT

CONSOLIDATED BANK OF KENYA LTD. 2ND RESPONDENT

GEOFFREY KARIUKI MWENDA 3RD RESPONDENT

HON. THE ATTORNEY GENERAL 4TH RESPONDENT

(An application under Sections 3A (1); 3B (1) of the Appellate Jurisdiction Act and the inherent jurisdiction of the court to declare orders made in Nai 18 of 1991 and all other orders in subsequent applications and appeals arising

From HCCC No. 937 of 1986 and HCCC No. 1260 of 2002 as nullities)

RULING OF THE COURT

Litigation leading up to this application has had a long, unfortunate and chequered history. It is however not necessary to relate it in any detail, suffice to say, that it commenced in the High Court in 1986 when the applicant, **George Gikubu Mbuthia**, instituted this action against the respondents, **Jimba Credit Corporation Ltd**, (before it was substituted with its successor, Consolidated Bank of Kenya Ltd, (*the bank*)) and the 1st respondent, **Peter Mugo**, an advocate of the High Court, (Mr. Mugo) seeking to restrain the bank from selling the applicant’s house on Plot title No. NAIROBI/BLOCK 73/325 to Mr. Mugo. It was the bank’s contention that it was entitled to exercise its statutory power of sale after the applicant failed to service the loan advanced to him in 1982. The applicant for his part maintained that he received from the bank a “friendly advance” and not a loan. This question is still pending in the suit, 27 years later. Instead, the Court has been inundated with one application after the other for this whole period. We have counted no less than 24 applications on the record before us although, we were informed during the hearing of this application that, there have been more than 33 applications. From our own assessment, the applicant has brought most of those applications. It is apparent from the history of this dispute that he will not relent in his quest against his opponents herein. For instance, he has brought

the present motion dated 22nd January 2012, worded in a rather sinuous and incoherent manner as follows:-

“a) This Hon. Court do declare its orders given on 1st August 1991 in Civil Application No. NAI 18 of 1991 void of no legal effect and be expunged from the record.

b) Subsequent orders given by the courts but founded on Nai 18 of 1991 be declared void of no legal effect and be expunged from the record: that is to say:-

Ruling Nai 18 of 1991	given on	1.8.1991
Order Nai 18 of 1991	given on	1.8.1991
Nai 36 of 1992	given on	5.3.1992
Nai 67 of 1994	given on	28.6.1994
Nai 43 of 1995	given on	5.4.1995
Nai 9 of 1995	given on	13.6.1995
Nai 137 of 1995	given on	6.7.1995
Nai 137 of 1995	given on	31.7.1995
Nai 35 of 2001	given on	12.10.2001
Nai 375 of 2001	given on	21.6.2002
Nai 375 of 2001	given on	5.11.2002
Nai 83 of 2003	given on	5.5.2003
Nai 225 of 2003	given on	29.4.2005
Nai 159 of 2003	given on	23.9.2005
Nai 159 of 2003	given on	18.5.2005
Nai 247 of 2004	given on	17.3.2006
Civil Appeal No. 12 of 1996		20.12.1996

IN HCCC NO. 937 OF 1986

DATE OF

ORDER

PRAYER

JUDGE

9.12.1991	Amendment by plaintiff – dismissed	Sheikh J. Amin
15.12.1991	Claim of the plaintiff dismissed	A.B. Shah J.

15.12.1991	<i>Preliminary decree</i>	A.B. Shah J.
18.12.1991	<i>Ruling on specific Performance</i>	Tank J.
18.2.1992	<i>Specific performance – order</i>	Tank J.
25.02.1992	<i>Transfer of Nbi/Block 73/225</i>	Tank J.
05.1.1995	<i>Injunction – granted</i>	Githinji J.
3.11.1995	<i>3rd Party Notice</i>	M. Ole Keiuwa J.
9.03.2000	<i>Amendment – refused</i>	Hewett J.
21.6.2000	<i>Amendment – refused</i>	Owuor E.
11.11.2008	<i>Consent – Substitution to Consolidated Bank</i>	P. Kariuki J.
30.4.2009	<i>Amendment – refused</i>	Lesiit J.
29.07.2009	<i>Striking out defences –appl. Dismissed</i>	Koome J.

IN HCCC NO. 1260 OF 2002

20.3.2003	<i>Striking out HCCC 1260/02</i>	Nyamu J.
20.3.2003	<i>Decree</i>	Nyamu J.
0.	<i>Striking out delay in appeal</i>	Ondeyo J.

c) *Any other relevant order not included herein given pursuant to Nai 18 of 1991.*

- d. *Transfer by charge in exercise of power of sale instrument over Nairobi/Block 73/225 registered in favour of the 1st respondent on 25th February 1992 and certificate of lease given on the same date be declared void and be expunged from the land register.*
- e. *Transfer of lease over Nairobi Block 73/225 registered in favour of the 3rd respondent on 9th September 2002 and certificate of lease issued on 11th September 2002 be declared void and be expunged from the land register.*
- f. *Upon reverting to the original situation existing as at 12th July 1988, the parties to arrange hearing on priority basis of HCCC No. 937 of 1986 and HCCC 1260 of 2002.*
- g. *A declaration that the applicant is not a vexatious litigant fond of making unsubstantiated allegations against the respondents as ordered in Nai 137 of 1995 but a true stickler to the rule of law.*
- h. *Costs of the application to the applicant.”*

Although the applicant has premised this application on several grounds, the main one as summarized by himself was that:-

“The majority Judges of this Court ordered on 12th July 1988 in Civil Appeal No. 111 of 1986 that HCCC No. 937 of 1986 be heard on priority basis but, todate, it has been

bogged down by the draconian orders given in Nai 18 of 1991.”

He believes that only when the orders issued by this Court on 1st August 1991 in Civil Application No. Nai. 18 of 1991 are declared void and expunged can the main suit proceed to hearing. The applicant further contends that the charge giving rise to the bank exercising its statutory power of sale was defective as it was not signed by him or attested by the bank’s clerk as required by **Section 109 (2)** of the repealed Registered Land Act; that it was not verified, endorsed or registered in terms of **Sections 110 and 35 (1)** of the Registered Land Act and the Advocates Act, respectively.

The impugned ruling of this Court of 1st August 1991 arose from an application by the 1st respondent to this Court seeking that an order of interlocutory injunction issued in favour of the applicant on 12th July 1988 by the Court in Civil Appeal No. 111/1986 be vacated.

In allowing the application, the Court observed, *inter alia*, that;

“Mr. Mbutia signed the charge attached to his affidavit and marked GGM4. In the said charge on Title No. Nairobi/Block 73/225 the rate of interest charged on the loan is clearly stated together with when and how such interest would accrue. He duly signed the charge and cannot now be heard to say that the loan carried no interest. It is absurd to hear that the banking or financial institution like Jimba Credit would lend money on ‘friendly basis’ without charging interest hereon. We think Mr. Mbutia is labouring under serious misconceptions. In any event he can urge the High Court as he deems fit. We are concerned with the compliance or otherwise with the Court order of 12th July 1988.

There is ample evidence to show that Mr. Mbutia is in breach of the order and that he is in arrears in the tune of Kshs. 683,768.00 or thereabout. He has not kept up remittances as he was required under the order so we hold. Mr. Mbutia agreed that the injunction order be vacated although his ground for this is that he has paid off the loan to Jimba Credit. We do not agree.

The result is that the applicant’s application for vacating or discharging the injunction succeeds. The injunction order dated 12th July 1988 is hereby vacated with costs to applicant. It is so ordered.”

It is the foregoing decision that the applicant wants declared void and to be expunged from the record along with all the subsequent orders founded on that ruling.

Mr. Mugo in his replying affidavit has averred that the application is incompetent and amounts to an abuse of the process of the court; that the applicant has lost more than 25 applications; that the present application is *res judicata*; and that the applicant is a vexatious litigant.

For its part, the bank through its advocate, Mr. Kevin Dermot McCourt has deposed that the Court correctly found that the applicant had failed to comply with the earlier conditions imposed by the Court; that the applicant, by the instant application, is asking the Court to sit on appeal of its decision; that the applicant ought to pursue the hearing of the main suit.

Finally the 3rd respondent has deposed that he is an innocent purchaser for value. He urged the Court to direct the applicant to prosecute Civil Appeal No. 159 of 2003.

The application is expressed to be brought under **Sections 3A (1), and 3B (1)** of the Appellate Jurisdiction Act. The source and extent of jurisdiction conferred to a court was recently succinctly considered by the Supreme Court in its decision in **Samuel Kamau Macharia & Another V. Kenya Commercial Bank & 2 others** in S.C. Civil Application No. 2 of 2011 as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can, parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal the Legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”

In the context of this Court and the application before us, this Court draws its jurisdiction from **Article 164 (3)** of the Constitution, **Section 3** of the Appellate Jurisdiction Act as well as from the Court of Appeal Rules made pursuant to **Section 5** of the Appellate Jurisdiction Act. The application is grounded on **Sections 3A** and **3B** of the Act, the “*02 Principle*” since the relief it seeks is clearly not provided for in any of the laws cited above. It is inconceivable for a Court to declare its own decision void.

This Court does not have jurisdiction to make the kind of orders the applicant is asking us to make. This court in **Rafiki Enterprises V. Kingsway Tyres & Automation Ltd**, Civil Application No. 375 of 1996 was emphatic on a similar question when it said:-

“We have no power to recall and nullify a judgment already delivered. The various sections of law quoted as enabling us to make the orders do not support anything of that sort.”

The other reliefs sought if granted will have the effect of deciding with finality the suit pending in the High Court on an interlocutory appeal. We clearly do not have the jurisdiction to entertain this application under the cited provisions of the law.

On the other hand, this Court, in applying the concept of overriding objective, must consider each case on its own peculiar facts and circumstances and it would be a grave mistake for a party to fail to comply with well-settled principles of substantive or procedural laws on the mere existence of **Sections 3A** and **3B** aforesaid. This is the outcome this Court envisaged when it warned that:-

“If improperly invoked, the ‘02 principle’ could easily become an unruly horse.....in exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable factual foundation. The overriding principle will, no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid.....”

See **Hunker Trading Co. Ltd. V. Elf Oil (K) Ltd** Civil Application No. Nai. 6 of 2010.

It follows that the mere fact that a party cites **Sections 3A** and **3B** does not excuse the party's responsibility to comply with the law.

The proverb, “*A man's home is his castle*” is perhaps the most apt way to describe the applicant's feeling following the auction of his property. The applicant has for over two decades misdirected both his efforts and resources chasing the wind in the forms of applications and interlocutory appeals, instead of listing the suit to be heard and determined on merit. It is on this consideration that we have decided against proceeding under **Section 2** of the Vexatious Proceedings Act, as was sought by learned counsel for the respondents, so that the doors of the court would not be shut on the applicant once and for all. With this ruling, we believe the applicant will see the futility of this application and appreciate the value of pursuing substantive justice in H.C.C. No. 937 of 1986.

Irrespective of his sentimental attachment to the suit property, the applicant must avoid the route of **Jandyce V. Jandyce**, a fictional case in the English Court of Chancery in Charles Dicken’s novel, **BLEAK HOUSE, [1852 – 1853]** concerning the fate of a large inheritance which dragged on for many generations so that, by the time it was resolved, legal costs had devoured the entire estate. The lesson from this satire is too obvious to require our paraphrasing but can be summarized in the following Latin words; ‘*interest reipublicae ut sit finis litium*’ – that is – in the interest of society as a whole, litigation must come to an end. And so the applicant would be very well advised to return to the High Court and fix your case for hearing and determination on merit without further delay.

For these reasons, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 26th day of July 2013.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR