



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 288 OF 2008**

**BETWEEN**

**MICHAEL MUNGAI ..... APPLICANT/APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LTD..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER AVISA ..... 2<sup>ND</sup> RESPONDENT**

**HOUSING FINANCE CO. (K) LTD. .... 3<sup>RD</sup> RESPONDENT**

**KENYA BUILDING SOCIETY LTD..... 4<sup>TH</sup> RESPONDENT**

**MR. MUNG'LA ..... 5<sup>TH</sup> RESPONDENT**

*(Application for correction of errors, omissions and other mistakes in a Court of Appeal proceeding, ruling and orders dated 17<sup>th</sup> July, 2009 so as to determine the real 3 (three) applications, complaints, issues and questions raised by the applicant/appellant (decree holder) in Court*

*in*

**H.C.C.C. NO. 335 OF 1997)**

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**RULING OF THE COURT**

The applicant, **MICHAEL MUNGAI**, appears in person as he has always done in the previous matters before this Court. That being the case, the Court has granted him some latitude so that he could ventilate his grievances. For example, the application is entitled:-

*“This application is brought under section 35 of the Court of Appeal rules Cap 9 and sections 38, 92, 98, 99 and 100 of the civil procedure Act Cap. 21 together with other enabling powers of law and statute.*

**APPLICATION FOR CORRECTION OF ERRORS, OMISSIONS AND OTHER MISTAKES IN A**

**COURT OF APPEAL PROCEEDINGS, RULING & ORDERS DATED 17<sup>TH</sup> JULY, 2009 SO AS TO DETERMINE THE REAL 3 (THREE) APPLICATIONS, COMPLAINTS, ISSUES AND QUESTIONS RAISED BY THE APPLICANT/APPELLANT IN COURT.**

**NOTICE OF MOTION”**

But what does the applicant seek from this Court in this application? We can do no better than reproduce the contents of the application in which the applicant states:-

**“Take notice that on the of 2009 at 9:00 o’clock in the morning or soon thereafter as he can be heard Michael Mungai (appellant/applicant) who is a favoured litigant (please see pages 18-27) of the main application dated 29<sup>th</sup> October, 2008) will move the Honourable Court for the following orders inter alia”**

- a. *The filed application for correction be re-certified urgent and service thereof be dispensed with.*
- b. *That the proceedings, ruling and orders of the Honourable Court of Appeal delivered on the 17<sup>th</sup> July 2009 be reviewed/corrected so as to determine and resolve the real prayers, complaint, applications, questions and issues presented before the Honourable Court.*
- c. *That the Honourable Court determine and resolve the three (3) real applications, issues and questions presented before the Honourable Court, as prayed.*
- d. *The five respondents and their lawyers be ordered to clear the unpaid rates of the Suit Property LR. Nairobi Block 111/530 to Nairobi City Council immediately.*
- e. *The cost of this application and any other orders that the Court may deem fit to grant to the applicant/appellant be provided for.*

***This application is based on the following grounds inter alia:-***

*Out of malice, arrogance, carelessness, negligence, contempt, etc the five respondents, their lawyers and others have incurred bills/penalties and are due for punishment as provided in law. That on the 29<sup>th</sup> October 2008 the applicant/appellant requested the Honourable Court to use the jurisdiction, powers and authority that it has in addition to the jurisdiction powers and authority that The Honourable High Court of Kenya has to determine and resolve the issues, questions and applications that were stated in the applications before the Honourable Court (please see rule 3 part 1, 2 and 3 of Cap 9).*

***The application that was presented before the Honourable Court was ignored and instead the Honourable Court had a different application thus causing a miscarriage of justice and huge bills for reinstatement and costs that could have been controlled by obeying/respecting the Court and its lawful served orders.”***

That is the application that came up for hearing before us on 5<sup>th</sup> May, 2010. As already stated, the applicant prosecuted his application in person while Mr. Gichamba, appeared for the 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> Respondents and Mr. Laichena appeared for the 3<sup>rd</sup> respondent.

In his address, the applicant who was armed with a bundle of documents to which he made reference from time to time reminded us that the application before us was the one dated and filed in Court on 5<sup>th</sup> August, 2009. We must hasten to say that it is that application that we have reproduced at the commencement of this ruling. The applicant went on to state that his earlier application was for contempt of court and not for a stay of execution. He surprised us when he said that his application for contempt has not been objected to by the respondents.

In responding to the application, Mr. Gichamba submitted that the applicant had been before this Court in

a similar application which was dismissed. Mr. Gichamba further submitted that his clients had nothing to do with this application since the dispute started as a divorce cause. We were further informed that the 5<sup>th</sup> respondent was the advocate for the 1<sup>st</sup> respondent.

On his part, Mr. Laichena argued that it would appear as if the applicant was asking for the review of the ruling of this Court. Mr. Laichena submitted that if the applicant was aggrieved by the ruling of the High Court he should file an appeal to this Court.

Mr. Laichena expressed displeasure with the numerous applications by the applicant and it was Mr. Laichena's view that in future, the applicant should be ordered to provide security for costs.

We have considered the submissions by the applicant and counsel appearing for the respondents, together with the plethora of documents in this voluminous record of the application, and it would appear that the genesis of this application is a dispute between the applicant and his wife, which dispute was placed before the subordinate court for determination. The dispute was taken to the next level which was the High Court in which the applicant was the successful party, and after his bill of cost had been taxed, he was awarded **Shs.311,290/=**. It would appear that the applicant was not contented with that award and hence he went back to the High Court and filed a notice of motion expressed as being "**under order XXI, order XXXIX and section 3A of the Civil Procedure Act and Section 5 of the Judicature Act.**" In that application, the applicant sought the following reliefs from the superior court.

- “1. Orders to stop Nancy Wanjeri (petitioner), Kenya Commercial Bank (1<sup>st</sup> Respondent), Christopher Avisa (2<sup>nd</sup> respondent), Housing Finance Co (K) Ltd. (3<sup>rd</sup> Respondent), Kenya Building Society Ltd. (4<sup>th</sup> respondent) and Mr. Mung'la (5<sup>th</sup> respondent), from malicious repeating (sic) in words and deed, false and malicious allegation that the appellant borrowed money from housing finance Company Ltd.**
- 2. That the 5 respondent's and their agents be ordered to vacate the appellant's property on LR. Nairobi Block 111/530. In default they be removed from the property by the OCPD/OCS Kayole Police Station.**
- 3. that the five respondents be ordered to pay the applicant the extra bills for the losses, charges and costs caused by the publishing in words and deeds false and malicious allegations.**
- 4. That warrants of attachment do issue against the respondent for the undisputed bills of Kshs.846,556,520/=.**
- 5. That the court should cite and penalize the five respondents by ordering their arrest and committal to civil jail for contempt of court.**
- 5. That the court do impose a fine of Kshs.100,000/= as punitive damages against the respondents.”**

That application was placed before Okwengu, J. for determination. The learned judge considered all that was urged before her and in a ruling delivered on 16<sup>th</sup> October, 2008, the learned judge said:-

**“I have carefully considered the application before me. The applicant has raised substantive complaints. First, he appears to be complaining about being defamed by the respondents. Secondly, he appears to be complaining about substantial loss and damage arising from his alleged unlawful eviction from the suit property by the respondents. And thirdly, the alleged contempt of court orders by the respondents. I have also considered the court record with regard to this appeal. I note that the appeal was against orders made on 11<sup>th</sup> December, 1997 in a Divorce Cause No. 122 of 1996 in the SRM's Court, Nairobi, where-in it was ordered inter alia that the applicant (who was the respondent in the divorce cause) vacates the suit premises i.e. Komarock Sector 3A House No. 283 by 13<sup>th</sup> December, 1997; that in default he be evicted; and that the couple be no longer bound to cohabit with each other.**

***This appeal was heard and the judgment delivered in favour of the appellant on 13<sup>th</sup> July, 1998. Subsequently, the appellant's bill of costs was taxed and he was awarded a sum of Kshs.311,290/=. In my considered opinion, the proceedings relating to this appeal have been finalized and there is no room for the applicant to canvass the substantive issues which he is now raising. Moreover, the respondents were not parties to this appeal and cannot be brought in at this stage. Further, the issue relating to defamation and damages, forms a substantive cause of action which can only be canvassed in a separate suit. Finally, the applicant cannot purport to enforce orders made in a different suit i.e. HCCC No. 17 of 2001 "OS" in this particular appeal. For these reasons, I find that the application before me is misconceived and the same is accordingly dismissed."***

It was after that ruling by Okwengu, J. that the applicant moved to this Court by way of an application dated 29<sup>th</sup> October, 2008 and filed in this Court on 31<sup>st</sup> October, 2008. That application was placed before this Court on 7<sup>th</sup> July, 2009 when the applicant appeared in person, and we allowed him to address us which he did. In its reserved ruling delivered on 17<sup>th</sup> July, 2009 this Court stated inter alia:-

***But what does the applicant seek from this Court in this application before us?***

***The prayers for the application to be certified urgent and that service be dispensed with are now spent since the application has now reached this Court. The third prayer is that this Court do order the respondents and their lawyers to stop disposing of any of their assets or shares pending the hearing of the appeal. There is no way we can grant that relief since it would be based on no cited legal provision. The fourth prayer is that the respondent be ordered to pay the undisputed assets and charges for these applications. We have only one application before us and if there are other applications, we do not know. In any case there is no basis for such a prayer. The fifth and last prayer relates to the orders of the High Court and costs of this application. It is upon the High Court to execute its orders. As for costs of this application, we shall decide that in a short while.***

***We have carefully considered the background to this matter and what the applicant has stated in his oral and written submissions but we have come to a firm conclusion that while the applicant has the constitutional right to ventilate his lamentations in our courts the application before us is clearly misconceived. We are unable to grant what the applicant is seeking in this application.***

***For the foregoing reasons, we order that the application dated 29<sup>th</sup> October 2008 be and is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.***

It would appear that the applicant considered our ruling of 17<sup>th</sup> July, 2009 but thought it fit to file yet another application which he filed in this Court on 5<sup>th</sup> August, 2009. This is the application before us. As the applicant is acting in person, it was difficult to decipher what he wanted this Court to do for him. He passionately argued his application and as it happens with an overwrought litigant, he is ready and willing to vilify anybody who appears to him to be against what he thinks is his right. That is why in this application even the advocate of the 1<sup>st</sup> respondent is made a party in the suit!

We have meticulously gone through the voluminous record placed before us in this application and having given the background to this matter, we are still of the view that this Court cannot grant the prayers sought. At one time the applicant told us that he had filed an appeal but when asked the particulars of the appeal e.g. Civil Appeal Number and when it was filed, the appellant was unable to be of any assistance to this Court. We are of the firm view that our Ruling of 7<sup>th</sup> July, 2009 considered the matters that were sought in the application that was before us and not matters that were not before us as claimed by the applicant.

Having carefully considered the applicant's oral submission and the documents in support thereof and the history of this matter, we are of the view that there is no substance in this application. We would further advise the applicant to refrain from making frivolous applications since they would not advance his case any further. Accordingly, this application is dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> respondents.

*Dated and delivered at NAIROBI this 11<sup>th</sup> day of June, 2010.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**