



County Government of Kakamega v Tumaz & Tumaz Enterprises Limited & another; Sarrai Group (Interested Party) (Civil Suit E001 of 2022) [2023] KEHC 3482 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT E001 OF 2022
WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA PLAINTIFF

AND

TUMAZ & TUMAZ ENTERPRISES LIMITED 1ST DEFENDANT

ONANGIPALLI VENKATA RAMANA RAO 2ND DEFENDANT

AND

SARRAI GROUP INTERESTED PARTY

RULING

1. The application for determination is dated March 16, 2022. It seeks stay of execution of orders made herein on March 9, 2022; discharge, variation, review and setting aside of the said orders of March 9, 2022, and any other of further orders or directions as the court may deem fit.
2. It is at the instance of the 1st defendant herein, and it is principally founded on the argument that the orders made on March 9, 2022, granting leave to the plaintiff to file appeal against the orders made on February 24, 2022, and stay of the proceedings, were substantive, and should have been made inter partes, after affording the 1st defendant a hearing.
3. The plaintiff responded to the application, by way of grounds of opposition, dated May 27, 2022, arguing that the said application did not reach the threshold for review. The interested party also filed grounds of opposition, dated March 30, 2022, where it also argues that the threshold for review was not met.
4. I would agree with the plaintiff and the 1st interested party, that the application does not meet the threshold for review, under Rule 45 of the *Civil Procedure Rules*, for no error on the face of the record or discovery of new matter has been demonstrated. However, I have to point out that the 1st defendant



is not just limiting the application to review, for it also seeks variation or setting aside of the orders of March 9, 2022. Review and variation or setting aside are not the same, and are not premised on similar considerations.

5. I will start by considering the aspect of stay of proceedings. I granted stay of proceedings, primarily on the basis of the pendency of parallel proceedings in Nairobi HCCC (C&T Division) No. E004 of 2022, between the same parties, where orders had been made which were in conflict with the orders that I had made earlier herein. The Nairobi suit was challenging the process of the making of the subject lease. The stay of proceedings order was made against that background. It is an order that a court could make suo moto. Previous to the stay of proceedings order, I had made an order, on February 24, 2022, staying an order I had made herein earlier on February 18, 2022, to obviate that conflict, and the stay order of March 9, 2022 merely reinforced the order of February 24, 2022.
6. With respect to leave to appeal, the plaintiff was aggrieved by the orders that I made herein on February 24, 2022. It is within the rights of a party to be aggrieved by orders made by a court, and, equally, it is within the rights of the aggrieved party to seek opinion of a higher court, by way of appeal. The applicant, in the Motion, dated March 8, 2022, expressed grievance with the orders that I had made on 24th February 2022, and was entitled to challenge the same at a higher court, by way of appeal. It sought leave to mount that challenge, and I exercised discretion, under section 75(1) of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, and Order 43 rule 1(2)(3) of the [Civil Procedure Rules](#), to grant that leave. It has not been demonstrated that I did not have the discretion to do so, to warrant review or variation or setting aside of the order granting the leave.
7. I am not persuaded, in the circumstances, and particularly considering that the 1st defendant is yet to file a defence to the plaint, that there is merit in the application, dated March 16, 2022, and I hereby dismiss the same. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL 2023

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Appearances

Ms. Vivianne Mmbaka Komwonyo, Advocate for the plaintiff.

Ms. Nasimiyu, instructed by Javier Georgiadis & Sylvester Law LLP, Advocates for the 1st defendant.

Mr. Gichaba, instructed by Gichaba & Company, Advocates for the interested party.

