REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.98 OF 2021

ZEKI WANJALA WANYAMA.....APPELLANT/APPLICANT

VERSUS

BENARD KAMUGA KURIA.....RESPONDENT/RESPONDENT

RULING

Introduction & Background

1. The applicant herein, Zeki Wanjala Wanyama, vide a Notice of Motion dated the 26th of October 2021, primarily seeks to stay the proceedings in the lower court in Eldoret CMCC No.128 of 2018, pending the hearing and determination of the instant application and the appeal. His main contention as gleaned from his supporting affidavit sworn on even date, is that he is dissatisfied with the finding in a report by DCIO dated the 25/04/2019 that the signatures appearing on payment documents were authored by different persons. He now seeks a second independent verification exercise to be conducted by the CCIO-Uasin Gishu arguing that the verification is at the heart of his defence. He alleges that the respondent herein seeks to defraud him of Kshs 2,000,000 and as a result, he should be allowed to conduct a second, independent verification report as he stands to suffer substantial loss.

2. The thrust of the case is that the appellant owed the respondent a total of Kshs 3,942,000 being payment for the purchase of three motor vehicles. What is in dispute, is the outstanding balance. Whereas the respondent claims a balance of Kshs 2,942,000 from the appellant, the appellant contends that he paid the respondent Kshs 3,000,000 and that the remaining amount is Kshs 942,000. In this regard, the appellant produced acknowledgment notes marked as ZWW 2 (b), (c) and (d) allegedly from the respondent indicating that the respondent had acknowledged payment of Kshs 3,000,000 in total. The respondent disputed two of the acknowledgement notes indicating that the signature was not his and or was forged which prompted the examination of the respondent's specimen signature *via a vis* the acknowledgement notes by the DCIO. In his report dated the 25th of April 2019, the DCIO noted that the two acknowledgement notes were authored by different persons and not the respondent. It is this report that the appellant is dissatisfied with and seeks to have a second verification exercise done on the notes by the CCIO. The lower court rejected his application to have a second verification which necessitated the instant application and appeal.

3. The application is opposed by the respondent through his affidavit in reply sworn on the 4th of November 2021 wherein he deponed that the instant application is premature and incompetent since no similar application has been made in the subordinate court. Secondly, the respondent averred that there is no judgement and or decree in Eldoret CMCC No.128 of 2018 since the appellant is yet to testify. Furthermore, the respondent averred that the appellant has been aware of the document examiner's report for more than 2 years and as such, his current application is only meant to delay justice and ought to be dismissed.

4. On the 18th of November 2021, an inter-parte hearing was conducted wherein counsel for the appellant submitted that the loan balance was Kshs 942,000 and not Kshs 2,942,000 as claimed by the respondent/plaintiff. Counsel submitted that the appellant had paid Kshs 3,000,000 via payment documents marked as ZWW-2 (b) (c) and (d), leaving only a balance of Kshs 942,000. The total debt was Kshs 3,942,000. The acknowledgement of payment documents marked 2 (b) (c) and (d)

Determination

5. I have carefully considered the application and submissions by both parties. The only issue arising is whether the applicant has met threshold for grant of the orders sought.

6. I note that the application has been brought pursuant to Order 51 Rule 14, Order 10 rule 11 and Order 22 rule 6 of the Civil Procedure Rules. The above provisions in no way relate to the orders sought by the appellant/applicant. It appear to me that the appellant seeks to stay proceedings in the lower court until the determination of the instant appeal. In that regard, the correct provision would have been Order 42 Rule 6 and not the provisions relied on by the appellant in his notice of motion. However, it is my view that the failure to cite the correct provision of the law upon which the application brought is not fatal to the application in light of the provisions of Section 1A of the Civil Procedure Rules.

7. The question therefore is whether the appellant/applicant has met the threshold for grant of the stay of proceedings pending the appeal.

8. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from of Order 42 rule 6 (1) of the Civil Procedure Rules.

9. In ***Re Global Tours & Travel Ltd HCWC No.43 of 2000*** Ringera**,** J (as he then was) held that:

> ***"…As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously…"***

10. The following passages in Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, further illuminate the grounds upon which stay of proceedings should be granted. It provides that:

> ***"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."***
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> ***"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."***
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> ***"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."***

11. For this court to therefore grant stay of proceedings, the Appellant ought to show that he has an arguable appeal with high chances of success such that if stay of proceedings is not granted, the appeal will be rendered nugatory.

12. I have read through the proceedings of the trial court and find that the facts before the Court do not favour the applicant/appellant. It is evident that the stay of proceedings as sought is seemingly a delay tactic for a number of reasons. First, there is no indication that the DCIO report was obtained fraudulently or that the examiner conducted a sham examination. There is also no evidence to suggest that the DCIO in any way gave an erroneous report or that his investigations were biased in any way. Secondly, it is clear that the appellant's counsel participated extensively in proceedings in the lower court. Notably, the appellant's counsel cross-examined the respondent herein and it was the defence case to begin when the application before court was lodged. Furthermore, I note that the report being challenged by the appellant was made in 2019. Three years have lapsed since it was made. No efforts were made to challenge the same between 2019 and 2021. This in my opinion is deliberate delay and the only reason the appellant seeks to have a second report, is in my opinion, to delay the proceedings in the lower court.

13. Third, I note that what is being appealed is the decision of the lower court rejecting the appellant's application to have a second independent report done by the CCIO. In my view, this does not go into the substantive issues and or merits of the case since the appellant will have a chance during his defence to rebut the claims made by the respondent/plaintiff and may appeal the judgement of the lower court if dissatisfied with it.

14. As noted earlier, stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. I do not see any reason to stay the proceedings in the lower court. In any case, I see greater prejudice being occasioned to the respondent herein more considering that the motor vehicles in question are in the custody and use by the appellant herein.

15. In the circumstance, I am of the considered view that it would not be in the interest of justice to exercise this court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court further.

16. Accordingly, the application dated the 26th of October 2021 is devoid of merits and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE