



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

ELECTION PETITION NO. 1 OF 2017

MUSA CHERUTICH SIRMA.....JUDGMENT DEBTOR/PETITIONER

VERSUS

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE ELDAMA RAVINE CONSTITUENCY

RETURNING OFFICER (NDIRANGU PETER KURIA).....2ND RESPONDENT

MOSES LESSONET.....3RD RESPONDENT

RULING

1. Pursuant to the provisions of section 84 of the Elections Act as amended in 2017 Under articles 165 of the Constitution and its inherent powers and under Orders 9 Rule 9 and 42 Rule 6 of the Civil Procedure Rules, section 1A, 3 and 3A of the Civil Procedure Act and article 159 of the 2010 Constitution of Kenya and all enabling provisions of the Law, the petitioner/applicant seeks the following orders from this court.

1 *spent*

2 An order of stay of execution and/or of further proceedings pending the hearing and determination of this application.

3 An order to make provision for costs.

2. The application is supported by nine (9) grounds that are set out on the face of the notice of motion and a sixteen (16) supporting sworn affidavit of the petitioner/applicant.

3. The major grounds in support of the notice of motion are as follows. This court delivered judgement in this suit on 4th March 2018 and awarded costs to the Respondents. There has been an illegal proclamation which is devoid of jurisdiction. The applicant is apprehensive that he shall be prejudiced should the illegal proclamation and or execution take place as presently intended.

4. Furthermore, the respondents have expanded the decree beyond the legal limits, which is illegal. The proclamation is fraught with illegality, more so the computation of the decretal sum, which is way beyond the amount claimed and the judgement capping at shs 4,000,000/- The illegal proclamations of the Respondents are as a result of split decrees and are offensive to the Election Act and the substantive law in that regard. The 3rd respondent through third parties namely Gillette auctioneers and Sadabri auctioneers have projected ransom as a preferred mode of engagement despite the grave illegalities and have breached the mandatory due processes.

5. In addition to the foregoing grounds, the petitioner/applicant has deponed to a sixteen supporting affidavit, whose major averments are as follows. Judgement was delivered on 4/3/2018, in which the petition was dismissed with costs. The applicant perused the court file and found that he was not served with the decree which was lodged in 2018 by the 1st and 2nd respondents; claiming shs 4,004, 200/-, it being an illegal figure as it is contrary to the law. The applicant stands threatened with an illegal distress. Following advice of his counsel which he believed the applicant avers that the capped figure of shs 4,000,000/- was a global figure that was to be taxed for all the parties. It was not to be expanded beyond the legal limit by the parties.

6. Furthermore, the applicant has deposed that there is security that is deposited in court in favour of all the parties; thus the additional figure of shs 4,004,200/- as claimed by one party is contrary to the law and is illegal. The 1st and 2nd respondents are advancing towards extracting a decree in respect of the sums claimed; which is an invalid process.

The submissions of the applicant.

7. The applicant did not file any written submissions in support of his application despite having been served with adequate notice to do so.

The case for the 1st respondent

8. Messrs Mirugi Kariuki & Co advocates for the 1st respondent filed a notice of a preliminary objection dated 4th June 2021. They have stated that the application is incurably bad, fatally defective and incompetent for lacking the anchorage of a substantive prayer. They have further stated that prayer (2) a substantive prayer at the ex parte stage and there is no substantive prayer to be determined at the inter parties stage and for this reason the application is incompetent and frivolous. Finally, they have stated that there is no substantive prayer or orders for determination on the face of the instant application and therefore the continuation of the adjudication of the same amounts to an abuse of the court process.

The submissions of the 1st respondent

9. Messrs Mirugi Kariuki & Company advocates, for the 1st respondent submitted that the application is incurably bad, fatally defective and incompetent for lacking the anchorage of a substantive prayer. This was raised as a preliminary objection which has to be determined first as it is the practice of this court.

The gist of counsel's submission is summed up in their own words as follows: "*A marginal skim of the Application will reveal that it begins and ends at the ex parte stage.*"

10. Counsel cited Geoffrey Kinja v Gilbert Kabeere M'mbijiwe & Another (2015) e-KLR, in which the court found that the plaintiff therein was guilty of non-innocent disclosure in his application. That court further found that the application did not contain any substantive prayer beyond the hearing of the application inter parties.

11. Based on the foregoing authority counsel have urged the court to dismiss the instant application.

The case for the 3rd respondent -Moses Lessonet

12. The 3rd respondent through Kibet Allan filed 35 paragraphs replying affidavit in opposition to the application; whose major averments are as follows.

13. The application is frivolous, misconceived and an abuse of the court process and ought to be dismissed. The applicant has previously filed three other similar applications as the instant application. The respondent has averred that the applicant was granted an order maintaining the status quo pending the hearing and determination of the reference from the taxing master's taxation of the bill of costs. The stay of execution that was granted was to remain in force for sixty days or until further orders of the court.

14. The deponent has further averred that the petitioner is not desirous of paying the balance to the respondent and the auctioneer's fees, who being the judgement debtor is by law required to pay. The petitioner took no steps towards filing an appeal or a reference as directed by the court. Instead he waited until more than one year had lapsed and was awoken by the letter dated 27th April 2021 and then proceeded to file a similar application.

15. Furthermore, the applicant has averred that the petitioner is abusing the court process and has particularized a number of nine instances including the following. The petitioner was granted leave to file an appeal or reference on 29th May 2020 within sixty days. No such appeal or reference has ever been filed for more than one year. Owing to the failure to file an appeal or reference warrants of execution were sent to the court for sealing on 5th May 2020 and despite several reminders to the court by e-mail no single e-mail has ever been responded to. As a result, the respondent wrote a letter dated 12th May 2020 to the Deputy Registrar conveying their dissatisfaction and frustration demonstrated by the failure to sign or seal the warrants.

16. The 3rd respondent's bill of costs was taxed at shs 2,000,000/- in a ruling delivered by the Deputy Registrar on 27th November 2020 and the petitioner has never expressed any dissatisfaction. Despite recording several consent orders to enable the petitioner to pay, the petitioner has constantly failed to adhere to the said consent orders. Based on order 22 of the Civil Procedure Rules and section 28 of the Civil Procedure Act both decrees and orders are executable contrary to the contention of the petitioner that only decrees are executable. The 3rd respondent had instructed their counsel to instruct Gillette Auctioneers to proclaim and attach in realization of his costs. Following a number of consent orders the petitioner made part payments but has not completed the balance.

17. The deponent has averred that the original award capping costs at shs 4,000,000/- does not apply to the auctioneers who were not **parties to the suit and they prepared their bill of costs pursuant to the Auctioneers Rules.**

The submissions of the 3rd respondent

18. The instant application is described as having been brought under Order 42 Rule 6 of the Civil Procedure Rules, which sets out three conditions that have to be met before a stay of execution is granted. Counsel cited Michael E. G. Muhindi v John Ngure Murekio (2015) e-KLR, in support of his submission that the three conditions that must be met are as follows. First, the court must be satisfied that substantial loss will result to the applicant unless an order of stay is granted. Second, the application is made without unreasonable delay. Third, the applicant has to give security for the due performance of the decree or order that may ultimately be binding upon the applicant. Based on the foregoing authority counsel has submitted that the applicant has not met the threshold set out in the foregoing authority to warrant being granted the order sought. He has submitted that judgment was rendered on 4th March 2018 and each respondent was awarded costs in the sum of shs 2,000,000/-. Additionally, the court rendered decisions on three other similar applications as the instant application seeking similar orders. He therefore submitted that the matter is *res judicata*.

19. Furthermore, counsel has submitted that it is four years since the judgement was rendered and the petitioner has not paid the balance of the money despite several reminders. As regards the contention by the petitioner that there ought to be a decree before the issuance of warrants of attachment, counsel has submitted that there was a decree that was extracted and served. The petitioner even used the said decree in his appeal to the Court of Appeal in Nakuru Civil Appeal No. 9 of 2018, which decree was annexed to the replying affidavit as annex ML-9a.

20. Counsel also submitted that the petitioner filed another application dated 19th March 2019 seeking stay of execution pending the hearing and determination of the said application which application was disposed of through a consent order with terms among which were that the petitioner was to pay the balance of shs 1,750,000/- within four months by 26th July 2019 and in default execution to issue. The petitioner further made payments leaving a balance of shs 750,000/-, which he has failed to pay.

21. Counsel has further submitted that the consent dated 26th March 2019 has never been set aside and it required the petitioner to comply with the order by 26th July 2019 and in default execution was to commence. The consent order still stands and the issuance of a temporary order violated the consent order which can only be set aside on grounds that would allow for vitiating a contract. In that regard, counsel cited Samuel Mbugua Ikamba v Barclays Bank of Kenya (2015) e-KLR, in which that court held that the variation of a consent judgement can only be on grounds that would allow for a contract to be vitiated namely fraud, collusion, illegality and mistake among other grounds.

22. Counsel also cited Nguruman Ltd v Shompule Group Ranch & Another (2014) e-KLR, and submitted that the court's inherent powers are intended to enable the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the court. Counsel therefore submitted that the petitioner is clearly abusing the court process.

23. Counsel for the 3rd respondent, have also supported the preliminary objection raised by counsel for the 1st respondent.

24. He has therefore urged the court to dismiss the application with costs to the respondent.

Issues for determination

25. Since counsel for the 1st respondent have raised a preliminary objection, I am bound to determine it first and if need be I may proceed to determine any other issues.

26. I find that the essence of the preliminary objection is that the petitioner's application had been determined and all the orders sought had been granted at the ex parte stage. In other words, there is no substantive prayer that the petitioner is seeking from this court.

27. I find that the petitioner sought three orders which are as follows. First, that the application be certified urgent, which I granted at the ex parte stage. Second,

“An order of stay of execution and/or of further proceedings pending the hearing and determination of this application.”

Third,

“An order to make provision for costs.”

28. It is clear from the foregoing prayers that the petitioner is not seeking any orders beyond the inter parties hearing stage. Stated differently, the petitioner is not seeking any order to preserve any property or threatened legal or equitable right pending the hearing and determination of the instant application. I am aware that disputes will always arise during the execution stage in any litigation, but in the instant application I find none.

29. I further find that in these days of litigation boom which is burdening the courts in terms of time and judicial other resources, I find that it is not the duty of the court to make findings in respect of the issues raised by the 3rd respondent; since those issues are now moot or academic.

30. In the premises, I hereby uphold the preliminary objection with the result that the application is hereby dismissed with costs to the respondents.

Ruling signed, dated and delivered in open court at Kabarnet this 28th day of September 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi and Mr. Sitienei, Court Assistants.

In the absence of the Petitioner and in the presence of Mr. Mwangi holding brief for Mr. E. Kibet for the 1st and 2nd Respondents

Mr Allan Kibet for the 3rd Respondents.