



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 15 OF 2020

MATFAM LTD.....1ST APPELLANT/APPLICANT

LANET MATFAM RESORT LTD.....2ND APPELLANT/APPLICANT

ELIJAH MATIBO.....3RD APPELLANT/APPLICANT

VERSUS

JARED MORANGA (SUING AS THE ADMINISRATOR OF THE ESTATE OF

THE LATE NEELSON ABED ONWONGA)RESPONDENT

RULING

The case for the applicant

1. Pursuant to the provisions of Order 42 Rule 6 (6) of the 2010 Civil Procedure Rules, the applicant has applied for the following major orders.

1) *spent*

2) a temporary injunction be granted to restrain the respondent, his agents, servants, or any other person acting at the behest of the respondent from attaching, proclaiming, carrying away or in any other way interfering with the applicants' property, pending the hearing and determination of this application

3) a temporary injunction be granted the restrain the respondent, his agents, servants, or any other person acting at the behest of the respondent from attaching, proclaiming, carrying away or in any other way interfering with the applicants' property.

4) an order directing that costs of this application be provided for.

2. The application is based on the following major grounds. First, the chief magistrate at Narok delivered two rulings in Narok CMCC 41 OF 2014, in which she dismissed an application for setting aside an *ex parte* judgement and objection proceedings to the ensuing attachment. Second, the applicants have filed an appeal against both rulings. Third, before the applications were heard, the respondent had sent auctioneers who had proclaimed the property owned by the applicants and the same were to be carried away in execution of the decree.

3. However, the court issued an order of stay of execution in the objection proceedings.

4. Fifth, the application having been dismissed, there is a risk that the respondent/decreed holder will proceed and attach the appellants' property in execution of the decree.

5. Sixth, the appeal has very high chances of success and that it only fair that a temporary injunction be issued to restrain the respondent in order to enable the applicants to exercise their right of appeal.

6. In addition to the foregoing, the applicants' have through their director (Elijah Matibo), the 3rd appellant/applicant herein, deposed to a 19 paragraphs supporting affidavit. In that affidavit he has replicated the same matters that are set out on the face of the notice of motion, except for the following major averments.

7. First, the respondent filed a compensatory suit in Narok being Narok CMCC No. 41 of 2014 following a road traffic accident, which

involved a vehicle registered in the name of the 1st applicant. The deponent then forwarded all documents to his insurer namely Jubilee Insurance Co., who retained an advocate to act on his behalf. In the middle of the execution proceedings the insurer instructed the advocates to stop acting for him, since the 3rd applicant had breached the terms contract of insurance.

8. The advocates who were representing the 3rd applicant filed an application praying for orders that they were bound to pay the claim and to represent him. The said application has not been heard to date. The said advocates stopped to represent him without informing him of the same. Judgment was therefore entered against him without being informed of the same.

9. Furthermore, the respondent extracted the decree and proceeded to proclaim the properties of the 2nd applicant. That is when the deponent knew that judgement had been entered against the 1st and 2nd applicants. That throughout the hearing of the suit the advocates then on record did not inform to attend court to testify.

10. The deponent has further deposed that the property that was attached were his own personal property and that of the 2nd applicant. As a result, he instructed his advocate, who filed an application to set aside the *ex parte* judgment and to challenge the attachment of his property and that of the 2nd applicant; which applications were dismissed by the court on 18th June 2020. He has not obtained both rulings which were handwritten, although he has applied for copies of those rulings.

11. The deponent has also deposed that he has filed appeals against both rulings and that the respondent has taken out warrants of attachment before he applied for stay of execution in the objection proceedings. He also applied for a stay of execution pending the hearing and determination of the instant appeal.

The case for the respondent

12. The respondent has filed a 23 replying affidavit in opposition to the application; in which he has deposed to the following major averments. He is the administrator of the estate of the deceased. The application is incurably defective, incompetent and an outright abuse of the court process. He has deposed that it is not true that the firm of Mose Mose & Milimo advocates, failed to prosecute an application to cease acting for the applicants. He deposes that they prosecuted the application, which was allowed; but before the suit could proceed further, the said firm re-filed a notice of appointment of advocates dated 23/6/2016 and proceeded to participate in the subsequent proceedings till judgement.

13. He has further deposed that a copy of the ruling of the magisterial court dated 18/6/2020 has not been attached to the applicants' affidavit and thus the instant application is premised on a non-existent ruling, and the same is fatally defective and ought to be dismissed with costs. The applicants' have chosen to omit from these proceedings the 1st defendant in the lower court suit, who participated fully in the proceedings by filing pleadings. Her lack of participation may prejudice her interest in the application and the appeal. In paragraph 10 the respondent has deposed that: *"THAT the applicants are using the back door of praying for an injunction to stop the Respondent from carrying with the execution process instead of seeking a stay of execution pending appeal which would require the applicants to furnish security before a stay order can be granted."*

14. The applicants have not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules. The provisions require the applicant to demonstrate that he will suffer substantial loss unless an order of stay of execution is not granted. Additionally, the applicant is also required to demonstrate that he is willing to provide security for the due performance of the decretal sum. And that the application has not been made without unreasonable delay. The applicants have not satisfied the conditions of Order 42 Rule 6 of the Civil Procedure Rules; to persuade the court to grant them the equitable relief of an order of a temporary injunction.

15. Furthermore, the deponent has deposed that the applicants have not met the conditions for the grant of a temporary injunction.

16. The deponent has deposed that the 1st applicant has not demonstrated that the intended appeal has chances of success and has not rebutted the respondent's evidence that the applicants were represented in the lower court. He has also deposed that the objection proceedings were filed following the attempt of the 3rd applicant to thwart the execution process by transferring the attached property to the 2nd applicant.

17. The deponent has further deposed that the applicants are guilty of unreasonable delay in filing the application as the judgement/decreet that is sought to be stayed was delivered on 17/8/2018. The applicants were awakened by the auctioneer's attachment of the applicants' properties.

Issues for determination

18. I have considered the affidavits, the submissions and the authorities cited by the parties in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the applicable law is Order 42 Rule 6 (6) of the Civil Procedure Rules or Order 40 (1) of the Civil Procedure Rules.
- 2) Whether there is a competent appeal before this court
- 3) Who bears the costs of this application?

Issue 1

19. I find that the applicants have filed their application pursuant to the provisions of Order 42 (6) (6) of the 2010 Civil Procedure Rules. Those provisions require an applicant to demonstrate that he will suffer substantial loss unless an order of stay of execution is not granted. They also require a demonstration by the applicant that the appeal will be rendered nugatory unless an order of stay of execution is not granted. The applicant must also demonstrate that the application has been filed without unreasonable delay. And more importantly, the applicant must demonstrate that he is willing and able to provide security for the due performance of the obligation that the court might ultimately find binding upon him.

20. I find that the applicants have not demonstrated that they are able and willing to provide security for the due performance of the obligation that the court might ultimately find binding upon them.

21. I therefore find that the provisions of Order 40 (1) of the Civil Procedure Rules, which are in relation to the grant of temporary injunctions are not applicable in the instant application.

Issue 2

22. Furthermore, I find that the judgement appealed against was delivered on 17/8/2018. I further find that the appeal was filed on 7/7/2020. I find that the appeal was not filed in the High Court within 30 days as required by section 79G of Civil Procedure Act (Cap 21) Laws of Kenya. The appeal was filed over one year and eight months following the delivery of the magisterial judgement on 17/8/2018. There is no evidence that the applicants applied and obtained leave to appeal out of time. It therefore follows that there is no competent appeal before this court. I also find that the applicants filed their application on 3/7/2020. Finally, I also find that the application was filed in the absence of a competent appeal in this court.

23. I find that the affidavit of the respondent is credible while that of the applicants is incredible. The averment of the applicants that the firm of Mose Mose & Milimo advocates, failed to prosecute the application to cease acting for the applicants is not true. I also find that the filing of the application by the applicants pursuant to the provisions of Order 42 Rule (6) (6) of the Civil Procedure Rules and thereafter proceeding to prosecute the application as if it was an application for a temporary injunction that was being sought was purposely pursued to evade complying with the provisions of Order 42 (6) (6) of the 2010 Civil Procedure Rules. I therefore find the applicants are frustrating the respondent from enjoying the fruits of his judgement.

24. In the circumstances, I find that the applicants' application is an abuse of the court process.

Issue 3

25. Costs follow the event as decreed by section 27 of the Civil Procedure Act. In other words, the successful party is entitled to his costs unless he has misconducted himself, which is not the position in the instant application. The respondent has succeeded in his application and is therefore entitled to the costs of this application.

26. In the premises, the applicants' application fails and is hereby dismissed with costs of the application being awarded to the respondent.

Judgment signed, dated and delivered at Narok this 21st day of October, 2020 in the presence of Mr. Kambo holding brief for Mr. Githui for the Applicants and in the absence of the Respondent.

J. M. BWONWONG'A.

J U D G E

21/10/2020