



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCC NO. 314 OF 2010

SURAYA PROPERTY GROUP LIMITED.....1ST PLAINTIFF

W & K DEVELOPMENT LIMITED.....2ND PLAINTIFF

-VERUS-

W & K ESTATES LIMITED.....1ST DEFENDANT

ISAAC KAMAU NDIRANGU.....2ND DEFENDANT

ELVIN WAMBUI KAMAU.....3RD DEFENDANT

RULING

1. This ruling is in respect to the application dated 2nd May 2019 wherein the Plaintiffs/Applicants seek orders as follows:

1. Spent.

2. Spent.

3. That the honourable court be pleased to stay execution of the Ruling and/or Oder/Decree of Lady Justice Farah S.M. Amin delivered on 11th April 2019 together with the Certificate of Taxation dated 9th February 2015 and all other further/ Consequent proceedings thereto, pending the hearing and determination of the Plaintiffs'/Applicants' intended appeal.

4. That the grant of an order of stay in terms of prayers (1) and (2) herein above, do operate as reinstatement and/or maintenance of the conservatory order made on 28th September 2012 by the Honourable Justice Mabeya.

5. That the costs of this application do abide the result of the intended appeal.

2. The application is supported by the affidavit of the Applicant's Director **Mr. Peter Muraya** and is premised on the grounds that: -

1. By her Ruling delivered on 11th April, 2019 the learned Lady Justice F. Amin pronounced herself on both the 2nd defendant's Notice of Motion dated 30th September 2014, for striking out the plaintiff's suit, and the Plaintiffs Reference on Taxation dated 17th February, 2015 in the following terms: -

a) The suit by the First Plaintiff is dismissed with costs.

b) The suit brought by the second plaintiff is dismissed with costs, the First plaintiff to pay the defendant's costs of the suit.

c) The Reference on the Taxation is dismissed with courts (sic). Leave to enforce immediately is granted.

d) Should the defendant wish to obtain an order that the Architect/Promoter personally pay the costs assessed, he must bring a specific application supported with detailed evidence for the court's adjudication.

2. The consequence of the honourable court's ruling and/or order aforesaid, particularly paragraph 25 (c) of the Ruling, is that the 3rd defendant/respondent can at any time proceed to execute in respect of its certified costs, without following due process.

3. Immediately upon delivery of the Ruling on 11th April 2019, Counsel for the plaintiffs orally sought for stay of the Ruling and/Order of the Honourable Court, and also applied for leave to appeal, whereupon the Lady Justice Maureen Odero granted the plaintiffs leave to appeal, but directed the plaintiffs to file a formal application for stay.

4. Being aggrieved by the Ruling and/or, the plaintiffs are desirous of lodging an appeal against the said Ruling and/or Order, on the grounds set out in paragraphs 5, 6, 7, 8 and 9 hereof.

5. The learned judge dismissed the 1st Plaintiff/Applicant's suit against the 2nd Defendant/Respondent on account of the alleged fact that the 1st plaintiff/applicant was not privy to the contract entered into on 1st December 2007, yet the said contract was duly executed by the 1st plaintiff/applicant through its Directors, on the one hand, and by the 1st Defendant/Respondent, on the other hand. As such, the learned judge misdirected herself on the documentary evidence on record.

6. By dismissing the 2nd Plaintiff/Applicant's suit against the 2nd defendant for the alleged reason that the 1st plaintiff did not obtain leave to commence a derivative suit at the point of filing the suit, the learned judge misdirected herself, and misconstrued the Court of Appeal's decision in *Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani & Another* [2015] eKLR wherein it was held that leave of the court be obtained before filing a derivative suit, BUT MAY ALSO BE OBTAINED TO CONTINUE WITH THE SUIT ONCE FILED. In the circumstances, the application for striking out the 2nd plaintiff's suit and the consequent order was premature.

7. Contrary to the principle set out by the Court of Appeal in the case of *Consolidated Chemicals Ltd vs KEL Chemicals Ltd* [1981] eKLR, the learned judge dismissed the 2nd plaintiff's suit on the alleged fact that the suit was based on a pre-incorporation contract which was null and void, without due regard to the documentary evidence on record to the effect that the 2nd plaintiff, upon incorporation, became bound by the pre-incorporation contract having entered into new contracts, obligations and engagements to give effect to the pre- incorporation contract, including appointing Nipsan Construction Company Limited, vide an agreement dated 15th July 2009, to offer civil and construction works and services, and executing sale agreements for the sale of villas constructed on land parcel LR No. 12239 in terms of the pre-incorporation contract. Furthermore, there is in existence, a Report dated 6th November 2018 filed in Miscellaneous Petition No. 165 of 2017, confirming that the multimillion house project undertaken through the 2nd plaintiff/applicant, pursuant to the incorporation contract, is seventy-five percent complete, and that fees are due to the project architect.

8. The learned judge misconstrued the existing body of case law and law on taxation when she dismissed the Plaintiffs'/Applicants' Reference on Taxation, without taking into consideration the fact that, the plaintiffs' suit against the 3rd Defendant/Respondent having been summarily dismissed, the taxing master committed an error in principle by awarding a hundred per cent(100%) of the instruction fees, as opposed to awarding seventy five percent(75%) thereof or a lesser amount, contrary to Schedule VI, paragraph 1 (ii) of the Advocates (Remuneration) (Amendment) Order, 2016.

9. There is imminent danger that the defendants/Respondents have either commenced or are about to commence execution against the 1st plaintiff in terms of paragraph 25(c) of the honourable court's Ruling aforesaid, the defendants/respondents having initially applied for, and obtained warrants of the sale of property the 1st plaintiff/applicant's property during the pendency of the Plaintiffs'/Applicants' Reference aforesaid.

10. In the event that an order of stay is not granted as sought in the application filed herewith, the plaintiffs shall suffer substantial loss for reasons that 2nd defendant passed away on 22nd November 2018, whilst the 3rd defendant was adjudged to be a person suffering from mental disorder vide a court order made on 25th May 2018 in *Milimani High Court Miscellaneous Petition No. 165 of 2017*.

11. Prior to his passing on, the 2nd defendant was also adjudged to be laboring from a mental insanity vide the order mentioned in paragraph (10) herein above, a fact which was concealed or not disclosed to the court by counsel for the 2nd defendant.

12. The 2nd and 3rd Defendants/Respondents' declaration of mental insanity aforesaid, therefore, casts doubt over their mental capacity to issue instructions on their defence and various applications, and their capacity to depone to various affidavits including the supporting affidavit allegedly sworn on 29th September, 2014 by the 2nd Defendant/Respondent as well as the replying affidavit purportedly sworn on 16th April, 2015 by the Defendant's Counsel at the behest and on behalf of the 3rd defendant.

13. The Report dated 6th November, 2018 mentioned in paragraph 7 above, further confirms beyond any scintilla of doubt, that the firm of Gichuru & Gichuru Advocates fell out with the 2nd and 3rd defendants' Guardians, and therefore had no instructions to act/continue acting for the 2nd and 3rd Defendants/Respondents in the present suit.

14. There is no overwhelming hindrance, hence the Honourable Court should grant an order of stay, so as not to render the plaintiff's intended appeal nugatory.

15. As alluded to in paragraph 10 herein above, the demise of the 2nd Defendant as well as a declaration of the 3rd Defendant's

mental insanity, and the failure of their counsel to disclose the death and declaration of mental insanity, constitutes a special and unique circumstance as to warrant the Honourable court to immediately grant an order of stay and suspension of further proceedings, as a declaration of mental insanity and the death of a party to a suit immediately suspends the suit at whatever stage, pending the appointment of a guardian and/or personal representative.

16. The plaintiffs also stand to lose their multi-billion investments on the 11.5 acres of land parcel number LR No. 12239 – Redhill Nairobi, which portion was until the delivery of the Ruling aforesaid secured by the order of the Honourable Court made on 28th September 2012.

3. The defendants opposed the application through the Notice of Preliminary Objection dated 12th June 2019 wherein they list the following grounds: -

1. This honourable court has no jurisdiction to Stay the Execution of the Orders of the Honourable Lady Justice Farah S. Amin dated 11th April 2019 so far as it relates to the Certificate of Taxation dated 9th February 2015 as sought in prayers 2 and 3 on the Grounds that a Stay of Execution of the said Taxation had already been granted on 17th March 2015 on terms that the plaintiff deposit 50% of the Taxed Costs of Kshs 18,765,060/= and further granted on 9th April 2015 upon review and consequently the court is *factus officio* and cannot entertain a third application for Stay of Execution except upon Appeal by the Court of Appeal.

2. There being no appeal against a ruling and orders of the Honourable Mr. Justice Mabeya striking out the pleadings and claim against the 1st and 3rd defendants with costs leading to the taxation of the Party & Party Bill of Costs dated 28th March 2014 which was taxed on 9th February 2015, this honourable court has no jurisdiction to stay execution thereof or reinstate the injunctive/conservatory orders granted on 28th September 2012 as sought in prayer 4.

3. So far as the Ruling and orders of the Honourable Lady Justice Farah S. Amin dated 11th April 2019 dismissed the suit by both plaintiffs against the remaining defendant (2nd defendant) and further dismissed the Reference by the plaintiff against the decision of the Taxing Officer dated 9th February 2015, there is nothing to stay as an order for dismissal cannot be stayed.

4. The only court that has jurisdiction to grant conservatory orders by way of injunction pending appeal after dismissal of a suit is the Court of Appeal under its Appellant Jurisdiction by virtue of Rule 5(2) (b) of the Court of Appeal Rules as there is nothing left in the High Court to stay but only to institute a fresh application for Injunction/Conservatory Orders.

5. That Notice of Motion application dated 2nd May 2019 is incompetent, fatally defective, misconceived and frivolous to the extent that the supporting affidavit and authority to act signed by one Peter Kiarie Muraya purportedly on behalf of both the 1st and 2nd plaintiffs/applicants is a nullity since the 1st defendant (W & K Estates Ltd) which is described as a shareholder, subscriber and Director through a nominee of the 2nd plaintiff and whose suit had been struck out cannot sue or instructions and make a resolution for a suit to be filed against itself.

6. Even if this honourable court was to exercise any jurisdiction to grant a temporary stay of execution under Order 42 Rule 6(1), the mandatory condition of provision of security under Order 42 Rule 6(2) (b) has not been fulfilled and therefore no order for stay can be made (the wording is in mandatory terms).

7. Order 22 Rule 22 does not apply to the current application as there is no pending application to the Appellate Court (Court of Appeal) and similarly even if there was such an application, Order 22 rule 22(3) imposes similar condition for provision of security as in Order 42 Rule 6(2) (b) before any order of stay is granted.

8. Consequent to the above grounds, the Notice of Motion dated 2nd May 2019 should be struck out with costs or in the alternative the plaintiffs/applicants should deposit the taxed costs of Kshs 18,765,060/= in a Joint Escrow Account in the names of the advocates within a specified time period pending the institution of a proper application for injunction under Rule 5(2)(b) of the Court of Appeal Rules in the Court of Appeal or any further orders.

4. The defendants also filed the replying affidavit of their previous advocate on record, **Mr. Daniel Gichuru Ngugi**, who avers that the decree dated 25th March 2014 was final in nature and effect and that no appeal had been preferred against the said decree directing the plaintiffs to pay costs to the 1st and 3rd defendants for both the application and suit.

5. He states that he is aware that the applicants have been battling numerous execution processes to save their assets and adds that any blanket order of stay will be detrimental to the 3rd respondent who has not been able to execute his decree for the last 5 years. He also states that any further stay or delay will be to the detriment of the 3rd respondent.

6. At the hearing of the application, **Mr. Murgor SC** advocate for the applicants submitted that the respondents do not have a proper response to the application as they have not presented anyone with the capacity to swear an affidavit. He faulted the respondents for filing a Notice of Preliminary Objection (P. O) that is not founded on pure points of law. He observed that the Preliminary Objection introduces contentions matters of fact that do not assist the respondents in overcoming their major challenge on the issue of legal capacity having been found to lack capacity in the ruling delivered on 25th May 2018 in Miscellaneous 165 of 2017.

7. It was submitted that the respondent's counsel lacked proper instructions to pursue the execution on account of death and mental incapacity of the 2nd and 3rd respondents respectively. It was further submitted that in the event that the costs are paid to the respondents and

eventually the appeal succeeds, there would be no one to refund the substantial amount of money.

8. Counsel argued that when the capacity of an applicant in the execution for costs is challenged, the evidential burden shifts to the said applicant to swear an affidavit to demonstrate that he/she will be able to make the refund. For this argument, counsel relied on the decision in *Fossin Motorcycle Company Ltd v Anne Wambui Wangui* [2018] eKLR.

9. It was submitted that contrary to the respondent's claim that there were no orders capable of being stayed in view of the fact that the courts orders appealed against are negative orders, there was already an interim order of stay which is sufficient proof that execution was imminent.

10. In a rejoinder, **Mr. Kopere**, learned counsel for the respondents submitted that the instant application is for stay of execution pending appeal, in which case, if the applicants believed that the respondents lacked the capacity to respond to the applications then they ought to have applied to substitute them. It was submitted that even though the 2nd and 3rd are incapacitated by death and mental illness, respectively the 1st defendant has capacity as it a limited liability company while the 3rd defendant has a guardian in lunacy. It was submitted that there is no positive order capable of being stayed as the orders of Amin J. delivered on 11th April 2019 is an order striking out the remainder of the suit.

11. Counsel submitted that the court is *functus officio* having dismissed the suit and reference on taxation. Counsel argued that following the striking out of the applicants suit against the 2nd and 3rd defendants, the only avenue available to the applicants was to go to the Court of Appeal under Rule 5(b) of the Court of Appeal Rules since negative orders cannot be stayed. Counsel observed that since there was no appeal against the order striking out the suit, there was no basis for staying the execution.

12. Counsel also noted that the applicants have previously been granted conditional stay of execution which conditions they did not fulfil. It was further submitted under Order 42 Rule 6(2) (b) and Order 22 Rule (3) the applicants are required to furnish security as a condition for stay.

13. Counsel further submitted that the decision in the *Fossin* case (supra) is not applicable to this case as the costs due to the respondents could still be deposited in an interest earning account pending the outcome of the appeal. It was submitted that the death of a party does not mark the end of the case as the 1st and 3rd defendants are still alive and deserve the benefit of any judgment delivered in their favour.

14. Counsel argued that even where the decree holder is deceased, the law envisages that the deceased's legal representative can step into the case and continue with it. Counsel observed that annexure marked "**PM-13**" reveals that the process of appointing an administrator of the 2nd defendant's estate had been initiated.

Analysis and determination.

15. I have carefully considered the application dated 2nd May 2019, the respondents' response and the submissions made by the parties' advocates together with the authorities that they cited. The main issue for determination is whether the applicants have made out a case for the granting of orders of stay of execution pending appeal. The following questions accompany the main issue: -

a) Whether there is a competent appeal on which an order of stay of execution can be granted.

b) Whether the 2nd and 3rd defendants have the capacity to execute for the costs granted following the dismissal of the applicants' suit against them.

c) Whether stay of execution is available as a remedy for the applicants in view of the negative orders striking out the applicants suit and reference.

a) Competence of the Appeal.

16. The respondents' case was that there was no competent appeal before the Court of Appeal on which orders for stay of execution pending appeal could be anchored. The respondents reiterated that the appeal in issue was not against the order striking out the applicant's case but rather against the dismissal of the reference on taxation.

17. The respondents argued that under Rule 11(3) of the Advocate Remuneration Order (ARO), the applicant was required to seek and obtain leave of the court to appeal against the decision on reference. It was the respondents' case that since no leave to appeal was sought and obtained, prior to the filing of the intended appeal, the appeal in question is not competent and by extension, no orders of stay pending appeal can be granted in respect to a defective appeal.

18. I have perused the court file and I note that the applicants filed a Notice of Appeal on 17th April 2019. My finding is that the issue of the competence of the intended appeal is an issue which can only be determined by the court which will be seized with the hearing of the said appeal and not this court. Be that as it may, even assuming, for arguments sake that the Notice of Appeal was filed without the leave of the court, my humble view is that such an anomaly can still be corrected through the filing of an appropriate application for such leave.

(b) Capacity to execute for costs.

19. The applicants challenged the capacity of the 2nd and 3rd defendants to execute for costs on account of the 3rd defendant's mental incapacity and the death of the 2nd defendant. On mental incapacity, I note that it was not disputed that the 3rd defendant has a legal guardian

on account of his mental illness while as regards the 2nd defendant, it was not disputed that the process of appointing an administrator for his estate had already been initiated.

20. It is trite law that the death of a party does not sound the death knell of a suit. Indeed, Order 24 Rule 1 of the Civil Procedure Rules (CPR) stipulates that: - ***“the death of a plaintiff or a defendant shall not cause the suit to abate if the cause of action survives or continues.”***

21. Order 24 Rule 2 of the Civil Procedure Rules on the other hand stipulates that:

“Procedure where one several plaintiffs and right to sue survives.

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or of continues to the surviving plaintiff or plaintiffs alone or against the or defendants dies surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants”.

22. My finding is that the 2nd and 3rd defendants herein have a right to pursue the costs awarded to them through their administrator and legal guardian as the case may be.

(c) Whether there is an order capable of being executed.

23. The respondents’ case was that since the orders issued against the applicants were negative in nature, the orders for stay of execution sought were not available to them.

24. On their part, the applicants maintained that the orders in question were not entirely negative in nature as the impugned order of Amin J. delivered on 11th April 2019 at paragraph 25(c) of the Ruling thereof contained an enforcement clause granting the defendants leave to immediately enforce the payment of costs. A perusal of the Notice of Appeal dated 11th April 2019 shows that the intended appeal is against the Ruling delivered on 11th April 2019.

25. My finding is that the prayer for stay of execution is available to the applicants herein in view of the positive nature of the order granting the respondents leave to enforce the award of costs on taxation.

26. The question which then arises is whether the instant application meets the threshold set for the granting of orders of stay of execution pending appeal. The legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Defendant/Applicant is required to demonstrate that:

“Substantial loss may result unless the order is made; the application has been mad without unreasonable delay; such security as the court orders for the due performance of the decree has been given before the applicant”

27. In the case of *Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat (2013) eKLR*, the court upheld the decision of *M/S Portreitz Maternity v James Karanga Kabia CIVIL APPEAL NO. 63 OF 1997* and stated that:

***“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right*”**

28. In the case of *Meteine Ole Kilelu & 10 Others v Moses K. Nailole, CIVIL APPEAL NO. 340 OF 2008*, the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.

Delay.

29. The instant application was filed on 3rd May 2019, while the impugned order intended to be appealed against was issued on 11th April 2019. My finding is that the application was filed within reasonable time as envisaged under Order 42 Rule 6.

Substantial loss/security for costs.

30. The applicant expressed apprehension that the 2nd and 3rd respondents may not be in a position to refund the amount awarded in costs should the same be paid out to them and the appeal turns out to be successful owing to their legal status/capacity. Counsel for the respondents on the other hand argued that the applicants’ fears could be overcome through the depositing of the amount awarded to the respondents in costs in an escrow account as a condition for stay pending the hearing and determination of the appeal.

31. Courts have taken the position that there is need to balance the interests of both the decree holder, to the fruits of his decree, and the appellants, to the right of appeal. In *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others [2012] eKLR* it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant

should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

32. My finding is that owing to the age and history of this case, that dates back to the year 2010, it will be just and fair to allow the Applicants' prayer for stay of execution pending appeal but on condition that the respondents are given the safety net of security of the amount awarded to them in costs. This court has not lost sight of the respondents' claim the applicants are currently battling numerous executions of decrees and may therefore not be on a position to pay their costs at the end of the intended appeal.

33. For the above reasons, I make the following final orders.

a) There shall be stay of execution of the Ruling/Order/Decree of Lady Justice Farah S. M. Amin delivered on 11th April 2019 together with the certificate of costs dated 9th February 2015 and all other further/consequent proceedings thereto pending the hearing and determination of the plaintiffs' intended appeal.

b) That order No. (a) hereinabove is granted on condition that the applicants deposit the sum of Kshs 18,765,060 in a joint interest earning account to be held by advocate for the applicants and respondents with a bank of repute within 30 days from the date of this ruling.

c) In the event of failure, by the applicants to comply with order no (b) hereinabove, the orders stay of execution granted in order no (a) herein above shall stand automatically vacated in which case, the respondents shall be at liberty to proceed with the execution for the costs as stated in the certificate of taxation dated 9th February 2015.

d) I award the costs of the application to the respondents.

Dated, signed and delivered via Microsoft Teams at Nairobi this 26th day of November 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kopere for Defendant/Respondent

Mr. Otieno for Murgor for Plaintiffs/Applicants

Court Assistant: Silvia