REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 5 0F 2017

GEOFFREY CHEGE KIRUNDI.....APPLICANT

-V-

THE DISPUTE RESOLUTION COMMITTEE

OF KTDA HOLDINGS LIMITED.....1ST RESPONDENT

KTDA HOLDINGS LIMITED.....2ND RESPONDENT

RULING

The application before me is the Notice of Motion dated 19th September, 2018 brought under certificate of urgency of Kithinji Marete Advocate, and under sections 1, 1 A, 3 and 3 A of the Civil Procedure Act, and all enabling provisions of the law.

The reasons for the urgency are set out as*:*

1. The respondents irregularly obtain the decree on 2nd August 2018 against the applicant and left unchecked, they may verily commence execution against the applicant to his prejudice and detriment.

2. The process of obtaining the issuance of the was decree fraught with impropriety and the applicant is reasonably apprehensive that unless this honourable court intervenes as prayed the respondent shall vide such execution, occasion him irreparable loss by visiting humiliation upon him.

3. The applicant has moved the taxing master to remedy the taxation proceedings constituting part of the decree, and proceedings before the learned taxing master would be rendered nugatory by any execution of the decree.

4. There is, in any event, an appeal against the said decision of this court presently pending before the Court of Appeal being Nyeri Civil Appeal number 15 of 2018, which is arguable and has reasonable chances of success and the same shall be rendered nugatory to his irredeemable prejudice and result in the unjust and inequitable enrichment of the respondents.

The Notice of Motion itself seeks two specific substantive orders;

1. *That this honourable court be pleased to vacate and set aside the decree issued on 2nd August, 201 8.*

2. *That thereafter pending the hearing and determination of* ***Nyeri Civil Appeal number 15 of 2018 Geoffrey Chege Kirundi vs. Dispute Resolution Board of KTDA and KTDA – HL****, this honourable court be pleased to order a stay any further proceedings herein.*

The grounds for the Motion as set out on its face include;

1.That the suit was dismissed on 15 November, 2017.

2. That on 6th of December 2017, the court ordered the status quo to be maintained as at 15 November, 2017.

3. That on 20 December, 2017, the Court of Appeal was persuaded that the intended appeal would be rendered nugatory, and granted injunctions sought in the applicant's Notice of Motion dated 22nd November 2017 pending the hearing and determination of the appeal.

The motion is also supported by the two affidavits of Geoffrey Chege Kirundi sworn on 19 September, and 18th October, 2018 respectively.

The same is opposed through the joint replying affidavit of the respondent's sworn by Dr. John Kennedy Omanga, the company secretary of the 2nd respondent.

Parties filed skeletal submissions and 24th October 2018, appeared before me through their respective counsel Mr. Kithinji Marete for the applicant and Mr. Milimo for respondents, where the motion was argued orally.

I have considered the motion, the supporting and rival affidavits, perused the applicant's skeletal submissions, list of bundles and authorities, and the further list of bundles and authorities. I have also perused the respondents list of bundles and authorities. I have reviewed and considered the rival oral submissions.

I must begin with an apology for the delay. First, pressure of work, followed by illness.

Background

On the 15th of November 2017, I delivered a ruling where I struck out, with costs, the applicant's Chamber Summons dated 23rd October 2017 on the grounds that the 1st respondent was a non-legal entity incapable of being sued or suing, that the suit was sub-judice and hence I was bereft of jurisdiction.

The applicant filed Civil Application No. Nai 133 of 2017 which was consolidated with 132 of 2017 before the Court of Appeal under rule 5(2) (b) Court of Appeal Rules

The Court at paragraph 24 of its decision in **Kiiru Tea Factory Ltd v KTDA Holdings and another [2017] eKLR** held on 20th December 2017.

> ***As regards the issue whether the appeals shall become nugatory if stay is not granted in application number 132 of 2017, it is plain to see that unless the respondents are stopped from conducting elections or doing any of the acts set out in sub paragraphs (a) to (m) of the notice of motion dated 22nd of November 2017, the appeals shall be rendered meaningless and the purpose and object of the appeal shall be defeated. In short, if the appeal succeeds, it shall be rendered nugatory if injunction is not granted. We accordingly allow the applications, granted the orders sought in both applications no. 132 of 2017, no. 133 of 2017, which are consolidated.***

It is apparent that on 13th March 2018, the respondents filed party and party bill of costs. Two certificates of taxation were issued by two separate deputy registrars on the 25th July 2018 and on the 2nd August 2018 for the sum of Ksh.1,090,510/=. The Second one accompanied a decree for the sum of Ksh. 2,183,505/=.

From the record, the applicant brought a Chamber Summons dated 10th August 2018 seeking orders *inter alia:*

> ***that the taxation proceedings before the learned taxing master Honorable P. Mutua, Deputy Registrar taxing the 1st and 2nd respondents party and party bill of costs dated 5 February, 2018 at Kenya shillings. 1, 090, 510. And Kenya shillings. 1, 092,090, respectively be and are hereby set aside***

The application was grounded the fact that the taxation had proceeded in the absence of counsel for the applicant, due to inadvertent misdiarising. Secondly, that a reading of my ruling would demonstrate that the 1st respondent, not being a legal entity was not capable of being awarded costs.

While that application is still pending determination before the Deputy Registrar, the applicant filed this Motion.

Submissions

There were lengthy submissions on each side.

Counsel for the applicant argued that this was an application for stay of the proceedings. That the Court of Appeal had found that the applicant had an arguable appeal, and had this court's order been positive order granting the respondents something, the court of appeal would have granted stay of proceedings. That in spite of my ruling that I had no jurisdiction to deal with the matter I still had inherent jurisdiction under Order 42 rule 6(1) of the CPR to grant the orders sought. That the 1st respondent whom I had found unsuable had filed a bill of costs, and obtained a certificate of costs. Further that what is to follow are execution proceedings, leaving the applicant with no recourse. That the award of costs led to ancillary proceedings and these are the ones that needed to be stayed. That having awarded costs it would be shirking my responsibility if I accepted the argument that I had already declared that I did not have jurisdiction. That I had jurisdiction on proceedings related to the order awarding costs. It would be shirking responsibility as a court with the powers under Article 159 and 163 of the Constitution and sections 1, 1A, 1B, 3 and 3A of the CPA. It was also argued that this court has supervisory jurisdiction over the proceedings before the Deputy Registrar. That this court was only functus *officio* on the preliminary objection but not on the ancillary proceedings.

I was referred to **Peterson Ndung'u & 5 others vs. KPLC LTD [2018] eKLR**

I was referred to *Black's Law Dictionary*'s definition of proceedings per Kuloba's *Judicial Hints* on *res judicata*. I was also referred to *Mulla: The Civil Procedure Code 18th Edition (2012)* on the court's inherent *jurisdiction to stay proceedings pursuant to its own order, in view of an intended appeal.* It was argued that the bill of costs and the subsequent proceedings all emanated from my orders and were therefor subject to exercise of my inherent jurisdiction. The applicant relied on the American Case of **Martin Ozinga III, et al ., v U.S Department of Health and Human Services, et al No. 13C 3292** on the inherent power of the court to stay proceedings and the legal standard to be considered; **Tatu City Limited &3 others v Stephen Jennings &6 others [2016]eKLR** on the definition of proceedings as *a process or an activity prescribed by law or procedure which seeks the power of the court or tribunal as the case maybe, to enforce the law or obtain legal remedies pursuant to a law;* **Ferdinand Ndung'u Waititu vs. I.E.B.C & 8 Others [2013] eKLR** as cited with approval in **Tatu City** *on* further definition of stay of proceedings; as *stay the proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act… This implies that the rationale for stay is the pendency of an act or step either required by the court or sought a party. It may be grounded on a statutory provision or on the need of a part based on a plea for the plenary exercises of the court's discretion.*

The applicant urged that his application was not an abuse of the process of court and relied on the holding in **Hassan Nyanje Charo v Khatib Mwashetani &3 others [2014] eKLR.** He reiterated the plea that his prayer no 4 in the application be allowed and a stay of proceedings be granted.

Mr. Milimo for the respondents strongly opposed the application.

He pointed out that the applicant had abandoned his prayer no. 3 and urged the court to consider it dismissed. He referred to s. 2 of the CPA on definition of a decree as the… *formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint….* He also argued that the applicant had not established any grounds for seeking that prayer. In any event the fact that the decree had not been served on the applicant did not invalidate it see **R vs RM's court MKS & Stephen Maundu Muia [2004] eKLR.**

He argued that the court lacked the power to set aside its decree having determined it had no jurisdiction in the first place.

Arguing the fact that this court was now *functus officio* he quoted from **Raila Odinga &2 Others v I.E.B.C&3 others** (cited in **Peterson Ndung'u**) above:

On the principle of *functus officio* … The Supreme Court of Kenya rendered itself thus'…. *the functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or the decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. One such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker…'*

He urged that to interfere with the decree in any manner, would be to usurp the powers of the Court of Appeal in Nyeri Civil Appeal no 17 of 2017.

With regard to Prayer 4 it was argued that the applicant had not specified the proceedings he sought to be stayed. However, from the applicant's affidavits it was clear that it targeted the decision of the proceedings before that taxing master. I was referred to Black's Law Dictionary 9th Edition's definition of proceeding as *the regular and orderly progression of a lawsuit including all acts and events between the time of commencement entry of judgment.*

With regard to the proceedings before the Taxing Master, it was Mr. Milimo's argument that those proceedings could only come before this court by way of a Reference as envisioned by the Advocates' Remuneration Order and this court could not confer upon itself powers it did not have by law. The taxing master had concluded his work and issued a certificate of costs. The other proceedings were not within the purview of this court. In any event these prayers were sub-judice the application pending before the Deputy Registrar dated 10th August 2018. The applicant was once again engaging in a multiplicity of suits. He was invoking two parallel forums to litigate the same issue-seeking the setting aside of the taxing master's orders before the taxing master, and bringing this application to stay 'proceedings'. In any event the application was *res judicata* as it was the same application the applicant had placed before the court of appeal. The applicant ought to have sought all the orders he needed before the Court of Appeal. He cited **John Florence Maritime Services Limited &Anor vs. Cabinet Secretary for Transport& Infrastructure &3 Others [2015] eKLR** where the court cited with approval **Henderson v Henderson [1843] 67 ER 313: -** where it was held

> *"…..where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time….*

He also argued that there can be no stay of an order for costs relying on **Francis Kabaa vs. Nancy Wambui &Anor [1996] eKLR (*also*** cited in ***Nyamogo &Nyamogo Advocates vs. Mwangi (2008) 1 E.A 283*** and ***Equity Bank Ltd v Capital Construction Ltd & 3 Others [2014] eKLR)*** where none other than the Court of Appeal held that there could be no stay on costs because if the appellant was successful he could get a refund.

It was also argued that the application had been brought 10months after the order of the court, hence unreasonable delay. That it was an

afterthought prompted by the determination of the taxation proceedings, and not even offering any security in flagrant contravention of order 42 rule 6 sub rules a and b. See **Equity Bank** case above.

Finally, after distinguishing the authorities cited in support, that the application had no merit and ought to be dismissed.

In response Mr. Marete reiterated that there is **an appeal** and the award of costs was part and parcel of the appeal, and any decision allowing the realization of that order would render the appeal nugatory.

That there was no delay as the decree was issued on the 2nd of August 2018 and provoked the application of 20th September 2018.

That the applicant stood to lose money to a party he had been told was non -existent. That was prejudicial.

That order 42 was clear. 'It is not in doubt that there is a comma after the word BUT…stay of proceedings is discretion of the court. **Turbo High way Eldoret Limited v Nicholas Karira t/a Karira &Co Adv [2011] eKLR** where the Judge reiterated the court's unfettered discretion to order stay of proceedings pending appeal in the interests of justice and in obeisance to sections 1A and 1B of the CPA.

On *res judicata* he argued that this issue was not live as at the time they moved to the Court of Appeal. And on *sub-judice*, he responded that the Taxing master had been moved to set aside his orders under the relevant law, and that had nothing to do with what is before me.

On the argument that this court had in striking out the applicant's application given a negative order, he submitted that the award of costs was a positive order.

Determination

The issue is whether this court can issue an order for stay of proceedings in the circumstances of this case, under order 42 rule 6 (1) which provides for **'Stay in case of appeal'** in the following terms

> *No appeal or second appeal shall operate as a **stay of execution or proceedings** under **a decree or order appealed from** except in so far as the court appealed from may order but, the court appealed from may for sufficient cause **order stay of execution of such decree or order**, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

1. Are there any proceedings pending before me?

There are no proceedings pending before me. The matter that was before me was finalized the moment I struck out the applicant's application.

The ancillary proceedings to which the applicant makes reference are before the Deputy Registrar vide the applicant's own application seeking to set them aside. There is a procedure in law through which the proceedings before the Deputy Registrar can become proceedings before me. To the extent that there is an application before the DR seeking orders whose effect would be exactly the same as the orders sought before me in this application, the application before me is *sub judice.*

And while at res judicata, it is important to point out that the decision I made is the subject of an appeal. The applicant cannot be heard to be splitting hairs. The holding in **John Florence Maritime Services Limited &Anor vs. Cabinet Secretary for Transport& Infrastucure &3 Others [2015] eKLR** where the court cited with approval **Henderson v Henderson [1843] 67 ER 313: - and I quote**

> *The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to **every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time**…. (emphasis is mine)*

The applicant cannot be heard to say that the issue of costs arose 10 months after the delivery of my ruling. The order of costs was made at the same time as the striking out order. At the time the applicant filed his appeal and the application in the Court of Appeal the order for costs was in place. It is an issue the applicant ought to have raised before the court of appeal as it was inevitable that proceedings related to the order for costs would follow the event. I find support for this in **Republic v The Commissioner for Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR** the court cited from The **Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007,** explaining the jurisdiction of the Court of Appeal;

> *"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2) (b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and **a stay of further proceedings**.*

It was always available to the applicant to seek the orders sought before me together with the injunctive orders he sought and obtained in the Court of Appeal.

With regard to stay for costs there are numerous authorities that it is an order that is incapable of being stayed. See in addition **Raymond M**

Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, where **Makhandia, J** (as he then was) held:

> *The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay.*

From the certificate of urgency to the supporting affidavits and the averments in the supporting affidavits, this application is clearly an application for an order of stay against costs. It has been held by the Court of appeal that this is an order against which stay does not attach.

It is not correct to argue that the applicant is left without recourse. The applicant has an application pending before the Deputy Registrar seeking similar orders. Those proceedings are properly before the Deputy Registrar and the applicant should first deal with the application to its final determination instead of seeking similar orders from this court as well.

This matter is pending on appeal before the Court of Appeal. It is not possible that the appeal could be just about the striking out and not about the order awarding costs. That has been made very clear by the applicant who argues that that order was wrongfully made. How then can this court be asked to deal with issues pending before the Court of Appeal? It is not right. That is the right forum for any further proceedings with regard to orders emanating from this court.

The notice of motion dated 19th September 2018 is dismissed with costs.

Dated, delivered and signed this 21st day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Jerusha-Court Assistant

Mr.Ochieng for Respondent

No appearance for Mr.Marete for Applicant who had indicated availability at 12.00 noon but not here by 12.15pm.

Mumbua T Matheka

Judge

21/1/19