



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
MISC. CAUSE NO. 71 OF 2018
IN THE MATTER OF THE ADVOCATES REMUNERATION (AMENDMENT) ORDER 201

AND
IN THE MATTER OF TAXATION OF ADVOCATES/CLIENT BILL OF COSTS

BETWEEN
PARMUATI OLOISHURU KORE.....APPLICANT
VERSUS
ERIC NTABO AND CO. ADVOCATES.....RESPONDENT

RULING

The applicant **Parmuati Oloishorua Kore** filed this notice of motion dated 9/12/2018 seeking stay of execution of the certificate of costs issued by the Deputy Registrar of the High Court in favour of the Respondents. It is made under Article 159 2(1) of the constitution; paragraph 11 (4) of the Advocates Remuneration Order 2009 rule 14 and 15 of the Auctioneer Rules Section 1A, 1B, 3A, 79(1) and 95 of the Civil Procedure Act order 42 Rule 6(1) and 51 of the Civil Procedure Rules and the enabling provisions. By this notice of motion, the applicant seeks to file a reference to set aside the certificate of taxation.

It is supported by the affidavit of the applicant in which he deposes that he is proprietor of the whole of land parcels Kajiado/Olcharo/Onyore 4283 scheduled for sale on 4/11/2018 to satisfy the decree arising out of the certificate of cost of Ksh. 6,055,997. That the applicant is dissatisfied with the entire taxation and if the schedule sale is allowed to proceed he will suffer substantial loss. Further, that the delay in approaching the court to file a reference was occasioned in circumstances beyond his control.

In his replying affidavit Mr. Eric Ntabo, the Respondent opposes the application for being vexatious, incompetent and otherwise an abuse of the court process. He further deposes that the Advocate-Client bill of costs in Kajiado ELC No. 19 of 2017 was properly filed and taxed by the Deputy Registrar. That it was after the ruling a certificate of costs was extracted which was adopted as a Judgement of the court capable of being enforced under the rules. That the attachment of property and notification of sale issued by the Auctioneer against the applicant is aimed at satisfying the decretal amount arising from the certificate of costs.

Submissions by the Applicant

Submitting on behalf of the applicant learned counsel Migosi-Ogamba argued that following the certificate of costs the respondent never gave the applicant a decree to settle the certificate of costs. Learned counsel took issue with the advertisement and sale of the parcel of land measuring over 304 acres valued at Ksh. 608,458,000 to realize the decretal amount of slightly over 6,000,000 (six million).

According to the learned counsel the applicant is willing to settle the fair costs incurred by the respondent without resorting to the sale of his property which comprises his matrimonial home. Learned counsel submitted that the high Court has unlimited discretion to enlarge time to enable the applicant file a reference on the certificate of taxation. The principles and the nature of exercising such discretion for the applicant argued counsel are settled as stated in the cases of: **HayWood v Cope (1858) 25 Beav 140, Stanley Kahoro Mwangi v 2 Others v Kanyamwi Trading Company Ltd 2015 eKLR, Mwangi v Kenya Airways Ltd [2003] KLR, Fakir Mohammed v Joseph Mugambi & 2 Others, Civil Appeal No. 332 of 2004.**

On the application for stay of execution counsel submitted and relied on Order 42 Rule 6(1) of the Civil Procedure Rules. He argued that the applicant has demonstrated sufficient reasons why the application was not filed within time. That the applicant remains the registered

proprietor of the suit property subject matter of the Auctioneer. That in view that he is aggrieved with the judgement of the court if the land is sold he will suffer substantial loss not capable of being compensated by way of damages.

It was also learned counsel's contention that the suit land is set to be subdivided to comply with the order of the Environment and Land Court such referred as 400/2017 in a judgement dated 20/11/2018. In the circumstances any alienation, sale or transfer would interfere with the interpretation of the judgment of the court. Learned counsel in buttressing his submissions placed reliance on various authorities: **Stanley Kahoro Mwangi & 2 Others v Kanyamwi Trading Company Limited [2015] eKLR**, **Fakir Mohammed v Joseph Mugambi & 2 Others, Civil Appln No. Nai 332 of 2004**, **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, **Hassan Nyanje Charo v Khatib Mwashetani & 3 Others [2014]**, **Kenya Power & Lighting Company Limited v Eshter Wanjiru Wokabi [2014] eKLR**.

Submissions by the Respondent

Counsel for the respondent submitted that though the court has discretion in the matter it cannot be exercised whimsically but on sound legal principles. In learned counsel's contention there has been inordinate delay on the part of the applicant and as such no discretion powers should be exercised to such an indolent litigant. On this ground learned counsel relied on the case of **Peter Wambugu & 6 Others v Kenya Agriculture Research Institute Nakuru Civil Appeal No. 271 of 2015**, **Sruth v Clay 1967 Eng. R55**.

Secondly, on substantial loss learned counsel submitted and argued that the applicant has not shown that substantial loss will be occasioned in a judicial process meant to settle the judgement of the court.

Analysis and Determination

In considering the application, it is well settled law that an application seeking stay of execution must demonstrate sufficient reasons of depriving the judgement creditor the facts of the fruits of his judgement.

The principles to guide the court in exercising any such discretion to stay the execution of the judgement are clearly provided for in the Civil Procedure Rules and in several decisions of the superior courts.

The law on stay of execution pending appeal is clearly stated in Order 42 Rule (6) (1) of the Civil Procedure Rules 2010. An application of stay of execution according to the Civil Procedure Rules can only succeed if the applicant satisfies the following criteria:

- (1) The applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay,**
- (2) Secondly, from the facts of the case appealed from the applicant would suffer substantial loss unless stay of execution is granted**
- (3) That the application has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.**

It is trite that the relief on stay of execution is an equitable and discretionary remedy aimed at preserving the status quo pending a particular action on the impugned judgement of the court. For that reason, under Order 42 Rule (6) (1) of the Civil Procedure Rules the applicant must satisfy the legal threshold for the discretion of the court to apply. The aforesaid courts of equity sometimes have been reluctant to order for stay of execution on money decrees unless there is sufficient reason to do so. The rationale behind this principle being generally the ability of the decree holder to refund the money in the event he loses an appeal. The other justification is that once there is a valid judgement from a competent court, the winner has a right to payment and in default commence execution proceedings. But again this is also dependent on the peculiar circumstances of each case.

It is also similarly accepted that where the subject matter is immovable property like land which on execution is likely to be sold, transferred and conveyed to third party before of an appeal is heard and determined the court may exercise discretion so as not to render the appeal nugatory.

In overall how do the notice of motion and facts of this case fair in relation with the grounds under Order 42 rule 6(1). The question to be answered is whether the applicant is guilty of laches. (a) Whether the applicant is guilty of laches.

From the affidavit evidence of both parties and submissions by counsels for the applicant and the respondent there is no dispute that this condition on delay is not disputed. It is apparent that applicant did not approach timeously in having his application heard to challenge the certificate of costs. However, the applicant has set out material facts and evidence why it was not possible to comply with Rule 11(1) of the Advocates Remuneration Order to file and serve the Respondent within 14 days from the date on the certificate of costs.

In the matter at hand the respondent through his agent the auctioneer has placed an advertisement to dispose off by public auction the applicants suit land in question. The law once transferred cannot be resold back to the applicant. The risk of injustice may likely set in whereas the applicant has deponed that he was not aware of the existence of the certificate of costs.

According to the applicant as at the time of the ruling by the Deputy Registrar he had travelled to the neighbouring Republic of Tanzania where he stayed for some time. That on his return back to Kenya he heard of the notification of sale and promptly instructed counsel to file this application. There is no dispute that the respondent is in possession of judgement of the court capable of being enforced through the court process. In the same view the applicant has a right to access court to pursue an appeal to its furthest extent within the confines of the

law. There is every possibility that if this court declines to grant stay on grounds that the applicant is guilty of laches there is risk of the appeal being rendered nugatory.

Indeed, under the Advocate's Remuneration Order and the Civil Procedure Rules it is trite that the rules provide a timetable of litigation which ought to be complied with by litigants at all times.

From the same statutes under Order 51 of Civil Procedure Rules, the discretion of the court is not fettered to extend time. For a party to bring his or her action on appeal or review out of time. The present position of the law is that in exercising discretion the court has to consider: (a) The length of the delay and the reasons for such a delay whether the applicant could suffer substantial loss (b) Whether the applicant has an arguable appeal (d) whether the applicant is ready to provide security (e) The degree of prejudice or failure of justice likely to be occasioned by the order on stay of execution. The principles in the case of **Nicholas Kiptoo Arap Korir Salat v the Independent and Electoral Boundaries Commission & 7 Others 2014 eKLR**, **Hassan Nyanje Charo v Khatib Mwashetani & 3 Others 2014 eKLR** takes an approach for the court to only exercise discretion where in balancing the rights of the parties that satisfies the interest of justice.

In the present application I have considered the reasons advanced by the applicant which occasioned the delay in filing the reference against the certificate of costs. From the affidavit evidence the applicant was out of jurisdiction of this court. That aspect combined with the draft grounds on the reference against the taxation by the Deputy Registrar is sufficient reason for this court to exercise discretion to extend time which a reference is to be ventilated on appeal. Further the material that the subject suit land valued over Ksh. 6,000,000 is to be sold to satisfy a decree of about Ksh. 6,000,000 is one aspect that makes this court to have the respondent restricted from proceeding further until the reference is heard and determined on the merits.

In the event stay is denied and at the end of a reference determination, the applicant succeeds the risk of injustice to him would be the difficulty in restoring back the land. For that reason alone, to competing interest persuades me to enlarge time from which the reference can be filed out of time.

Substantial Loss

On the other hand, the applicant has submitted that he will suffer substantial loss if the subject suit law is allowed, conveyed and transferred to a third party before the reference is heard and determined.

The respondent counsel urged this court to take into account the pending decree of the court. The persuasive decision in the case of **Limalype-Hell Finance Ltd v Baker 1992 4ALL ER 887** held as follows on what constitutes substantial loss:

“Where an unsuccessful defendant seeks a stay of execution pending an appeal to the court of Appeal it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without an appeal which has some prospect of success.”

Execution is a culmination of finalized proceedings and there is a valid judgement and a decree or order of the court to be satisfied by the losing litigant. Given all these and other circumstances the fundamental question as to what constitutes substantial loss has been deponed in the case of **Antone Ndiaye v African Virtual University 2015 eKLR** where the court quoting the decision in **Sewakarubo Dealzon v Ziwa Abby HC TOOMAD 178 of 2005** went on to state that:

“Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real, worth or value, as distinguished from a loss without value or loss that is merely nominal, insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals especially in a Commercial court such as ours, where the transactions typically tend to lead to colossal decretal amounts.”

These principles do apply to the facts of this case. In the instant application and on the strength of the affidavit evidence by the applicant he has established that substantial loss is likely to incur if the land is sold before the reference is heard and determined by the court. The case involves a substantial question of law as to whether the order on costs as arrived at by the Deputy Registrar should be set aside, varied or left to stay as taxed.

To me if the respondent is allowed to press on with the public auction of the parcel of land to settle the decree the applicant will suffer substantial loss if stay of execution is not granted before the reference is determined. The loss in the circumstances of this case is irremediable.

In respect to security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgement. As such any order made on stay of execution is to take into account the interest and rights of the decree holder so as not to make him feel that the fruits of judgement awarded by the original court are being taken away by an appellate court during the pendency of the appeal.

The scope of the applicability of this ground is for the applicant to fulfil the condition of providing security for due performance of the decree or deposit the entire decretal amount with the Registrar of the court.

Taking into account the facts of this case an order for security for due performance of the decree qualified at Ksh. 5,000,000 be deposited with the court by the applicant until his claims at the reference are heard and determined.

Conclusion

In light of the above, I am satisfied that the application under consideration succeeds and the following declarations are made:

- (1) The applicant's notice of motion for stay of execution pending appeal is hereby allowed.**
- (2) That the applicant has leave of this court to file his Reference under Rule 11(1) of the Advocates Remuneration Orders out of time.**
- (3) That the reference be deemed to have been filed within time**
- (4) The applicant to deposit the entire decretal sum of Ksh. 5,000,000 in a joint earning interest of both counsels in a preferred bank of their choice within 45 days from today's date.**
- (5) That in default of depositing of security within the time stipulated in this Order of stay of execution automatically lapses.**
- (6) The applicant shall file and serve the reference upon the respondent within 21 days from today's Order.**
- (7) The respondent shall have the costs of this application which is to abide the outcome of the reference.**

Dated, delivered and signed in open court at Kajiado this 27th February, 2019.

R. NYAKUNDI

JUDGE

Representation

Mr. Musyoka for the Applicant –present

Mr. Naikuni holding brief for Ntabo for the Respondent