



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 40 OF 2019

NOVATECH LIMITED.....APPELLANT/APPLICANT

VERSUS

WILLIAM YIDAH ANZEZE.....1ST RESPONDENT

KENVAH CONSTRUCTION LIMITED.....2ND RESPONDENT

RULING

1. By a notice of motion dated 29th March, 2019; brought Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the Appellant/applicant pray for orders **THAT**:

1) This Honorable Court be pleased to order stay of execution of the Ruling of the learned Magistrate delivered on 21st March, 2019 and execution proceedings in KISUMU CMCC NO. 598 OF 2017 KENVAH CONSTRUCTION LIMITED KENVAH CONSTRUCTION LIMITED V NOVATECH LIMITED & 4 OTHERS (hereinafter referred to as *the suit*) pending the hearing and determination of the Appeal

2) Costs of be in the cause

2. The application is based on the grounds among others that the applicant is aggrieved by a Ruling dated on 21st March, 2019 in which the trial court declined to set aside the judgment entered in default defence.

3. The application is also supported by an affidavit sworn on 29th March, 2019 by KENNETH IMBUGA BANDI who describes himself as a director of the Appellant/Applicant in which he reiterates the grounds on the face of the application. The deponent avers that the 2nd Respondent has commenced execution proceedings as demonstrated by a copy of the Garnishee Decree Order Nisi (**KIB-1**). Applicant has also annexed a letter by which its advocate applied for proceedings (**KIB-2**). In his further affidavit sworn on 25th April, 2019,

4. The 2nd Respondent has opposed the application by way of a replying affidavit sworn on 05th April, 2019 by SAMUEL KIMANI who describes himself as the 2nd Respondent's project manager. He avers that the Applicant and the 1st Respondent were served with the plaint and summons in *the suit*, they entered appearance on 13th December, 2017 and having failed to file a defence, the 2nd Respondent applied for judgment in default of defence which orders were granted.

5. The deponent avers that the Applicant and the 1st Respondent were served with a Notice of Entry of Judgment subsequent to which on 12th February 2019, they filed a Notice of Motion (**SKN-1**) seeking stay of execution and leave to settle the debt in instalments which was heard and dismissed by a ruling (**SKN-2**) dated 13th March, 2019.

6. It has further been averred on behalf of the 2nd Respondent that the Applicant and the 1st Respondent did not appeal the ruling dated 13th March, 2019 whereupon it commenced execution proceedings by attaching the Applicant and the 1st Respondent's accounts and was issued with Garnishee Decree Order Nisi (**SKN-3**).

7. It has additionally been averred on behalf of the 2nd Respondent that the Applicant and the 1st Respondent filed a Notice of Motion dated 16th April, 2018 (**SKN- 4**) seeking stay of execution and leave to defend the suit which was heard and dismissed by a ruling (**SKN-5**) dated 21st March, 2019 which Ruling the Applicant now appeals against.

Applicant's submissions

8. The applicant holds the view that the present application is not the same as the ones dated 12th February 2019 and 16th April, 2018 and that the 2nd Respondent is estopped from raising the said issue of *res judicata* having not raised it when the Applicant filed the latter application. The Applicant further argues that the parties to the previous applications were not the same for the reason that it was represented by a different advocate.

9. The Applicant contends that it was condemned unheard and it is likely to suffer substantial loss if stay of execution is not granted for the reason that the 2nd Respondent has not demonstrated that it is able to refund the decretal sum should the appeal succeed. Reliance was placed on **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR** where the Court of Appeal stated:

This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

10. The Applicant concedes that the ruling made on 21st March, 2019 is a negative order but argues the trial court gave a positive order when it fixed the matter for mention on 2nd May, 2019 to give directions on execution. The applicant contends that the present application was brought without delay and it is ready to give security since the decree though a money decree is likely to cause it undue hardship. In support thereof, the Applicant relied on Kenya **Hotel Properties Limited v Willesden Investments Limited [2007] eKLR** and **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the courts held that with time it has become necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.

2nd Respondent's submissions

11. The 2nd Respondent holds the view that the issue of stay of execution relating to the decree dated 9th January, 2018 was litigated in applications dated 12th February, 2018 and 16th April, 2018 and determined with finality by rulings dated 13th March, 2018 and 21st March, 2019 respectively and is under the provisions of Section 7 of the Civil Procedure Act therefore *res judicata*.

12. In support thereof, reliance was placed on **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** where the Court of Appeal restated the elements of *res judicata* as:

- (a) **The suit or issue was directly and substantially in issue in the former suit.**
- (b) **That former suit was between the same parties or parties under whom they or any of them claim.**
- (c) **Those parties were litigating under the same title.**
- (d) **The issue was heard and finally determined in the former suit.**
- (e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

13. The 2nd Respondent also relied on **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** where the Court of Appeal held that:

There is no doubt at all that provisions of section 7 of our Civil Procedure Act relating to *res judicata* in regard to suits do apply to applications for execution of decrees but there is no doubt, also that these provisions are governed by principles analogous to those of *res judicata*.

14. The 2nd respondent submitted that the order issued on 21st March, 2019 was a negative order dismissing the Applicant's application dated 16th April, 2018 which was seeking the setting aside of the *ex parte* judgment and is incapable of being executed except for costs. In support thereof, reliance was placed on **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** where the court held:

But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.

15. The 2nd Respondent additionally argued that the Applicant has not met the threshold for grant of stay of execution pending appeal under the provisions of Order 46 (6)(2) of the Civil Procedure Rules which requires that such an application be brought without delay, substantial loss be demonstrated and security be offered.

16. Concerning the appeal being rendered nugatory, the 2nd Respondent contends that this is a money decree and the appeal is unlikely to be rendered nugatory. Reliance on this point was placed on **Kenya Shell Ltd v Benjamin Karuga Kibuku and Ruth Wairimu Karuga, Nairobi Civil Application No 97 of 1986, Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR and Corporate Insurance Company Limited v Emmy Cheptoo Letting & Another [2015] eKLR.**

ANALYSIS AND DETERMINATION

17. I have carefully considered the notice of motion *vis a vis* the affidavits on record and the submissions and various authorities cited on behalf of the parties.

LEGAL PRINCIPLES

18. The *locus classicus* on *res judicata* is Section 7 of the Civil Procedure Act. It applies when the suit or issue in dispute is directly and substantially the same as the issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title and the issue was heard and finally determined in the former suit and where the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

19. It is on record that the parties to the current application and the applications dated 12th February, 2018 and 16th April, 2018 are the same. In the applications dated 12th February, 2018 the Applicant sought orders for stay of execution and leave to settle the decretal sum in installments. In the application dated 16th April, 2018, the Applicant sought orders for stay of execution and setting aside of the *ex parte* judgment. The current application also seeks stay of execution pending appeal. The subject matter that is directly and substantially in issue in the 3 applications is a prayer for stay of execution of the decree in this matter. There is no doubt that the said issue has been heard and finally determined by a court of competent jurisdiction by way of rulings dated 13th March, 2019 and 21st March, 2019.

20. From the foregoing, I have come to the conclusion that the issue in the current application is *res judicata* notwithstanding that it was previously determined in interlocutory applications. In arriving at this decision, I find fortification in the decision in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others (Supra)**.

21. It is worthy to note that the order issued on 21st March, 2019 that the Applicant seeks to stay is a negative order dismissing its application dated 16th April, 2018 with costs. In the light of the decision in **Western College of Arts and Applied Sciences v EP Oranga & 3 others (Supra)**, I find and hold that any execution in respect of that application can only be in respect of costs and that there is nothing arising out of the lower court's ruling for this Court, in an application for a stay.

22. Having said that, I find that it would be an exercise in futility to make any determination on whether the current application was brought without delay; whether substantial loss has been demonstrated and whether security has been offered.

23. In the result, this court finds no merit in the applicant's notice of motion dated 29th March, 2019 and the same is hereby disallowed with costs to the 2nd Respondent.

DELIVERED AND SIGNED IN KISUMU THIS 30th DAY OF May 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For 1st Appellant/Applicant -Mr Osino

For 2nd Respondent - Mr Jeji/Mr Nderitu