



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 50 OF 2016

IN THE MATTER OF: ARTICLES 10, 40, 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 40, 47 AND 50 OF THE CONSTITUTION REGARDING PROTECTION OF RIGHT TO PROPERTY RELATING TO MOTOR VEHICLE REGISTRATION NO. KCG 475L

AND

IN THE MATTER OF: REGULATION 15(3) OF THE KENYA NATIONAL HIGHWAYS AUTHORITY (REGULATIONS), 2013, L.N. NO. 86 OF 2013

AND

IN THE MATTER OF: ABUSE OF LEGAL POWER BY THE KENYA NATIONAL HIGHWAYS AUTHORITY (REGULATIONS), 2013, L.N. NO. 86 OF 2013

AND

IN THE MATTER OF: ABUSE OF LEGAL POWER BY THE KENYA NATIONAL HIGHWAYS AUTHORITY IN THE CAPRICIOUS MANNER IN WHICH THEY HAVE DETAINED MOTOR VEHICLE REGISTRATION NO. KCG 475L

BETWEEN

1. RICRAC COMPANY LIMITED

2. ERIC KIBAARA NDERITU.....PETITIONERS

VERSUS

1. KENYA NATIONAL HIGHWAYS AUTHORITY

2. OCS KALOLENI POLICE STATION.....RESPONDENTS

RULING

The Application

1. By a Notice of Motion dated 8th March, 2019 and filed herein on 13th March, 2019 the Applicant prays for the following orders:

(a) That this application be certified as urgent and in view of the urgency service in the first instance be dispensed with and the application be listed for hearing on priority basis.

(b) That a stay of execution of the Judgment delivered on 24th November 2017 be granted preventing the Petitioners, his agents, servants, assigns or anyone acting through him from in any way executing against the 1st Defendant pending the hearing and

determination of this application inter-partes.

(c) That a stay of execution of the Judgment delivered on 24th November 2017 be granted preventing the Petitioners, his agents, servants, assigns or anyone acting through him from in any way executing against the 1st Defendant pending hearing and determination of the Appeal filed by the 1st Defendant herein.

(d) That the costs of this application be provided for.

(e) That this Honourable Court be pleased to make such further or other orders as it may deem fit and just to grant.

2. The application is premised on the grounds set out therein and is supported by Affidavit of **Jessica Mbae** sworn on 8th March, 2019. The deponent states that she is a Senior Legal Officer of the 1st Respondent herein and has the authority to depone to the affidavit.

3. The Applicant's case is that the Petitioner filed suit against the Respondents herein. The 1st Respondent subsequently instructed the firm of **Orego & Odhiambo** to defend the Petition to its determination. The said firm had the conduct of the matter until Judgement was delivered on the 24th November, 2017. That being dissatisfied with the Judgement of the High Court, 1st Respondent instructed the firm of **Igeria & Ngugi Advocates** to file an Appeal in the Court of Appeal challenging the High Court's decision. The firm filed a Notice of Appeal and requested for proceedings. On advice of the 1st Respondent's advocates on record, the 1st Respondent/Applicant believes it has an arguable appeal with a very high chance of success. Unless stay of execution of the Judgment herein pending the hearing and determination of the appeal is granted, the 1st Respondent's appeal shall be rendered nugatory. The Applicant/Respondent avers that it discovered at a late stage no stay of execution had been sought on delivery of Judgment by the previous advocate on record, hence this application became necessary. In the meantime, however, the Petitioner filed a Bill of Cost and the file was moved to the Deputy Registrar for taxation wherein it remained pending Ruling which Ruling was delivered on the 30th August, 2018. The 1st Respondent intends to pursue an appeal in the Court of Appeal having filed a Notice of Appeal and obtained the superior Court's proceedings but is under imminent threat of execution by the Petitioner. The Applicant states that it is therefore necessary for this Court to grant the stay of execution pending the hearing of the 1st Respondent's appeal. Should such stay not be granted, it would render the Appeal nugatory and cause the 1st Respondent substantial loss.

4. That the 1st Respondent is ready to abide by any order as to security as may be made by this Court and/or deposit the Judgment amount into Court and undertakes to prosecute the appeal expeditiously. The Applicant states that the application herein has been brought within reasonable time before execution proceedings and prays that the same be allowed in the interest of justice.

The Response

5. The motion is opposed vide a Replying Affidavit sworn by **Joseph Karanja Kanyi** on 28th March, 2019.

6. Mr. Kanyi is the learned counsel for the Petitioner. The Petitioner's case is that it is true as stated in paragraph 2 of the Supporting Affidavit that this Court delivered itself in a Judgment on the 24th day of November, 2017. That further to the foregoing, no Appeal has ever been preferred against the said Judgment nor leave to Appeal out of time. The Respondent/Petitioner states that the Applicant has always been to pay the decretal sum, and proved this assertion by copies of correspondences marked as "**JKK 1**". Further, the Petitioner avers that the Notice of Appeal marked as annexure "JM 1" to the Supporting Affidavit does not constitute any Appeal. That without prejudice to the foregoing, the filing of an Appeal (if any) is by the existing rules and procedure no grounds for the grant of the orders sought herein. The Petitioner further avers that upon the delivery of the Judgment, the Applicant has made concessions towards settling the same and infact sought for the Respondent's Advocates indulgence in extending time for them to satisfy Judgment. (See annexure "**JKK 2**"). Vide a letter dated 26th October, 2018, the Respondent's Advocates reminded the Applicants of their undertaking to satisfy the Judgment. (See annexure marked as "**JKK 3**"). From the foregoing, the Petitioner states that the instant application is an afterthought and clear indication that the Applicants have only been awakened by the Notice to Show Cause sat their doorsteps. In any event the Petitioner states that upon delivery of the said Judgment, there has never issued any decree capable of being executed to warrant the issuance of the Orders now being sought. That courts do not issue orders in vain. That delay defeats equity.

Submissions

7. Parties made oral submissions in Court, which I have considered together with the entire application. The issue I raise for determination is whether or not the application herein is merited and whether it was filed within a reasonable time.

The Determination

8. Under Order 42(6) a stay of execution may be granted upon the Applicant fulfilling the following conditions:

- (i) that it may suffer substantial loss unless the stay is given.
- (ii) the application is made without unreasonable delay.
- (iii) sufficient security for the performance of the decree.

9. In the matter before the Court Judgment was delivered on 24th November, 2017 against the Respondent. The Respondent filed a Notice of

Appeal on 12th January, 2018 out of the period required in law. Further, that notwithstanding, the Respondent filed the current application on 8th March, 2019 more than one year after the Judgment was delivered.

10. The issue that this Court raises is whether or not the conduct of the Applicant is reasonable and whether or not the current application is an afterthought. In my view, the current application could be an afterthought because, firstly, the Notice of Appeal is filed out of time, and there has been no application by the Applicant to regularize the same. Secondly, the application herein is filed sixteen (16) months after the Judgment was delivered. These are clear indications that the Applicant has not taken the issue of appeal seriously and that this application may have been made to buy time. I say this because before the application was filed the Respondent sought to have the relevant officer of the Applicant to show cause why they could not pay the decree. In response to the NTSC a Ms. Norah Odingo, the Corporation Secretary/Deputy Director, Head of Legal Services swore and filed an affidavit herein on 25th March, 2019 in which she stated that the Director General of the Corporation enjoys immunity from execution and could not be subjected to the NTSC. She deponed that the corporation is a body corporate and that the decree should instead be executed against the corporation's property.

11. Further, there are correspondences attached to the Replying Affidavit of Joseph Karanja Kanyi being "JKK1", "JKK2" and "JKK3". These correspondences show that the Applicant/Respondent was prepared to pay the decree and sought enlargement of time from the Petitioner herein. In fact in the document marked "JKK2" the advocates of the Applicant herein specifically requested for sixty (60) days to effect the payment of the decree. This request was acceded to by the Respondent's advocate Mr. J. K. Kanyi vide letter dated 26th October, 2018 marked "JKK3".

12. From the foregoing it is clear that the Applicant here did not only renege on the promise to pay the decree, but also acted in bad faith by preferring this application after its failure to pay the decree, and obviously upon being notified to show cause.

13. It is the view of this Court that the application herein is intended to merely delay the settlement of the decree and to buy time for reasons best known to the Applicant.

14. As regards the conditions under Order 42(6) this Court finds that the Applicant will not suffer any or any substantial loss if the stay is not granted. Further, it is the finding of this Court that the application herein is made with unreasonable delay, sixteen (16) months after Judgment was delivered.

15. As for security, it was submitted by the Applicant that they are willing to provide security or to deposit the decretal sum in Court. The deposit of security in Court would be good because it protects the suit property until the dispute is wholly determined. However, deposit of security can only be allowed in clear cases where there is an arguable appeal, and there is a desire by the intending Appellant to prosecute the intended appeal in the shortest time possible. That is not the position in this matter. The Notice of Appeal filed herein is done out of time and no application has been made to regularize the position. Further, the Applicant has shown clear indication that it intends to pay the decree. A Judgment creditor must be allowed to enjoy the fruits of his or her Judgment. Allowing the Applicant to deposit security will only delay the Judgment creditor herein from the said enjoyment of the decree. Further, the security may serve no purpose except to prolong the matter to the detriment of the Judgment debtor.

16. Further, there is as yet no decree herein capable of being executed to warrant the issuance of stay.

17. For the foregoing reasons, the application before this Court dated 8th March, 2019 is not merited. The same is dismissed with costs to the Respondent/Petitioner.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 27th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Mwangi holding brief Mr. Ngugi for Applicant

Mr. Araya holding brief Maundu for Respondent

Mr. Kaunda Court Assistant