



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 5 OF 2017

THE STANDARD LIMITED.....APPELLANT

VERSUS

ALFRED MINCHA NDUBI.....RESPONDENT

RULING

1. The appellant herein, the Standard Limited, filed the Notice of Motion dated 2nd November, 2017 under Section 5(1) of the Judicature Act and sought the following orders:-

a. Spent

b. Spent

c. There be a stay of execution of the judgment and decree in Nyamira PMCC No. 76 of 2014 pending hearing and determination of this application.

d. The respondent's advocates be cited for contempt of court.

e. This honourable court be pleased to punish the respondent's advocates by of imposition of a fine payable within a prescribed period of time or attachment and/or sale of their properties (as the case may be) in satisfaction of any fine imposed by this honourable court but which will remain unpaid.

f. The respondent's advocates do purge their contempt by paying the auctioneer's costs of the execution undertaken against the applicant and by paying costs of this application.

g. The auctioneer's costs incidental upon the execution undertaken against the applicant be borne by the respondent and/or his advocates in any event.

h. Parties be at liberty to apply for such orders or such further order(s) as may be just and expedient in the circumstances.

i. Costs hereof be granted to the applicant.

2. The application is supported by the affidavit of Millicent Ngetich, the Appellant's Head of Legal Department, who avers that on the 31st October, 2017, the appellant's property was proclaimed for

attachment over an alleged unpaid decretal sum in Nyamira CMCC No. 76 of 2014 (hereinafter also referred to as “the primary suit”). She attached copies of the following documents in support of the alleged proclamation: -

i. Decree and Certificate of Costs marked “SG01”.

ii. Warrant of Attachment marked “SG02”.

iii. Proclamation marked “SG03”.

iv. Interim Fee note marked “SG04”.

3. She states that on 27th April, 2017, this court, sitting at Nyamira High Court, made an order staying execution of the judgment and decree in the primary suit as shown in the attached a copy of the court order marked as “SG05”. She further states that the respondent was served with the court order and the said application which was scheduled for inter parties hearing on 6th September 2017 on which date the said application was not heard as the court did not sit after which the Deputy Registrar *suo moto* fixed the said application for hearing on 2nd October, 2017 on which date, the application was stood over generally.

4. It is the appellant’s case that the execution now underway is an affront on the authority of this honourable court as the order of stay of execution has never been discharged, reviewed or set aside and it is only fair that the authority of this honorable court be restated by citing the respondent’s advocates for contempt of court.

5. The application was opposed through the respondent’s lengthy replying affidavit and Notice of Preliminary Objection dated 17th November 2017. In the said Preliminary objection, the Respondent has listed the following grounds:--

1. That the same is frivolous, vexatious, bad in law, incurably defective, incompetent and otherwise an abuse of the court process.

2. THAT the Application offends the provisions of section 6 of the Civil Procedure Act as the same is *sub judice* as it seeks for similar orders as the orders sought in the pending application dated 24th April, 2017.

3. THAT the application offends the provisions of Section 7 of the Civil Procedure Act as the same is *res-judicata* as it seeks for orders of stay of execution of the Decree in Nyamira CMCC No. 76 of 2014 which orders were granted by a competent Court on 10th April, 2017 upon hearing the application dated 1st April 2017 in Nyamira CMCC No. 76 of 2014 seeking for similar Orders.

4. THAT the Applicant has no audience for being in contempt of the orders given on 10th April, 2017 in Nyamira CMCC No.76 of 2014 requiring it to deposit the full Decretal sum of Kshs. 4,000,000 within 21 days which it has not done to date.

6. In the replying affidavit, the respondent averred that he was the plaintiff in Nyamira SPMCC NO.76 OF 2014 wherein he successfully litigated his case and was awarded Kshs. 4,000,000 in a judgment delivered on 7th March 2017. He accused the appellant of not paying him the decretal sum as ordered by the court and instead filing multiple applications and obtaining ex parte orders without fixing the said applications for inter partes hearing.

7. He further deposed that on 7th April 2017, the appellant filed an application dated 1st April 2017 in the Magistrate’s Court seeking stay of execution pending hearing and determination of the instant appeal and that that said application was granted ex parte on condition that the Appellant deposits in court the

entire decretal sum of Kshs. 4,000,000/=. He attached a copy of the application dated 1st April 2017 and of the order by the court granted on 10th April 2017 to his affidavit as annexures “**AMMI(a) and (b)**”.

8. He further deposed that on 24th April 2017, while the application dated 1st April 2017 was still pending determination in the Magistrates Court with orders of stay granted, the Appellant without disclosing the existence of the said application and orders granted on 10th April 2017 filed a similar application before this court dated 24th April 2017 and obtained ex parte orders for stay of execution which orders were made on condition that the appellant fixes and serves a date for inter partes hearing within 14 days. Copies of the application dated 24th April 2017 and the order made on 27th April 2017 were attached to the replying affidavit and marked as “**AMM 2(a) and (b)**”.

9. The respondent explained that when the application first came for inter partes hearing on 9th May 2017, the appellant failed to attend court and the same was stood over generally without extension of ex parte orders of stay of execution and further that when a further date was fixed for 6th September 2017, neither the appellant nor his advocate on record attended court even though the court did not sit on the said date. He maintained that since the ex parte orders issued on 27th April 2017 were not extended, they were not permanent, could not last indefinitely and lapsed automatically after which he instructed his advocates to apply for execution and appointed an auctioneer to seek for warrants of attachment.

10. In a nutshell, it is the respondent’s case that the orders of 27th April 2017 lapsed on 9th May 2017 when the application was coming for hearing inter partes on a date which had been taken by the advocate for the Appellant who failed to attend court or even seek for extension of the same.

11. The respondent further contends that he was not served with the court order issued on 27th April 2017 and the application dated 24th April 2017 for inter parties hearing on 9th September 2017 and challenged the appellants to prove service of the said documents to himself and his advocate.

12. On their part, the appellant filed a supplementary affidavit dated 11th January 2018 in which they contend that the order of this court dated 27th April 2014 was an unconditional order of stay of execution whose life span the court did not limit. They further contend that the respondent was duly served with the court order on 27th April, 2017 and urge the court to uphold the integrity of its orders.

13. The application was thereafter argued by way of written submissions which I have considered and I note that the issues that present themselves for determination in this case are: -

1. Whether the preliminary objection raised by the respondent is merited and;

2. Whether the respondent acted in contempt of the court orders issued on 27th April 2017.

14. With regard to the first issue for consideration, I refer to the case of **Mukhisa Biscuit Company vs West end Distributors Limited (1969) EA at page 701** wherein a preliminary objection was defined as follows: -

“A preliminary Objection is in the nature of what used to be a demurrer. It raises pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper rising of points by way Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion on issues. This improper practice should stop.”

15. In the present case, the preliminary objection raised by the respondent is to the effect that this matter is both *sub judice* or *res judicata*. To my mind these are pure points of law whose determination will have the effect of resolving the entire application before me in which case, the determination of the 2nd issue

will not be necessary. *Sub judice* and *res judicata* are legal principles that are embedded in our legal system in the Civil Procedure Act at sections 6 and 7 respectively. The general tenor of the court decisions take the view that to file similar applications over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the subsequent applications are barred by the principle of *res judicata* (see *Mburu Kinyua v. Gichini Tuti* (1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (*Wanguhu v. Kania* (1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is *sub judice* by virtue of section 6 of the Civil Procedure Act.

16. In the present case, it was not disputed by the applicant that it had, on 10th April, 2017, obtained orders of stay of execution pending appeal before the lower court where the matter was first heard and further that as a condition for the stay, the applicant was to deposit the entire decretal sum in court within 21 days. It is instructive to note that the said orders of the lower court were obtained *ex parte* and have to date not been varied or set aside. The applicant did not make any disclosure or reference to the lower court's said order. This court is therefore at a loss as to why the applicant, on 27th April, 2017, filed an application before this court seeking the same orders of stay that had already been issued by the lower court. It is clear to me that the applicant concealed the existence of the lower court order from this court at the time it filed the application of 27th April 2017.

17. The importance of full disclosure of material facts was discussed in **Brink's-Mat Ltd v Elcombe and others [1988] 3 All ER 188** where it was stated that:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...': see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR.”

18. I agree with the Respondent's submissions that filing the instant application in the face of the existence of other similar applications both before the lower court and this court over the same subject matter of stay of execution amounts to abuse of the due process of court. As was held in the case of **Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, it has always been a policy of the law to prevent a multiplicity of suits on one issue. A multiplicity of suits between the same parties concerning the same issues is not only a waste of judicial time but is likely to put the courts into disrepute where conflicting decisions are issued in those cases.

19. The above position is manifested in the instant case where, after obtaining an ex parte conditional stay before the lower court, the applicant surreptitiously approached this court with yet another application for stay over the same subject and was lucky to obtain a fresh unconditional stay which he now blames the respondent for not obeying while forgetting that it has itself not fulfilled the conditions set for the earlier stay of execution before the lower court. My finding is that the applicant has not come to this court with clean hands as he is seeking to benefit from orders obtained as a result of non-disclosure of material facts. I concur with the respondent's submissions that the applicant should not have any audience before this court as a result of its failure to comply with the order issued by the lower court on 10th April 2017 requiring it to deposit the full decretal sum of Kshs. 4,000,000 within 21 days.

20. In this case, I find that the applicant is guilty of material non-disclosure and abuse of the court process. It has not approached the Court in good faith and appears to be playing a cat and mouse game with the court process. Such conduct cannot be countenanced by this court and the court cannot exercise its discretion in favor of such a party.

21. In light of my above findings, I further find that the respondent's preliminary objection to the instant application is merited and I allow it with the result that I dismiss the application dated 2nd November, 2017 with costs to the respondent.

Dated, signed and delivered in open court this 21st day of March, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyamurongi for the Applicant

Mr. Kaburi for the Respondent

Omwoyo court clerk