REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 32 OF 2017

GITHINJI NGURE……..……..……1ST APPLICANT

CHARLES MWANGI GITUNDU…….....……...……2ND APPLICANT

VERSUS

CHARLES WANJOHI WATHUKU…….....……..RESPONDENT

RULING

On 29th September, 2017, the applicants filed a motion of the even date seeking, in principle, an order of stay of apparently execution proceedings against them before the deputy registrar of this court. At the time of filing the motion, the applicant's immediate concern was the hearing that was scheduled for 2nd October, 2017; they, however, also sought to stop any other proceedings before the deputy registrar between themselves and the respondent on any other date until an appeal they filed against a determination of the deputy registrar has been heard and determined.

The grounds upon which the motion is based are that the applicants have deposited what they have referred to as "substantial surety" in court; that there is, in any event, a stay granted by the Court of Appeal in Civil Application No. NAI 178 of 2009 (UR 120/2009); and, that the order of the deputy registrar is ultra vires order 42 rule 6(i) of the Civil Procedure Rules, 2010.

In the affidavit sworn by the 2nd applicant in support of the motion, it was deposed that the deputy registrar issued a notice dated 16th January, 2017, apparently addressed to the applicants, to show cause why execution should not issue against them under order 22 rule 18 of the Civil Procedure Rules.

According to the applicant, he objected to the notice and in that regard he filed another motion dated 2nd February, 2017 for stay of the notice pending the determination of the application.

On 6th of June 2017, the deputy registrar dismissed the motion and in the same breath allowed the respondent's motion dated 18th January, 2017 to effect service of the notice to show cause against the applicants by way of advertisement in one of the daily newspapers. The notice was subsequently placed in the Daily Nation of 16th June, 2017. According to this notice, the applicants were to appear before the deputy registrar on 25th July, 2017 either in person or by an advocate to show cause why execution shall not be granted. However, their presence would have been dispensed with if the decretal amount of Kshs 8,983,356.00 which escalated to Kshs 8,984,856.00 (if the interest, the costs of execution and the court collection charges were taken into account) was deposited in court prior to 25th July, 2017.

In response to the present motion, the respondent filed a replying affidavit in which he chronicled the issue of several orders by this court and the Court of Appeal in High Court Succession Cause No. 60 of 1997 and Civil Application No. 365 of 2001 respectively. Of particular relevance to this motion, is the order made on 3rd June, 2009 by the Hon. Mr. Justice Makhandia, J, as he then was, directing the applicants to pay the estate of Wathuku Ngure, whose representative is the respondent, the sum of Kshs Kshs. 8,983,356.00. This amount was made up of Kshs. 4,074,899.00 being the value of an earth mover which the applicants removed from the estate and Kshs 4,908,457.50 which was the income the earth mover would have generated but for the wrongful detention by the applicants.

It would appear that the applicants have never settled these sums and it is as a result of their failure to pay that the respondent resolved to initiate execution proceedings against them.

The fact that this court made an order against the applicants to pay the sum of 8,983,356.00 is not in dispute and as far as I can see, the 2nd respondent has acknowledged this order in the affidavits he filed before the deputy registrar.

It is also apparent that being dissatisfied with this order, the applicants filed a notice of appeal with the intention of appealing against it. On the strength of this notice, they managed to obtain an order from the Court of Appeal in Civil Application No. 178 of 2009 (UR. 120/2009)

staying the execution of the order pending the hearing and determination of the intended appeal. This order for stay was, however, automatically discharged when on 6th July, 2017 the Court of Appeal ruled that since the applicants had not filed their appeal six years after they filed the notice of appeal, their notice of appeal was deemed to have been withdrawn. In effect, there was no appeal upon which the order for stay of execution could be hinged under rule 5(2) (b) of the Court of Appeal Rules.

Undeterred, the applicant filed another application in the Court of Appeal, more particularly on 30th September, 2016 seeking for leave to file the notice and record of appeal out of time. Unfortunately for them, by a ruling delivered by the Court (G.B.M Kariuki, J.A., as he then was) on 20th December, 2017, the application was dismissed with costs.

It is also acknowledged, and there shouldn't be any doubt, that in the absence of any appeal against the order of this court requiring the applicants to pay a certain sum to the respondent or to the estate which he represents, and more crucially, in the absence of any order staying the execution of that order, there is absolutely nothing that stops the respondent from enforcing payment through any such means as is available in law. The Court of Appeal itself alluded to the respondent's liberty to proceed with the execution when it allowed the respondent's application to have the notice of appeal filed by the applicants deemed as withdrawn. The prayers which the respondent had sought for in the motion before the Court of Appeal were stated in the following terms:

> ***"1. That the notice of appeal dated 4th June, 2009 and lodged in the record of High Court Succession Cause No. 60 of 1997 on 4th June, 2009 is deemed to have been withdrawn following the failure to institute the requisite appeal under rule 82 of the Court of Appeal Rules, 2010 under Rule 81 of the former Court of Appeal Rules revoked on 17thDecember, 2010, after notice dated 17.11.2010 to collect proceedings and ruling was sent to the advocates on record for the respondents by the deputy registrar of the High Court at Nyeri.***
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> ***2. That the order of stay of execution in the ruling of the court of appeal at Nyeri (P.K. Tunoi, E.M. Githinji and J.W. Onyango Otieno, JJA) in the ruling dated 11th December, 2009 in Civil Application No. NAI 178 of 2009 (UR. 120/2009) to wit, "That there be stay of execution of the order issued by the Superior Court on 3rd June, 2009 in that the respondent be restrained from executing the said order till determination of the intended appeal" is set aside and vacated, the substratum for the order of stay of execution having been extinguished by operation of rule 83 of the Court of Appeal Rules, 2010.***
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> ***3. The applicant is at liberty to execute the orders of the High Court made on 3rd June 2009, to wit, "the respondents are still expected to pay to the estate of the deceased Kshs 4,074,899/= being the value of the earth mover and a further Kshs. 4,983,356/=. This amount shall be paid forthwith by the respondents jointly and severally failing which their known properties shall be sequestered and sold to recover the said amount."***

In its ruling in respect of these prayers, the Court of Appeal noted as follows:

> ***We have considered the application, the affidavits on record, the authorities cited and the submissions of counsel. In our view, the application stands or falls on whether prayer 1 is granted or not. If it is, and the notice of appeal is deemed to have been withdrawn, there will be no substratum upon which an order for stay under prayer 2 can survive and even less for an order for execution of the decree before the High Court can be made as sought in prayer 3. If prayer 1 is not successful, then there would be no basis for granting prayers 2 and 3. In short, prayers 2 and 3 are consequential to the outcome of prayer 1.***

As noted earlier, the first prayer in respondent's application was allowed. Going by the Court of Appeal's own reasoning, the grant of prayer 1 opened the way for the 2nd and 3rd prayers as well.

It would have been sufficient for the respondent to proceed with execution once the Court of Appeal held that the applicant's notice of appeal is deemed to have been withdrawn and since, with the withdrawal of the notice also went the order for stay of execution; however, in allowing prayer 3 of the respondent's application, the Court of Appeal went a step further and expressly sanctioned the execution of the order against the applicants and dispelled any lingering doubts on whether execution proceedings could be taken against the applicants or either of them.

From what I gather, once he got the green light, the respondent initiated the execution process and took out notice under order 22 rule 18 of the Civil Procedure Rules requiring the applicants to show cause why execution, by way of arrest and committal to civil jail should not issue against them. The notice which was dated 16th January, 2017 required the applicant's to attend court on 18th January, 2017.

It would appear that the respondent could not effect personal service of the notice to the applicants and so he moved the court for an order that they be served by way of substituted service. Curiously, even before the application was heard, the applicants moved the court to stay the notice to show cause. I understand the applicants' action to imply that they must have been aware of the notice even as the respondent strove to serve them. It would be illogical for them to seek to stay the execution of a notice that they had not been served with.

Be that as it may, the deputy registrar heard the two applications simultaneously and in her ruling delivered on 5th June, 2017, she dismissed the applicant's application but allowed the respondent's one. The respondent proceeded to advertise the notice in the print media, more particularly, in the Daily Nation of 16th June, 2017.

The respondent took out another notice to show cause dated 13th June, 2017 and again served it upon the applicant. In response to this latest notice, the applicant filed a 'replying affidavit' which in effect sought to achieve the same objective that his earlier application sought to achieve and that is staying the execution. Perhaps for better understanding I need to reproduce the affidavit's pertinent parts here; it stated as follows:

"REPLYING AFFIDAVIT TO THE NOTICE TO SHOW CAUSE DATED 13TH JUNE, 2017

I CHARLES MWANGI GITUNDU of P.O.Box 14126-00800 Nairobi in the Republic of Kenya make oath and states(sic) as follows:-

1. That I have seen the notice in the daily nation of 10th June, 2017 asking me to show cause as to why execution shall not issue against me to recover the sum of Kshs 8,983,356.00.

2. That this amount is the subject matter in the Court of Appeal Application number 64 of 2017 seeking among other matters, leave to appeal against this order for me to pay the aforementioned amount.

3. That further, the 1st respondent Mr Githinji Ngure is deceased and the application to substitute him is listed for hearing on 18th October, 2017 before the Court of Appeal in Nyeri.

4. That the judgment was entered against both judgment debtors and therefore it is important to substitute him first before any order is made against me.

5. That more importantly, the applicant/petitioner has gone ahead and made another application dated 15th June, 2017 seeking interest on the said amount the notice to show cause.

6. That the application is slated for hearing on 16th October, 2017.

7. The application for leave to appeal has been disposed off (sic) by way of written submissions and the ruling will be given notice by the court.

8. That for the above reasons, this notice to show cause must be stayed pending;

a) The ruling in the Court of Appeal application number 64 of 2017.

b) The hearing of the application for substitution of the 1st defendant.

c) The hearing of application dated 15th of June 2017 on the interest herein coming up on 16th October, 2017.

9. That the facts deponed (sic) to herein are true to the best of my knowledge, information and believe as advised by my advocate."

These issues were either captured in the applicant's initial application for stay or are deemed to have been captured and determined in the context of that application. It follows that there is absolutely no basis why they should have been regurgitated in the form 'a replying affidavit' to a notice to show cause that was similar, in every material respect, to the previous notice whose execution had been opposed but overruled.

The learned deputy registrar, however, heard both the applicant and the respondent on the notice to show cause and the replying affidavit filed in response thereto. In my view, she embraced the replying affidavit as an application for stay.

In her ruling delivered on 15th September, 2017 the deputy registrar overruled the applicant and held that the matters pending in the Court of Appeal could not amount to stay of execution. As far as substitution is concerned, she held that the order for payment was against the applicants jointly and severally and therefore, it was not necessary that the deceased applicant be substituted before execution proceeds. Concerning the question of interest, the learned deputy registrar concluded that the issue of interest aside, the applicant was indebted to the respondent and the latter was justified in executing the judgment.

Rather than appeal against the previous order according to which his application for stay was rejected, the applicant chose to appeal this latest order.

I would agree with the learned magistrate that there are no sufficient grounds for stay of execution. For one, it is obvious that by the time the present motion was filed on 29th September, 2017, the order for stay by the Court of Appeal had been discharged more than two months earlier. Yet one of the grounds upon which the applicant's motion is purported to be based is that there is in existence an order for stay of execution from the Court of Appeal. This is obviously untrue; it follows that the motion is misconceived to extent that it presupposes the existence an order that has since been discharged.

The applicants could also not rely on the argument that there was a pending application for substitution of the 1st applicant because in the ruling delivered on 6th July, 2016 in Civil Application No. 9 of 2016, the Court of Appeal noted that the order for substitution had been given by the Court on 26th September, 2015. The court also noted that the liability to pay the adjudged amount was joint and several and therefore it did not necessarily follow that no action could be taken in the proceedings before the deceased party had been substituted.

Circumstances also appear to have changed for the worse for the applicants after the learned deputy registrar delivered her ruling since on 20th December, 2017, the Court of Appeal, as noted, dismissed their application to file the notice of appeal and the record out of time.

Accordingly, the ground that execution ought to be stayed because on the basis that there is the possibility of the challenging in the Court of Appeal the order to pay the decretal sum no longer subsists.

As things stand now, none of the rules under Order 42 Civil Procedure Rules may be available to the applicant. I am so persuaded because it must be borne in mind that the order to pay the decretal sum was made, not by the deputy registrar in exercise of her special powers under order 49 of the rules, but by the judge of this court in performance of his judicial functions. When that order was made the applicants were free then to invoke order 42 rule 6 of the rules and apply for stay of execution of that order before the judge or proceed as they did and make a similar application in the Court of Appeal under rule 5(2)(b) of the Court's Rules.

Once the orders were discharged and door to appeal slammed against them, it is not open to the applicants to begin a fresh round of applications for stay of execution under order 42 rule 6 because there is neither an appeal that has been filed against that order nor is there a possibility that such an appeal will be filed in future.

My assessment of the applicants' application is that it is not only misconceived, but it is also made in bad faith and it is abuse of the process of the court. I hereby dismiss it with costs to the respondent.

Dated, signed and delivered in open court on 16th March, 2018

Ngaah Jairus

JUDGE