



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 180 OF 2018

PSL CAPITAL LIMITED.....APPELLANT

- V E R S U S -

BENMA TECHNICAL SERVICES LIMITED.....RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 13th April 2018, taken out by PSL Capital Ltd, the appellant herein. In the aforesaid motion, the appellant sought for the following orders:

1. THAT this application be certified urgent and heard ex parte.

2. THAT the firm of Moka Advocates be allowed to come on record for the appellant in place Onyoni Opini & Gachuba advocates.

3. THAT there be a stay of execution of the orders dated 29th March 2018 by Hon. B. J. Ofisi and proceedings in NBI CMCC 6634 of 2012 and all consequential orders pending the determination of this application inter partes.

4. THAT there be a stay of execution of the orders dated 29th March 2018 by Hon. B. J. Ofisi in NBI CMCC no. 6634 of 2012 and all consequential orders pending the determination of the appeal lodged by the appellant.

5. THAT the appellant be at liberty to apply for further orders and/or directions as the honourable court may deem just to grant.

6. THAT costs of this application be provided for.

2) The aforesaid motion is supported by the affidavit of Andrew Kanyutu. When served with the motion, Benma technical Services Ltd, the respondent herein, filed the notice of preliminary objection dated 24.5.2018 to oppose the application. The respondent put forward the following grounds:

1. THAT the notice of motion dated 13th April 2018 drawn and filed by Moka Advocates is in contravention of Order 9 rule 9 of the Civil Procedure Rules, 2010.

2. THAT the application has been filed by an advocate who is not on record in this matter.

3. THAT the firm of Moka Advocates should not be heard because they have failed to seek leave of the court to come on record nor have they filed a consent as such are not properly on record.

3) When the motion came up for interpartes hearing, the respondent opted to argue the preliminary objection without responding much to the merits of the motion.

4) It is important to set out in brief the background of the dispute.

The respondent filed an action against the appellant before the Chief Magistrate's Court vide the plaint dated 5.11.2012 in which it sought for judgement as follows:

a. The principal amount of the fixed deposit performance bond to the tune of Ksh.2,039,280.20.

b. Interest on the principal amount at the rate of 23% from 16th April 2012 up to the date of final settlement.

c. A declaration that the continued holding of the two log books for motor vehicle registration no. KBC 217Q and KBJ 260A is illegal and unlawful and they should be released forthwith to the plaintiff.

d. The cost of this suit.

e. Interest on (a), (b) and (d) above at court rates.

f. Such further order as the honourable court may deem fit to grant.

5) When served with the aforesaid plaint, the appellant filed a notice of admission of the respondent's claim and proposed to liquidate the debt by monthly instalments as follows:

1. The defendant admits the contents of paragraph 1, 2 and 3 of the plaint in so far as the same are merely descriptive of the parties and their respective address save that the defendants' address for service for the purposes of this suit shall be care of ONYONI OPINI & GACHUBA ADVOCATES, Duplex Apt No. 4 Lower Hill Upper Hill, P. O. Box 70707-00200 Nairobi.

2. The defendant admits owing the plaintiff the sum of kshs.2,039,280.20 but avers that due to financial difficulty it has been unable to settle the amount is full.

3. The defendant prays that it be allowed to liquidate the sum of ksh.2,039,280.20 by monthly instalments of kshs.350,000/= per month.

6) Hon. B. J. Ofisi, learned trial magistrate entered judgment in favour of the respondent in the sum of ksh.2,232,224/29 and based on the appellant's notice of admission. The appellant begun to liquidate the decretal sum by monthly instalments and eventually paid in full the principal sum of ksh.2,039,280/20 after which the appellant fell into financial doldrums and stopped paying the outstanding decretal sum. The respondent is said to have applied for warrants of arrest against Andrew Kanyutu, who is one of the directors of the appellant. Pursuant to the aforesaid warrants of arrest, Andre Kanyutu was apprehended and taken before the trial court for committal. He successfully applied to be released on bond. Being dissatisfied with the decision, the appellant filed this appeal and put forward the following grounds in its memorandum:

1. That the learned trial magistrate erred in law and fact by lifting the cooperate veil of the appellant by ordering one of its director, Andrew Kanyutu to pay balance of the decretal sum.

2. That the learned trial magistrate erred in law and fact by failing to appreciate that a veil of incorporation is not to be lifted merely because the appellant company has no assets to attach.

3. That the learned trial magistrate erred in law and fact by not considering that there were other forms of execution of the decree and the respondent had not demonstrated that they had exhausted the other forms of attachment as provided for by the law.

4. That the learned trial magistrate erred in law and fact by failing to appreciate the appellant had not committed any fraud to warrant the lifting of the corporate veil.

5. That the learned trial magistrate erred in law and fact in holding that the appellant's director personally be held liable in paying the respondent.

7) The main issue which was argued as a preliminary point is to the effect that the motion dated 13.4.2018 so far as it is drawn and filed by Moka Advocates is incompetent since it is in violation of Order 9 rule 9 of the Civil Procedure Rules. It is submission of Mr. Ochieng learned advocate who held brief for Mr. Odhiambo for the respondent that the firm of Moka Advocates should have sought for leave prior to coming on record in place of the firm of Onyoni Opini & Gachuba Advocates. Mr. Anyona learned advocate for the appellant opposed the preliminary objection arguing that the same lacks merit. It is Mr. Anyona's submission that the firm of Moka Advocates did not need to seek for leave to come on record in place of the firm of Onyoni Opini & Gachuba advocates because the appeal and the suit were totally different actions.

8) It is not in dispute that the firm of Onyoni Opini & Gachuba Advocate represented the appellant in the trial court. It is also not in dispute that the appellant instructed the firm of Moka Advocate to file this appeal and the current application. The Court of Appeal was faced with a similar issue in the case of **Tobias M. Wafubwa vs= Bishop Ben Buali (2017) eKLR** and the Court of Appeal expressed itself in part as follows:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable..... parties should therefore have the right to choose whether to remain with the same counsel or engage other counsel on appeal without being required to file a notice of change of advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

9) In my view, it goes without saying that the respondent's preliminary objection has no merit. In short, the firm of Moka Advocates did not

breach the provisions of Order 9 rule 9 of the Civil Procedure when it filed this appeal and the subsequent application for stay without seeking for prior leave. The appeal is a totally new proceeding which is distinct from the suit which gave rise to the appeal. Consequently, the preliminary objection is dismissed.

10) The parties are now invited to submit on the merits or otherwise of the motion seeking for stay of execution pending appeal.

11) Costs of the preliminary objection to abide the outcome of the motion.

Dated, Signed and Delivered in open court this 29th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents