



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 99 OF 2017

ITALBUILD IMPORTS LIMITED.....APPLICANT

VERSUS

KIMANI MAUNDU.....RESPONDENT

RULING

1. I have the applicant's motion dated 8th March, 2017. It seeks to stay the execution of the judgment and orders of Hon R Ngétich in the Chief Magistrate's Court at Nairobi in Milimani CMCC No 4918 of 2015. The orders sought are:

“...2. THAT the Honourable Court be pleased to stay the execution of the judgment and order of the Chief Magistrate's Court at Nairobi delivered by Hon. R. Ng'etich (CM) on 31st January 2017 in Milimani CMCC Case number 4918 of 2015 Kimani Maundu vs. Itablbuild Imports Ltd pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to stay the execution of the judgment and order of the Chief Magistrate's Court at Nairobi delivered by Hon. R. Ng'etich (CM) on 31st January 2017 in Milimani CMCC Case number 4918 of 2015 Kimani Maundu vs. Itablbuild Imports Ltd pending the hearing and determination of the intended appeal to this Honourable Court.

4. THAT this Honourable Court be pleased to grant leave to the Applicant to lodge an appeal from judgment and decree in Milimani CMCC Case No. 4918 of 2015 delivered on 31st February 2017 out of time;”

2. Briefly, the application is supported by two affidavits of Vittorio Veneziani, the applicant's Managing Director dated 7th March, and 31st March, 2017. The applicant concedes that time for filing the appeal has run out, but prays that the same be allowed in the interest of justice. Further, the applicant states that it is willing to deposit security equivalent to the decretal sum.

3. The Respondent's replying affidavit dated 22nd March, 2017, asserts that the applicant is guilty of non-disclosure of material facts: namely, that a similar application had been made in the lower court seeking similar stay orders pending appeal; however the same was not certified urgent, and the Applicant was directed to fix a date at the registry. Accordingly, he argues, the applicant is undeserving of the orders sought.

4. The Respondent also contends that the Applicant has not explained the reason for the delay in making the present application.

5. The parties filed written submissions for disposal of the application, the arguments of which followed essentially the content of their pleadings

Analysis and Determination

6. The sole issue for determination is whether the applicant merits the order of stay sought in light of the fact that there is a similar application filed before the lower court.

7. **Order 42 Rule 6 Civil Procedure Rules** provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from,

the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless-

(a) *the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made unreasonable delay; and*

(b) *such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

8. The Respondent contends that the applicant having filed before the lower court a similar application which was certified urgent and in respect of which a hearing date was directed in the lower, that amounts to *sub judice*. The question is whether those facts disclose *sub judice*.

9. Section 6 of the Civil Procedure Act provides as follows on *sub judice*:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

10. Is the application for stay filed in the present matter a proceeding in which the matter in issue is directly and substantially in issue in the proceeding or application that was filed but not heard in the lower court? I have no doubt that that is so. I have perused the application before the lower court annexed to the replying affidavit and the application before this court. They are similar. Further, the application before the lower court is still pending.

11. The doctrine of *sub judice* is discussed in the case of **Heritage Insurance Company Limited vs. Patrick Kasina Kisilu [2015] e KLR**. There the court stated that:

“To prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process. In addition, the appellate court has no jurisdiction to interfere with the exercise of discretion by a lower court except where the court is clearly wrong or has misdirected itself resulting in a miscarriage of justice. From the material before the court, it is not possible to determine that the trial court has exercised its discretion wrongly, as the grant of an order for stay of execution is not automatic upon the filing of an appeal to a higher court.”

12. Further, in the case of **Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR** where the learned Judge held that:

“...the entire subject matter in the subsequent suit must be covered by the previously instituted suit. That proposition of law is informed by the extract from the learned text in Judicial Hints on Civil Procedure Vol. 1 by Justice Kuloba where at page 42 it is stated:-

*‘Authorities are clear that ‘matters in issue’ does not mean any matter in issue in the suit but has reference to the entire subject matter in controversy. it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa. Sir Newnham Worly, VP, in *Jadna Karsan –Vs- Harnam Singh Bhogal (1953) 20 EACA 74 at 76 (10th March, 1953).*’*

... if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources.”

13. In the present scenario, the application in the lower court is essentially word for word similar to the present application. It is a cut and paste job with amendments *mutatis mutandis* applicable to the court in which it is filed. Like the present application, it is dated and filed on 8th March, 2017, and is under certificate of urgency. It seeks exactly the same prayers as the present application. The fact of this multiple application in both courts was not disclosed to this court at the time the application was made or argued, and Njuguna, J, who granted an interim stay was unaware of this conniving position.

Disposition

14. In light of the foregoing, I have no hesitation in declining the application for stay. The applicant elected the lower court as the forum in which to prosecute his application. He cannot now have a corresponding bite of the cherry in this court on a replica of that application between the same parties. It is an abuse of the court process.

15. This application is therefore hereby dismissed with costs, and the interim orders granted on 8th March, 2017 are hereby discharged. In addition, this suit shall be stayed in terms of section 6 of the CPA until the application in the lower court is determined.

16. Orders accordingly.

Dated and Delivered at Nairobi this 19th Day of June, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.for the Plaintiff

2.for the Defendant

Court Clerk.....