



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 17 OF 2003

SAMUEL KEROSI ONDIEKI t/a

ONDIEKI & CO. ADVOCATES..... PLAINTIFF

-VERSUS-

NAROK COUNTY GOVERNMENT DEFENDANT

RULING

[1] The Notice of Motion dated 13th March 2015, by the appellant/defendant, **Narok County Government**, against the respondent/plaintiff, **Samuel Kerosi Ondieki** trading as **Kerosi Ondieki & Co. Advocates**, seeks an order of stay of execution of the Order made on 12th March 2015 and issued on 13th March 2015, by the Acting Deputy Registrar of this court.

The grounds for the application are contained in the body of the motion and supported by the averments in the supporting affidavit, dated 13th April 2015, deponed by the applicant's County Secretary, **Lenku Kanar Seki**.

[2] The respondent's objection to the application is based on the grounds and averments contained in the replying affidavit deponed by the respondent and dated 14th January 2015.

The objection as well as the application were argued by way of written submissions as agreed by the parties. In that regard, **Chelanga & Associates Advocates**, filed submissions on behalf of the applicant while **Bosire Gichana & Co. Advocates** did likewise on behalf of the respondent.

This court having given due consideration to the rival submissions and the grounds in support of the application and those in opposition thereto is of the view that the basic issue for determination is whether the applicant has fulfilled applicable conditions for an order of stay pending appeal.

[3] Such conditions are expressed in Order 42 Rule 6(2) of the Civil Procedure Rules, which provides that:-

“No order for stay of execution shall be made under sub-rule (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 without 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.

[4] The conditions foregoing provide the guidelines for exercise of the court's discretion in this matter. In an old English case, **Sharp Vs. Wakefield (1891) AC 173**, it was stated that discretion must be exercised

“..... According to rules of reason and justice not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

This position has not to this day changed.

[5] At this juncture and in accordance with the principles set out in Rule 6(2) of Order 42 CPR, it is not necessary for the applicant to demonstrate that the intended appeal is arguable or that the appeal, if successful, would be rendered nugatory if stay is not allowed.

What the applicant was required to demonstrate at this juncture is that it shall suffer substantial loss if stay is not granted.

It is implied in the applicant's supporting affidavit that the respondent was erroneously paid an amount of Kshs. 5,700,000/= through its advocate on account of a decree which had long been settled and/or issued unlawfully.

[6] The applicant fears that the respondent may be unable to refund the aforementioned sum of money if it is paid to him and the appeal later succeeds. In that event, the applicant thinks that it would have been occasioned substantial loss or damage and more so, considering that the amount is public money which ought to be expended strictly and prudently in accordance with the Public Finance Management Act, 2012.

It was the respondent's submission that the decretal sum payable to him was actually Kshs. 37,881,309/= but after negotiations it was agreed that the amount would be liquidated by monthly instalments of Kshs. 5,700,000/= until payment in full and in that regard payment commenced in the month of February 2015.

[7] The respondent submitted that the applicant later changed its position and caused his advocate's client account to be flagged thereby denying him the fruits of his hardwork earned lawfully.

It is thus contended by the respondent that the applicant has failed to demonstrate that it will suffer substantial loss if stay is not granted.

Indeed, substantial loss is a vital factor in an application of this nature where it is presumed that there is already in existence an appeal against a judgment and/or order of a court.

[8] Herein, there is a memorandum of appeal dated 13th March 2015, annexed to the applicant's supporting affidavit showing that the impugned order of the Deputy Registrar was made on 12th March 2015. It would however, appear that the appeal itself has not been formally filed. Its existence is therefore doubtful thereby begging the question whether this application is competent coming as it does at this point in time. There is also the question whether necessary leave to file the appeal was sought by the applicant and granted in its favour. Apparently, there is no formal appeal and neither was necessary leave sought to file the appeal. Consequently, this application is neither proper nor competent for this court to exercise discretion in favour of the applicant. However, these are matters of procedural technicalities which ought not be given undue regard by this court over substance of the matter (see, **Article 159(2) (d) of the Constitution**).

[9] Be that as it may, the applicant has failed to satisfy this court that the mere payment of the sum of Kshs. 5.7 million to the respondent shall cause it irreparable damage by say, crippling its operations. Substantial loss must be something more than just the mere payment of the decretal amount to a successful litigant especially where the amount under consideration is not too large or colossal.

However, a successful litigant must not be allowed to benefit from a decree which is questionable in the manner it was obtained. In that regard, a brief look at the history of this case may shade some light and determine whether a refusal to grant a stay order would cause more hardship than would serve the cause of justice.

[10] The record shows that the case was commenced vide a plaint dated 24th January 2003, in which the respondent claimed a sum of Kshs. 28 million being taxed bill against the applicant's predecessor, Trans-Mara County Council. The respondent alleged that he was appointed through his legal firm of advocates to act for the Council in Kisii High Court Civil Case No. 17 of 1996 between Trans-Mara County Council and Narok County Council. Thereafter, he filed his bill of costs against the Trans-Mara County Council and this was taxed at Kshs. 28 million of which a part payment of Kshs. 400,000/= was made leaving an outstanding balance of **Kshs. 27,600,000/=**.

[11] However, a consent letter dated 3rd February 2003, was filed. Accordingly, judgment was entered for the respondent in the sum of **Kshs. 13,500,000/=** together with costs to be liquidated by a part payment of Kshs. 300,000/= on or before 30th June 2003 and the balance be paid by monthly instalments of Kshs. 200,000/= until payment in full.

A formal decree was issued to that effect on 31st March 2003 and after necessary taxation a certificate of costs for the sum of Kshs. 549,200/= was issued on 3rd October 2003.

After a period of time from the year 2005, the respondent made several attempts to execute the decree but all in vain. With the advent of the system of governance known as "**devolution**", all the county councils in the country were abolished and taken over by the succeeding County Governments in terms of assets and liabilities.

The Trans-Mara County Council was thus succeeded by the applicant, Narok County Government.

[12] The execution process related to this case was now directed at the applicant whose movable property was attached by auctioneers on the 12th February 2015, to recover the decretal amount Kshs. 13,500,000/= and interest on the sum i.e Kshs. 22,522,500/= together with costs of Kshs. 549,200/= together with interest on the sum i.e Kshs. 890,619/50cts. The total amount claimed by the respondent shot up to Kshs. 36,022,500/=. It is instructive to note that the sum claimed as interest was more than the principal amount. Nonetheless, after the attachment of the applicant's property a payment of Kshs. 5.7 million was made to the respondent through a bank account in the name of the respondent's advocate at the Co-operative Bank of Kenya Ltd, Kisii branch, being A/C No. **001120017401600**. This is the payment which is the subject matter of this application.

[13] What followed was the respondent's application dated 19th February 2015, seeking an order to enjoin the Co-operative Bank of Kenya Ltd as an interested party in this suit and an order restraining the banks from reversing the transaction relating to the aforementioned sum of Kshs. 5.7 million paid into the respondent's aforementioned bank account. The respondent also sought an order allowing him to access the amount.

On the same 19th February 2015, the applicant filed an application seeking orders to nullify the warrants of attachment issued against itself and any form of execution against itself and an order to restrain the respondent either directly or indirectly from attempting or in any manner whatsoever executing against itself in respect of the decree herein.

[14] Grounds of opposition respecting the respondent's application dated 19th February 2015, were filed by the proposed interested party i.e Co-operative Bank of Kenya Ltd on 2nd March 2015. However, by that time, the application had already been heard "ex-parte" on the same 19th February 2015, and orders granted against the interested party by the Deputy Registrar.

Interim orders of stay of execution were also granted on the same date (19th February 2015) against the respondent by this court (**Nagillah J.**).

Apparently, both applications dated 19th February 2015, were eventually heard inter-parties and orders made in favour of the respective applicants.

The respondent's application was concluded by the Deputy Registrar on 12th March 2015, while the applicant's application was concluded by this court on 12th June 2015, with an order nullifying the warrants of attachment and any form of execution against the applicant and an order restraining the respondent from attempting or in any manner whatsoever executing against the applicant in respect of the decree herein.

[15] Prior to the 12th March 2015, the applicant filed an application dated 5th March 2015 for orders to restrain the respondent or his advocate from dealing with the amount of Kshs. 5.7 million deposited at the interested party's premises situated in Kisii and in the alternative, the amount be deposited in court. Additional prayers included an order to set aside the decree issued on 31st March 2003 by consent dated 3rd February 2003. It is not clear from the record what happened with this application but it could have been abandoned or held in abeyance to pave way for the current application dated 13th March 2015, seeking stay of execution of the order of the Deputy Registrar made on 12th March 2015 pending appeal.

[16] From all the foregoing, it is clear that this matter has a protracted and somehow controversial history. Each party has an order in their favour. The respondent's order was firstly granted "ex-parte" on 19th February 2015 and confirmed on 12th March 2015 after inter-parties hearing before the Deputy Registrar. The applicant's order was firstly granted "ex-parte" also on the 19th February 2015 and confirmed on 12th June 2015 after inter parties hearing before this court (**Nagillah J.**).

At the time the High Court issued its final order on the 12th June 2015, the Deputy Registrar had already issued his final order on 12th March 2015, a difference of approximately three (3) months. However, the Deputy Registrar's order could not take precedence over the orders of a superior court. In any event, by the time the Deputy Registrar made his order on 12th March 2015, the "ex parte" stay order issued to the applicant had not been vacated and/or set aside. It was eventually confirmed on 12th June 2015. This clearly meant that the order by the Deputy Registrar had no effect and may have been made in vain.

[17] Although the applicant has not satisfied this court that it will suffer substantial loss if stay is not granted, it is quite obvious it has undergone hardship at the hands of the respondent in prosecuting its case and this may go on indefinitely if stay of execution of the orders made by the Deputy Registrar on 12th March 2015, is not granted pending the hearing and determination of the intended appeal. A refusal to stay execution would cause more hardship to the applicant than would serve the cause of justice.

In sum, this application dated 13th march 2015 is allowed in terms of prayer three (3) of the notice of motion but on condition that the applicant shall effectively file the appeal and have it listed for hearing within the next six(6) months from this date hereof if only to prevent its acute indolence in this matter. In default, the stay order shall automatically be vacated. Each party shall bear own costs of the application.

Ordered accordingly.

[Read and signed this 17th day of May 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Bosire for respondent

Applicant Absent

Mohe CC