



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 132 OF 2011

MANSON OYONGO NYAMWEYA.....PLAINTIFF/RESPONDENT

VERSUS

DR. KITHURE KINDIKI1ST DEFENDANT/ APPLICANT

OMWANZA OMBATI.....2ND DEFENDANT/APPLICANT

RULING

1. Through an application dated 8th December 2016, brought under certificate of urgency, the applicant sought the following orders:

1. Spent

2. THAT Pending the interpartes hearing and determination of this Application, the Honourable court do stay the execution of the judgment in this matter entered on the 6th December 2016.

3. THAT the court be pleased to set aside the judgment in this matter entered/and or delivered on the 6th December 2016 and remits the matter back for hearing of the Defendants counter claim in the.

4. THAT the plaintiff be and is hereby recalled for cross examination and the Defendants be and are hereby granted leave to defend and prosecute the counterclaim.

5. THAT the costs of the Application be in the cause.

2. The application is supported by the affidavit of OMWANZA OMBATI the 2nd Defendant/Applicant wherein he avers that the plaintiff/respondent's case proceeded to hearing ex parte after which a judgment was delivered in favour of the respondent. He explains that applicant's failure to attend court on the hearing date was due to inadvertence and failure to diarise the hearing date. In a nutshell, the applicant's prayer for an opportunity to be heard on the merits of their defence.

3. The 2nd applicant also filed a supplementary affidavit dated 22nd March 2017 in which he highlighted the fact that some of the 1st respondent's bills of costs filed in miscellaneous applications had been taxed, and that since the instant suit was in respect to recovery of costs, it was only reasonable that no judgment be entered in this case until the costs have been taxed and therefore, this court ought to stay this suit to await the outcome of the taxation.

4. The application was opposed through the plaintiff/respondent's replying affidavit sworn on 10th April 2017.

5. When the application came up for hearing before me on 12th April 2017, the advocates for both parties agreed to canvass it by way of written submissions to be filed and exchanged within 60 days after which a mention date was fixed for 19th June 2017 with a view to confirming if the said submissions had been filed. After fixing the mention date, Mr. Begi for the applicant made an oral application for stay of execution of the judgment herein pending the hearing and determination of this application on the basis that the applicants feared that after the taxation of the respondent's bill of costs slated for 18th April 2017, the plaintiff/respondent may proceed with the execution of the decree before the instant application is heard and determined.

6. Mr. Ochwangi for the plaintiff/respondent opposed the application for stay of execution while stating that no execution had commenced and that the court had not been moved appropriately.

7. I have considered the applicant's prayer for stay of execution pending the hearing and determination of the instant application. A perusal of this file shows that even though judgment was delivered in favour of the plaintiff on 6th December 2016, no decree has been drawn in respect to the said judgment so as to justify the defendant's claim that execution may issue at anytime. Furthermore, the applicant's have not demonstrated that any execution process has been initiated by the respondent which process should be stayed by an order of this court.

8. To my mind, the applicant's prayer for stay of execution pending the hearing and determination of the application dated 8th December 2016 is founded on fear and skepticism on their part that the respondent could pull the rug from under their feet by executing the decree before their application for setting aside the judgment delivered on 6th December 2016 is heard and determined.

9. In an application for stay of execution and indeed in any application filed before the court, the grounds for the applications must clearly be spelt out and adduced.

10. In the instant case, no grounds have been laid out before the court to satisfy it that there is need, at this point, to grant orders of stay of execution. To my mind, the mere fact that the applicants fear or are skeptical that the respondent might execute a decree, which has still not been extracted is not a sufficient reason to grant orders of stay of execution.

11. I find that the application for stay of execution brought at this stage is premature considering that the main application dated 8th December 2016 to set aside the judgment that is the subject to stay is still pending and has been listed for mention 19th June 2017 for purposes of confirming if parties have filed their written submissions in respect to the said application dated 9th December 2016. My view is granting the orders for stay of execution at this point will be tantamount to deciding the application dated 9th December 2016 in piecemeal and it is for this reason that I decline to grant the orders sought at this stage and direct that the entire application be canvassed at the same time.

12. Costs will abide the outcome of the application dated 9th December 2016.

Dated, signed and delivered in open court this 27th day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Begi for the Applicants

- Miss Sagwa for the Respondents

- Omwoyo: court clerk