REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 27 OF 2017

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT/APPLICANT

-versus-

JOSHUA ONDARA ONDIGI.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. C. M.

Kamau, Resident Magistrate in Rongo Principal Magistrate's

Civil Case No. 79 of 2015 delivered on 15/02/2017)

RULING

1. By a Notice of Motion dated 12/06/2017 and filed on 15/06/2017 the Appellant/Applicant seeks the following orders: -

(1) The Application herein be certified urgent and same be heard Ex-parte in the first instance.

(2) Pending the hearing of the application herein inter-partes, the Honourable Court be pleased to grant interim orders of stay of execution of the Court Judgment and Decree dated the 21st day of February, 2017.

(3) Pending the hearing and determination of this application, the Honourable Court be pleased to grant interim orders of stay of execution of the Court Judgment and Decree dated the 21st day of February 2017.

(4) The Honourable Court be pleased to grant an order of stay of execution of the Court Judgment and Decree dated the 15th day of February 2017, pending the hearing and determination of MIGORI HCCA NO. 27 OF 2017.

(5) Costs of this Application do abide the Appeal.

(6) Such other and/or further orders as this Honourable court may deem just and expedient be granted.

2. The application is premised on the grounds appearing on the body of the said Notice of Motion and it is supported by the Affidavit of the Applicant's Legal Officer, one **Joyce Ogoye** sworn on 12/06/2017.

3. The Respondent strenuously opposed the application through a Replying Affidavit sworn on 19/06/2017 and filed in Court on 20/06/2017.

4. The application was heard by way of oral submissions where Learned Counsel **Mr. O. M. Otieno** appeared for the Applicant and Learned Counsel **Mr. Ben Gichana** appeared for the Respondent.

5. The brief background to the application is that the Respondent filed **Rongo Principal Magistrate's Court Civil Case No. 79 of 2015** (hereinafter referred to as '**the suit'**) against the Applicant claiming for damages arising from injuries the Respondent allegedly sustained from an accident while in the course of employment with the Applicant. The suit was heard and judgment rendered in favour of the Respondent for Kshs. 94,875/= with costs and interests on 15/02/2017. The Applicant then filed a stay of execution application pending the hearing and determination of this appeal before the trial court. The application was allowed on condition that the Applicant do pay one-half of the decretal sum to the Respondent and the other one-half of the decretal sum be deposited in an interest earning account in the joint names of the parties' Advocates. That was on 23/05/2017. The Applicant then filed the current application before this Court.

6. In laying a basis for the application, Learned Counsel for the Applicant submitted that the Applicant is ready and willing to deposit the entire decretal amount in an interest earning account in the joint names of the parties' Advocates as security pending the determination of this appeal. It was submitted that the Applicant was apprehensive that once the sum is paid to the Respondent it will be a tall order recovering the same in the event the appeal succeeds given that the Respondent is no longer employed by the Applicant. That the Applicant will suffer substantial loss.

7. It was also submitted that the application was timeously made. As to why the Applicant did not comply with the conditions imposed by the trial court when the court delivered itself on a like application for stay of execution, the Applicant contended that it cannot be accused of non-compliance since the trial court did not set any timelines within which the conditions were to be met. The Applicant further contended that it was aggrieved by the ruling of the trial court as it is still apprehensive that it may suffer substantial loss on compliance. The Applicant urged this Court to exercise its discretion under **Order 42 rule 6(1)** of the **Civil Procedure Rules** and grant the orders sought.

8. The Applicant took issue with the submission that the application amounted to an abuse of the Court process or was *res judicata*. It submitted that this Court has a special jurisdiction in dealing with like application. It also distinguished the decisions relied upon by the Respondent.

9. The Respondent vehemently opposed the application. It took the Court through how the Applicant filed a like application before the trial court which was determined with conditions and how the Applicant failed to comply with those conditions but instead chose to rush to this Court and file a fresh application which in essence the now application is challenging the orders of the trial court. The Respondent submitted that the conduct of the Applicant amounts to an abuse of the process of the Court and that the application was *res judicata*. The Respondent relied on the decisions of **Patriotic Guards Ltd v James Kipchirchir Sambu (2017) eKLR** and **Collin Bett v Silas Kabisa (2016) eKLR.** The Respondent further submitted that the Applicant did not prove its alleged fear contrary to **Sections 107** and **108** of the **Evidence Act**, Chapter 80 of the Laws of Kenya.

10. In a rejoinder, the Applicant contended that since the Respondent did not rebut the fear by the Applicant then the burden of proof shifted to the Respondent pursuant to **Section 112** of the Evidence Act to prove otherwise.

11. I have carefully perused and considered the entire application alongside the parties' submissions and I fully understand the nature and gravity of the application.

12. Since the application is mainly grounded on the provisions of Order **42 Rule 6(1)** of the Civil Procedure Rules, the starting point is a look at that provision of the law. **Order 42 Rule 6(1)** of the Civil Procedure Rules is tailored as follows: -

'6(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 y 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 od stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have order set aside.

13. The above provision provides two important aspects of stay of execution applications. The first one relates to the original and special jurisdiction of the High Court to entertain an application for stay of execution when a like application was initially heard in the lower court but disallowed. In such a case the High Court, although sitting as an appellate Court, is vested with such a special and original jurisdiction in law to consider a like application regardless of the fact that the earlier one was disallowed by the court appealed from. Therefore, the application before the High Count will neither be caught up by the doctrine of *res judicata* nor be regarded as an abuse of the process of the Court.

14. The second aspect relates to what happens when the court appealed from allows the application for stay but the Applicant or Respondent is aggrieved by that order. In such a case, an Applicant is still at liberty to file a fresh application before the High Court or the Court appealed to or may apply to vary or set-aside that order. An aggrieved Respondent may also apply to the Court appealed to for setting aside such an order.

15. It is however important to take note of the conduct of an Applicant who is granted a conditional stay in the court appealed from and fails to comply with those orders and instead rushes to the Court appealed to and files a fresh application. The Court appealed to cannot just close its legal eyes to what happened before the court appealed from. What happened before the court appealed from forms part of the record of the Court and the Court appealed to must consider that background in light of the fresh application. In such a scenario, the Court of Appeal has pronounced itself that such a party is in clear abuse of the process of the Court. The Court in the case of **Patriotic Guards Ltd v James Kipchirchir Sambu (2017) eKLR** held as follows: -

'As we have already shown in this ruling the applicant applied for, and was granted by the trial court a stay of execution pending appeal. A condition was given in that the entire judgment sum be deposited in an interest earning account in the name of the advocates of the parties. That condition has not been met by the applicant and no explanation has been offered why the applicant has not complied with the condition. The applicant chose to apply for a stay of execution of the judgment of the trial court and received favourable orders by that court but instead of complying with orders given chose to file an application for stay of execution to this Court. Although we recognize that we have our jurisdiction on such an application, is original we cannot be blind to the fact that an applicant, is original we cannot be blind to the fact that an applicant who is armed with orders of a lower court but who chooses to file a similar application for stay of execution may very well be abusing the process of the court…..'

16. The Court of Appeal in dealing with that aspect further in the case of **Hunker Trading Company Limited v. Elf Oil Kenya Limited (2010) eKLR** stated as follows: -

'As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of Section 3A of the Appellate Jurisdiction Act. Moreover the disobedience of the order in our view has an impact on the management of the Court resources.

Sections 3A and 3B of the Appellate Jurisdiction Act and also in the context of the High Court

section 1A and 1B of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of sections are in pari material. Section 1A (3) of the Civil Procedure Act reads:-

> *'A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.'*

As the applicant has admitted having failed to comply with the order of stay by (Koome, J) we find that it is in breach of section 1A (3) of the Civil Procedure Act and also section 3A (3) of the Appellate Jurisdiction Act.

We do not think that the fact that the orders has since lapsed has in any way eroded the relevance of the disobedience o f the order to the operation of the overriding objective. The thrust of the applicant's application to this Court under Section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders.

In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another r case has been baptized the (double "O" principle") and in this case, we have chosen to call it ("the O2 o r the oxygen principle") because it is intended to re-energise the processes of the court's and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this court's resources (time) and also an abuse of its process. The fact that the notice of appeal under rule 5(2)(b) and is directed at the judgment of (Lesiit,J), would still not take the matter outside the provisions of Section 3A which is a provision of an Act of Parliament.

As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5 (2) (b) and Section 3A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to tis Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.

The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court."

17. Although the foregone decisions of the Court of Appeal dealt with stay of execution applications under the Court of Appeal Rules, the legal arguments and findings therein encapsulate the applicable principle in law on stay of execution applications made before the court appealed from and the court appealed to hence to that extent the decisions are binding on this Court.

18. In this case, the Applicant was granted conditional stay order by the lower court. That order is yet to be complied with and no application to review, vary or set-it aside is pending. I am surprised by the argument of the Applicant that it is not in disobedience of those orders since the court did not set timelines within which the Applicant was to comply. That is not a serious response. I say so because the Applicant clearly indicated its unwillingness to comply with those orders in its annexture '**JO-3**' which is a letter from the Applicant's insurers to the Applicant's Counsels on record where the author made it clear

that ***'….we cannot release any monies to them as ordered by the court.'***

19. Further to the failure to comply with the conditions of stay, the Applicant contends that if it pays the decretal sum to the Respondent it will be a tall order recovering the money in the event the appeal succeeds as the Respondent is no longer employed by the Applicant. That is the only reason the Applicant puts forth as to why it did not comply with the earlier conditions or why no money should be paid to the Respondent who is by now a decree-holder. As the Respondent was employed by the Applicant, it is not far-fetched that the Applicant must have held the Respondent's details during that employment. I do believe that those details are sufficient to trace the Respondent when need arises. Further, it has not been demonstrated that the Respondent is a man of straw or has no source of income at all to an extent that he will not be able to make any refunds if called to. There is also no evidence on the nature of the job the Respondent was engaged in with the Applicant. The onus of proof was on the Applicant pursuant to **Sections 107** and **108** of the **Evidence Act**. I find that the Applicant cannot benefit from the provisions of **Section 112** of the **Evidence Act** as it is the Applicant who is to demonstrate how it shall suffer substantial loss under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** as a condition precedent to the grant of the orders sought. The Applicant cannot expect the Respondent to aid it in discharging that burden. I therefore find the Applicant's apprehension as being too speculative and as such the Applicant has failed to demonstrate any loss it stands to suffer if the orders sought is not granted.

20. Having failed to demonstrate any loss likely to visit the Applicant, the security offered as well as the fact that the application was timeously made to this Court notwithstanding, disentitles the Applicant to any stay orders.

21. The upshot is that the Notice of Motion dated 12/06/2017 is hereby dismissed with costs to the Respondent.

22. This ruling shall apply in Civil Appeals Nos. **28 of 2017, 29 of 2017, 30 of 2017, 31 of 2017, 32 of 2017, 33 of 2017, 34 of 2017, 35 of 2017, 36 of 2017, 37 of 2017, 38 of 2017, 39 of 207, 40 of 2017 and 41 of 2017,**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of July 2017.

A. C. MRIMA

JUDGE