



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL MISC. APPL. NO. 105 OF 2013

BERNARD KARANJA KINGARA APPLICANT/RESPONDENT

- V E R S U S -

TOM ONDONGO1ST RESPONDENT/APPLICANT

ENG. S. K. MBURU 2ND RESPONDENT/APPLICANT

RULING

1. Eng. S. K. Mburu, the 2nd respondent/applicant herein took out the Notice of Motion dated 14/9/2015, the subject matter of this ruling in which he sought for the following orders:

1. That the application herein be certified as urgent, admitted to hearing during the court vacation and heard ex parte in the first instance.

2. That there be a stay of execution of ruling and orders made by Justice J. K. Serگون on 31st August 2015 pending the hearing and determination of the applicant's appeal to the Court of Appeal.

3. Costs be in the cause.

2. The motion is supported by the affidavit of Eng. S. K. Mburu. When served the appellant/respondent filed his replying affidavit to oppose the same.

3. When the motion came up for inter partes hearing learned counsels appearing in the matter recorded a consent order for the motion to be disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival submissions. In the motion, the applicant is seeking from this honourable court to be granted with an order for stay of execution pending appeal.

5. The 1st respondent/applicant avers that the ruling and orders were made by Justice J. K. Serگون on 31st August, 2015 in this suit, which was an application for contempt of court proceedings arising from **CMCC 4290 of 2012 Bernard Karanja Kingara -vs- City Council of Nairobi & 2 others**, where the trial court found the applicants are in contempt of court. An appeal being **HCCA no. 69 of 2013 City Council of Nairobi -vs- Benard Karanja Kingara** had already been filed by the City Council of Nairobi and was proceeding in the High Court when the respondents filed their application for contempt proceedings and that the High Court had issued orders for stay of execution of the trial Court's Orders

from which the contempt application arose.

6. The applicant has argued that he risks being sentenced for contempt and the court has fixed a date for sentencing on 21.9.2017 and if the applicant is sentenced then the application herein and the Appeal will be rendered nugatory since he will have commenced serving the sentence. The applicant further avers that they have already appealed to the Court of Appeal against the finding of contempt and are seeking for an order for stay of execution of the same pending the hearing of the Appeal. The applicant has argued that if the order for stay is not granted, he will in the circumstances suffer substantial loss and damage.

7. The respondent on the other hand has argued that the applicant's application is incompetent, bad in law and the same ought to be struck out. It is further argued that the applicant's application is an abuse of the process of this honourable court as the same is intended to deprive the respondent of the use of motor vehicle registration no. KAB 377Q which he duly purchased in a public auction conducted by M/s Leakey's Auctioneers, on behalf of the Nairobi County Government way back on 23rd June, 2012. The respondent has gone ahead to state that the application is vague and lacking in substance and is only intended to derail the course of justice. It is also stated that the application is frivolous, vexatious and is solely calculated to harass and vex the respondent so as to give up his legal rights.

8. The principles to consider in determining such an application are well settled. First, an applicant must show the substantial loss he would suffer if the order is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly, the provision for security for the due performance of the decree or order must be considered.

9. On the first principle, the applicant is of the view that he would suffer substantial loss if the order for stay is denied in that the 1st and 2nd respondent/applicants will have been sentenced for contempt of court before their appeal is heard.

10. The respondent on the other hand are stating that the court is yet to pronounce itself on the sentence owing to contempt of the applicant and therefore they are not entitled to the orders sought.

11. The second principle is that the application should be filed without unreasonable delay. It is clear on the face of record that conviction was entered on 31st August 2015 and the motion was filed on 14/9/2015. The motion was therefore timeously filed.

12. The third principle is the provision of security for the due performance of the decree.

13. Having considered the rival submissions and the material placed before this court, I am satisfied that the applicant will suffer any substantial loss. The applicants have already been convicted and what remains is for the court to receive facts in mitigation before pronouncing the appropriate sentence. The applicants will still have a right of appeal as against the order on sentence. It is clear in my mind that there are other remedies available to the applicant even after sentence have been pronounced pending appeal. Having found no merit in the motion, I find no reason to belabour to consider the other principles.

14. Consequently the motion dated 14.9.2015 is found to be without merit. It is dismissed with costs.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant