



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 102 OF 2015

LILIAN WANJERI WATHUKO.....1ST APPELLANT
SAMUEL NJOROGE WATHUKO.....2ND APPELLANT
LUCY NJOKI.....3RD APPELLANT
PERIS NDUTA.....4TH APPELLANT
JANE WAMBUI MWAI.....5TH APPELLANT

VERSUS

WATHUKO NDERI CHONGORESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 28th April, 2015 and taken out under **Section 3, 3A and 75(1) of the Civil Procedure Act, Chapter 21 Laws of Kenya, under Order 42, 43 and 51 of the Civil Procedure Rules 2010, under Section 3 of the Judicature Act** and all other enabling Provisions of the Law. In the main, the Applicant/Appellants pray that the proceedings in the lower court, and the enforcement of both the ruling made by Hon. Ngugi T (Mrs.) Senior Principal Magistrate on 20th March 2015, and the *ex parte* judgment entered on 18th November 2013 be stayed, and status quo be maintained pending the hearing and determination of the Applicant/Appellant's application and intended appeal.
2. The application is based on grounds that the Applicant/Appellants have an arguable appeal with overwhelming chances of success. That if the orders sought herein are not granted the intended appeal will be rendered nugatory. Further that the Respondent will not suffer any harm and or prejudice for which relief is otherwise irrecoverable.
3. The application is supported by the affidavit of Jane Wambui Mwai the Defendant/Applicant herein, sworn on even date, in which she deposes *inter alia*, that the Preliminary Objection dated 17th September, 2014 was dismissed in a ruling on 20th March, 2015 to their detriment. That the pleadings that are the genesis of this matter were prepared and filed by an incompetent person, one Stephen Walter Kaai, whose status was confirmed by the Law Society of Kenya through a letter dated 17th March, 2014.

4. The Applicant/Appellants further aver that the *ex parte* judgment was entered on 18th November, 2013 based on the said irregular pleadings and thus the Applicants/Appellants preliminary objection was based on this incurable technicality. The Applicant/Appellants argue that the Hon. Magistrate did not address this matter exhaustively in her ruling and that although the Applicants have the right to seek an appeal against the Ruling, the provisions of **Order 43, sub-rule 3** of the **Civil Procedure Act**, require that they seek leave from the lower court to do so.

5. The Applicant/Appellants states that being aggrieved by the Honourable Court's Ruling dated 20th March, 2015 they filed an application dated 23rd March 2015 in the lower court and intend to appeal in the High Court at Nairobi. That the Applicant contend that they have an arguable appeal with good prospects of success and they stands to suffer substantial loss if status quo is not maintained. They urge that the lower court has refused to listen to them until they deposit the decretal sum in court and that the Respondent has already disposed of one of the cars despite there being a court order stopping the disposal.

6. The Applicant/Appellants argue that, other than the suit being fatally defective, it is not founded in law as it is subject of a succession cause to wit Succession cause No. 2171 of 2001, in the matter of the Estate of Wathuko Chongo alias Wathuko Chongo Wathuko (deceased), which can only be advanced against the administrators.

7. Wathuko Nderi Chongo (hereinafter the Respondent) deponed in his Relying affidavit filed on 15th May 2015, that he is the eldest son of the deceased who had four wives. That he accompanied the process server during the service of the summons on the appellants/app and that it is the duty of the Law Society of Kenya to ensure that their members are licensed. He argues that the ruling of the subordinate court was in accordance with the law and that the magistrate considered everything before making her ruling.

8. The Respondent avers that the Applicant/Appellants were ordered to deposit the money in court by the Magistrate before filing any appeal but have not done so. That it is not correct for Respondent to claim his money in Succession Cause No.2171 of 2001, because his claim is only against the second House in respect of Mathare Plot No.117, 30 rooms, Q12 Ayani Kibera and Turasha whose rent is shared between the Second and Third houses. That the First and Fourth houses share rent from Plots No. 15 and 27 Ngara.

9. The Respondent argues that the ruling by Hon. Ngugi, Senior Principal Magistrate is proper in law and ought to be enforced to enable him enjoy his fair share of the Estate. That the Applicant/Appellants were granted stay by the Chief Magistrate's Court on condition that they deposit Kshs.618,608.00 in court and they have not complied. That the Applicants disposed of one of the cars and still continue to collect and spend rent without his involvement.

10. Two issues came to the fore upon perusal of the grounds of the application and the affidavits in support and in reply. The first is whether the pleadings filed in the lower court, having been filed by an advocate who did not hold a practicing certificate at the time of filing were invalid. The second is whether the Applicant/Appellants are deserving of the exercise of this court's discretion in their favour.

11. On the issue as to whether the Applicant's pleadings are invalid for having been filed by an advocate who did not hold a practicing certificate. I have had sight of the recent decision of the Supreme Court of Kenya on the question as to whether **Section 34 Advocates Act**, actually invalidates all instruments of conveyance (and by extension other legal documents) prepared by an advocate who does not have a current practicing certificate.

12. In **Petition No. 36 of 2014 National Bank of Kenya Limited vs Anaj Warehousing Limited** the Court rendered itself thus:

“In these circumstances, how does the citizen's position rest? If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practicing certificate? Would he or she be in

breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.”

The Supreme Court has therefore overturned to the long held assumption that the import of **Section 34 of the Advocate’s Act** is that where Advocates acted when they did not hold current practicing certificates all documents drawn during that period were invalid.

13. This assumption was fortified by the court of Appeal decision in the case **National Bank of Kenya Ltd vs Wilson Ndolo Aga CA No. 119 of 2002** and has been the governing position of law until the Supreme Court’s decision adverted to above. The Supreme Court has clarified that the spectre of illegality lies squarely with the Advocate and ought not to be apportioned to the client.

14. On the second issue as to whether or not to grant a stay of the lower court’s orders pending Appeal, the Court shall not issue any stay orders unless the two grounds set out in **sub-rules (a) and (b) of Order 42 Rule 6(2)** are satisfied. The pertinent **sub rule** in this case is **6(2)(a)** 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:”

From the above quotation the applicable provisions of the law are couched in mandatory terms, on when the court may grant stay orders.

15. On the question of delay, the court finds that this application, though made with some delay, the said delay cannot be said to be unreasonable from the time the lower court orders were issued. On the second limb of substantial loss, the decisions which lend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’

16. In this case the Applicant/Appellants were already granted stay by the Chief Magistrate’s Court on condition that they deposit Kshs.618,608.00 in court and they have failed to do so. More importantly, the Applicant/Appellants have not obeyed the said orders of court. This point was emphasized in **Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others (2010) EKL**R by Njagi, J (as he then was) as follows:

“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”

17. In view of the foregoing, this court holds that the circumstances of this case are such that it cannot exercise its discretion to grant the orders sought, for to do so would not serve the interest of justice.

Secondly, these orders having been made by a court of competent jurisdiction, the Applicants who are aggrieved thereby must first indicate that they have endeavored to comply with them even as they move the higher court on appeal. The conduct of the Applicants demonstrates that they do not deserve the discretion of this Court.

Accordingly, the Applicants' application must fail, with costs.

SIGNED DATED and DELIVERED in open court this **25th** day of **January 2016**.

.....

L. A. ACHODE

JUDGE