REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 147 OF 2014

COLLIN BETT ……. APPLICANT

VERSUS

SILAS KABISA ….…… RESPONDENT

RULING

INTRODUCTION

This is a ruling on an application for stay of execution and stay of proceedings pending appeal from the judgment in Chief Magistrate's Court's Civil Case No. 965 of 2010 made on the 26th June 2014. In addition, the applicant has sought that he 'be allowed to deposit reasonable amount of monies and or an alternative of a logbook or title deed as security for appeal if deemed necessary.'

The principal grounds of the application as set out in the application dated 26th October 2015 are that the appeal which has a high probability of success will be rendered nugatory by the payment in the meantime of the substantial judgment sum, which the respondent would not be in a position to refund, if the intended appeal is successful.

THE RESPECTIVE CASES OF THE PARTIES

In support of the application, the applicant swore an affidavit on 26th September 2015 in which he claimed that the respondent had applied for *'a release of security deposit I had made good pursuant to the orders of this honourable court made on or about the 20th September 2012 and should the the said deposit be released to the plaintiff I will suffer irremediable loss and damage and my intended appeal will be rendered nugatory.'*

By Grounds of Opposition dated 2nd November 2015, the respondent contended that the application for stay was misconceived, incompetent and an abuse of the court process and claimed that *'the applicant had been granted stay of execution which he failed to meet [and] that the appellant is avoiding compliance and/or [is] in breach of a court order.'*

In addition, by a replying affidavit sworn on 11th November 2015, the Respondent set out the history of the litigation between the parties disclosing as follows:

That the suit herein arises out of money I personally lent and advance to teh Applicant/Appellant, amounting to Ksh.875,000=00, which amount he refused to pay back.

That because of this, I instructed my advocate herein, Modi & Co. Advocates to act for me in this matter, which they did.

That on the 22nd September 2010, the applicant/appellant advocates failed to attend court for the hearing of the application for summary judgment, as a result of which my advocates herein obtained ex parte judgment against the applicant/appellant on 5th October 2010.

That on 26th October, 2010 the applicant/appellant filed an application dated 18th October 2010, seeking to have stay of execution and setting aside of the ex parte judgment entered against the applicant/appellant.

That, on 19th September 2012, the court allowed the application, but also ordered the applicant/appellant to deposit Ksh.200,000=00 in court which money was deposited on 17th October 2012. Annexed and marked SK1 is a copy of the ruling.

That the matter was heard and judgment entered on 26th June 2014.

That, on the applicant/appellant made an application to court dated 7th July 2014 seeking stay of execution of the judgment and sub-sequential orders made on the 26th June 2014 pending the lodging, hearing and determination o fan intended appeal.

That, on 21st August 2014, the court allowed the application, but also ordered the entire decretal sum be deposited in a joint interest earning account in the names of both counsel within 45 days. However, the order was never complied with by the applicant/appellant and the stay orders granted lapsed. Annexed and marked SK2 is a copy of the ruling.

That on the 24th October 2014 made another application dated 21st October 2014 seeking the extension of stay orders issued on 21st August 2014 and reduction of the amounts of monies to be deposited to fulfill the condition for stay of execution pending appeal.

That on 5th December 2014 the application was allowed on condition that as security for performance of the decree the applicant/appellant deposits half the decretal sum in court within 30 days. Annexed and marked SK3 is a copy of the ruling.

That the applicant/appellant neglected, refused and /or assumed to comply with the court's ruling and did not deposit the decretal sum within the 30-day period as per the honourable court's ruling and the stay orders lapsed.

That my advocate made an application to court seeking the release of the Ksh.200,000=00 deposited to court, the same was served to the applicant/appellant advocate and judgment was entered ex parte orders for release of the security monies above since the same was not opposed.

That, the applicant/appellant advocate made an application dated 26th June 2015 seeking to set aside the ex parte orders. The application was disallowed on the grounds that it was an abuse of the court process and the same was dismissed. Annexed and marked SK4 is a copy of the ruling.

In response, the applicant filed a further affidavit sworn on 10th December 2015 in which while not denying the course of proceedings and lower court rulings set out in the respondent's replying affidavit contended that *'this Honourable Court has unlimited original jurisdiction and [the court] is not bound by the proceedings of the lower court.'* In addition, the respondent blamed for his inability to comply with the order for the deposit of half the decretal amount to *'financial hardship and liquidity issues'* caused by misfortune of cancellation of his mining licence, and prayed '*to be allowed to deposit some more for a sum of half the decretal.'* (sic)

Counsel for the parties – M/S Masika & Koros Advocates for the Applicant and M/S Modi & Co. advocates for the Respondent - then filed written submissions respectively dated 10th December 2015 and 16th December 2015, and ruling was reserved.

DETERMINATION

Order 42 rule 6 (1) of the Civil Procedure Rules provides for jurisdiction to stay execution pending appeal to both the trial court and the appellate court 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 by 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 of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."*

Where therefore, as here, the trial court declines stay of execution, the appellate court may consider an application for stay pending hearing and determination of the appeal. However, where an applicant has failed to comply with the terms of an order for stay granted by the trial court, the repeat of the application for stay in the appellate court is an abuse of the process of the court. In *Hunker Trading Company Limited v. Elf Oil Kenya Limited* [2010] eKLR, the Court of Appeal held that -

"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 sections 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 materia. 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 order has since lapsed has in any way eroded the relevance of the disobedience of 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 case has been baptized the (double "O" principle") and in this case, we have chosen to call it ("the O2 or 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 this 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."

See also ***Wanguhu v. Kania*** *(1987) KLR 51*, where the court held that –

> *"if a party to a suit does not appear to prosecute an application and it is dismissed, he cannot be allowed to bring a second application unless he prays for reinstatement which will only be given if he explains to the court why he failed to appear."*

The applicant's explanation of impecuniosity for failure to comply with the order from the trial court for the deposit of half of the decretal amount cannot hold given that the applicant is seeking further accommodation to 'be allowed to deposit reasonable amount of monies and or an alternative of a logbook or title deed as security for appeal if deemed necessary.' It has not been shown that an order for the deposit of half the decreatal amount upon review by the trial court of the order for deposit of the full decretal sum is unreasonable so as to call for a reasonable deposit.

The Judgment appealed from was made on the 26th June 2014, and in filing this application for stay of execution dated the 26th October 2015, the applicant is perpetuating the denial of the respondent of his undoubted right to enjoyment of the fruits of his judgment, which should not be taken away by multiple applications for stay and related applications with whose terms the applicant has failed to scrupulously comply.

As observed by the trial court in its ruling of 28th August 2015, after the lapse of the 2nd stay order on 5th January 2015, the applicant did not seek extension of time to comply with the order for deposit of the money until 26th June 2015 after the respondent had obtained an order for the release of the sum previously deposited in court, and in the entire proceedings the applicant was clearly dilatory. Indeed, even the present application for stay of execution dated 26th October 2015 filed in this court on 27th October 2015, was a full two months after the order of the lower court of 28th August 2015 dismissing the application for extension of time dated 26th June 2015.

CONCLUSION

As I held in ***Heritage Insurance Company Limited v. Patrick Kasina Kisilu*** Machakos HC Civil Appeal NO. 142B of 2015,

I agree with the general tenor of the court decisions that take the view that to file similar application over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of ***res judicata*** *(see* ***Mburu Kinyua v. Gichini Tuti*** *(1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (****Wanguhu v. Kania*** *(1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is* ***sub judice*** *by virtue of section 6 of the Civil Procedure Act.*

As demonstrated by *Hunker Trading Company Limited* case, to file an application in the appellate court for stay of execution after having failed to comply with the terms of an order of stay granted upon a similar application for stay before the trial court is an abuse of the process of the court. This has the same effect on the process of the court as filling repeated applications seeking the same relief where such relief is denied in previous proceedings before the same or other court.

In this case, by his conduct in delaying for two (2) months since the adverse order the filing of the application and in failing to comply with terms of orders made by the trial court upon grant of a previous application for stay, even though alleged caused by unrelated cancellation of mining licence, the applicant has disentitled himself to the favourable exercise of discretion of the court.

ORDERS

Accordingly, for the reasons set out above, the appellant's Notice of Motion dated 26th October 2015 is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 18TH DAY OF JANUARY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kibunja for Mr. Masika for the Applicant

N/A for the Respondent

Mr. Ndola - Court Assistant.