



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT MISC. CIVIL APPLICATION NO.12 OF 2014

AMUGA AND COMPANY ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

JOYCE NZISA.....1ST RESPONDENT/APPLICANT

MONICA NDUNGE MWONGELA.....2ND RESPONDENT

CONNIE MBITHE MUIA.....3RD RESPONDENT

MARY MUSUKI MUDACHI.....4TH RESPONDENT

JOSEPH LOMBA MWONGELA.....5TH RESPONDENT

RULING

1. The Amended Notice of Motion dated **4th February, 2016** was filed by **Joyce Nzisa Muthama** (hereinafter the Applicant) on her own behalf and on behalf of the other Respondents for orders that:

1. Spent

2. Spent

3. Spent

3. a) Pending the hearing and determination of this Appeal, this Court be pleased to grant a stay of execution of the Ruling of the Deputy Registrar, Hon. Elizabeth Tanui delivered on 15th January, 2016.

4) This Court be pleased to set aside, vary and/or alter the Ruling of the Deputy Registrar Hon. Elizabeth Tanui delivered on 15th January, 2016 in respect of the warrant of the sale of the suit property issued to Mr. Stephen Nyamu Thurairira t/a Life Line Auctioneers.

5) This Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

6) The costs of the application be provided for.

2. The Grounds set out in support of the application are that, being dissatisfied with the Ruling of the Deputy Registrar delivered on **15th January, 2016**, the Applicant intends to file an appeal to the Court of Appeal, and that the intended appeal has high chances of success and may be rendered nugatory unless stay orders are granted. The application is supported by the Supporting Affidavit and Further Affidavit sworn by the Applicant in which she deponed that she had already filed a Notice of Appeal and placed a request for a certified copy of the proceedings and Ruling to enable her lodge her appeal.

3. The Applicant provided the background to her application by stating that she retained the services of **Mr. Paul Amuga t/a Amuga & Company Advocates**, (hereinafter referred to as the Respondent for purposes of the instant application) to act for her and her siblings in a succession matter at an agreed fee of **Kshs. 2,500,000/=**, being High Court Succession Cause No. 162 of 1979. That in the course of time, the Respondent had his costs taxed and Judgment entered in his favour in the sum of **Kshs. 11,894,926/=**. For the reason that the Applicants were unable to pay that judgment sum, the Respondent moved the court for leave to levy execution against Land **No. LR 209/7196/113**. It was their collective fear that if the property was sold as per the impugned order of the Deputy Registrar, the beneficiaries and the estate of her deceased father generally will suffer great loss and damage.

4. The Respondent opposed the Application vide the Replying Affidavit sworn by him on **8th February, 2016** in which he deponed that the application is not only an abuse of the process of the Court but is also *res judicata*. He averred that the Applicant had earlier filed a Chamber Summons Application dated **17th October, 2014** seeking stay of proceedings and taxation and that the said application was heard, whereupon the Court delivered its Ruling on **23rd February, 2015** dismissing the Applicant's application for stay. He accordingly urged the Court to find that the instant application for stay, is *res judicata*, and therefore is an abuse of the process of the Court, for the reason that it has been brought after the dismissal of the Applicant's first application for stay.

5. I have perused and considered the pleadings and proceedings herein in the light of the averments in the affidavits filed herein in respect of the Amended Notice of Motion dated **4th February, 2016** as well as the written submission's filed herein and note that this matter was initiated in **2014** as a taxation of Advocate & Client Bill of costs. The Advocates costs were consequently taxed on **30th July, 2014** in the sum of **Kshs. 11,894,926/=** and a Certificate of Costs issued to that effect dated **4th August, 2014**.

6. The record further shows that the Respondent herein then moved the Court for Judgment in the aforesaid sum pursuant to **Section 51 (2) of the Advocates Act, Chapter 16 of the Laws of Kenya** after the Applicants neglected or failed to pay the same. In its Ruling dated and delivered on **23rd February, 2015** the Court allowed the Respondent's application and entered Judgment in his favour in the sum of **Kshs. 11,894,926/=** together with interest thereon at Court rates till payment in full. Thereafter the Respondent initiated the execution process vide the Notice of Motion dated **27th May, 2015**.

7. The Applicant responded to the application by filing Grounds of Opposition as well as an application for stay of proceedings. In the Ruling delivered on **21st September, 2015** the Deputy Registrar granted leave for **LR No. 209/7196/113** to be sold in execution of the decree herein. The stay application filed by the Applicants was accordingly unsuccessful.

8. The Applicant thereafter filed a second application for stay of proceedings under Certificate of Urgency on **12th October, 2015**. This was in response to the Respondent's application dated **5th October, 2015**, for Settlement of Terms of Sale of the aforesaid property. The two applications were heard and determined by the Deputy Registrar on **15th January, 2016**, the result thereof being that the Deputy Registrar dismissed the Applicant's Chamber Summons dated **12th October, 2015** on the ground that the matters raised therein had already been determined by the Court. On the other hand the Respondent's application dated **5th October, 2015** for settlement of Terms of Sale was allowed and the terms set as hereunder:

- a) That warrants for the sale of the Property No. LR 209/7196/113 be issued to Stephen Nyamu Thurania t/a Lifetime Auctioneers.
- b) That the sale be advertised in the Daily Nation Newspaper.
- c) That the subject property not to be sold below a reserve price of Kshs. 6 Million.
- d) That costs of the advertisement, valuation and the Auctioneers charges be recovered from the sale proceeds.
- e) That the net sale proceeds be paid directly to the Decree holder, M/s Amuga & Company Advocates.

This is the Ruling that provoked the instant application.

9. As to whether the application dated 4th February, 2016 is *res judicata*, the touchstone is Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya, which provides thus:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

10. Thus, the law clearly stipulates that where an issue has been decided by a court of competent jurisdiction, the parties would not be allowed to re-litigate the same issue in a separate suit or application. In the case of *DSV Silo Vs The Owners of Sennar [1985] 2 ALLER 104* an authority that has been adopted in various Kenyan precedents, such as *Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR* the Court laid down the principles which an Applicant alleging *res judicata* must show to be:

- a) The matter in issue is identical in both suits.
- b) That the parties in the suit are substantially the same.
- c) There is concurrence of jurisdiction of the Court.
- d) That the subject matter is the same and finally,
- e) That there is a final determination as far as the previous decision is concerned.

11. The Applicant's first application for stay of proceedings was in respect of the Ruling delivered on 21st September, 2015 by the Deputy Registrar, whereby leave was granted for LR No. 209/7196/113 to be sold in execution of the decree herein. The stay application filed by the Applicants was accordingly unsuccessful.

The Applicant thereafter filed a second application for stay of proceedings under Certificate of Urgency on 12th October, 2015. By then the Respondent had also sought, vide the application dated 5th October, 2015, the settlement of Terms of Sale of the aforesaid property. The two applications were heard and determined by the Deputy Registrar on 15th January, 2016, the result being that the Deputy Registrar dismissed the Applicant's Chamber Summons dated 12th October, 2015 on the ground that the matters raised therein had already been determined by the Court.

12. This application was filed after the Ruling of 15/1/2016. Clearly, the issues at stake in the first application are not the same issues at play in the second application in so far as the stay sought was in

respect of different Rulings of the Court. The Court of Appeal, in the case of **Madhupaper International Ltd vs Kerr [1985] eKLR** recognized that the High Court has concurrent jurisdiction when it comes to the granting of interim orders in the case of appeal. It cited with approval the English case of **Erinford Properties Ltd vs Cheshire County Council [1974] 2 All ER 443** in which **Meggary J** held that where a Judge dismisses an application for an interlocutory injunction, he had the jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and that it was unnecessary for the applicant to apply to the Court of Appeal for it and that there was no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed. The Court of Appeal was of the view that:

"It is preferable for the High Court to deal with such an application, in any event, ... because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs."

13. In the 18th Edition of **Mulla on the Code of Civil Procedure**, it is stated thus with regard to such applications:

"It is needless to point out that interlocutory orders are of various kinds, some...are designed to preserve the status quo pending the litigation and to ensure that parties might not be prejudiced by normal delay which the proceeding before the Court usually takes. They do not, in that sense, decide in any matter the merits of the controversy in issue in the suit and do not, of course put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge..."(emphasis added)

14. Accordingly I find and hold that the principle of *res judicata* is inapplicable to the set of circumstances at play herein.

15. In their submissions, the Applicants argued that they dutifully paid the fees due to the Respondent pursuant to their Retainer Agreement marked **JNM3** and that the Respondent deliberately failed to disclose to the Taxing Master the fact that there was a Retainer Agreement, thereby occasioning a miscarriage of justice in the form of the Ruling dated 15th January, 2016. They urged that they be afforded an opportunity to save their inheritance.

16. The application has been filed pursuant to Sections 1A, 1B, 3, 3A & 63(e) Civil Procedure Act and Order 40 Rules 1 & 2, Order 10 Rule 11, Order 22 Rule 25, Order 51 Rule 1 Civil Procedure Rules. It is therefore easy to see that from its very nature, the application is ill suited for any of those provisions of the law. It is not an application for injunction for purposes of Order 40 Rules 1 & 2, neither is it one for setting aside a default Judgment pursuant to Order 10 Rule 11. Order 22 Rule 25 on the other hand provides that:

"Where a suit is pending in any Court against the holder of a decree of such Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

17. In this instance, there being no other pending suit between the Decree Holder/Respondent and the Judgment Debtor/Applicant, this provision is clearly inapplicable herein. Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Order 51 Rule 1 Civil Procedure Rules are generic in terms and speak to the general administration of justice. As for Section 63 (e) Civil Procedure Act, it is a provision intended for such interlocutory orders as would be necessary in order to prevent the ends of justice from being defeated and therefore, to my mind, would only come into play as a last ditch measure.

18. It is appreciated that the Applicants are lay persons and may not be well versed in the law and yet are entitled to equal protection of the law. For that reason, and pursuant to the provisions of Article 159(2) (d)

of the Constitution as read with Order 51 Rule 1 of the Civil Procedure Rules, I would presume that the Applicants intended to make their approach to Court in this instance for stay in case of Appeal under Order 42 Rule 6 (1) of the Civil Procedure Rule. That provision reads in part:

“the Court appealed from may for sufficient cause order stay of execution of such decree or order...”

19. It is evident that a Notice of Appeal has indeed been filed by the Applicant and for purposes of **Order 42 of the Civil Procedure Rules**, an appeal is deemed filed when a notice is given (see **Order 42 Rule 6(4), CPR**). Accordingly, the issue to determine is whether the conditions for stay in the case of appeal as set out in Order 42 Rule 6 (2), Civil Procedure Rules have been satisfied by the Applicant, namely:

a) Substantial loss, and that the application has been made without unreasonable delay; and

b) That security has been provided for the due performance of the decree.

20. I have no doubt, from the averments in the affidavits of **Joyce Nziza** that the applicants stand to suffer substantial loss if the suit property is sold. It is part of the estate of their deceased's father and therefore their inheritance. Its exact value is still in dispute and therefore the risk of its being sold at an undervalue cannot be ruled out. The foregoing would therefore suffice in terms of establishing substantial loss.

21. It also evident that the application was filed without unreasonable delay. The Notice of Appeal was lodged on **28th January, 2016** in respect of a Ruling dated **15th January, 2016**. The application itself was filed on **3rd February, 2016** and amended on **4th February, 2016**. I would therefore find and hold that the Applicant has demonstrated sufficient compliance with **Order 42 Rule 6 (2) (a) Civil Procedure Rules**. The only issue remaining for determination is in terms of the requirements of **Order 42 Rule 6 2(b) Civil Procedure Rules**. No security has been provided by the Applicants and for this reason the Respondent urged the Court, on the authority of **Equity Bank Limited Vs Taiga Adams Company Limited [2006] eKLR** to uphold the finding that failure to satisfy any one of the tenets stipulated in **Order 42 Rule (6) (2)** is fatal to the application.

22. I however take the view that even where no security is expressly offered the Court is not precluded from making an order as to security as would meet the ends of justice in the case and requiring that the same be provided, for **Rule 6 (2) (b) of Order 42** states:

“Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

23. Such that the order for security would, in appropriate cases, precede the provision of security. I note too that the assertion by the Applicant that the Respondent is presently holding the safe custody of the title to the subject property appears not to have been refuted.

24. In his written and oral submissions herein the Respondent argued that there is no automatic right of appeal against the Ruling of the Deputy Registrar dated 15th January, 2016 and that an appeal could only be against the orders made on 21st September, 2015. My considered view is that the intended appeal is the Applicants' and it is therefore for her to present and prosecute it as best as she can. Accordingly its competence or otherwise would best be canvassed before the appellate Court.

25. Accordingly, I would be inclined to grant stay of execution as sought, pending the hearing and disposal of the Applicant's intended appeal but direct that:

(1) The property No. LR No. LR 209/7196/113 be not disposed of or interfered with in anyway pending the hearing and disposal of the Intended Appeal.

(2) The Applicants shall pay the costs of the Auctioneers including advertisement charges within the next 30 days.

(3) Prayer 4 being the subject of appeal, is misconceived and is declined.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29th DAY OF JUNE 2016

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OLGA SEWE

JUDGE