



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLANEOUS CIVIL APPLICATION NO. 22 'A' OF 2016

ABRAHAM LENAUIA LENKEU.....APPLICANT

VERSUS

CHARLES KATEKEYO NKARU.....RESPONDENT

RULING

This is an application by way of notice of motion dated 2.6.16 filed under certificate of urgency in the first instance exparte pursuant to Section 1A, 1B, 3A, Section 63E, 79G, 95 of the Civil Procedure Act and Order 42 rule 6 Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law; seeking orders:

- 1. That service of this application be dispensed with in the first instance and the same be certified urgent and heard exparte in the first instance due to the urgent nature of the relief sought herein.**
- 2. This honourable court be pleased to stay execution of the Principle Magistrate Court in Case No. 795 of 2015 pending hearing and determination of the application interpartes.**
- 3. The respondent be and is hereby restrained by himself, officers, employees, agent, servants and or any other person whosoever from in anyway disposing off, concealing, repossessing, selling, commencing the suit of or otherwise proceeding with the intended auction or interfering with the applicant ownership and possession of any property pending the hearing and determination of this application interpartes.**

The application is premised upon the fourteen grounds as denoted on the body of the notice of motion and an affidavit in support by **Abraham Lenaiya Lankeu** dated 2.6.2016.

Summary of facts:

The matter involves an application filed by the applicant seeking orders for stay of execution and injunction by this court on the judgement of the lower court in PMCC 795 of 2015. The respondent filed PMCC 795 of 2015 on 22nd December 2015 seeking recovery of the sum of Ksh.2,300,000/= with interest at 25% per annum and costs of the same. The applicant herein from the record perused was allegedly served but failed to enter appearance or file defence within the stipulated period under Order 5 rule 2 of the Civil Procedure Rules.

The trial magistrate made an order for entry of judgement for a liquidated claim as particularized in the plaint. That resulted in the decree drawn in favour of the respondent to be satisfied by the appellant. It is not in dispute that the respondent in the notice of motion applied for execution of the judgement by way

of attachment of goods under Order 22 of the Civil Procedure Rules. Warteem Auctioneers Ltd received instructions to carry out the execution process by a proclamation dated 11/4/2016.

Being dissatisfied with the decree and subsequent execution by way of attachment of movable goods applicant filed a notice of motion challenging the lower court's judgement and decree.

The respondent was aggrieved by the decision of appellant moving this court for orders of stay of execution, as the same was premature and done without jurisdiction. A preliminary point of law was raised on the jurisdiction and procedure in which stay orders were issued. Both counsels canvassed the application by way of written submissions.

Submissions by the Respondent/Applicant at the Objection

Mr. Salonka counsel for the respondent opposed the applicant's procedure of approaching the court seeking substantive orders where no appeal has been filed against the judgement in PMCC 795 of 2015. The counsel further submitted that there was no jurisdiction in this court to entertain the notice of motion and grant any of the reliefs sought.

It is further Mr. Salonka's arguments that the applicant had not satisfied the conditions for grant of stay of execution. The orders sought by the applicant laid no basis nor foundation in absence of substantive suit seeking permanent injunctive relief. Counsel further argued and submitted that the manner in which the notice of motion was crafted ousted the jurisdiction of the court to entertain it and issue any orders thereto.

The respondent relied on the decisions in the case of **VISHIRAM RAUJI HALAL & ANOTHER V THORNTON & TURNPIN [1963] LIMITED NAIROBI CA NO. 15 OF 1990** for the holding that where no appeal is filed this court has no jurisdiction to entertain an application for stay of execution. The case of **BENSON NGUGI MUIRURI V KENYA NATIONAL CAPITAL CORPORATION LIMITED HCCC 1981 OF 1993**. The court citing the decision in **UJAGAR SINGH V RUNDA COFEE ESTATES LTD** for the proposition:

"There are, I think three other reasons why the word "appeal" must be given a wide meaning in rule 53. The first is thus Order XLI Rule 4 (now Order 42 Rule 6) of the Rules of the High Court provides that no appeal shall operate as a stay of execution except in so far as the court appealed from making order and whether a stay is granted or not by the court, the court to which the Appeal is preferred shall be at liberty on application being made, to consider such application and to make such order therein as may seem just.... That rule contemplates that an appeal must be in being before an application for stay can be entertained by the court appealed from. An appeal either exists or it does not."

The respondent counsel further cited the celebrated decision of **OWNERS OF MOTOR VESSELS (LILIAN (S) V CALTEL OIL (KENYA LTD) [1989] 1KLR** for the proposition inter alia that:

"Jurisdiction is everything, without it, a court has no power to make one more step where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence."

It was Mr. Salonka's submissions that the respondent was entitled to the fruits of judgement granted in his favour by the lower court. As such the applicant's application for a stay of execution proceedings lacked merit and as a result of orders issued injustice was occasioned by the order. He urged this court to dismiss the application with costs.

The Applicant's Submissions

Mr. Mutoro, counsel for the applicant submitted and opposed the line of arguments by Mr. Salonka for the respondent. The counsel Mr. Mutoro submitted that the jurisdiction of this court has been properly

and procedurally invoked. He cited the provisions of Article 165 (3) (a) of the Constitution 2010; which has a provision that the high court has unlimited original jurisdiction on criminal and civil matters.

Mr. Mutoro counsel for the applicant further argued and submitted that this court has powers to grant stay of execution. Counsel cited Article 165(7) of the Constitution and the case of **BUTT V RENT RESTRICTIONS TRIBUNAL 1982 KLR 417**.

In this case the court held inter alia that:

“The general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed.”

Learned counsel reiterated that this court has jurisdiction to issue the orders sought in the application dated 2.6.2016.

DISCUSSION AND DETERMINATION

The Law

The Constitution provides for appellate jurisdiction of the high court under Article 165 (3) (c) and (e) of the Constitution 2010. As an appellate court it is guided by Section 78 of the Civil Procedure Act and Order 42, Rule 32 of the Civil Procedure Rules in civil proceedings. Rule 32 provides as follows:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal.”

The reading of rule 32 under Order 42 of the Civil Procedure Rules empowers the court to exercise jurisdiction to consider and make orders or objections raised in respect of a judgement or ruling from the lower court. That considerations may be exercised in the whole of the order, decree or partially as the case may be depending on the issue objected to by an appellant.

Section 78 of the Civil Procedure Act provides as follows:

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

(a) To determine a case finally;

(b) To frame issues and refer them to trial;

(c) To take additional evidence or to require the evidence to be taken;

(d) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Order 42 rule 1 (1) provides:

“Every appeal to the high court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

The rationale is to facilitate the issues designed to be canvassed on appeal to enable the respondent to an appeal to respond to accordingly to the appeal.

In view of Article 50 (1) on right to a fair hearing and Article 159 (d) on the principle that justice shall be administered without undue regard to procedural technicalities; what do I see as the position of the rules of procedure in adjudication of disputes? This position was clearly ventilated by the Court of Appeal in the case of **FCS LTD v ODHIAMBO & 9 OTHERS [1987] KLR 182 – 188**. The court held inter alia:

“The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the Civil Procedure Act on inherent jurisdiction of the court to do justice.”

In this respect what Order 42 rule (1) and (2) of Civil Procedure Rules provides is the procedure and manner to plead issues by way of a memorandum of appeal to give an opportunity to the other party to be aware of the case in advance. They cannot therefore be regarded as procedural technicalities provided for under Article 159 (d) of the Constitution. In the case of **SPEAKER OF THE NATIONAL ASSEMBLY v KARUME [2008] KLR 425**, the Court of Appeal held:

“Where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament; that procedure should have been strictly followed.”

Further consideration was in the case of **ANARITA KAREME V REPUBLIC NO. 2 [1979] KLR** it held:

“The court has only such jurisdiction as expressly conferred by statute.”

It is trite that courts are creatures of statute based on the constitution with their jurisdiction prescribed therein. That being the case, jurisdiction is the authority a court has to decide matters that are litigated before it or take cognizance of matters prescribed in a formal way for a decision. Jurisdiction cannot be implied or can it be conferred by agreement of parties. See celebrated case of **OWNERS OF THE MOTOR VESSELS LILLIAN (Supra)**. The same principle was discussed **HALISBURYS LAWS OF ENGLAND 9TH EDITION** at **pg 927** it provides inter alia that:

“procedure for involving the jurisdiction of the court should not be confused with the authority of the court to decide matters which on the fact of the proceedings have been properly prescribed in the formal way for its decision and which are within its jurisdiction.”

What can be deduced from the above text and case law principles is that there exist a distinction between cause of action, jurisdiction and adjudicatory jurisdiction. The cause of action jurisdiction is based upon the state of the law conferring jurisdiction at the point. The cause of action is said to have arisen requiring invocation of adjudication of the dispute in a formal way.

In this case there is no dispute that both under the constitution and statute the court is clothed with appellate jurisdiction. In exercise of that jurisdiction the same constitution and statute provides for due process of the law. It is upon fulfillment of any condition precedent to the exercise of jurisdiction by a

party the court's jurisdiction is invoked. The condition precedent to be fulfilled by the applicant in this case was to comply with Order 42 rule 1 (2) and Rule 32 of the Civil Procedure Rules. The validity of the appeal is to be entertained when adjudication jurisdiction has been determined. The procedural provisions are aimed at achieving a quality case flow management as between the parties and the court.

In this respect there was absence by the appellant to bring himself within the statutory provisions in a formal way by filing a memorandum of appeal as provided for under Order 42 (1) (2) of Civil Procedure Rules. On the fact of it the writ of notice of motion was inappropriate as a procedure without accompanying memorandum and decree appealed from for this court to entertain the appeal. The function of any pleadings like a memorandum of appeal under Order 42 (1) (2) of the Civil Procedure Rules is to put the other party on notice of what to expect at the trial.

The appellant's counsel who filed the respective motion cannot feign ignorance of the point of law in filing the application to be considered by this court seeking stay orders in contravention with Civil Procedure Rules. In the instant case, the appellant had not filed the appeal nor applied for enlargement of time to enable him seek alternative reliefs that may be available as of right or discretion of the court.

It is clear that in the matter of justice the case for the appellant's claim was not ripe for this court to exercise appellate jurisdiction under Section 78 of the Civil Procedure Act. The necessary conditions for exercising the power to adjudication under the Civil Procedure Act and Rules has not arisen as the dispute between the parties is properly before the lower court. The procedure provided for on any issues arising out of the judgement, decree or order for the appellate court to be seized of jurisdiction of the matter is not available to the appellant at this stage as of right.

I agree with Mr. Salonka counsel for the respondent that the court lacked jurisdiction by virtue of lack of a competent appeal by the applicant pursuant to Order 42 (1) (2) and 32 of the Civil Procedure Rules. It seems to me therefore in applying the law and principles in the cited texts and authorities this is a typical example of an abuse of a court process.

Given the above reasons, I allow the objection on jurisdiction based on the grounds on mode of commencement of an action, non-fulfillment of condition precedent and abuse of the court process by the appellant. Thus the preliminary objection on jurisdiction is hereby upheld.

Secondly, this application would be incomplete without a discussion on exparte order of stay issued against the respondent under certificate of urgency. The issue must be decided in the context of Article 50 (1) and Article 47 and 159 (2) (d) of the Constitution 2010. I bear in mind the effect of the sought exparte orders on the substantive rights of the parties that has not been given an opportunity to be heard on the dispute. Equally important is the provision of Article 47 which provides for a fair administration action.

The other parameter to this is the question whether granting an exparte application has the effect of extinguishing substantive rights without the due process of the law. Noteworthy that an exparte proceedings resulting in an exparte order are exceptions to the basic court procedure which requires both parties be present to canvass their respective positions before a judge. As a general rule exparte matters usually involve urgent requests and often result in temporary orders pending an interpartes hearing at a near future date.

The law demands of justice that in allowing exparte proceedings courts balance the right of individuals to receive fair notice against the need for the interest of justice for the court to step in to prevent imminent and irreparable harm. That is the basis upon which to maintain the integrity of the justice system, where a court order resulting from exparte hearing should be quickly followed with a full hearing interpartes.

The law enjoins an applicant appearing before the court without notice to other party to exhibit a high quality and degree of sincerity and honesty. He or she must be guileless. He or she must be frank. He or she must be open. Each must keep nothing that touches on the matter away from the court.

This proposition n law has been considered in the following authorities. In the case of **ESTHER**

MUTHONI PASSARIS v CHARLES KANYUGA & 2 OTHERS ELC 1256 OF 2014 [2015] eKLR. The court cited amongst other authorities the masterly judgement of **Washington L.J.** in the case of **REX v KENSINGTON INCOME COMMISSIONERS**, *ex parte princess Edmond De Polignac* [1917] 1KB 486 and stated as follows:

“There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders *ex parte* (without notice, then the party is obligated to disclose the facts which the court thinks are most material to enable the court to fairly form its judgement. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the interparties stage.”

This rule which has existed since **CASTELLI v COOK [1849] 68 E.R. 36** and was intended to ensure that parties who appear *ex parte* before the court are not deceitful and do not break faith with both the court and the other parties to litigation, has been followed in various subsequent cases both outside and within our jurisdiction. See for example **R.V KENSINGTON v INCOME TAX COMMISSIONERS Ex parte Princess Edmond De Polignac [1917] 1KB 486**, **SMITH v CROFT NO.1 [1986] (1WLR) 58**, **BOREH v DJIBOUTI [2015] EWHC 769**, **TIWI BEACH HOTEL LTD v STAMN 1990 – 1994 EA 565**, **THE OWNERS OF THE MOTOR VESSEL LILLIAN S v CALTEX OIL (K) LTD 1989 KLR**, **BONDE v STEYN [2013] 2KLR & ANOTHER** among others.

So strong is the rule that where disclosure has not been met the court will not even decide the applicant’s application on its merits. In *Ex parte Princess Edmond De Polignac* 1917 1KB 48 **Washington L.J.** stated as follows at page 509:

“It is perfectly well established that a person who makes an *ex parte* application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”

From the above principles, it is for the applicant to exercise due diligence and investigate the facts relevant to his case and any additional information which he could have known if he had made inquiries of the internal facts. The extent of the inquiries which will be held to be proper must depend on all the circumstances of the case including:

- (a) Nature of the case which the applicant is making when *ex parte* application is being made;**
- (b) The order for which the application is made and the probable effect of the order as to the respondent.**

See **COLUMBIA PICTURES INDUSTRIES LTD v ROBINSON [1987] CR 38**:

“Where or not the facts not disclosed is of sufficient materiality to justify or require immediate discharge of the *ex parte* order depends on the importance of the facts to the issues which were to be decided by the court on the application.”

Lastly, it is not every omission that the *ex parte* order will be automatically discharged. A locus penitential may sometimes be afforded? As per **Lord Denning in BANK MELLAL v NIK POUR [1985] FSR 87**. The proposition that the court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the discharge of the *ex parte* order nevertheless to continue any order or even make a new order on terms.

The principles which can be deduced from the above authorities are in respect to notice, fairness, justice,

caution and proportionate in conducting proceedings to adjudicate disputes between two disputants agitating for their respective rights within an adversarial system of justice like the one in our county.

The question which begs for an answer in this application is; what is the fate of the temporary injunctive orders obtained ex parte by the applicant? I have considered the affidavit evidence by the applicant and submissions by both counsels in this issue. It is not disputed that the ex parte order of stay was prayed for and issued without compliance of Order 42 (1) (2) of the Civil Procedure Rules. There was no memorandum of appeal nor the decree or order of the lower court attached to the application by the appellant. Order 42 Rule 6 (1) of the Civil Procedure Rules provides for criteria for grant of stay in case of appeal.

Section 6 (1) states:

“No appeal or second appeal shall operate as a stay of execution or proceedings under decree or order appealed from except in so far as the court appealed from may order.”

The jurisdiction of the high court to grant stay of execution provided for under Section 6 (2) (6) of Order 42 of the Civil Procedure Rules. The applicant in invoking that provision had not brought himself within the procedure. That plea by the appellant was premature and any subsequent orders granted in absence of full disclosure of material facts is void and a nullity

It is clear from the submissions of both counsels that the motive by the applicant was to stop the execution and drag the respondent to a further litigation on appeal unjustifiably. The respondent had obtained a valid judgement of the court. By virtue of the decree he was entitled to the fruits of his judgement. The applicant on learning of the execution proceedings did not seize the opportunity to avail himself before the lower court to first ventilate any issue at that forum. There is no evidence that the trial court had shut the door for a redress for the applicant to seek intervention of the high court.

It should be pointed out that if the objection was in respect of the ex parte – judgement, an avenue is provided for under the Civil Procedure Act and Rules to set aside the judgement by applying to the court to re-open the case. In the affidavit filed in support of the application no averments that such positive steps had been taken by the applicant before the magistrate’s court which heard the dispute originally.

The effect of assuming jurisdiction to entertain an appeal by the applicant is provided for under Order 42 of the Civil Procedure Rules. If any judge not being empowered by law does anything contrary to the law and procedure, such proceedings shall be void.

DECISION

In view of the foregoing reasons; the dictates of the law both the authorities cited and the provisions of Order 42 Rules (1), (2), (6), (32) and Section 78 of the Civil Procedure Act and Rules, I am satisfied that there was no prima facie case to have warranted temporary orders of stay of execution in favour of the applicant. In the result, the following orders abide the notice of motion by the applicant.

- (1) The preliminary objection by the respondent is hereby allowed as against the applicant.**
- (2) The temporary order of stay of execution lifted and set aside.**
- (3) The PMCC 795 of 2015 is hereby released and returned to Chief Magistrate’s Court for adjudication and determination.**
- (4) In the event the matter matures for this court to be seized of jurisdiction, each party will be at liberty to apply.**
- (5) The costs of this notice of motion be met by the applicant for the respondent.**

Dated, delivered in open court at Kajiado on 22nd day of July, 2016.

R. NYAKUNDI

JUDGE

Representation

Mr. Mutoro for the applicant

Mr. Salonka for the respondent

Mr. Mateli Court Assistant present