



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 38 OF 2010

MOSES MWANGI KIMANI.....PLAINTIFF

VERSUS

SHAMMI KANJIRAPPARAMBIL THOMAS.....1ST DEFENDANT

SPECTSAVER (K) LIMITED.....2ND DEFENDANT

PRIME BANK LIMITED.....3RD DEFENDANT

RULING

1. The substantive prayer in the Notice of Motion dated 1st February 2016 is for an Order that this Court Stays Taxation of the Bill of Costs and any other proceedings herein pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No.94/2015 (**Moses Mwangi Kimari Vs. Shammi Kanjirapparambil Thomas & 2 others**). That Appeal challenges the decision of Justice Gikonyo of 31st July, 2014 and is pending for hearing and determination.

2. In his Affidavit of 1st February 2016 filed in support of the Motion before Court, the Plaintiff avers that he was served with a Bill of Costs for taxation on 24th February 2016. The date of service was not revealed. The taxation itself did not proceed on 24th February 2016 or at all. The Plaintiff had obtained Interim Stay.

3. The Plaintiff avers that one of the prayers he is seeking in the Appeal is an Award of Costs to himself. The Plaintiff is apprehensive that if Stay is not granted, then he will suffer irreparable loss and damage as Execution may issue thereafter. In addition, if he were to ultimately succeed in the Appeal, then he would be required to seek recovery of costs.

4. In arguing the Application through his Counsel, the Applicant states that the Application was filed without undue delay as it was brought as soon as he was served with the Notice of Taxation. In addition, Counsel stated that the Applicant is ready and willing to provide security or comply with any condition the Court may impose.

5. The 1st and 2nd Defendants opposed the Application. In an Affidavit sworn on 20th February, 2016, Advocate Saenyi stated that the Application was brought after inordinate delay as the Court Order on

dismissal was made on 31st July, 2014. He further stated that as costs follow the event, the Defendants should be allowed to enjoy the fruits of having the suit dismissed.

6. In addition Counsel averred:-

“THAT I have been informed by the Defendants herein which information I verify believe to be correct that they have enough resources and can comfortably refund back the amount paid as costs should the Appeal succeed. While on the other hand, the Plaintiff’s means and resources are unknown and it will be difficult for the Defendants to recover their costs should the Appeal be dismissed”.

7. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules is on Stay in case of Appeal and reads;

“6(1) No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appealed 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.

(2) 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 reasonable delay: and

(b) 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”

8. The argument by the Applicant is that he will suffer substantial loss because he may be required to ‘chase’ for his costs if he was to ultimately succeed in the Appeal. Further that the Respondents have not demonstrated that they have the financial ability to meet those costs in the event of success. The Applicant argues that the Respondents did not provide evidence to back their averment that they have the financial ability to easily refund costs in the event of a successful Appeal.

9. It is a correct argument that “where an Applicant alleges that the Respondent is a man of straw, the burden of prove otherwise shifts to the Respondent” (As per Mabeya J in **JOHN WANDETO & ANOTHER Vs. VIRGINIA NJERI GATONYE [2015] eKLR**). The Applicant argues that the Respondents have not discharged this onus. The truth of the matter however, is that the Applicant did not and do not question the ability of the Respondents to meet an ultimate Decree and Costs. The Respondents’ statement about their resources was therefore wholly unnecessary as their fortunes or financial ability had not been questioned. In other words no such allegation had been made by the Applicant requiring an answer from them.

10. The Applicant attempted to demonstrate the likelihood of loss by pointing out that the recovery of costs, if he were to succeed would require the filing of suit. I have my doubts. I do not think that the Plaintiff will require to take out separate Proceedings to pursue Costs in the event that his Appeal were to succeed. But whether by fresh Proceedings or Execution herein, the Plaintiff has not alleged or proved that it will be impossible or unduly difficult to recover those Costs.

11. The Plaintiff has failed to satisfy the Court that Substantial Loss may result if this Court were not to grant Stay. On that alone this Application would fail.

12. But they would be yet another reason why the Application is lacking on merit. Order 42 Rule 6 (2) requires an Application for Stay to be made without unreasonable delay. It is admitted that the Decision against which the Appeal has been preferred was rendered on 31st July, 2014. By the count of the

Respondents that would be 1 ½ years before the present Application was filed. It is pursuant to that Decision that the Respondents are seeking costs.

13. The Applicant is of the view that in determining whether or not the Application was brought promptly, the Court should consider the date when the Notice of Taxation was served on him and not the date of the Decision. The Respondents, obviously, are of a contrary view. It is easy to agree with the Respondents. The Order of 31st July 2014 was for dismissal of the suit. The Judge also granted the 1st and 2nd Respondents cost of both the Application and the suit. The responsibility to pay the costs was an incident of that Order. On that day the Plaintiff knew or ought to have known that he was required to meet the costs of the Respondents. He need not have been jolted into action by the taxation proceedings. The Plaintiff was therefore less than vigilant in waiting for about 1 ½ years before bringing an Application whose real intention was to stop payment of the costs.

14. In the end I find that the Notice of Motion of 1st February 2016 is without merit. It is hereby dismissed with costs.

READ, DELIVERED AND DATED AT NAIROBI THIS 21st DAY OF JULY, 2016.

F. TUIYOTT

JUDGE

PRESENT:

Wesonga for Mungata for Plaintiff

N/A for Defendant

Alex Court Clerk