



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. NO. 241 OF 2013

IN THE MATTER OF THE TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

ODERA OBAR & Co. ADVOCATES.....ADVOCATE/RESPONDENT

VERSUS

ALY ENTERPRISES LIMITED.....1ST CLIENT/ APPLICANT

HALAL MEAT PRODUCTS LIMITED.....2ND CLIENT/APPLICANT

MOHAMED ALI MOTHAS.....3RD CLIENT/APPLICANT

MAFUTA PRODUCTS LIMITED.....4TH CLIENT/APPLICANT

RULING

1. By a Notice of Motion brought Under the Provisions of Order 42 Rule 6 of the Civil Procedure Rules, this Court is asked to Stay the Ruling of the Honourable Justice Charles Kariuki delivered on 23rd March 2016 pending the hearing and determination of an Intended Appeal there from.

2. In that Ruling, the Honourable Judge made the following ultimate Orders:-

32. “In the foregoing, I allow the Notice of Motion dated 3rd February, 2016. The Orders made for stay of execution on 3rd December, 2015 are hereby discharged and the Applicant is free to execute the decree dated 6th November, 2014 held in its favour.

I award the costs of this application to the Applicant”.

Explicit in that Ruling was that the Advocate was at liberty to execute a Decree issued in his favour on 6th November, 2014 for Kshs.17,716,484.00 and costs.

3. In an Affidavit of Juma Mohamed Motha sworn on 1st April, 2016 in support of the Motion before Court, the Clients aver that following the Ruling the Advocate was poised to continue with Winding up proceedings already commenced against the Clients. That would render the Applicant’s Intended Appeal nugatory.

4. Attached to the said Affidavit is a Notice of Appeal dated 29th March 2016 in respect to the Intended

Appeal. For purposes of an Application for Stay Under Order 42 Rule 6, such as the one before Court, an Appeal to the Court of Appeal is deemed to have been filed when, under the Rules of that Court, a Notice of Appeal has been given (Order 42 Rule 6(4)).

5. The Advocate opposed the Application on the basis of four (4) Grounds set out in the Grounds of Opposition dated 14th April 2016 and filed on the same day. They are:-

1. The Applicants have not established any or any sufficient cause to warrant the grant of the Orders sought for stay of the Orders issued on the 23rd day of March 2016.

2. The Notice of Motion Application is irredeemably incompetent for failing to invoke the jurisdiction of this Honourable Court under Order 42 Rule 6 of the Civil Procedure Rules.

3. The Orders of this Honourable Court issued on the 23rd day of March 2016 was a negative Order striking out the Notice of Motion of Objection dated 11th day of December 2015. An Order of stay cannot issue on the basis of a negative order.

4. The Notice of Motion Application constitutes a gross abuse of the Court process. The same should be dismissed with costs.

6. This Court agrees with Counsel for the Advocate that as a general proposition an Order of Stay cannot issue against a negative Order. But whether the Application is competently before Court would depend on the real effect of the Order of 23rd March 2016. It is true that the Ruling struck out the Notice of Objection dated 11th December 2015. It is nevertheless also true that following the striking out of the Notice of Objection, the Advocate was at liberty to execute the Decree they held. Indeed the Judge expressly said so. The implication of that Order was that the Advocate was at liberty to take out steps that were adverse to the Clients. The Clients were therefore entitled to seek Protection as they have now done by way of an Application of Stay. Whilst the Application could have been more gracefully worded, its purpose is easy to understand!

7. Order 42 Rule 6(2) of the Civil Procedure Rules provides:-

“No order for stay of execution shall be made under subrule(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; 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 Rule speaks for itself and sets out the conditions to be satisfied before an Order for Stay can be granted. These are that:-

a) The substantial loss may result to the Applicant unless Stay is granted.

b) The Application is made without unreasonable delay.

c) Security as the Court orders for the due performance an ultimate decree/order has been given by the Applicant.

9. On the question of security there is rival argument as to whether or not the offer for Security should come from the Applicant or whether the Court should nevertheless make such an Order even in the absence of an offer from the Applicant. On this I prefer to take the same view as Gikonyo J. in JAMES WANGALWA & ANOTHER VS. AGNES NALIAKA CHESOTE[2012]eKLR where he held

“I agree with the Respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 Rule 6(2) of the CPR reveals that, it is the Court that Orders the kind of security the applicant should give as may ultimately be binding on the Applicant. This modeling of the law is to ensure the discretion of the court is not fettered”.

10. In an application for Stay there is a balance to be struck. This Court accepts the argument by the Advocate that in considering whether or not to grant Stay the Court should bear in mind that a successful litigant should not be deprived of the fruits of a judgement without just cause.

11. Let me examine the rival positions in the light of the principles I have set out.

12. The Application passes the test of timeliness as it was brought hardly one week after the Order sought to be stayed was made. The Order was made on 23rd march 2016 and the Application filed on 1st April, 2016.

13. It is not disputed that in a bid to realize their Decree, the Advocate commenced Winding Up proceedings against the Client. The Advocate did not pull any punches. In a sense the Advocate went for the Jugular!. Once commenced, Winding Up proceedings (now Insolvency Proceedings) against a Company have serious legal consequences. These include the manner in which a Company can relate with its unsecured creditors. This can affect the operations of a Company and this Court believes the Clients when they say that execution through Winding Up proceedings may result in substantial loss to them.

14. Upto there, this Court is inclined to grant Stay of execution of the Decree. But the Court is minded to make the Order conditional for two reasons. The first is for giving of security as required by Order 42 Rule 6(2) of The Civil Procedure Rules. But importantly as well is that the Advocate is not kept away entirely from enjoying the fruits of a successful Taxation.

15. In arguing the Application, the Counsel for the Clients stated that a fair amount of fees due to the Advocate would be Kshs.3 million. Counsel then went on to state that the Clients had made an unsuccessful offer to the Advocate for settlement at Kshs.4 million. This Court is of the view that payment of the offered amount should not await the outcome of the Appeal.

16. So that the Advocate is not anxious about the due performance of any outcome in its favour the Court will require that the Clients furnish security equivalent to the unpaid Decretal sum.

17. These now are the Orders of the Court:-

1) There shall be Stay of Execution of the Decree herein given on 1st October 2014 and issued on 6th November 2014 on the conditions set out in 2 and 3 below.

2) The Clients shall pay to the Advocates the sum of Kenya Shillings Four Million) Kshs.4,000,000/= within sixty (60) days hereof.

3) The Client shall lodge in Court a Bank Guarantee for payment of the balance of the Decretal sum after payment of the sum in 2 above. The lodge shall be within ninety (90) days hereof.

4) In default of 2 or 3above the Stay granted herein shall automatically lapse and the Advocate shall be at liberty to execute.

5) Cost of this Application to the Advocate.

Dated, Signed and Delivered in Court at Nairobi this 29th day of September, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Odero for Advocates

Agwara for Client

Alex - Court Clerk