



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 282 OF 2010

WILLIAM ABIRA

WILIS M. MURIGU

PAUL NGAO MAKALI

KENNETH MUKHAYA

PETER N. MWONGELA

NYAPINDA DAVID

JEFF GUANTAI

LAZARUS OBUNGU

MATHENDU KAVITA

MUHANGANI JOEL

RICHARD M. NJUGUNA

WILSON KARANJA

MARTIN K' OBONYOPLAINTIFFS

VERSUS

KENYA CIVIL AVIATION AUTHORITYDEFENDANT

RULING

1. This court on 27th June, 2016 granted orders for stay of execution in an application that was brought under certificate of urgency. The orders were granted exparte and the court gave a hearing date for interpartes hearing of the application dated 27th June, 2016. In the intervening period, the defendant/applicant, filed a Notice of Motion application on 15th July, 2016 seeking the following orders:-

(i) Spent;

(ii) That this matter be urgently placed before Honourable Justice Emukule for further orders and direction;

(iii) That this Honourable Court be pleased to review and set aside the order by this court issued on the 27th June, 2016 staying the ruling and orders of Justice Anyara Emukule issued on the 16th day of June, 2016;

(iv) That this Honourable court be pleased to make any and/or further orders in the interest of justice;

(v) That the costs of this application be provided for.

2. The application is supported by the supporting affidavit of Cyril S. Wanyong'o the Legal Manager of the defendant/applicant corporation. The plaintiffs/respondents filed grounds of opposition on 30th August, 2016.

APPLICANT'S SUBMISSIONS

3. Ms. Jadi, Learned Counsel for the applicant submitted that she was seeking a review of the orders this court issued on 27th June, 2016 staying the orders of Judge Emukule and requested for the court file to be placed before Judge Emukule for directions. She contended that the respondents are in total abuse of the court process as they have been filing applications for stay of execution. She further submitted that Judge Muriithi on 31st October, 2012 delivered orders on a similar application where he declined to grant an order for an injunction. The respondents then filed an application for stay of execution on 6th December, 2012. The application was heard and a ruling delivered on 8th June, 2016 whereby the court declined to grant stay of execution. The applicant's deponent attached a copy of Judge Emukule's ruling marked as CSW 2 to his supporting affidavit. This court was referred to page 19 of the said ruling where the Judge stated that the respondents are in abuse of the court process as they have been filing a series of applications.

4. Counsel took issue with the fact that the application dated 27th June, 2016 was scheduled for hearing on 21st September, 2016 before Judge P.J. Otieno. She referred the court to the case of **Margaret Njoki Migwi vs Barclays Bank of Kenya Ltd**, Civil Appeal No 68 of 2015 [2016] eKLR where the court at paragraph 17 posed the questions whether a matter of interlocutory nature decided in one suit may be subject of another similar application in the same suit and answered in the negative. It further posed the question whether the principle of *res judicata* applied to an application heard and determined in the same suit and answered in the positive.

5. Ms Jadi submitted that there has to be an end to litigation but the respondents keep on bringing applications of similar nature to court. She stated that the ruling of justice Muriithi shows that the suit was summarily dismissed and the respondents were given 60 days to vacate the suit premises but they are still in occupation of the same. Counsel cited the case of **Pop – In (Kenya) Ltd. & 3 Others vs Habib Bank AG Zurich** [1990] eKLR, at page 2, it was held that applicants cannot keep on filing applications of a similar nature. She prayed for her application to be allowed.

RESPONDENTS' SUBMISSIONS

6. Dr. Khaminwa, Senior Counsel, filed grounds of opposition on behalf of the respondents on 30th August, 2016 to the effect that:-

(i) The Defendant's Notice of Motion application dated 15th July, 2016 is mischievous and an abuse of the court process;

(ii) The plaintiff's application dated 27th June, 2016 has been set down for hearing interpartes on

21st September, 2016 and the defendant shall be at liberty to argue the issues they have raised;

(iii) We insist that the application is frivolous and an abuse of the court process as the Learned Judge addressed her mind to the issues and properly exercised her discretion within her jurisdiction in the prevailing circumstances.

7. Dr. Kahminwa expounded on his grounds of opposition by submitting that the application is frivolous and an abuse of the court processes as stay orders were granted *ex parte* and this matter was scheduled for hearing on 21st September, 2016, thus the arguments canvassed by Counsel for the applicant could be canvassed then. He closed his submissions by stating that it has not been demonstrated why this court should interfere with its orders.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should review and stay its orders dated 27th June, 2016.

8. The applicant's bone of contention is that this court gave orders for stay of execution on 27th June, 2016 staying the orders of Judge Emukule dated 16th June, 2016. This court is being requested to review and set aside its orders. In paragraph 8 of the applicant's affidavit, the deponent states at paragraph (a) that the application (dated 27th June, 2016) is a total abuse of the court process since two applications of the same nature had been made in the matter and accordingly dismissed by the Honourable Judge. (Judge Emukule). At paragraph 8 (b) of the said affidavit the deponent deposes that the said application seeks to review the orders of Hon. Justice Emukule and as per the order issued, the same has been set to be heard before Honourable P.J. Otieno whereas the law mandates that any application for review upon some other ground other than the discovery of such new and important matter or evidence of the existence of a clerical or arithmetical mistake or error apparent on the face of the order shall be made to the judge who passed the order.

9. In paragraph 8 (c) the applicant's affidavit deponent states that given the background of the matter, this court being the duty court, did not have jurisdiction to issue stay orders more so since the judge who issued the orders sought to be reviewed was and is still in station and the most this court could have done was to direct that the file be mentioned before Honourable Justice Emukule for directions pursuant to section 80 of the Civil Procedure Act and as further elucidated by the provisions of Order 45 rule 2 of the Civil procedure Rules, 2010. Further, in paragraph 8 (d), the deponent avers that there was no urgency for this court to grant the stay orders in the matter since the court had granted the plaintiffs thirty (30) days to vacate the suit premises whereof the same had not lapsed thus the matter could have been mentioned before Justice Emukule for further directions and orders.

10. Dr. Khaminwa, SC, in his view considered the application an abuse of the court process as the issue being canvassed in this application could have been dealt with *inter partes* on 21st September, 2016.

11. Order 45 of the Civil Procedure Rules provides as follows:-

“1 (1) Any person considering himself aggrieved

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment of the court which passed the decree or made the order without unreasonable delay

(2)

(2) (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important mater or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed

12. This court granted interim orders of stay of execution on 27th June, 2016, by so doing this court did not review the orders granted by Emukule Judge on 8th June, 2016. I need to state the obvious, that orders granted at exparte stage are granted at the discretion of the duty Judge based on the facts deposed in an affidavit and the grounds on the application. The issue raised by the applicant on the multiplicity of suits that the respondents have filed over the years is a matter that could only be canvased at interpartes stage. This court being the duty court on 27th June, 2016 was clothed with jurisdiction to grant the orders then sought by the respondents. This court is alive to the fact that an order for review of a court order cannot be granted exparte. What this court is being told by the applicant is that it should have, as a duty court, downed its tools and ceased to exercise its jurisdiction as a duty court. It needs not to be said that an applicant who has a dispute is entitled to a hearing and it is up to the court that hears the matter interpartes to determine if an application is res judicata based on the facts adduced and the applicable law.

13. The upshot of the foregoing is that I decline to review or set aside my orders of 27th June, 2016 granting orders for stay of execution. I however in line with the provisions of order 45 of the Civil Procedure Rules direct that this file be placed before Hon. Justice Emukule for directions on the hearing of the application dated 27th June, 2016.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mwangunya holding brief for Ms. Jadi for the defendant/applicant

Dr. Khaminwa, SC, for the plaintiffs/respondents

Mr. Oliver Musundi Court Assistant