



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 120 (O.S.) OF 2017

REHEMA KAZUNGU BAYA.....PLAINTIFF

- VERSUS -

TULIP DEVELOPMENT LIMITED.....DEFENDANT/RESPONDENT

RULING

I. Preliminaries

1. What is before this Honorable Court for determination is the Notice of Motion application dated 29th September, 2021 filed by the Plaintiff/Applicant in court on 30th September, 2021. It is brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil procedure Act Cap of the Laws of Kenya and Order 46 Rules 2 order 51 Rule 1 of the Civil procedure Rules.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant filed this application seeking for the following orders:-

- a) *The Honorable Court be pleased to stay and/or set aside the execution of the Ruling by Hon. C.A. Ogwenon on 20th August, 2021 pending determination and/or decision of the Advocates Complaint Commission over the suit matter.*
- b) *The Honorable Court be pleased to issue order it may deem fit in the circumstances.*
- c) *The costs of this application be provided for*

3. The aforesaid application is based on the grounds, testimony and evidence averred in the 10 Paragraphed Supporting Affidavit sworn and dated 29th September, 2021 by REHEMA KAZUNGU BAYA and the two (2) annexures marked as "RKB 1 & 2" annexed thereto. She deposed that she is the Plaintiff/Applicant herein hence competent to swear the Affidavit. She held that on 26th July, 2021 she was served with the Respondent's Bill of Costs dated 20th April, 2021 by her former Advocate.

4. She deposed that the Respondent Bill of Cost was taxed on the 30th July 2021 and a ruling on it was delivered on 20th August, 2021.

She averred that unless the taxation by the Taxation master was stayed the Honorable Court Execution would follow whereby the Registrar was likely to issue a Certificate of Cost against her which was likely to prejudice her as she had serious issues with her former Advocate on grounds that the suit was filed without her instructions.

5. It was her contention that currently there existed a dispute before the Advocates Complaint Commission (Herein after referred to as "The ADC") between her former Advocates, the law Firm of Mwangata Korir & Company Advocates and herself pending hearing and determination with regard to this suit in terms of instructions and/or capacity by her former Advocates to institute the said suit without her instructions. She annexed and marked as "RKB -1" is a letter dated 4th December, 2020 to that effect.

6. She stressed never having instructed her former Advocates to withdraw the suit – ELC. No. 82 of 2017 nor to file another suit – ELC No. 120 of 2017 as they seemed to have unilaterally done. As a result of this conduct by her former Advocates lodged a complaint before the Advocates Disciplinary Committee to that effect for its determination.

7. In the given circumstances, she averred that she would be prejudiced if the Respondent was allowed to execute the Decree and obtain the

Certificate of Costs issued herein in the given circumstances. She further indicated that there were other pending suits touching on the suit property known as No. GRANT NO. CR. NO. 27666 and registered as Land Reference No. MN/I/3220 between the Plaintiff/Applicant and the Defendant/Respondent namely ELC No. 131 of 2020, Rehema Kazungu Baya –versus- Tulip Deve Limited, and ELC. No. 222 of 2020 Tulip Development Limited –versus- Rehema Kazungu Baya, Khalid Omar Ahmed, Salim Salim Mwabalila, Joseph A. Ng’etich, Abraham Bimndu Nyangoto and which were still pending hearing and determination hence would be adversely affected. She annexed copies of the said pleadings herein marked as “RKB-2”.

8. In the long analysis, she pleaded to be granted the orders as sought in the application as failure to which she held she would be prejudiced thereof.

III. The Defendant/Respondents Case

9. On 15th October, 2021, while opposing the Plaintiff’s Application the law firm of Messrs. Mwakireti & Asige Advocates for the Defendants/Respondent filed a four (4) pointer grounds of opposition dated 14th October, 2021 to the application by the Plaintiff/Applicant. The Learned Counsel stated that the suit herein was dismissed on 22nd February 2021 with costs and the Plaintiff had neither preferred an appeal nor filed an application for the review of the said court orders. They argued that in the given circumstances this Honorable Court lacked jurisdiction to entertain the said application. Further, its their contention that the Defendant/Respondent was not a party to the alleged proceedings before the Advocates Disciplinary Committee for which stay of execution was being sought. Therefore, they urged this Honorable Court to find the application to be incompetent and a nullity in law and dismiss it with costs.

IV. The Submissions

10. On 6th October, 2021 in the presence of all the parties in court, the Honorable court directed that the said Notice of Motion application dated 29th September, 2021 by the Plaintiff/Applicant be disposed off by way of written submissions. Pursuant to that, on 9th November, 2021 all the parties fully complied and the Honorable Court reserved 18th January, 2022 as the date to deliver this ruling hereof.

B. The Plaintiff/Applicants Submissions

11. On 26th October, 2021, the Law firm of Messrs. Kedeki & Co. Advocates for the Plaintiff/Applicant filed their written submissions dated 25th October, 2021. They submitted that the application by the Plaintiff/Applicant had established that she had a “*Prima Facie*” case as she originally filed her suit in ELC No. 82 of 2017 against the Defendant/Respondent herein and in the course of the proceedings her Advocates unilaterally decided to withdraw it and filed this instant suit without notifying her nor seeking her consent. The Learned Counsel argued that she alluded this to be acts of pure negligence making her to pay costs for the mistake of her Counsel which tantamounted to miscarriage of justice.

12. The Learned Counsel averred that they had nothing for and/or against the said judgment obtained by the Defendant/Respondent. According to them, their only contention was who ought to pay costs over a matter which was illegally (sic) (wrongly) filed by her former Advocate. As an indication of the seriousness of the matter she had lodged a complaint against the former Advocates at the ADC. For this reason, the Learned Counsel urged the Defendant to hold on for a while as they awaited the decision of the Advocates Disciplinary Committee. They argued that she was a stranger in this instant case and she needed the protection of the court. The Learned Counsel relied on the case of **MRAO Limited –Versus- First American Bank of Kenya Ltd. And 2 Others (2003) eKLR 125** to hold that she had established “*a prima facie*” case against the Defendant/Respondent. Therefore, she urged court to grant the orders as prayed.

B. The Defendants/Respondents Written Submissions

14. On 2nd November, 2021, the Law firm of Messrs. Mwakireti & Asige Advocates for the Defendant/Respondent filed their written submissions dated 1st November, 2021. The Learned Counsels submitted that the prayers sought and the test alluded to by the Plaintiff/Applicant to be granted the orders were not founded on law. They held that there was no authority availed in support of the argument relating to the prayers sought herein.

In vehemently opposing this application the Learned Counsels submitted under the following five (5) grounds. These were:- Firstly, for stay of execution to be granted there ought to be a pending appeal or review or a reference challenging the taxation of costs. In the given case they argued after the delivery of Judgment on 22nd February, 2021 dismissing the suit and ruling on taxation by the Taxation Master dated 30th June 2020 no appeal had been preferred by the Plaintiff/Applicant nor any reference challenging the taxation. For this very reason this Honorable Court was “*Funtus Officio*” as it lacked jurisdiction to entertain this application henceforth.

Secondly, the Learned Counsel argued that the Defendant/Respondent was not a party to the proceedings before the Advocates Disciplinary Committee for which stay of execution was sought. Indeed, they averred no orders could be granted by the Advocates Disciplinary Committee that would affect the Defendant herein. Ideally, they argued the Proceedings was between the Plaintiff and her former advocate.

Thirdly, they submitted that for all intents and purposes the former Advocates for the Plaintiff/Applicants though adversely mentioned in this proceedings but had not been made party to this application contrary to the principles of Natural Justice – being condemned unheard.

Fourthly, the Learned Counsel held that the Plaintiff/Applicant seemed to have some selective arguments while holding that which she never instructed her former Advocates. She does not deny that she is the one who executed the affidavits in support of the originating summons or the application for injunction. To the Learned Counsel, it was a clear gimmick of her trying to evade the responsibility of paying costs having lost the case.

Fifthly, they argued that the suit was determined on 22nd February, 2021 and the Plaintiff/Applicant was then represented by the Firm of Messrs. Murangata Korir & Company Advocates. After the delivery of Judgment, the current Advocates never sought the leave of court under Order 9 Rule 9 of the Civil Procedure Rules 2010 to come on record on her behalf as required by law.

Finally, the Learned Counsels posed that if the Honorable Court was inclined to grant the stay of execution under Order 42 Rule 6 of the Civil Procedure Rules 2010 then the Plaintiff/Applicant should be ordered to deposit the taxed costs being a sum of Kenya Shillings five hundred and sixty one seven fifty (Kshs. 561,750.00) in court pending the determination of the proceedings before the Advocates Disciplinary Committee.

Nonetheless, they urged the court to dismiss the application with costs.

V. Analysis And Determination

15. I have read and keenly assessed the filed pleadings, the written submissions the cited authorities and the provisions of the relevant laws.

In order to arrive at an informed just and fair decision, this Honorable Court has framed the following salient four (4) issues for consideration. These are:-

(a) Whether the Plaintiff/Applicant's application dated 29th September, 2021 seeking for stay of execution of the ruling of Taxation Master of 20th August, 2021 pending the determination by Advocates Discipline Committee meets the threshold established under Order 42 Rule 6 (1) of the Civil Procedure Rules 2010.

(b) Whether the parties herein are entitled to the prayers sought?

(c) Who will bear the costs of the application?

ISSUE No. (a) Whether the Plaintiff/Applicant's application dated 29th September, 2021 seeking for stay of execution of the ruling of Taxation Master of 20th August, 2021 pending the determination by Advocates Discipline Committee meets the threshold established under Order 42 Rule 6 (1) of the Civil Procedure Rules 2010.

16. Prior to embarking on the analysis for this matter, it's imperative that this court extrapolate on the brief facts. From the filed pleadings, the facts are that appears the Plaintiff and the Defendant have had a long standing dispute over the suit property. On 6th April 2017 the Plaintiff filed the ELC No. 82 of 2017 against the Defendant vide an Originating Summons for a title to all that property known as Land Reference No. Plot No. MN/1/3220 claiming title by virtue of the Land Adverse Possession and sought the orders thereof. Subsequently, her former Advocate decided to withdraw the aforesaid case but filed a fresh one being the instant suit. On 20th July, 2021 the Defendant/Respondent filed a Bill of Costs. On 20th August, 2021 the Taxation Master delivered her ruling awarding the Defendant/Respondent a sum of Kenya Shillings Five Hundred and Sixty One, Seven Hundred and Fifty (Kshs. 561,750/=). The Plaintiff/Applicant got aggrieved by the said Bill of Costs upon being served She turned the tables against her advocates on grounds that she had not given him any instructions to withdraw the case nor to file the instant suit. She questioned why she would be made to bear the costs for an Advocates' mistake which she termed as a miscarriage of justice. From this rage, she instituted a complaint before the ADC of course withdrew her services from them. She instructed a different law firm to represent her. Those are basically the issues of contention.

Having stated the facts, let me now deal with the subject matter under this sub-title. The substratum of the Provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules are stated below:-

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

17. It presupposes that for the Applicant to be considered for orders of stay of execution the Applicant ought to have preferred an appeal. Further, the other requirements are:-

- (a) The Applicant must have a sufficient cause of action
- (b) Likely to suffer substantive loss.
- (c) Ready to place security of costs and
- (d) Filed the application of Stay without inordinate or undue delay.

In this case from the ruling of the Taxation master, of 20th August, 2022 as the Learned Counsel for the Defendant/Respondent argued no

appeal had been preferred or reviewed or any reference made. This court therefore finds itself in an awkward situation on what to stay in the given circumstances.

ISSUE (b) Whether the parties herein are entitled to the prayers sought?

18. Under this sub-heading, apparently I fully agree with the submissions made out by the Defendant's Advocates onto the facts that :- (a) The former Advocate ought to have been made part of this proceedings and since that never happened clearly there was blatant breach of the principles of natural Justice. (b) The Defendant is not party to the Advocates Disciplinary Committee (ADC) proceedings and thus unreasonable and unfair to be dragging them into the said issues in the instant case. (c) From the filed Complaint, and the submissions made hereof in this application it is rather hard to deduce whether the Plaintiff/Applicant is entitled to the orders sought.

Nonetheless based on the ratio and the principles of Overriding objectives under Section 3(1) of the Environment and Land Court Act and the Sections 1, 1A, 3 of the Civil Procedure Act Cap. 21 and Article 159 (1) of the Constitution of Kenya, this court has proceeded and invoked its inherent powers and grants the Plaintiff/Applicant same reprieve by directing that the Plaintiff deposits the decretal amount with in a joint escrow bank account to be opened and held by the Plaintiff's and Defendant's Advocates herein as the most fair, just and equitable thing to do in the given circumstances.

VI. Determination

19. Ultimately, upon undertaking the detailed analysis of this matter, for the sake of sustaining the principles of natural justice, equity and conscience I do proceed to direct as follows:-

(a) **THAT** the Notice of Motion application by the Plaintiff/Applicant dated 29th September is allowed.

(b) **THAT** the Plaintiff/Applicant is directed to deposit the decretal sum of Kenya Shillings Five Sixty One Thousand Seven Hundred and Fifty (Kshs. 561,750.00/= in the joint escrow bank account of Messrs. Kedeki & Co. Advocates and Messrs. Mwakereti & Asige Advocate within the next 30 days from the date of this ruling to be held there pending the hearing and final determination of the Advocates Disciplinary Committee proceedings.

(c) **THAT** the Plaintiff/Applicant to ensure that the proceedings and the matter before the ADC commences in earnest and finalized within the next One Eighty (180) days from the date of this ruling.

(d) **THAT** in default or failure to adhere with any of the above stated conditions the Plaintiff/Applicant's Notice of Motion application dated 29th September, 2021 will stand dismissed with costs and execution to issue thereof.

(e) **THAT** this matter be mentioned on 18th March, 2022 to ascertain progress made and further directions on the matter

(f) **THAT** costs to be in the cause.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 18TH DAY OF JANUARY, 2022.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna Hassan – the Court Assistant

Mr. Kedeki Advocate for the Plaintiff/Applicant

Mr. Mwakereti Advocate for the Defendant/Respondent