



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 25 OF 2014

H M.....APPELLANT

VERSUS

S K.....RESPONDENT

RULING

1. The application that I am enjoined to determine is the Motion dated 14th May 2014. It seeks in the main that there be stay of execution of the judgment and decree in this matter delivered on 4th April 2014 pending hearing and determination of the Motion.
2. The grounds upon which the application is premised are set out on the face of the Motion as well as in the affidavit in support thereof sworn by the applicant on even date. The applicant pleads that he has an arguable appeal with good chances of succeeding of and that he would suffer substantial loss if the judgment and decree are not stayed. He also alleges that the said appeal would be rendered nugatory should stay be denied. His case is that the judgment the subject of the appeal was entered after an *ex parte* process was conducted on 19th March 2014 after he had been misled by the respondent's counsel that the matter would proceed at 2.00 p.m.
3. The respondent upon being served, filed a replying affidavit, sworn on 21st May 2014. She is the plaintiff in the proceedings before the lower court which culminated in the appeal proceedings. Her case is that the applicant to the Motion of 14th May 2014 entered appearance and filed defence through the law firm of Messrs. Avedi & Company, Advocates, whose principal was Mr. Oscar Avedi, Advocate, who at the time did not have a practicing certificate. When this was raised, the applicant changed lawyers and brought in the firm of Messrs. Korongo & Company Advocates in the place of Messrs. Avedi & Company, Advocates. She argues that the process by Avedi & Company, Advocates was invalid, and the coming in of Messrs. Karongo & Company , Advocates did not cure the invalidity. She dated that the appeal is founded on non-existent or invalid pleadings and as such no appeal can and subsists.
4. Contemporaneous with the replying affidavit, the respondent also filed a notice of preliminary objection stated 21st May 2014. She pleads that the appeal be struck out for the application before court is defective in law, the orders it seeks cannot be granted as sought, it is an abuse of the process of court and it cannot sustain a cause of action.
5. The matter was placed before me on 22nd May 2014 for hearing. Counsel appearing agreed by

consent to dispose of the application dated 14th May 2014 by way of written submissions, to be highlighted.

6. Both sides did file written submissions. The applicant's submissions are dated 10th June 2014 and were filed in court on 11th June 2014, while the respondent's written submissions are undated and unsigned, but were filed in court on 25th June 2014.

7. The applicant in his written submissions stated that his application is predicated on the constitutional right to have his dispute determined fairly in a public hearing before a properly constituted court or tribunal and that an appeal does not operate as stay of execution or proceedings. He submits that the appeal in question arises from *ex parte* proceedings that were conducted in his absence as he did not attend court at 9.00 a.m. for he had been misled into believing that the proceedings were to be conducted at 2.00 p.m. He is silent as to whether the advocate who entered appearance and filed defence for him had the necessary competence, but he appears to be saying that even so the procedure for dealing with such a case, as set out in Order 42 rule 6 (1) (2) of the Civil Procedure Rules, was not followed. He submits that the only matter for determination is whether there is ground for grant of stay pending appeal. He pleads that as he was robbed of his right to a fair trial at the lower court he is entitled to appeal. He submits that he has fulfilled all the requirements for grant of stay pending appeal.

8. The submissions filed on behalf of the respondent are neither signed nor dated. This is contrary to the rules of procedure that require that all court process be dated and signed by the party or their counsel. Execution of court process is intended to authenticate it and give it binding force. Unexecuted court process does not deserve any attention and it ought not be treated to be what it purports to be. I shall take it that the respondent did not file any written submissions.

9. The parties highlighted their written submissions on 23rd July 2014. Mr. Aredi appeared for the applicant, while Mr. Kithi argued the case for the respondent. In view of what I have stated in paragraph 8 above, I shall take it that Mr. Kithi did not highlight the respondent's written submissions, but rather he made oral submissions founded on the respondent's replying affidavit.

10. Mr. Kithi submitted that it was not in dispute that Mr. Avedi did not have a valid practicing certificate at the time he entered appearance and filed defence on behalf of the applicant. He urged the court to find that the act of another advocate taking over the conduct of the defence did not cure the invalidity of the documents filed by the previous advocate. He further argued that the subsequent advocate for the applicant also did not have capacity to file an appeal founded on the invalid papers lodged in the lower court. He further argued that the order or decree impugned on appeal has not been attached to demonstrate that there exists a decree capable of execution. He asserted that there is no danger that execution is likely to take place. He also raised issue with Mr. Avedi urging the application, on the grounds that he did not have a practicing certificate and even if he had one, he was not on record for the applicant, as he did not express himself to be holding brief for the counsel on record.

11. On his part, Mr. Avedi stated that there was on record a judgment of the lower court and the appeal on record arises from that judgment. He pleaded that the applicant was not given opportunity by the lower court to ventilate his case, hence the appeal. Mr. Avedi also pleaded for time to produce his practicing certificate.

12. I directed that Mr. Avedi avails his practicing certificate before I could proceed to write my ruling on the application. He was to avail his practicing certificate on 29th July 2014. The matter was not listed on 29th July 2014. Mr. Aredi eventually availed his practicing certificate on 26th August 2014. The date of issue was 15th April 2014. He also availed a letter from the Law Society of Kenya dated 23rd July 2014, which indicated that he had paid for the certificate on 19th March 2014 and his application was forwarded to the Chief Registrar of the Judiciary on 8th April 2014.

13. Neither side attached copies of the proceedings in the lower court. The lower court has not been availed either. I therefore do not have the benefit of having sight of the proceedings conducted at the

lower court. I have though had occasion to see copy of the judgment attached to the affidavit in support of the application.

14. The respondent invites me to find that there is no appeal on record. Her case is that as the applicant did not appear nor file defence at the lower court, he lost an opportunity to defend himself, and consequently he cannot impugn the judgment that was subsequently delivered. The applicant's case is that he had appeared and filed defence, but mistakes were made by his counsel, and he should not be penalized for that. A judgment was pronounced against him and he is therefore entitled as of right to file an appeal.

15. I have had sight to the judgment attached to the affidavit in support. Specific orders were made against the applicant. I have already stated that I have had occasion to see the proceedings conducted at the lower court. I doubt whether I can at this state make a determination to whether there is a valid appeal or not. There is inadequate material upon which I can make such a determination. The application before me seeks stay of execution and of proceedings. The determination that I have to make is whether the orders sought is that application are available.

17. The principal order in the application dated 14th May 2014 is in prayer 3. Prayer 3 states as follows:-

“That execution of and all proceedings to enforce the judgment and decree in this matter delivered on 4th April 2014 be stayed pending the hearing and determination of this application.”

18. Mr. Kithi for the respondent raised issue with the workmanship on the application, and especially in relation to prayer 3. Stay is not sought pending appeal, but rather pending the hearing and determination of the application. As worded the prayer is vague. In my view the prayer sought is not grantable. Indeed such order is not envisaged in Order 42 Rule 6(1)2(2) (a) (b) of the Civil Procedure Rules.

19. Moreover, the stay sought is of *“execution of and all proceedings to enforce judgment and decree in this matter determined on 4th April 2014.”* There is no judgment nor decree yet in this matter. None was delivered on 4th April 2014. Indeed there were no proceedings at all in this matter on 4th April 2014. The first event in these proceedings was on 15th May 2014.

20. I have noted too that the body of the application makes no reference whatsoever to the lower court case – Kadhi's Court Civil Case No. 339 of 2013. The principal prayer does not refer to the said case, neither do the grounds on the face of the application. The only reference to the case is in the affidavit in support of the application.

21. Orders are sought in applications. The prayers in the application should be comprehensive and should carry sufficient detail. The order that the court eventually makes should be based on the prayer sought and not on the contents of the affidavit. The affidavit in support merely sets out the factual background to the application. In a sense therefore the application is superior to the affidavit for the affidavit is merely an appendage to the application. An application can stand without an affidavit, but an affidavit cannot stand without the application it purports to support. There must therefore be a logical connection between the affidavit and the application.

22. My finding is that the application before me is not properly conceived, Ideally it should have sought stay of execution pending appeal and not pending the application. Secondly, the Motion should have specifically referred to the lower court case, whose judgment is ostensibly sought to be stayed. It is not enough to cite the lower court case in the affidavit, while the application is silent about it. It should not be left to the court to make presumptions about it. The law expects certainty and specificity in court papers.

23. I need not say more. The Motion dated 14th May 2014 is not for granting. It is available only for dismissal. I hereby do dismiss the same with costs to the respondent.

24. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE