



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 614 of 2004

ZACHARIA MBORI.....1<sup>ST</sup> PLAINTIFF

BELINDA ACHOLA MBORI.....2<sup>ND</sup> PLAINTIFF

VERSUS

RAJENDRA RATILAL SANGHANI.....1<sup>ST</sup> DEFENDANT

PRADEEP KARAMSHI SHAH.....2<sup>ND</sup> DEFENDANT

PALVI GUDKA.....3<sup>RD</sup> DEFENDANT

NNK INVESTMENTS.....4<sup>TH</sup> DEFENDANT

RULING

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Motion application dated and filed on 19<sup>th</sup> October 2012 has been brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 9 Rule 9, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer Nos 1, 3, 5 and 6 are spent. The remaining prayers seek the following:-

a. **THAT the Honourable Court do grant the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants leave to appoint Messrs Apopo & Co Associates Advocates in place of Rach & Co Advocates.**

b. **THAT this Honourable Court be pleased to grant an Order of stay of execution in respect of the judgement entered in this matter in favour of the Plaintiffs/Respondents on the 27<sup>th</sup> of March 2012 pending the hearing and final determination of the Defendants'/Applicants' Appeal to the Court of Appeal.**

c. **THAT the costs of this Application be provided for.**

2. The grounds on which the Defendants/Applicants relied on in support of their application were as follows:-

a. The Applicants have an arguable appeal with a high probability of success.

b. If the order sought is not granted, the Applicants' Appeal will be rendered nugatory and the Applicants will suffer irreparable damage.

- c. Unless the application is allowed, the Respondents threaten to levy execution against the Applicants.
- d. The Applicants are ready and willing to provide such reasonable security as the Honourable Court may order.
- e. Substantial loss will result to the Applicants unless the orders sought are granted.
- f. The Application has been made without any unreasonable delay.
- g. The Application ought to be granted in the interest of equity, fair play and justice.

3. On 17<sup>th</sup> October 2012, Rajendra Ratilal Sanghani swore a Supporting Affidavit on his own behalf and that of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He stated that judgement had been entered in favour of the Plaintiffs for a sum of Kshs 4,000,000/= plus interest at court rates from the date of filing suit until payment in full and costs of the suit.

4. He also stated that on 6<sup>th</sup> April 2012, the said Defendants filed a Notice of Appeal and also applied for the certified copies of the proceedings. The Defendants were apprehensive that the intended appeal in the Court of Appeal would be rendered nugatory if the stay of execution pending appeal was not granted.

5. On 29<sup>th</sup> October 2012, Musinga J ordered the Defendants to deposit a sum of Kshs 2,000,000/= into a joint interest earning account and they had duly complied with the same.

6. In their written submissions dated and filed on 28<sup>th</sup> November 2012, the Defendants argued that they had satisfied the conditions under which a stay of execution could be granted. On the other hand, the Plaintiffs submitted that the Defendants had not satisfied the conditions for which the Defendants could enjoy a stay of execution pending appeal. They submitted that the Defendants had not shown how the appeal would be rendered nugatory and what irreparable loss they would suffer if the said stay of execution was not granted.

7. I have noted the submissions and documentation filed by both the Plaintiffs and Defendants on the issue of a stay of execution pending appeal but did not see anything on record to suggest that prayer No 2 of the said application was dispensed with. None of the parties addressed me on the same. It appears to me that leave was not granted by the court for the firm of M/S Apopo & Co Associates Advocates to come on record on behalf of the Defendants herein. Lack of a formal Notice of Change of Advocates is mandatory bearing in mind that the said advocates were coming on record after the entry of judgment in favour of the Plaintiffs herein. I am not sure whether this was an oversight and if not, there is nothing on the court record to show that the issue was resolved.

8. Order 9 Rule 9 of the Civil Procedure Rules, 2010 stipulates as follows:-

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall be effected by order of the court:-**

- a. Upon an application with notice to all the parties
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

9. Under Order 9 Rule 10 of the said Rules, it is stipulated as follows:-

**An application brought under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.**

10.It is not sufficient for a deponent to depose that the previous advocates do not have any objection to the incoming advocates taking up matter. The two (2) orders hereinabove have been couched in mandatory terms.

11.In view of the fact that the application was not filed by Rach & Co Advocates who were deemed to be the advocates on record by virtue of Order 9 Rule 13 of the Civil Procedure Rules, 2010, I am unable to grant the orders sought by the Defendants herein. Order 9 gives an elaborate procedure on the change of advocates and this must be adhered to. The lack of a Notice of Change of Advocates is not a technicality that can be ignored. Rather, it is a substantive issue that goes to the core of the orders sought by the Defendants.

12.This court is under a duty to ensure the expeditious disposal of this matter but it must follow procedure. I do appreciate that there was a stay of execution granted pending the inter partes hearing of the Defendants' application and security in the sum of Kshs 2,000,000/= deposited but in view of lack of a proper authority for M/S Apopo & Co Associates Advocates to represent the Defendants herein, I am unable to address the issue of stay of execution pending appeal as submitted by the parties or to extend the stay of execution pending appeal that had been allowed by the court previously.

13.Consequently, I direct that the parties address the court on the issue of appointment of advocates prior to submitting on the issue of a stay of execution pending appeal. Unless a consent on the appointment is filed allowing M/S Apopo & Co Associates Advocates to come on record for the Defendants herein, the issue of their appointment should be canvassed in accordance with the law.

14.The upshot of my ruling is that the Defendants prayers for a stay of execution pending appeal in the application dated 17<sup>th</sup> October 2012 will not be dismissed but will instead be held in abeyance pending the resolution of the appointment of advocates representing the Defendants herein and further directions and/or directions of the court. In the meantime, the stay of execution order issued on 29<sup>th</sup> October 2012 is hereby discharged as the same was granted prematurely.

15.Orders accordingly.

**DATED and DELIVERED at NAIROBI this 19th day of March 2013**

**J. KAMAU**

**JUDGE**