REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.137 OF 2010

(Arising from the judgment in BGM CM CC NO.623 OF 2007)

JOSEPH WANGILA...APPELLANT

VRS

FLORIAN NYONGESA.. RESPONDENT

RULING

The application

[1] The application I am called upon to determine is dated 17th January, 2013, and is praying for:

(a) The stay order of 21/12/2012 issued in favour of the appellant by the trial magistrate to be lifted/vacated.

(b) Costs of the application.

[2] The major grounds of the application are:

1. That the trial magistrate acted contrary to the law in granting the impugned stay order without a formal application.
2. That the trial court was *functus officio* to issue an order of stay.
3. That by law there can never be a stay recovery of costs.
4. That the appellant should have applied for an extension of time rather than stay order.

[3] The Applicant/Respondent filed an affidavit sworn on 17/1/2013 and a supplementary affidavit sworn on 12/2/2013. The affidavits reinforce the grounds of the application, except the Supplementary Affidavit has introduced new element that casts doubt on the signatures purportedly appended to the Appellant's affidavits of 31st January, 2013 and of 10th November, 2010. That is a matter the court cannot decide in this application, for it is not supported by any expert evidence on handwriting. I will say no more about it.

[4] The Applicant filed written submission on 20/2/2013. In those submissions, they have reinforced

the grounds of the application and more specifically argue:

(1) That the appellant was entitled to only one application for stay before a trial court.

(2) That it was wrong for the trial magistrate to have issued another stay on a mention date.

(3) That conditional stay issued on 18th March, 2011 lapsed by efflux ion of time after the Appellant deposited the decretal sum on 19th April, 2013- two days outside the time allowed by the court.

[5] For those reasons, the Applicant prays for the stay order made on 21/12/2012 to be lifted and vacated accordingly.

The Respondents/Appellant case

[6] The Respondent/Appellant filed a replying affidavit sworn on 31/1/2013 and written submissions dated 19th March, 2013. In those pleadings, the Respondent/Appellant argues that:

(a) The application dated 17/1/2013 is not meritorious.

(b) That the Respondent/Appellant deposited the entire decretal amount in the sum of Ksh.128, 758 on 19/4/2011.

(c) That there was a misunderstanding in this matter and since the Applicant/Respondent had applied for execution, there was danger of execution then.

(d) That the court only confirmed stay that had been issued since the full decretal sum had been deposited in court.

(e) That, therefore, there is no more than one stay orders.

COURT'S DETERMINATION

[7] I have considered all the rival submissions, and perused the trial court's file. I observed the following:

(a) That the trial court on 18/3/2011 ordered a stay of execution of the judgment and decree of that court pending the hearing and determination of this appeal.

(b) That the stay was upon condition that the Appellant deposits an amount of money as security within 30 days. Unfortunately that part of the ruling of the trial court's record where the actual figure was recorded has been torn and the piece lost, such that one is not able to discern the amount of money to be deposited as security.

[8] Further perusal of subsequent proceedings of the trial court reveals that the trial court ordered the decretal sum to be deposited and the Appellant indeed deposited a sum of Ksh.128, 758 on 19/4/2011 vide receipt no.332315.

[9] The Applicant/Respondent had commenced execution process even after the deposit of security had been made but the trial court wrested the warrants of execution by recalling them through its order made on 31/8/2012.

[10] The turn of events in this matter particularly as occasioned by Mr. Waswa is disturbing. I do not understand how Mr. Waswa could have received the sum of Ksh.128, 758\= deposited in court without a formal court order by the trial magistrate. The letter dated 28/4/2011 by Wabwile & Co. Advocates is not

sufficient authority to cause release of security deposited in court pursuant to an order of the court. Any withdrawal of such security from court must be upon an order of the court first; releasing the security from its original purpose to another purpose; then ordering payment of those funds to the party to whom it is due. This course should be applied in all such cases, but of course on hearing the parties. Mr Waswa's actions are tantamount to a complete abuse of court process because he was not competent to declare default of a court order especially where the money was already in court. Even in clear cases of default, where the subject matter is the property of the law for having been deposited pursuant to a court order, the correct procedure is to apply to the court to declare the default and then order the release of the money. I call upon Mr Waswa to appear before me and offer an explanation on the issue after which I shall make appropriate orders on that aspect. That kind of withdrawal of security deposited in court was improper and an insidious act which defeated the entire purpose of the order made by the trial magistrate on 18/3/2011. And the court will not countenance such processes being adopted lest chaos should rein in judicial proceedings.

[11] It is not any excuse or legal justification for Mr Waswa to have relied on the purported breach by the Appellant of the order made on 18/3/2011, in requesting for the payment out of the security held by the court in such casual and un-procedural manner.

[12] Before the inquiries in preceding paragraphs are done, I hereby hold that the trial magistrate did not flout any law by reinforcing the stay that had been issued on 18/3/2011. She should however have dealt with all the illegal events that had taken place in the file, which should have corrected the sad factual state of affairs in the matter, and found a justification for her subsequent orders to preserve the subject of appeal.

[13] Therefore, the application by Mr. Waswa dated 17/1/2012 is *mala fides* whose main tide is to perpetuate force and wrongdoing. And as the principal duty of the judge is to supress force and denounce wrongdoing when it established before him, I hereby dismiss the said application with costs to the Appellant. See the words of Lord Denning quoting Lord Bacon's essay 'Of Judicature', in the case of **Wallersteiner v. Moir (CA) [1974] 1 W.L.R pp. 996 letter G** on that. This appeal is to be mentioned on a date to be assigned by the DR for Mr. Waswa and the advocate for the Appellant to appear before me. The typing of proceedings in respect of the trial court file should be fast tracked. Meanwhile, both files shall be kept under safe custody of the Deputy Registrar, Bungoma.

Dated, signed and delivered in open court at Bungoma this 22nd day of July, 2013

F. GIKONYO

JUDGE

In the presence of:

Mr. Waswa for the Respondent

Mr. situma for the Appellant

CA: Khisa

COURT: Ruling delivered in open court.

F. GIKONYO

JUDGE