REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.54 OF 2012

ENOCK ABOK OLOO KISIA ……………………………………APPELLANT

VERSUS

NAOMI ODHIAMBO …………………..………………………RESPONDENT

R U L I N G

1. This decision is in answer to the Notice of Motion dated 3rd July 2011. In that Application, what needs to be determined is prayer 2 & 4 which read:

   "2. THAT this honourable Court be pleased to order for maintenance of status quo or for the restoration of interim stay orders in this instant suit being the lead suit and by extension suits CMCC 102 OF 2010, CMCC 99 OF 2010, CMCC 103 OF 2010, CMCC 98 OF 2010, CMCC 101 OF 2010, CMCC 117 OF 2010 which have judgments pending the hearing of the interparties application on 23rd July 2013 to reinstate the application BUSIA HCCA 54 of 2012 to re-open our case for purposes of calling our witnesses.

   4. THAT the costs of this Application abide with the Appellant."

2. It is necessary to outline the background to this Application. The Appellant first approached this Court with a Notice of Motion dated 24th September 2011 which was simultaneously filed with an Appeal of even date. That Notice of Motion sought an order of stay of proceedings in Busia SRM.CC.120 of 2010 pending the hearing and determination of the Appeal. The Order, if granted was to apply to the other related suits which are cited in the Notice of Motion. On 8th October 2012, Kimaru J. certified that application urgent and granted temporary stay orders. Inter parties hearing was fixed for 22nd October 2012. On that day the Judge was not sitting and a fresh date of 31st October 2012 was fixed by the Deputy Registrar. Come the 31st October 2012, Mr. Jumba who was holding brief for Mr. Omondi told Court that parties had agreed to take out the matter from the list of the day as they were considering settling it in its entirety. With that, the Judge stood over the matter generally.
3. It is unclear as what became of the intention to settle the matter, but the application was later fixed for hearing on 19th November 2012. On that day the Judge ordered that the matter be mentioned on 28th November 2012. On 28th November 2012, the Judge marked the matter as stood over generally it being indicated that Mr. Nyongesa appearing for the Appellant was unwell. Enter the current Judge. The application came up before me on 13th March 2013. There was no attendance by the Applicant or his Counsel and so Mr. Omondi for the Respondent moved the Court for dismissal of the Application. The Court obliged.

4. Not surprisingly, three days later, the Appellant filed an Application in which he sought the reinstatement of the dismissed application. In that application was a prayer for an order of stay of execution of the Judgments in Busia CMCC.120 of 2012 and the related matters. The Court granted temporary relief and slotted the hearing for 24th April 2013. The Court did not sit on 24th April 2013 and so on 13th May 2013, in the registry, Mr. Nyongesa for the Applicant fixed the Application for hearing. The appointed day was 24th June 2013.On that day, Mr. Okutta held brief for Mr. Nyongesa for the Applicant while Mr. Omondi appeared for the Respondent. Mr. Okutta requested for an adjournment of two weeks. The reason, Mr. Nyongesa was unable to serve Mr. Omondi in good time. Mr. Omondi resisted the request and stated that he was ready to proceed. In exercise of my discretion, I adjourned the application to 23rd July 2013 but discharged the interim orders that had been subsisting. Hence this Application.
5. In the Application, the Appellant relied on two supporting affidavits one by Dennis Yuni and another by Nyongesa Eugene Wangilla. Basically, Mr. Yuni who says he is a clerk at the firm of Kairu and McCourt Advocates avers that on 13th June 2013, he received instructions to serve a hearing notice upon the Firm of Omondi & Co. Advocates. Omondi & Co. Advocates represent the Respondent. Yuni says that he misplaced the Hearing Notices that where to be served. And it is for that reason that he did not serve the firm of Omondi & co. On his part, Mr. Nyongesa corroborated the story of the clerk when he stated that he had on 13th June 2013 instructed Mr. Yuni to serve the Hearing Notice upon the Respondent's Counsel. But on the eve of the hearing, the clerk intimated to him that he had inadvertently forgotten to serve the Hearing Notice upon the Respondent.
6. In an affidavit filed in opposition to the Application, Mr. Omondi stated that there was no evidence whatsoever that Mr. Yuni worked in the firm of Kairo and McCourt. Further, that the dispositions made in the two affidavits were at variance with what was stated in Court on 24th of June 2013. Counsel also pointed out that the Plaintiffs in the suit sought to be stayed had commenced execution proceedings. He gave an example of a declaratory suit being Busia CMCC.256 of 2013 **Farida Atieno –vs- Direct Line Assurance Co. Ltd**. which was filed on 5th July 2013 and which seeks to enforce the decree in Busia CMCC 102 of 2010.This is one of the suits whose execution the Application seeks to stay. Counsel further averred that the Judgments in those suits are not subject of any appeal.
7. In opposing the Application, Mr. Omondi appearing for the Respondent rehashed what was stated in his affidavit of 12th July 2013. He underscored that reinstatement would prejudice the Respondent as, other than CMCC 100 of 2010, the other suits are not subject to any appeal. And therefore a stay order would serve no purpose. That any rate the Plaintiffs in those suits had already commenced execution. It was his further view that an Application could only be grounded on one affidavit and so the affidavit of Mr Nyongesa being the second affidavit had to be expunged.
8. As I turn to determine the Application, it needs to be remembered that whether or not to grant the reinstatement of the stay order is a matter of discretion. As usual, that discretion ought to be exercised Judicially. Let me first deal with what I consider to be prefatory issues. Should I expunge the second affidavit? An argument was made that an Application can only be supported by one affidavit. I have looked at Order 50 Rule 4 of The Civil Procedure Rules which reads:

> **"4. Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.**"(my emphasis).

A plain reading of that Rule does not suggest that a motion can only be grounded on a single affidavit. In my view the term '**any affidavit'** must be construed as both singular and plural. There would be instances where evidence in support of an Application is in the knowledge, information and belief of more than one person. In those instances, it would be necessary that more than one deponent gives evidence in support of an Application. To read the rule as restricting an application to one affidavit would be an unreasonably constricted interpretation. I find support, I think, in section 3 of the Interpretation and General Provision Act Chapter 2 of the Laws of Kenya which provides '' **that in every written law , except where a contrary intention appears, words and**

expressions in the singular include the plural and words and expressions in the plural include the singular"

9. It was also the position of the Respondent that the Judgments in the related suits are not subject of appeals. The Court has looked at a copy of the proceedings to Civil Suit No.100 of 2010.Those Proceedings are annexed to the affidavit of Maryanne Mwangi which was filed in support of the first application. What emerges is that Civil suit No.100 of 2010 was a test suit in respect to the following suits 152 of 2010, 103 of 2010, 101 of 2010, 99 of 2010, 98 of 2010, 117 of 2010, 148 of 2010 and 102 of 2010. There is express acknowledgement of this by Counsel for both sides. For example, Mr. Omondi on 29th September 2012 told Court as follows:-

"The matter is for the lead file in respect other files including

cc.no.152/2010,c.c.no.103/2010,c.c.no.101/2010,c.c.no.99/2010,c.c.no.98/2010,c.c.no.117/2010,c.c.no.148/2010,

c.c.no.102/2010

The Plaintiff in all the cases closed their cases between the 25th November, 2011 and 9th of December 2011. The defence hearing has been pending for the last 10 months."

The test suit would be in respect to liability.

10. In my view as the test suit is the subject of this Appeal, in respect to liability, then this appeal affects all the other suits. In addition, on my reading of Order 38 of the Civil Procedure Rules in relation to selection of a test suit, a Court may order that related suits be stayed until a selected test suit is determined or is found to have failed to determine what was thought to be a common issue.
11. I now turn to consider whether the Application deserves my discretionary favour. It is acknowledged by the Appellant's Counsel that the reason for failing to attend Court to prosecute the matter on the 13th March 2013 was caused by an oversight on the part of the Law Firm of Kairu & McCourt Advocate. Mr. Yuni who in paragraph 1 of his affidavit describes himself as a clerk in the said Firm admits misplacing the Hearing Notice that was to be served upon the Firm of Omondi & Co. Advocates. A mistake committed by a clerk is a mistake of the Law Firm when committed in the course of employment. Whether or not a lapse by an Advocate ought to be laid at the door of a litigant depends on the uniqueness of each case. Many things count. It will depend, for instance, on the nature of the lapse and whether it prejudices the adversary. It will also depend on whether the Advocate who has fallen into the lapse has timeously and diligently sought to remedy the situation. These are what I must bear in mind.
12. The Court quickly noticed that this is the second occasion in which the Firm had failed the Applicant. It did not send representation on 11th March2013 when this matter was due for hearing. This is not a pictorial of attentive advocacy. That does not favour the Applicant.
13. However, the Advocates for the Applicant have candidly admitted their failure on this occasion. The result of that failure is that the Application which should have been heard on 24th June 2013 will now be heard on 23rd July 2013. That failure has caused a 30 days delay, almost. That is the prejudice that the Respondents would have suffered if I had not discharged the Orders. This Court also takes into consideration that this Application was filed on 4th July 2013. This was 10 days after the Court had discharged the interim orders. And although the Appellants could have been more quick-footed, the Application cannot be said to have been brought unduly late. The Application of 13th March 2013 is due for hearing in the coming week, 7 days from the date of this decision. In my view, the Respondents will not suffer unbearable prejudice if the interim orders are now restored. But there is an issue .This Court has been told that execution has commenced in some matters. I am unable to reverse what has already happened. The Court must strive to strike a balance. The Court is concerned as to whether there is a cost implication from execution that may have commenced .For this reason while staying further execution, the Court orders that any costs so far incurred on the execution will have to be met by the Appellant.

14. The upshot is that I allow prayer 2 of the application dated 3rd July 2013 but costs of that application shall be borne by the Appellant in any event. The Appellant's Counsel has been less than diligent.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 18TH DAY OF JULY 2013.

IN THE PRESENCE OF:

KADENYI …………………………………………………..COURT CLERK

N/A …………………………………………..…………FOR APPELLANT

OMONDI ………………………………………………FOR RESPONDENT

F. TUIYOTT

J U D G E