



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PETITION CAUSE NO. 3 OF 2003
THE CONSTITUTION OF KENYA

AND

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CAP 7 OF THE LAWS OF KENYA)

AND

THE REGULATIONS MADE THEREUNDER

AND

THE ELECTION OFFENCES ACT (CAP 66 LAWS OF KENYA)

AND

IN THE ELECTION FOR LARI CONSTITUENCY
THE PETITION OF FRANCIS NJARI KAGUNYI

BETWEEN

FRANCIS NJARIPETITIONER

AND

DANIEL HENRY GATHUA 1ST RESPONDENT
HONOURABLE JAMES VISCOUNT KIMATHI2ND RESPONDENT

Coram: Mwera J.
Mbigi for Petitioner
Kithi Kilonzo for 2nd Respondent
Njoroge Court Clerk

RULING

The motion filed here on 19.1.2011 was brought under Order 50 rule 6 of the Civil Procedure Rules and Section 3A of Civil Procedure Act. It had one main prayer:

i) that the stay of execution granted on 17.12.10 be extended for at least 6 months to enable the applicant to deposit the balance of costs in court.

It was contended in the grounds that the applicant was given 30 days stay on 17.12.10 to deposit sh. 1.1m. The applicant had done his best through his agricultural activities and deposited a further sh. 500,000/= bringing the total deposit to sh. 1m. It has proved hard to deposit the balance unless the sought extension is granted to avoid execution. The supporting affidavit was on the same lines.

The 2nd respondent filed grounds of opposition to the motion in that it was an abuse of the court process since it was a disguised appeal from the orders of 17.12.10. That course should not deny the 2nd respondent the fruits of his litigation. The matters in the application were res judicata and it should thus be dismissed. The parties then submitted.

The applicant went over the background to this whole proceedings in that an ex parte taxation took place and he applied to file a reference against it out of time. But while the application was pending, execution was levied against him and so he applied for an interim stay of execution. The ruling thereof was due on 23.11.10 while the application to enlarge time within which to file a reference was due for hearing on 6.12.10.

On 23.11.10 and 3.12.10 the court was not sitting to deliver the ruling which then came on 17.12.10. Thus the hearing of the application to enlarge time was overtaken by events and the applicant was intending to set it down again for hearing after the 17.12.10 ruling. He had so far managed to deposit a total of sh. 1m in court against the taxed costs of sh. 1.6m. May he have 6 more months to deposit the balance. His application was not disguised as an appeal and the applicant was not denying the 2nd respondent enjoyment of fruits of his judgement. But he was entitled to be heard over the disputed taxation as this is the guiding principle in litigation – a party having an opportunity to be heard. To the best of his ability the applicant had managed to deposit what he could and thus the court should grant him the orders.

The 2nd respondent held a contrary view to the foregoing emphasizing that litigation must come to an end. The applicant had not complied with the stay order of 17.12.10 which was on condition to deposit sh. 1.1m in court within 30 days. This application has no merit.

In its view and applying discretion in the circumstances of this case the court observed in its ruling of 17/12/10 that the application before it for stay ought to have been dismissed. The court had earlier noted that the execution sought to be stayed bore the taxed costs of sh. 1,603,613/= so it added:
“ ...but that the applicant appears keen on trying his luck whether he will be given opportunity to challenge and challenge successfully the taxed costs, may he deposit the balance of the sum of money in the decree in court in 30 days then move whenever and however he wants but with expedition. At least by the deposit of the decretal sum the respondent will be rested in his mind that after all there is something to fall on in the event the applicant fails in his endeavours.”

This court is alert in its mind about all the above and that the application to enlarge time within which to make a reference to this court against the subject taxation is yet to be fixed for hearing. It is quite likely that the 2nd respondent opposes it. It is also not lost on the court that there is no direct prayer to review its orders of 17.12.10 and neither has there been an appeal against them. The parties have not been heard on the application to enlarge time. However in the context, history and circumstances of this case the court grants the sought wish but subject with the following:

1) the total of sh. 1m deposited in court to be paid out to the 2nd respondent forthwith

- 2) the applicant has orders to file his intended reference against taxation and have the same heard
- 3) the fate of the balance of the taxed costs to abide the outcome of the reference. In the event the reference succeeds, the 2nd respondent to refund any sums due to the applicant
- 4) costs of this application to the 2nd respondent

With the above this court is of the mind that all is ordered in the course of doing justice to the parties here. It should be a fair course to either side so that soon litigation herein gets to an end.

Ruling delivered on 21.2.11.

J. W. MWERA
JUDGE