



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 814 OF 2001

MARY NJERI the personal representative of the Estate of KENNETH WANGENDO GATIMU(DECEASED)

.....PLAINTIFF

VERSUS

THE AGA KHAN HEALTH SERVICES

T/A THE AGA KHAN HOSPITAL.....DEFENDANT

PROF. MUTHURE MACHARIA.....THIRD PARTY NO. 1

DR. A.W.WAHOME.....THIRD PARTY NO. 2

RULING

This court, did deliver a ruling in this matter dated the 7th day of March 2008. The court, has been informed that the first 3rd party became aggrieved by the said ruling and is desirous of seeking a second opinion on the matter from the court of Appeal. He has therefore presented an application dated 17th day of November 2008 and filed the same date. It is brought under the inherent jurisdiction of the court, and order 41 rule 4 of the CPR. Two prayers are sought namely:-

1. *That all further proceedings, third party proceedings herein be stayed pending the hearing and determination of the 1st third party appeal i.e. civil appeal No. 168 of 2008 lodged on 15th August 2008 against the decision and orders of Lady Justice Nambuye delivered on 7th March 2008.*
2. *That the costs of and occasioned by this application be provided for.*

The grounds are set out in the body of the application, supporting affidavit, written skeleton arguments and case law. The major ones are that:-

- The plaintiffs' suit is in palce herein having been filed on 21st may 2001 seeking the reliefs specified therein.
- That on 19th December 2003, the honourable court granted the defendant exparte leave to issue a 3rd party notice on to the 1st 3rd party.
- On 11th October 2004 the plaintiff obtained exparte third party directions which directions were later set aside on the application of the 1st third party.
- Thereafter the defendant presented an application dated 18th October 2005 and filed on the 25th day of October 2005 for directions on the 1st third party notice under order 1 rule 18 CPR.
- The 1st 3rd party accordingly opposed the said application for directions through grounds of opposition filed against them and

written skeleton arguments.

- That this court, through Nambuye J gave a ruling on 7th day of March 2008, dismissing the said application for directions with costs and instead of stopping there, went further to give the defendant leave to issue another 3rd party notice to the 1st third party within 15 days from the date of the ruling.
- That the first 3rd party applicant became aggrieved and filed an appeal to the court of appeal vide civil appeal No. 168 of 2008.
- It is their stand that the civil appeal is arguable and has good chances of success.
- For the reasons given above, it is only proper that the proceedings herein be stayed because if not stayed, then the subject matter of the 1st 3rd party appeal which is to stop the proceedings herein against him will be effectively eviscerated.
- That it is just and equitable to grant the relief being sought.

In the written skeleton argument, counsel for the 1st 3rd party applicant reiterated the content of the grounds in support of the application and supporting affidavit and then stressed the following points:-

-They are aware that order 41 rule 4 deals with stay of execution and that is why they cited the inherent jurisdiction of the court. However if the inherent jurisdiction of the court, has been wrongfully cited this does not prejudice the opposite party in any way, neither does it amount to an abuse of the court process.

- That there are no mandatory tests to be applied when one is applying for stay of proceedings, but the court, is invited to be guided by case law on the subject which states clearly that whether or not a court is inclined to grant an order for stay of proceedings is a matter of the courts judicial discretion, which is to be exercised in the interests of justice, and which discretion is unlimited save that it should be exercised rationally and not capriciously or whimsically. Bearing in mind the fact that the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is on what terms it should be granted. The court, also has to consider such matters as the need for speedy disposal of the case, the prima facie merits of the intended appeal in so far as its arguability is concerned.

- Contend that they have demonstrated that the appeal is arguable by reason of the grounds of appeal exhibited herein.
- That the first 3rd party has a genuine complaint as he is raising jurisdictional challenge based on settled legal doctrine.
- The application was presented without undue delay.
- It is also their stand that as opined by the court, of appeal in a situation where natural justice rules have been breached, the courts discretion is called for.
- It is their stand that by reason of what has been stated above, they have earned the relief being sought.

The Respondent to the application has filed a replying affidavit sworn by one Stephen Juma Saenyi on the 20th day of November 2008, and filed the same date. The salient features of the same are:-

- That the current application was filed six months after the commencement of the third party, proceedings whose notice was issued on the 18th March 2008, three months after the lodging of the appeal and more than one month after being served with the defendants application dated 19th September 2008 which was due for hearing on 26th November 2008 and which defendants application was to finalize the 3rd party proceedings and pave the way for the hearing of the suit.
- It is their stand that the aim of this application is simply to delay the finalization of the third party proceedings to pave way for the hearing of the main suit.
- That the application has been brought belatedly 6 months later and no explanation has been given as to why the same was not filed promptly.

- That no security has been offered by the applicant as required by order 41 rule 4 CPR and as such the applicant should not be allowed to apply the law selectively and conveniently to suit their own interests.
- That no prejudice has been suffered by the applicant since the commencement of the third proceedings which will necessitate the staying of the proceedings.
- It is their stand that the court, dismissed the defendants 3rd party notice on a point of technicality and the same court, rightly exercised its discretion in allowing the defendant to reissue the same. For this reason, it is their stand that the appeal is frivolous with no chances of success and it is only meant to aid the applicant escape liability from the defendant since there is demonstration that there is a cause of action against the 1st third party.
- Contend that justice demands that proceedings herein should not be stayed more so when the applicant has not demonstrated existence of ingredients for the granting of an order for stay of proceedings.

In their skeleton arguments, dated 6th March 2009 and filed on the 10th day Of March 2009, the learned counsel stressed the following points in opposition to the application for stay.

- There has been inordinate delay in the presentation of the said application.
- During the said delay third party proceedings were put in place following this court, granting leave to reissue the 3rd party notice based on sound principles and the judicious exercise of the courts discretion.
- That there is no arguable appeal demonstrated.
- That in view of the existence of the provision of order 41 rule 4 CPR. the inherent jurisdiction of the court, can not be invoked.
- Equity does not aid the indolent and since the applicant sat on its rights and waited only when the applicants application for 3rd party proceedings was due to be heard and then presented, this application, their delay in so ,moving has not been explained and as such the application should fail.
- It has not been demonstrated how the appeal pending will be eviscerated if the proceedings are not stayed.
- This court should not allow a procedural slip or technicalities to overshadow the need to render substantive justice.
- Maintain that there is a genuine cause of action against the 1st 3rd party and the court, should not allow him to wriggle out of the same on the basis of technicalities.
- No prejudice will be suffered by the applicant if stay were to be denied, but an injustice will be suffered by the plaintiff and the defendant if proceedings were to be stayed, and then at the end of the trial of the appeal then the same is disallowed as opposed to the proceedings proceeding and then the appeal allow at the end of the trial of the appeal. No prejudice will be suffered by the applicant as the proceedings against them will just be rendered unnecessary.
- The interest of justice demands that the application should be disallowed .

On case law the court, was referred to the case of VIPIN MAGANLAH SHAH VERSUS INVESTMENT AND MORGAGES BANK LIMITED AND 2 OTHERS NAIROBI CA NAI 325 OF 2000 (159/200/UR) which concerned an application under rule 5 (2) (b) of the court, of appeal rules for stay under which a litigant wishing to avail himself of that procedure is required to establish:-

(a) That the intended appeal is arguable.

(b) That if stay is not granted the same will be rendered nugatory.

The case of GEOFFREY ORAO OBURA VERSUS MARTHA KARAMBU KOOME NAIROBI CA NO. NAI 258 OF 1998 (101/98 UR) where the court, of appeal granted a stay because it was apparent that he had been denied a right to defend himself by reason of the court, denying him a right to file a replying affidavit and there was a possibility of the default judgement being set aside exdebito

justiciae.

The case of PURSHOTAM RAMJI KOTECHEA AND ANOTHER VERSUS NARANDAS RANCHODD AS PAU AND ANOTHER KISUMU CA NO. NAI 63 OF 2003 (34.2003 UR) in which the court, of appeal was of the view that *the issue of denial of their right to natural justice to be heard made the intended appeal arguable.*

(b) That on a situation where an applicant may be entitled to have the judgement of the lower court, set aside as of right the effect of refusing of such an applicant an order of stay may well render his intended appeal nugatory.

(c) Where there is a possibility of the judgement appealed against being upset, it may not be right to compel him to comply with the said judgement before the appeal is heard.

In Re Global Tours and Travel limited cause number 13/00 (2000) LLR1061(CCK) decided by Ringera J (as he then was) The salient features of the same are as follows:-

- (i) That the structures that apply when one is seeking stay of execution pending appeal do not apply to applications for stay of proceedings.*
- (ii) The decisions of the court, of appeal on stay of proceedings do not help the superior court much because they are premised on the court of appeal Rules.*
- (iii) The above notwithstanding, the understanding of the learned judge of the law is that, whether or not to grant a stay of proceedings or further proceedings or decree or order appealed from, is a matter of judicial discretion to be exercised in the interest of justice, which discretion is unlimited save that it should be exercised rationally and not capriciously or whimscally, the sole question being whether the same is in the interests of justice, to order a stay of proceedings and if so ordered on what terms the same is to be ordered and order 16 rule 4 (8) of the supreme court of England to the effect that “The effect of the dismissal of the defendants summary or refusal to give directions thereof is to put an end to the third party proceedings.*

The Respondent also referred to court, the case of the HON. JOEL OMAGWA ONYANCHA VERSUS SIMON NYAUNDI OGARI AND ANOTHER NAIROBI CA 104/2008 (UR 62/2008) on an application for stay of proceedings under Rule 5 (2) (b) of the CA rules, where stay of proceedings was declined because proceedings for the hearing of the petition had commenced, and if the applicant succeeded on this appeal then the proceedings in the superior court, would have been rendered unnecessary which situation would be remedied by an award of costs.

The case of the MATTER OF GLOBAL TOURS AND TRAVELS MATTER OF THE COMPANIES ACT WINDING UP CAUSE NO. 43 OF 2000 (SUPRA)

The case of TRANS ROAD (K) LIMITED VERSUS GENERAL TYRE SALES LIMITED NAIROBI MILIMANI COMMERCIAL AND TAX DIVISION HCCC NO. 609 OF 2004 decided by Warsame J on the 7th day of April 2008, on an application for stay of proceedings pending appeal, the court, declined the same because there was no evidence to show that the intended appeal would be rendered nugatory or that the applicant would suffer any loss should stay be refused.

The case of PETER NDIRANGU KINUTHIA VERSUS OFFICER COMMANDING KIKUYU POLICE STATION SENIOR RESIDENT MAGISTRATE COURT, KIKUYU CA NAI 173/2002/90/2002 UR, where an application for stay was refused because the intended appeal would not be rendered nugatory.

The case of MAYORS VERSUS AKIRA RANCH (1972) EA 347 where it was held inter alia that *“the inherent power cannot be invoked to defeat the express provisions of the status.*

On the courts’, assessment of the facts herein, it is clear that there is no dispute that this court, made orders on the 7th day of March

2008, which orders are alleged to have grieved the 1st 3rd party whereby the said 3rd party has been obligated to move to the court of appeal to seek a second opinion on the matter. The court, has been informed that the appeal has already been filed and that is why the applicant seeks stay of proceedings herein. The reason for seeking the stay of proceedings is because the appeal might be rendered nugatory should they succeed ultimately. To fortify their argument, the applicant relies on the case law cited, mainly decisions of the court of appeal. It is their stand that they contend that they are within the ambit of the ingredients for granting this relief because of the following reasons:-

1. The court, has jurisdiction to grant the relief.
2. Their appeal is arguable and not frivolous
3. If stay is not granted, the appeal will be rendered nugatory since it has high chances of success.
4. The facts demonstrated are within the principles laid down in the case law cited.

To counter this, the Defendant/Respondent has stated that:

1. There is no provision of law, under which stay of proceedings can be stayed in the superior court, as the provision of law cited by the applicant relate to stay of execution of a decree which is not the case herein.
2. The case law relied upon by the applicant does not help the applicant because they relate to a specific provision of rule 5 of the court of appeal rules which deals specifically with stay of proceedings pending appeal in the court of appeal, which jurisdiction is specifically meant to be exercised by the court of appeal and cannot be exported to the superior court.
3. That there has been no offer of security.
4. No prejudice will be suffered by the applicant because should the matter proceed and then the appeal succeeds ultimately then the proceedings herein is so far as they relate to the 1st 3rd party will have been rendered unnecessary and any inconvenience caused will be compensated for by an award of costs.
5. That each case ought to be dealt with on its own facts and the circumstances of the case herein are that the 1st 3rd party wants to wriggle out of its own obligation to the defendant who has a genuine claim against the 1st 3rd party on the one hand. On the other hand the first 3rd party just wants to inconvenience the case of the plaintiff because once the proceedings are stayed, the plaintiff cannot pursue her case.

Due consideration has been made by this court, of the rival arguments herein, and the same considered in the light of principles of law and case law relied upon by each side and the court, proceeds to make the following findings.

1. There is no dispute that the application subject of this ruling has been brought under the provisions of order 41 rules 4 of the CPR. A perusal of these provisions reveals that indeed they relate to stay of execution of a decree. There are conditionalities set there under namely:
 - (a) Presentation of the application promptly and without undue delay.
 - (b) Demonstration of existence of substantial loss if stay is not granted.
 - (c) And offer of security for the due performance of the decree all are in line with stay of execution of a decree a matter whose consideration is different from those required when a court is dealing with stay of proceedings.

Indeed there is no other provision which specifically deals with stay of proceedings provided for in the CPA and CPR, therefore it is correctly submitted by the Respondent that the procedure and case law relied upon by the applicant relate to the court of appeal jurisdiction. The question that the court, has to ask itself is whether by reason of lack of this provision for stay of proceedings in the superior court, is in itself evidence of lack of jurisdiction to grant this relief to a deserving litigant.? The answer to the question is given in the negative. The reason being that the court, has a ready tool namely its inherent power enshrined in section 3A of the CPA which provision

enjoins the court to do justice to both litigants and to prevent abuse of the due process of the court. This means that if justice demands a stay of proceedings herein, this court, has jurisdiction to grant the same under the inherent jurisdiction of the court.

Having ruled that the court, has jurisdiction to grant the relief, the question that the court has to ask itself is whether on the facts demonstrated herein, the applicants have earned this relief, on the first instance and 2ndly whether this is the best forum to grant the said relief.

In this court's, opinion, the applicant is entitled to exercise his undoubted right of appeal. He is also entitled to seek stay of the proceedings. He rightly approached the seat of justice of the superior court because it is the court, which made the grieving orders, and its jurisdiction to entertain the application and grant the relief in appropriate circumstances. However in view of the fact that their reason for seeking stay of proceedings is because they have an arguable appeal with high chances of success, which appeal will be rendered nugatory if the stay is not granted, the court, is of the opinion that the best forum for determining this is the court, of appeal. Because if this court, were to determine the argurability of an appeal arising from its decision, that will amount to sitting on an appeal from its own decision. Justice therefore demands that the applicant will only be granted a temporary reprieve of 30 (thirty) daysparty stays and he be directed to seek stay from the court of appealed to.

The court, therefore makes the following orders in the disposal of the application dated 17/11/2008 and filed the same date.

1. That the applicant has 30 (thirty) days stay of proceedings in terms of prayer 1 of the said application pending the filing of an application for stay of proceedings to the court appealed to
2. The Respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2010.

R.N. NAMBUYE

JUDGE