



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 51 of 2010**

STEPHEN KATHURIMA APPELLANT

VERSUS

JANEALLAM SABAZAN KHAN RESPONDENT

RULING

The appellant filed a case in Isiolo principal Magistrate Court being Civil Case No. 12 of 2002. In that case, he sought against the respondent an award of general damages for trespass and an order of injunction to restrain the respondent from interfering with or claim of parcel number 3 *Kiwanjani Isiolo*. The lower court by its judgment of 27th April 2010 found that the respondent was the owner of that plot and not the appellant. It should be noted that the respondent had not counter claimed. The appellant has appealed against that judgment and has filed a Notice of Motion dated 17th May 2010. By that Notice of Motion the appellant seeks stay of execution pending appeal. It should be appreciated that the decree of PM Isiolo Court dismissed the appellant's suit with costs. The only decree capable of being executed from that judgment is that of costs awarded to the respondent. The appellant in support of his application argues that if stay is not granted he will suffer substantial loss. In his affidavit in support of the application, the appellant stated that he is the owner of plot number 3 and that he has documentary evidence of that ownership. That since PM Isiolo Court delivered its judgment on 27th April 2010, the respondent had made attempt to enter the said plot. He stated that he is apprehensive that the respondent, if he takes possession, may sell or otherwise deal with the property in order to defeat the appellant's interest. The appellant's application was opposed by the respondent by his replying affidavit. The respondent stated that since the lower court judgment, he had not gone onto the plot. In any case, he said that the plot is an open space void of any structure or habitation. The respondent said that the appellant's affidavit contained falsehoods. The respondent denied trying to execute the decree for costs awarded to him since those costs had not been accessed. The appellant's counsel argued that the

respondent's affidavit which was drawn and filed by the respondent in person breached Sections 34 and 35 of the Advocates Act. In this regard, counsel relied on the case Johann Distelberger Vs. Joshua Kivinda Mundi & Ano. HC Misc. Civil Application No. 1587 of 2003. The judge in this case, after discussing the provisions of Section 34 and 35, proceeded to find that an affidavit is a document which those sections require to be drawn by a qualified person. It is necessary to reproduce sections 34 and 35 for better understanding of the appellant's objection to the respondent's replying affidavit.

“34. (1) No unqualified person shall, either directly or indirectly take instructions or draw or prepare any document or instrument-

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for or in relation to an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under Section 44; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or regard of any such instruction or for preparation of any such instrument; for the taking the drawing or document or

Provided that this sub section shall not apply

to-

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily

- (3) **Any person who contravenes subsection (1) shall be guilty of an offence**
- (4) **This section shall not apply to**
 - (a) **a will or other testamentary instrument; or**
 - (b) **a transfer of stock or shares containing no trust or limitation thereof.**

35. (1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate:

Provided that in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.

(2) The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred to in Section 34(1) unless such document or instrument is endorsed in accordance with this section."

A qualified person is defined by Section 9 of the Advocate Act to mean:-

"Subject to this Act, no person shall be qualified to act as an advocate unless –

- (a) **he has been admitted as an advocate; and**
- (b) **his name is for the time being on the roll; and**
- (c) **he has in force a practicing certificate;**

and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by any order under Section 60 (4).

The respondent's replying affidavit was filed by the respondent in person. It is indicated that he drew and filed it in person. Does that then contravene Sections 34 and 35? The mischief that those sections intended to address was to protect the public from persons who are not qualified drawing documents holding themselves out as qualified persons as defined in the Advocates Act. That means that the respondent could not draw legal documents on behalf of another person as though he was an advocate. Nothing however in law prevents him from drawing his own documents particularly as in this case his own affidavit. This was the finding in the case **Travel Shoppe Limited**

Vs. Indigo Garments EPZ Limited & Others Civil Suit No. 586 of 2004 where the court in discussing sections 34 and 35 had this to say:-

“Section 35 states in part.

Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in Section 34 (1) shall at the time endorse thereon his name and address.....

The pertinent words in that section are “Person who draws or prepares.” Those are important words in this Section I believe because the public who is being protected by sections 34 and 35 ought to know, without a doubt that the person who has endorsed their name and address on the document are in fact the drawer and not just any busy body. I am therefore of the opinion that the firm of Mohamed Madhani & Co. Advocates needed to indicate that they are the drawers of the debenture.”

Section 35 (1) requires a person drawing a legal document to disclose his name. In the case of the respondent, he drew his own replying affidavit and indicated on it that he was the drawer and was the person who filed it. That replying affidavit conformed to Section 35 (1). The objection therefore raised by the appellant is overruled and rejected. Now to come to the main application as stated before, the appellant seeks stay of execution of the PM Isiolo judgment of 27th April 2010. What that judgment did was to dismiss the appellant suit with costs. The decree that the respondent would seek to execute is the award of costs. In the case **Sande Investment Ltd T/A Westland Cottage Hospital and Others Vs. Kenya Commercial Finance Corporation and others** [2007] 2 E.A. the court stated:-

“This court (High Court) has no jurisdiction in the Civil Procedure Rules or the Advocates Act to stay execution of taxed costs.”

The Court of Appeal in the case **Francis Kabaa Vs. Nancy Wambui & Ano.** Civil Application No. NAI 298 of 1996 (UR) dealt with the same issue and had this to say:-

“The application according to the Notice of Motion, is to stay the order of Amin J. in which he dismissed the plaintiff’s suit then before him. Before us, the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what order of Amin J. was all about. In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs. The appellant has also not given any cogent reason why he should be granted stay.”

(Underlining mine.)

I have underlined that portion of that ruling to emphasize its relevance to the application before court. The appellant does not show sufficient reason why the court should grant stay of the costs awarded to the respondent. I would

reiterate that ruling and say that the appellant if he succeeds in his appeal can be refunded those costs. The other issue to consider is that the order which the appellant seeks stay of execution pending appeal. The order for dismissal of appellant's suit was a negative order not capable of being stayed. The stay of a negative order was considered in the Court of Appeal case **Republic Vs. The Business Premises Rent Tribunal & Ano.** Civil Application Case No. Nai. 165 of 2008 (UR 105/2008) where the court had this to say:-

“The superior court did not give orders directing doing of anything or stopping the doing of anything, and do so because in the application before it, it not asked to do so and could not have The Judge merely quashed *could not was indeed been asked to do so. certain orders.*

*Staying the quashing would amount to reversing the orders. That cannot be done at this stage of the matter. To do so or not to do so must await the full hearing of the appeal yet to be filed. In the case of **Western College of Arts and Applied Sciences Vs. Oranga** and Others [1976] KLR 63 at page 66 – L-D Law, V.P. stated:-*

In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction.

*That decision was cited with approval by this court in the case of **Kileleshwa Service Station Limited Vs. Kenya Shell Limited** Civil Application Nai 84 of 2008 in which this court stated the recent ruling in further as follows:-*

The order of the superior court that the applicant intends to appeal against merely set aside the order requiring the company to compensate the applicant in the sum of Kshs. 13,088,000/= for improvements done in the petrol station. It was not a positive order capable of execution by enforcement. It seems that by the stay of application the applicant is in effect seeking a restoration of the order for payment of the compensation pending appeal which cannot be done at this stage.

As the author of BLACKS LAW DICTIONARY, sixth Edition explains at page 1413, A “stay” does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor on the merits of orders of the trial court, but suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.” *been pass merely*

The order dismissing the appellant suit is incapable of being stayed because the court simply dismissed appellant's claim of ownership of the subject plot. Accordingly, the appellant's Notice of Motion dated 17th May 2010 is

dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 23rd day of July 2010.

MARY KASANGO
JUDGE