



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CIVIL CASE 409 OF 2008

DR. SAMIER MOHAMED RAZA MURAVVEJ APPELLANT

V E R S U S

DR. RAVINDER KUMAR MAGONRESPONDENT

R U L I N G

By a Notice of Motion dated 20th September, 2008 and brought under O. XLI rule 4 of the Civil procedure Rules and Section 3A of the Civil Procedure Act, the Appellant seeks from the court the following orders-

1. *THAT there be a stay of proceedings in Chief Magistrate's Court at Mombasa Civil Suit No. 1707 of 2008 and stay of orders of 12th September, 2008 and/or all further or other consequential orders issued in CMCC NO. 1707 of 2008 pending the hearing and determination of an appeal filed by the Appellant against the said orders made herein on 12th September, 2008 on such terms as appear just and proper.*
2. *THAT costs of this application be provided for.*

The application is supported by the annexed affidavit of the applicant, Dr. Samier Mohamed Raza Muravvej, and is based on the grounds that-

- (a) *The appeal filed by the appellant herein against the orders made on 12th September, 2008 has good prospects of success.*
- (b) *Substantial loss will result to the Appellant if a stay of proceedings is not granted.*
- (c) *The Respondent's wife, agent, servant and/or employee was barred from practicing in the premises by the Medical Practitioners and Dentist's Board and if allowed to regain access to the suit premises she will continue to interfere with the Appellant's Medical practice and the appeal herein which raises serious and sound grounds shall be overtaken by events and thereby rendered nugatory.*
- (d) *The Appellant is prepared to give appropriate security.*

The Respondent does not seem to have filed either a replying affidavit or grounds of opposition. However, during the oral canvassing of the application, Ms. Lang'at appeared for the Appellant while Mr.

Muthama appeared for the Respondent. Ms. Lang'at submitted that if the orders of mandatory injunction are enforced, the appeal shall be rendered nugatory as the Respondent's agents will gain access to the premises. In that event, the Respondent's wife, who is also a dentist, will interfere with the Appellants practice which will cause substantial loss to the Appellant. She also submitted that the Appellant had come to court without undue delay, and that he was ready, willing and able to deposit any security which the court may order. She referred the court to VISHRAM RAVJI HALAI & ANOR. v. THORNTON & TURPIN (1963) LTD. Nairobi Civil Application No. 15 of 1990 (UR) and Winding UP Cause NO. 43 of 2000, IN THE MATTER OF GLOBAL TOURS & TRAVELS LIMITED and urged the court to grant the orders as prayed.

Opposing the application, Mr. Muthama submitted that the same was without merit. He also submitted that no substantial loss will be suffered by the applicant because the Respondent has no intention of practicing dentistry in the premises if he has not been licensed. Even his authorized agent will not practice in the premises if not licensed to do so. Therefore the applicant's fears have no justification. Counsel then asked the court to grant the Respondent access to the premises on condition that he does not practice dentistry without first complying with the conditions for Licensing.

I have considered the pleadings and submissions of counsel, and I have also read the authorities cited to the court. The application is two thronged as it seeks a stay of the orders made by the lower court on 12th September, 2008, as well as a stay of the proceedings in that court pending the hearing and determination of the appeal. The first limb of the orders sought falls under O. XLI rule 4(1) and (2) of the Civil Procedure Rules, and the second limb would be governed by Section 3A of the Civil Procedure Act. In summary form, in order that one may obtain an order of stay under O. XLI rule 4(1), one should satisfy four conditions-

- (a) *The applicant must establish a sufficient cause;*
- (b) *The court must be satisfied that substantial loss would ensue from a refusal to grant a stay;*
- (c) *The application must be made without unreasonable delay; and*
- (d) *The applicant must furnish security.*

I am satisfied that this application was made without unreasonable delay. The orders sought to be stayed were made on 12th September, 2008, and this application was filed on 22nd September, 2008. That was a space of 10 days which I don't find unreasonable. As for the issue as to whether the applicant has established a sufficient cause, I have to be economical with my words because some of the grounds upon which the application is made bear some close semblance to some of the grounds of appeal. I have to restrain myself, therefore, from making any statements which could possibly embarrass the judge who will hear the appeal. Suffice it to say that I find the grounds of appeal arguable in the sense that they are not frivolous. In any event, refusal to grant a stay at this stage might open doors to some people who are not licensed to practice dentistry in the suit premises. I therefore find that the applicant has established a sufficient cause for the stay. By the same token, allowing anyone other than the Respondent to engage in such practice in the premises would obviously lead to pecuniary loss to the applicant. Substantial loss may therefore result to the applicant unless the order of stay is made.

As for the second limb of the application, I think that it would be pointless proceeding with the suit in the lower court since the orders sought therein are similar, if not entirely the same, as those which are the subject of the appeal.

The outcome of the appeal will have a direct bearing on the entire suit, and I think that it will make sense for the suit to be stayed.

I therefore find that the applicant has satisfied the conditions for the stay of the orders made on 12th September, 2008, and that his application ought to succeed subject to furnishing security. I accordingly make the following orders-

1. *Order 2 of the application by Notice of Motion dated 20th September, 2008, is hereby granted as prayed.*
2. *The applicant to file an undertaking as to damages and for any costs within 5 days from today.*
3. *Costs of this application to abide the appeal.*

Dated and delivered at Mombasa this 22nd day of May, 2009.

L. NJAGI

JUDGE