REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 120 OF 2006

BETTY CHEPCHIRCHIR SEGUTON……..PLAINTIFF

VERSUS

KUNSTE HOTEL LIMITED…….……DEFENDANT

RULING

This court, Mugo, J. gave judgment in favour of the respondent in the instant application against the applicant in the sum of Kshs.2.7m for personal injuries on 6th February, 2009. On 17th June, 2009 the respondent brought a Motion on notice for orders of stay of execution of the decree given on 5th March, 2009 pending appeal. That application would ordinarily go before the court that gave judgment which is sought to be stayed. In this case the application ought to have been placed before Mugo, J under Order 41 rule 4 of the Civil Procedure Rules. But going by the local arrangements in this court, the court dealing with matters brought under certificates of urgency happened to be court 3 presided by myself.

My role was to look at the application and see if it was urgent or not and whether the same raises *prima facie* case.

In my assessment of the matter I found it both urgent and the applicant having demonstrated a *prima facie* case, the court granted a ***H.C.C.C.NO.120/2000*** *t*emporary stay pending the *interparte* hearing of the Motion before Mugo, J. on 23rd July, 2009.

While that was pending, the instant application was brought by a Notice of Motion for the court, in exercise of its inherent discretion

"***….to discharge and/or vary and/or set aside the temporary stay of execution orders made in the matter on 17th June. 2009…..***"

The application is premised on the grounds that the respondent's insurers, M/s. APA Insurance Limited tendered payment of Kshs.1.5m being their share of the claim, the balance to be settled by the respondent; that the respondent's goods were proclaimed; that the temporary orders of stay were obtained by misleading the court; that the Notice of Appeal was not served within the stipulated time; that the intended appeal is an afterthought, among several grounds.

The respondent has filed through counsel grounds of opposition to the effect that the application is

bad in law, incompetent and is otherwise an abuse of the court process; that the application is unknown in law and the procedure of the court; that it is tantamount to protest and/or appeal from the *exparte* orders in question or even a review of the said orders.

I have considered the application, the grounds of opposition, authorities cited by both sides and submissions by counsel.

The application is brought pursuant to the inherent powers of the court under Sections 3, 3A and 63(e) of the Civil Procedure Act and Order

H.C.C.C.NO.120/2000

50 Rule 1 of the Civil Procedure Rules. By invoking the court's inherent jurisdiction, the applicant is confirming that there are no specific provisions of the law under which this application would have expressly been brought.

Inherent jurisdiction is a doctrine of the English Common law that a court has jurisdiction to hear any matter that comes before it, unless a statute or rule limit that authority or grants exclusive jurisdiction to some other court or tribunal, hence the common phrase, inherent jurisdiction must be exercised judicially and within the law. The doctrine of inherent jurisdiction is expressly legislated in Sections 3, 3A and 63(e) aforesaid among other statutes.

Inherent jurisdiction appears to apply to an almost timeless set of circumstances. The courts appear, however, to limit the use of its inherent jurisdiction to four general categories:

i) to ensure convenience and fairness in legal proceedings;

ii) to prevent steps being taken that would render judicial proceedings inefficacious ;

iii) to prevent abuse of its process

iv) to control its processes and procedures before it ***H.C.C.C.NO.120/2000***

The applicant contends that the court's process has been abused by the respondent's application for stay in the sense that the temporary orders of stay were obtained by the making of a false statement and concealment from the court of material matter. For that she seeks that the temporary order of stay be discharged or set aside.

The court has inherent jurisdiction to set aside or discharge its own orders issued *exparte*. It is a fundamental premise in our jurisprudence that the other party must be notified and heard before any order likely to affect him/her is made.

However, there are situations when *exparte* orders may be made. Indeed the Civil Procedure Rules specifically provide for such situations. A party is permitted to move the court for orders without notice to the other party as that notice may delay the process and thereby defeat the purpose for which the relief has been sought. However, the court does not blindly grant *exparte* orders. The court will require, among other conditions to be fulfilled;

i) reasons why the application for interim orders is made without notice.

ii) evidence in support of the application

iii) a fair presentation of the application

iv) the applicant to give full and frank disclosure of all relevant matters which will assist the court to assess the application.

I reiterate that *exparte* orders are generally speaking provisional because such orders are granted on the one-sided material presented to the court by the *exparte* applicant and the court in deciding whether or not to grant temporary orders will do so upon the establishment of an arguable or prima *facie case*. In the English case of **Wea Records Ltd** V. **Visions Channel 44 & Others** (1983) 2 All ER 589 the position of *exparte* applications was stated thus:

"***As I have said, exparte orders are essentially provisional in nature. They are made by the Judge on the basis of the evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of the evidence"***

I expected counsel in this matter to address me on the powers and the circumstances under which this court will set aside an exparte order as outlined in the previous paragraphs.

At the *interpartes* hearing, the respondent will be expected to prove that it has sufficient cause; that substantial loss will result if the order of ***H.C.C.C.NO.120/2000*** stay is not granted; that the application has been made without undue delay; and that it is ready, willing and capable of providing security as may be ordered. The present application, the grounds upon which it is premised appears to take the matter to that stage which is the preserve of the court that will hear the application for stay at the *interparte* stage. The issue of the Notice of Appeal being served late and the fact that no appeal has been filed are matters for that court and in my view do not constitute proof that there was material non-disclosure.

All the court was concerned with at the *exparte* stage is whether the applicant had furnished reasons to warrant an *exparte* hearing of the application; whether it provided evidence in support of the application; whether it presented the application fairly and made disclosures relevant to the application at that stage. The Court was satisfied on these on a *prima facie* basis. But more importantly the court was satisfied that a Notice of Appeal required under Order 41 Rule 4 of the Civil Procedure Rules had been given in accordance with the Court of Appeals Rules. It was not for the court to investigate whether the notice had been served. That will be for the court that will hear the application for stay *interpartes.*

For these reasons, therefore, this application is misconceived. It must fail and is dismissed with costs to the respondent.

Hearing of the application dated 17th June, 2009 is set for 23rd July, ***H.C.C.C.NO.120/2000*** 2009 before the Hon. Lady Justice M. G. Mugo.

DATED and DELIVERED at Nakuru this 21st day of July, 2009.

W. OUKO

JUDGE