



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 121 of 2009

ANDREW WEBUYELE BIKETI.....APPELLANT
-VERSUSCHINESE
CENTRE FOR PROMOTION OF
INVESTMENT DEVELOPMENT TRADE.....1ST RESPONDENT
WARLEEN TRADERS (K) LTD.....2ND RESPONDENT
GEORGE N. KIMANI.....3RD RESPONDENT

R U L I N G

1. By an amended Notice of Motion filed on 14th May, 2009 Andrew Webuyele Biketi, hereinafter referred to as the applicant, seeks an order of stay of execution in respect of a decree for certificate of costs dated 6th March, 2009 for Kshs.48,910/= which is pending hearing and determination.
2. The application is based on the following grounds:
 - (i) The applicant has appealed against the ruling of Chief Magistrate Court in CMCC 7976 issued on 9th February, 2009 and in all likelihood the said appeal will set aside the said ruling of 9th February, 2009.
 - (ii) The applicant's case against the respondents has never been heard on merit to finality. There is a pending appeal. There are also other proceedings pending in the High Court Misc. Civil Application No. 81 of 2009. At this point in time the respondents are not entitled to any costs because the outcome of these proceedings is unknown.
 - (iii) Moreover it is the applicant's contention that the Chief Magistrate's Court erroneously issued a wrong ruling on the basis of a preliminary objection by the 1st and 3rd respondents dated 20th December, 2008. The applicant is now challenging that ruling in HCCA No. 121 of 2009.
 - (iv) The High Court on 12th February, 2009 did issue orders injunctioning the 1st and 3rd respondents from alienating applicant's business premises (the subject matter of the suit) and from selling the applicant's goods (respectively). The High Court ruling on the applicant's application dated 11th February, 2009 is yet to be granted. Litigation between the applicant and the respondents is ongoing and it is unjust for the respondents to be entitled to party to party costs at this point in time.
 - (v) The justice of the case requires that the courts grant an order staying the execution of the decree for certificate of costs pending the hearing and determination of applicant's appeal as the costs awarded by the lower Court are unmerited and unsubstantiated
3. The application is also supported by an affidavit sworn by the applicant, in which the applicant reiterates the above grounds. The applicant further adds, that he is not in a position to pay any monies to the respondent as his business premises has been closed by the respondents since 2nd December, 2008, and therefore he has no money. The applicant has annexed to his affidavit an order issued in High Court Misc. Civil Application No. 81 of 2009, wherein orders of temporary injunction were issued on 12th February, 2009.

4. The orders *inter alia*, restrained the respondent from alienating, leasing, taking possession or entering into any contract in respect of the premises known as Martin's Bar and Lounge situated on 1st floor China Center, pending the hearing and determination of the application and appeal, against the ruling of the Honourable Aggrey Muchelule issued in CMCC No. 7976 of 2009. A further order was also issued restraining the 2nd respondent from selling the applicant's goods which were distrained from the suit premises on 2nd December, 2008. In a further affidavit sworn on the 10th July, 2009, the applicant reiterates that the 3rd respondent is not entitled to any costs in respect of CMCC No. 7976 of 2008 as he has appealed against the decision of the Chief Magistrate.

5. In response to the application, Qin Minxue who is the managing director of the 1st respondent has sworn a replying affidavit in which he maintains that the application is frivolous and bad in law. He depones that the defendants are entitled to costs as CMCC No. 7976 of 2008 (Milimani) is an independent suit, which has been concluded and costs awarded to the respondent. The deponent maintains that the defendant is a financially stable company with assets in Nairobi, and that the applicant is not entitled to the orders sought, as he has not demonstrated any substantial loss that he is likely to suffer. The deponent further contends that the applicant's supporting affidavit shows that he is impecunious, a man of no means and therefore he should be ordered to deposit a sum as security for the cost of the appeal.

6. George N. Kimani, who is the 3rd respondent has also sworn a replying affidavit in which he depones that he has been erroneously included in the appeal, as he was not a party in the suit in the lower Court. He further depones that the application is defective, as it should have been first filed in the lower Court. He maintains that the application has been brought in bad faith and should therefore be dismissed with costs.

7. Following an agreement between the parties, written submissions have been filed and the Court is invited to determine this application on the basis of those submissions. For the applicant it was submitted that the appeal has high chances of success, as the trial Magistrate based his ruling on nonexistent law, erred in allowing the respondent to irregularly amend pleadings, and also erred in limiting his jurisdiction by misinterpreting the provisions of the Registration of Titles Act Cap. 281. It was submitted that the application for stay of execution was properly before the Court under the provisions of Order XLI Rule 4 of the Civil Procedure Rules. The Court was urged to grant the orders sought, in order to safeguard the interests of the applicant. It was maintained that the applicant who is now jobless having lost his business (Martin's Bar and Lounge) due to the irregular termination of his lease, will suffer irreparable loss and damage unless the orders sought are granted. In support of the applicant's submissions, ***Reuben & 9 Others vs. Nderitu & Another [1989] KLR 459*** was relied upon.

8. For the 1st respondent it was submitted that costs were awarded against the applicant in the lower Court i.e. Milimani CMCC No. 7976 of 2008 and the applicant did not seek a stay of execution of the judgment in the lower Court as envisaged in the provision of Order XLI Rule 4. It was maintained that the applicant having failed to invoke the powers of the lower Court, before moving to the superior Court, his application for stay of execution in the superior Court, was defective and ought to be dismissed on that ground. It was further submitted that the 1st respondent had stated that it is a stable company with properties in Nairobi and elsewhere worth millions of shillings and the applicant will not therefore be prejudiced at all, since the respondent has capacity to refund the amount in the event the applicant's appeal succeeds.

9. Relying on *Nation Media Group Limited & 2 Others vs. John Joseph Kamotho and 3 Others, Civil Application No. Nai 108 of 2006*, counsel for the 1st respondent argued that the applicant has not demonstrated that if the amount is paid his appeal will be rendered nugatory. It was maintained that there was no nexus between the appeal and the decree as the applicant has not sought the initial order in the lower Court before coming to the appellate Court. Finally it was submitted that the applicant has not shown that he is a man of means.

10. For the 3rd respondent, it was submitted that the application should be dismissed as it was irregular, unprocedural, and lacking merit. It was contended that the decree is a monetary decree and that in the absence of any orders for stay in the lower Court, execution should be allowed to proceed.

11. In the ruling dated 9th February, 2009 which is subject of the applicant's appeal, the lower Court upheld a preliminary objection raised by the 1st respondent with regard to the Court's jurisdiction. The lower Court therefore, struck out the applicant's suit with costs. The costs have apparently been assessed by the lower Court in accordance with schedule 7 of the Remuneration of Advocates Order. A decree including a certificate of stated costs under Order XX has been issued. That is the decree whose execution is sought to be stayed.

12. There are two main issues that have been raised; firstly, is whether the application is properly before this Court, the applicant having moved this Court for an order of stay of execution before moving the lower Court for such orders. Secondly, is whether the applicant has satisfied the conditions provided under Order XLI Rule 4 of the Civil Procedure Rules for granting an order of stay of execution pending appeal.

13. With regard to the first issue, Order XLI Rule 4 of the Civil Procedure Rules provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

14. The rule gives powers to the appellate Court to consider an application for stay of execution and make orders, notwithstanding the fact that such an application may have been made to the Court appealed from and orders made refusing or granting such an application. In my considered view the above rule does not make it mandatory for a party to first apply for an order of stay of execution to the Court appealed from before making such an application to the appellate Court. Therefore, notwithstanding the fact that the applicant did not make any application for stay of execution in the lower Court, the application for stay of execution made before this Court is proper.

15. It is evident that what is material in determining this application is whether the applicant has satisfied the conditions for granting an order for stay of execution as provided under Order XLI Rule 4(2) of the Civil Procedure Rules as follows:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

16. The effect of the order made by the lower Court is to dismiss the applicant's suit. The applicant has filed an appeal against the orders which were made in the lower Court. That appeal is still pending before this Court and it is therefore not appropriate at this stage to go into the merits of the appeal. It is however apparent that if the respondents are allowed to execute the decree in the lower Court, the applicant will be highly prejudiced. Although the 1st respondent's managing director deponed that the 1st respondent has assets worth millions of shillings, no evidence has been exhibited to confirm such allegation. In any case, if the 1st applicant is worth so much as alleged, it can surely await the conclusion of the appeal for such a modest amount as the sum of Kshs.48,910/=.

17. It is therefore in the interest of justice that the Court do grant the applicant an opportunity to be heard in its appeal before the execution is levied. In the circumstances I find it appropriate and just that an order for stay of execution do issue. However, in order to balance the scales of justice and to protect the interest of both parties, I do hereby order that the applicant shall deposit the sum of Kshs.48,910/= into Court as security. The applicant raised an issue with regard to security for costs of the appeal. However, no appropriate application has been made nor is there any justification for the estimated sum of Kshs.260,000/=. For the purpose of this application, the required security is only the sum of Kshs.48,910/= subject of the decree. Further, I find it necessary to impose a time limit so as to ensure that the order of stay of execution is not abused.

18. The upshot of the above is that I allow the application and grant an order for stay of execution pending appeal on the following conditions:

(a) That the applicant shall deposit the sum of Kshs.48,910/= into Court within 7 days from the date hereof.

(b) The applicant shall file and serve a record of appeal within 90 days from the date hereof.

(c) The applicant shall take all appropriate action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed of within 12 months, the order for stay of execution pending appeal shall lapse unless otherwise extended by the Court.

Those shall be the orders of this Court.

Dated and delivered this 22nd day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Chahenya for the appellant

Advocate for the respondent, absent