REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 32 of 2004

TABITHA KERUBO OMAMBIA ……………...………… APPLICANT

V E R S U S

AKAMBA PUBLIC SERVICE ROAD SERVICE … RESPONDENT

R U L I N G

The defendant has moved the court by a Notice of Motion which they say is brought pursuant to the provisions of Section 3A of the Civil Procedure Act; Order 41 rule 4; and Order 50 rules 1 and 2 of the Civil Procedure Rules.

The substantive prayer in this application is for stay of execution pending the hearing and determination of the defendant's appeal.

The application is supported by two affidavits of **DINAH OGULLA**, who is said to be the Legal Manager of the applicant's Insurers, Messrs Jubilee Insurance Co. Limited.

It is common ground that the judgment in relation to which the applicant has expressed a desire to appeal, was handed down by the Hon. G. B. M. Kariuki, J. on 15th February, 2007. By the said judgment this court awarded to the respondent herein, the sum of **KShs.732,600/=** together with interest thereon, as well as with costs of the suit.

Thereafter, the costs of the suit were taxed by consent of the parties, and allowed in the sum of **KShs.180,000/=.** The parties filed a consent letter dated 6/9/2007, embodying the consent on the costs, and on 2/10/2007, the learned Deputy Registrar adopted the terms of the consent letter as an order of the court.

In anticipation of the respondent taking steps to execute the decree and the certificate of taxation, the applicant brought this application for stay of execution.

The applicant fears that if stay was not granted, and if the decretal amount was paid to the respondent, the applicant would find it very difficult in getting full restitution from the respondent, in the event that the appeal were ultimately successful.

It is the applicant's belief that the documents made available by the respondent, do not support her contention that she was worth over **KShs.5.0 million**, and that she would not therefore have difficulty in making restitution if she eventually had to.

Furthermore, the applicant cast doubt about some of the other documents produced by respondent, for the reason that the said documents were not in her name.

I will revert to the details of the said documents in due course.

Finally, the applicant offered to provide security, in the form of money, which they suggest could be held in a joint interest-earning account, in the names of the advocates acting for the parties herein.

When called upon to respond to the application, the respondent first submitted that the application was incompetent as it was founded upon affidavits which were inadmissible. The reason advanced for the contention that the affidavits were inadmissible was that the deponent, **DINAH OGULLA**, was not a party to the suit. She was not even an employee of the defendant.

As far as the plaintiff was concerned, the deponent was simply laying claim to being a Legal Officer of Jubilee Insurance Co. Ltd., which is also not a party to this suit.

The plaintiff submitted that pursuant to the provisions of **Order 3 rule 2 (c)** of the Civil Procedure Rules, it is only those persons who had been duly authorized under corporate seal who could swear affidavits on behalf of corporations.

And in this case, the plaintiff saw no evidence that Jubilee Insurance Co. Ltd. had authorized Dinah Ogulla to swear the affidavits in support of the application. The plaintiff therefore asked the court to strike out the affidavits.

What does Order 3 Rule 2 (c) state? It reads as follows:-

"***The recognized agents of parties by whom such appearances, applications and acts may be made or done are –***

(a) ……..

(b) ……...

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal."

In my considered view, the only way to fully appreciate the scope of that rule is by first reverting to Order 3 rule 1 of the Civil Procedure Rules. That rule stipulates that;

"***Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf……"***

Therefore, it is within that context that an officer of a corporation who has been duly authorized under corporate seal can make an appearance, or an application, or do any act in any court, on behalf of the party.

In this case, as the plaintiff has rightly pointed out, the Jubilee Insurance Co. Limited is not a party to the suit. They cannot therefore enter an appearance or bring any application in these proceedings, let alone authorize an officer of that company to do so.

However, I believe that there is a world of difference between an officer of a corporation who makes an appearance or an application , or who takes an action in a suit, pursuant to authority given to him under the corporate seal, and an officer who gives evidence either on behalf of that corporation or on behalf of any other party to a suit. In my considered view, when a person is a witness, he cannot be said to be a

party to the suit in which he is testifying simply because he did give evidence in the said suit. Of course, there will be instances in which a party to the suit is also a witness, but it would not follow that just because one was a witness, he was also a party to the suit.

In this case, Dinah Ogulla was merely a witness, who had given her evidence through the medium of an affidavit. There was therefore no legal requirement that before she could swear her affidavit, she had to be so authorized under corporate seal.

In the case of **MICROSOFT CORPORATION Vs. MITSUMI COMPUTER GARAGE LTD. [2002] 2 E.A. 460**, the Hon. Ringera J. (as he then was) struck out the affidavit of Pearman because she had failed to state that she had made the affidavit with the authority of Microsoft.

It is noteworthy that in that case Microsoft was a party to the suit. Secondly, the issue as to the competence of the affidavit was raised by way of preliminary objection.

In this case the plaintiff allowed the applicant to make its submissions based on the affidavit, and thereafter only challenged the competence of the supporting affidavit when she was responding to the application.

In the case of **QUASAR LIMITED Vs METRO PETROLEUM, MILIMANI HCCC NO.240 OF 2005** (unreported), I had occasion to express myself thus;

"***The reason I decline to strike out the said affidavit is that the plaintiff allowed the defendant to make its submissions, based on it, and only thereafter asked that it be struck out. If the court were to strike out the affidavit at this stage, it would be extremely prejudicial to the defendant; whereas, if the plaintiff had taken up the objection to the supporting affidavit as a preliminary point, the defendant may well have been accorded an opportunity to file a compliant affidavit, for use in the same application."***

I do reiterate the same views herein, as I believe that to decide otherwise may condemn a party to become the victim of the doctrine of res judicata, by virtue of his having substantively argued his application on the strength of an affidavit which was subsequently pulled from under his feet.

I strongly believe that the courts should not permit parties appearing before them to use the said courts as arenas where they could ambush the other parties to the case. It is for that reason that Discovery of documents is essential before a suit is set down for hearing. It is also for that very reason that parties who intend to rely on authorities to back their cases need to provide the other parties with, at least, a list of the authorities well in advance.

In the same vein if a party intends to challenge an application on the basis of such issues as the competence of the supporting affidavit, I hold the considered view that such issues ought to be raised at the outset of the arguments on the application. The court may then either first adjudicate on such an issue separately, or may in its discretion choose to hear the whole application and then give a composite decision on all the issues raised.

The respondent herein did submit that there was no appeal which was pending. Therefore, it was her considered view that if this court were to grant an order staying execution, that would amount to an abuse of the court process, as courts should not grant orders for stay of execution pending non-existent appeals.

It is common ground that the applicant did file a Notice of appeal on 22/2/2007. It is also common ground that as at the date when this application was canvassed before me, the applicant had not yet filed its intended appeal.

In the light of those facts, the respondent invited this court's attention to the provisions of **Rule 82 (a)** of the Court of Appeal Rules, which provides as follows:-

"***If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time –***

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

By virtue of the provisions of **Rule 81 (1)** a memorandum of appeal is supposed to be filed within sixty days from the date when the notice of appeal was lodged. However, that rule has a proviso which stipulates that if an application is made by the appellant, for a copy of the proceedings in the superior court within 30 days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as the registrar of the superior court may certify as having been required for the preparation and delivery to the appellant of the copy of the proceedings.

Therefore, it is not necessarily the case that automatically after the lapse of 60 days from the date when the notice of appeal was filed, if no appeal had been lodged, the notice of appeal is deemed to have been withdrawn.

In this case, the applicant may still have the opportunity to persuade the Court of Appeal that it applied for a copy of the proceedings within 30 days from 16/2/2007.

More instructively, the provisions of **Order 41, rule 4 (4)** of the Civil Procedure Rules expressly provides as follows:-

"***For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given."***

I say that that rule is instructive because the application before me is specifically pursuant to **Order 41 rule 4**.

In the circumstances I find and hold that the applicant is deemed to have filed an appeal to the Court of Appeal.

But that fact, by itself, is insufficient to result in a stay being granted in favour of the applicant.

Pursuant to **Order 41 rule 4 (2)** of the Civil Procedure Rules, the court may only order for stay of execution if it is satisfied that substantial loss may result to the applicant unless an order is made, and that the application has been made without unreasonable delay.

Secondly, if an order for stay of execution is granted, the applicant is required to provide such security as the court orders;

"***for the due performance of such decree or order as may ultimately be binding on him."***

I believe that it is in an attempt to meet the requirement that security be provided, that the applicant offered to have the decretal amount deposited in an interest-earning account, to be held in the joint names of the advocates for the parties herein.

Meanwhile, there is no doubt that the application was brought without any unreasonable delay.

In the circumstances, the only question that remains to be determined is whether the applicant may suffer substantial loss, if execution is not stayed pending the hearing and determination of the appeal.

The respondent has deposed that her gross salary was **KShs.28,380/=,** whilst the net salary was **KShs.12,014/=.** She has produced copies of her pay slip for January, 2008 to prove those figures. She

also stated, on oath, that she owns immoveable property worth well over **KShs.5.0 million**.

The respondent also contends that she runs a business of buying and selling cereals. She said that she had invested well over **KShs.2.0 million** in that business.

But, as the applicant pointed out, both the title deed and the statement of accounts produced by the respondent, in an endeavour to demonstrate her financial stature, were in the names of **TABITHA KERUBO WERE**, whereas the respondent is **TABITHA KERUBO OMAMBIA.** Although the issue was raised by the applicant, the respondent and her advocate did not offer any explanation which could link-up the two sets of names to one and the same person.

In the circumstances, even though the respondent may not be a woman of straw, I hold the considered view that unless this court stays execution pending the hearing and determination of the appeal, the applicant may suffer substantial loss.

In contrast, the respondent who says that she is running a very profitable business is not likely to be prejudiced by the delay in obtaining the decretal amount.

In the result I order that there shall issue an order for stay of execution pending the hearing and determination of the applicant’s appeal. However, the said order for stay shall be conditional upon the applicant making available the decretal amount together with the taxed costs, in the form of a cheque, which is to be used to open a joint interest-earning account in the names of the advocates for the parties herein: the said cheque is to be made available within the next 30 days from today.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 26th day of May, 2008.

FRED A. OCHIENG

J U D G E