REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 549 OF 2006

KIDS ALIVE KENYA REGISTRED TRUSTESS

(suing as Trustees of Kids Alive Kenya Registered ::::::::::::PLAINTIFF

VERSUS

DR. WENDY BOVARD & 8 OTHERS::::::::::::::::::::::::::::DEFENDANT

RULING

In this courts ruling delivered by this court on 3rd August 2007 at page 1 and 2 of the said ruling that the current applicant in the application subject of this ruling had filed a notice of intention to act in person simultaneously with a notice of withdrawal of the suit. At page 2 of the said ruling observation was made to the effect that the said move by the current applicant prompted the counsel for the plaintiff to file a notice of motion under the provision of law cited to strike out the said notice of withdrawal of the suit.

In alleging the application, the court made the findings formal at page 18 – 20 of the said ruling. The current applicant became aggrieve with the said decision. The court has been informed that he has lodged a notice of appeal to the court of appeal and in decision of appealing against this courts decision in the said afore mentioned ruling.

The applicant has therefore presented to this court an application by way of notice of motion dated 18th September 2007 and field on 25th September 2007. It is brought under Order 41 Rule 4 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. The prayers sought are an order that there be a stay of proceedings in this suit pending the hearing and final determination of an appeal lodged in the court of appeal and that cots be provided for.

The grounds in support are those se out in the body of the application, supporting affidavit and oral submission in court and the major ones are that:-

(1) That the applicant becomes aggrieved by this court's decision of 3.8.07 and have lodged a notice of appeal with the court of appeal and a decision of appealing against that decision. They also applied for proceedings.

(2) They are properly before this court as the court which made the grieving orders in accordance with the provision of Order 41 Rule 4 (1) Civil Procedure Rules which requires that the application for stay be

presented to the court which passed the decree or made the order complained of.

(3) That issues intended to be taken upon appeal are arguable because in holding that the applicant was not a trustee and therefore not qualified to withdraw the suit the court only looked at the face of the trust deed but did not read the endorsement on the reverse of the first deed where the applicant is endorsed as a trustee.

(4) It is their stand that since the endorsement on the reverse of the trust deed was made before the filing of the suit had the court looked at it they are sure the decision of the court would have been different.

(5) They maintain that authority had been given to the trustees to withdraw the suit a fact overlooked by this court.

(6) They contend that if stay is not granted the appeal will be rendered nugatory because if the applicant succeeds on appeal when the proceeding have already been concluded, then he will have been prejudiced as the decision to withdraw will be defeated.

(7) It is also their stand that the suit involves children and children homes and the continued pendence of the proceedings in court is injuries to the smooth running of the homes and the welfare of the children who are the beneficiaries.

(8) It is also their stand that the stand aggrieved because the orders of the court are final as the applicant was adjudged not to be a trustee and yet he is one of the trustees and if he succeeds an appeal then he will not be compensated for by cots as there will be nothing to go for trial.

(9) They maintain that this is a proper case for stay pending appeal as if proceedings continue they are adverse effects on the applicant.

The respondent has opposed the application on the grounds set out in the replying affidavit case law as well as oral submissions in court. The major points relied upon by them are as follows:-

(1) Since the applicant seeks stay of proceedings the application should have been filed in the Court of Appeal as Order 41 rule 4 Civil Procedure Rules under which the application is presented deals only with stay of execution.

(2) They contend the applicant is guilty of undue delay as the ruling was made on 3.8.2007 where as the current application was presented a month later which delay is unreasonable to them.

(3) There is nothing to show that the applicant has an arguable appeal as they have not displayed a memorandum of appeal in order to show what complaints they intend to take up on appeal.

(4) It is their stand that there is no way the appeal can e rendered nugatory as there is no execution procession raised. The order made that the applicant was not a trustee can be reversed should he succeed on appeal. The order can even be reviewed after the trial and evidence given since the order complained of was made at an interlocutory stage which orders can be upset upon the full trial being gone into.

(5) There is no appeal in place because the notice of appeal relied upon is of no effect as the same was lodged 108.2007 and served on 30th August, 2007 when rule 76 of the Court of Appeal rules requires that the same be served onto the respondent within 7 days. The one subject of these proceedings was served 20 days later after the time allowed. It is liable to be struck out and if it is truck out then there will be no appeal for which stay of execution could be sustained.

(6) They maintain that granting stay herein will just prolong the litigation as it will put the trial on hold for long. More so when no steps have been taken to process the speedy disposal of the appeal.

(7) If stay is granted to the applicant stopping the progression of the suit to trial, it is going to

inconvenience 9 other defendants who are not appealing and might be desirous of proceeding with the trial so that the dispute is finally determined between them and the plaintiff. Allowing one parity to hold many at ransom will not be in the best interests of the other parities and the case.

(8) Stay of proceedings if allowed will be against public policy which requires that disputes be speedily disposed off.

(9) From the submissions of Counsel their quarrel appears to be that the Court overlooked evidence a matter which could have been corrected by review and not an appeal more so when it is clear from their submissions that only part of the ruling is being challenged.

(10) It is not true that if stay is not granted the children homes will be affected adversely as there is no proof for the same. Secondly they are running dispute the pendence of the case.

(11) They contend the authorities relied upon by the applicant are not relevant to the issues in controversy.

In response counsel for the applicant stressed their earlier submissions and then added the following points.

(i) They contend they are in the right forum as the first place that a litigant should go to seek stay of proceedings should be the Court appealed from.

(ii) There is no legal requirement that a Memo of Appeal be availed before one can seek stay of proceedings pending appeal and as such failure to annex the memo of appeal Is not fatal to the application.

(iii) As long as the notice of appeal is still on record and ha snot been struck out it is still valid.

(iv) It is their stand that they are genuinely aggrieved because the orders that the court made were financial in nature as the Court did not rule that the applicant is not a trustee pending trial, but just ruled that the applicant was not a trustee. They contend that they will be prejudiced if stay is not granted. The applicant will be prejudiced because of the appeal will be determined after the trial is disposed of the situation will not be reversed.

(v) They agree review was an option but since they intend to appeal against the entire ruling review was not the best option to take and that is why they opted for the appeal.

(vi) They maintain that all the case law cited is relevant.

Both parties relied on case law. For purposes of the record there is the case of **DAVID MORTON SILVERSTEIN VERSUS ATSANGO CHESONI NARIOBI C.A. NAIROBI 189 OF 2001** under consideration by the Court of Appeal was n application for stay pending appeal presented to the Court of Appeal rules whose central theme in the ruling is that the onus is on the applicant to demonstrate that the appeal will be rendered nugatory if stay is not granted.

In the case of **UAP PROVINCIAL INSURANCE CO. LTD VERSUS MICHAEL JOHN BACKET NAIROBI CA. Application 204 of 2004.** On an application for stay of proceedings for stay of the same was refused because the applicants failed to demonstrate that if stay is not granted they will suffer irreparable loss.

In Nairobi C.A. No. 812 of 2004 in the case of PRIME BANK LIMITED VERSUS JOSEPHAT OGOUA ESIGE. ALNASHIR VISRAM J. had occasion to continue the provisions of Order XL1 rule 4 and determine as to whether they did with stay of proceedings is well. At page 2 of the ruling lines from the bottom the learned judge observed thus "*order XLI rule 4 of the Civil Procedure Rules deals with "stay" and it begins by mentioning both "stay of decree" and "stay of proceedings", the rest of that rule focuses*

primarily on execution and outlines in extensive detail the principles governing the grant of stay of execution. There is little said about stay of proceedings".

At page 3 line 7 from the top the learned judge observed "*The Rules Committee did not give a grudge on how to deal with applications for stay of proceedings but that did not stop applications for stay of proceedings coming to Court. At page 3 the learned judge referred to as Mulla rule 5 (2) (b) and remarked that the Court of appeal too does not mention any thing about stay of proceedings but the Court of Appeal had developed principles to deal with the problem namely:-*

(a) The appellant must show that his appeal is an arguable one. In other wards, he must show that the appeal is not a frivolous one.

(b) The appellant must also show, in addition that if the order for stay of proceedings is not granted his appeal if it were to succeed would be rendered nugatory.

At page 4 at lien 3 from the top the learned judge remarked that the principle developed by the Court of Appeal are joined by the superior court in similar circumstances where there are no guide liens given by the rules committee. The learned judge removed that he would borrow those principles and used them in resolving the application before him. The same was dismissed because the appellant "did not demonstrate to the satisfaction of the court that its appeal would be rendered nugatory if its application were not allowed. To render an appeal nugatory in a sense means that the appeal would be useless of no value …. If the trial in the lower court have to proceed and it turned out that the Appellant succeeded in its appeal. The trial in the lower court could be in done as appropriate.

The applicant referred the court to the case of Hon. Justice Mayayia Ole Keiwua Versus the Hon. The Chief justice and 6 others. Nairobi Application 202 of 2005. At page 6 line to from the bottom ruled that all that the applicant needs to do to prove that he had an arguable point. One is enough. On nugatory the court found that the appeal would be rendered nugatory if stay was not given.

In SHASHIC-PATEL VERSUS DAMAYANTINA VIN C HAH, NAVINR SHAH NAIROBI IVIL APPL. 236 OF 2006 stay was granted because "*it might be difficult if not impossible to get the matter to arbitration once it is heard by the superior court as there will remain nothing to go to arbitration by then arbitration by then common sense commands that as the question of whether to refer the matter to arbitration or not is still to be subject of an appeal or intended appeal in this Court, the hearing in the superior court must be stayed to abide the out come of this courts decisions on the intended appeal".*

On the Courts assessment of the facts herein it is clear that the applicant has approached the seat of justice seeking neither under Order 41 rule 4(1) Civil Procedure Rules. A reading of it reveals the following ingredients that the applicant has to satisfy one as follows:-

(i) The Court appealed form may for sufficient cause order stay of execution of such order or decree.

(ii) irrespective of whether the stay shall have been granted by the court appealed form or not, the applicant can seek the same relief from the Court appealed to.

(iii) The court appealed to may grant such orders assist may to it seem just.

There are conditional ties to be met by the applicant. These are found in order 41 rule 4 (2) of the civil Procedure Rules and these are

(2) No order for stay execution shall be made under sub rule

(i) unless

(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 biding on him has been given by the applicant"

Applying that to the facts therein, it is clear that as mentioned earlier on herein the applicant had moved to terminate the proceedings herein in his capacity as a trustee. This court after due consideration of the relevant factors on record and after scrutinizing documentary exhibits arrived at the conclusion that the applicant was not trustee as his name was not in the list of trustees that had been exhibited to affidavits for and against the application. The court went on to rule that since the applicant was not a trustee, he lacked locus standi in the case, to bring it to an end.

This court has been informed that the applicant became aggrieved by those orders and wishes to move to the Court of appeal allegedly because the Court failed to look at the endorsement on the reverse of the trust deed which endorsement bore the name of the application. Besides this assertion no memo of appeal or draft of the same. As argued by the applicants counsel exhibition of a Draft memo of appeal is not crucial to the grant of such orders. However such exhibition assists the court to determine the arguable point to be taken upon appeal.

Application of the provision of the law to the facts leaves no doubt that this court has jurisdiction, the power and authority to grant the relief. On conditional ties are made. These conditional ties are two namely.

(a) demonstration that the applicant will suffer irreparable

(b) provisions of security.

Applying these conditional ties to the applicant's deponement and submissions this court has not been told what irreparable loss the applicant stands to suffer if stay is not granted.

The court was also informed that the applicant is just one of the money defendants in the case. Their interests also have to be taken care of. There is no offer of security made by the applicant as regards costs to be incurred by these other parties by prolongation of the proceedings.

There was mention that children names are likely to suffer if stay is not granted. As submitted by the respondent's counsel no date has been presented to this Court to show how these homes were suffered since the matter came to court, when they will continue to suffer if stay is not granted.

For the reasons given, the court is of the opinion that this is a proper case where the application can be referred to the court appealed to seek the same relief.

Issues was also raised about the notice of appeal filed that it was filed out of time stipulated namely 7 days from the date of lodging and as such there is no appeal in place. Order 41 rule 4 (4) reads:

"*For purposes of this rule an and appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given"*. This being the case, the notice of appeal complained of is now the property of the Court appeal. Any more by this Court to rule on its current conditions will be tantamount to usurping or trespassing upon the powers of the appellate court, which cannot be allowed.

for the reasons given the application dated 18TH September, 2007 and filed on 25th September is dismissed with costs to the respondent to it for the reasons given.

(2) The respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2008.

R.N.NAMBUYE

JUDGE