



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 480 of 2008

WANYIRI KIHORO.....APPELLANT/APPLICANT

VERSUS

SURINDERPAL SINGH SYAN.....1ST RESPONDENT

JASMEER SINGH SYAN.....2ND RESPONDENT

SANATKUMAR SHANTILAL TRIVEDI..3RD

RESPONDENT

R U L I N G

Wanyiri Kihoro (hereinafter referred to as the applicant) has moved this court under Order XLI of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main prayer sought by the applicant is as follows:

“That the Honourable court be pleased to grant stay of proceedings in respect of the above suit whose hearing is due to commence on 13th September, 2008 at Milimani Commercial Courts, until the appeal which has been preferred and lodged with this Honourable Court is heard and determined.”

Obviously this prayer is misleading as the “above suit” is High Court Civil Appeal No. 480 of 2008, but as is apparent from the affidavit sworn by the applicant in support of the application, the proceedings sought to be stayed is in actual fact proceedings relating to Civil Suit No.1468 of 2008 in Milimani CM’s Court. As stated from the body of the application, the grounds upon which the application is premised are as follows: -

- (1) That the plaintiffs are claiming arrears of rent and also an eviction order against the defendant on a property which was purchased by the appellant’s wife Dr. Wanjiru Kihoro and is the subject of a succession cause.
- (2) That the appellant claims a proprietary interest in the subject property and has traversed the claims made by the plaintiff in his defence and raised a preliminary objection to the hearing of an application for summary judgment because two of the three plaintiffs have not sworn verifying affidavits as to the correctness of the averments contained in the plaint contrary to the provisions of the Civil Procedure Rules.
- (3) That appellant’s stake in the appeal is high as he lives on the property and a stay of proceedings so that the plaint can be verified before the commencement of the substantive hearing will be in the interest of justice.

From the affidavit of Mr. Wanyiri Kihoro, it is evident that the applicant is dissatisfied with the ruling of the trial magistrate made on 29th August, 2008, overruling the applicant’s objection to the suit on the grounds that the plaint is incompetent and bad in law. Although the applicant has lodged the current appeal against the ruling of the trial magistrate, the suit is set for the hearing of an application for summary judgment against the applicant. The applicant believes that unless an order for stay of proceedings in CMCC No.1468 of 2008 is granted his appeal will be rendered a

mere academic exercise.

Referring to *HC.Misc. Civil Application No.689 of 2001 Republic vs Kajiado Land Disputes Tribunal & Others*, it was submitted that if the suit in the CM's Court is incompetent then the whole proceedings are a nullity. It is further submitted that there is an issue regarding the pecuniary jurisdiction of the trial magistrate *vis a vis* the value of the suit property thereby making it impossible for the applicant to raise a counter-claim. Further it is submitted that the suit is also incompetent for wrongful joinder of parties the applicant having been sued in his personal capacity instead of the Estate of Wanjiru Kihoro.

Surinderpal Singh Syan, Jasmeer Singh Syan and Sanatkumar Shantilal Trivedi (hereinafter referred to as the respondents), are the plaintiffs in CMCC No.1468 of 2008, they have filed grounds of opposition to the applicant's motion raising the following grounds: -

- (1) That the application has been overtaken by events.
- (2) That the application is misconceived and incompetent
- (3) That the application is an abuse of the court proceed
- (4) The appellant has not established that he had a sufficient cause for filing the application for stay of proceedings.
- (5) The appellant has not established any loss that he might suffer if the proceedings are not stayed.
- (6) The appellant has not established that he has an arguable appeal.
- (7) That no security has been offered by the appellant for the due performance of any orders that might be made.

It is submitted on behalf of the respondents that the application has already been overtaken by events as the application for summary judgment has already been heard and is due for a ruling on 30th September, 2008.

It is submitted that the preliminary objection which gave rise to the ruling subject of the applicant's appeal only raised two grounds. First, that the mandatory requirements in respect of filing verifying affidavits in support of the plaint had not been complied with, secondly whether in law, a co-plaintiff could swear an affidavit on his own behalf and on behalf of other co-plaintiffs. It was submitted that the applicant could not argue his application on any other ground. It was maintained that there is no mandatory requirement under Order VII rule 2, that a plaintiff cannot swear an affidavit on behalf of another co-plaintiff. Reference was made to *Civil Appeal No.228 of 2002 Grace Ndegwa & Others vs Attorney General* where the Court of Appeal ruled that such an affidavit was acceptable provided the plaintiff swearing it had authority from the other plaintiffs.

The following cases were also cited:

- *Allesandro Picco Chimeo SRL vs Giulio Giro HCCC (Malindi) No.20 of 2003*,
- *Francis Njakwe Githiari & Another vs Hon. Daniel Toroitich Arap Moi HCCC No.596 of 2004*
- *Ole Unua Ole Kankai & Others vs Sukei Ole Nkoyiei & 3 Others (2005) e KLR.*

It was submitted that in this case, the verifying affidavit expressly indicated that the deponent had authority to swear the affidavit on behalf of other plaintiffs. It was maintained that the verifying affidavit was proper and that the trial magistrate was therefore right in overruling the preliminary objection.

It was further submitted that the issue of capacity of the parties, and the issue of jurisdiction not having been raised before the lower court, it was not open to the applicant to raise them at this stage. In any case it was maintained that the plaint was clear that the applicant was sued in his personal capacity as the occupier of the suit premises. It was contended that there was no counter-claim raised in the defence. It was submitted the applicant has not established any sufficient cause or loss that he would suffer if the proceedings are not stayed. It was maintained that the applicant would in fact suffer no loss as he has a right of appeal. Finally, it was submitted that the applicant has not offered any security for the due performance of any decree that may be made.

In response to the submissions made on behalf of the respondent, it was submitted that there was no decree in force and

therefore the issue of security for performance could not arise. It was maintained that the preliminary objection was dealing with the validity of the suit *per se*, thereby, affecting the competence of the entire suit. It was maintained that the authority purported to have been given in respect of the verifying affidavit was signed and filed, long after the suit had been filed, contrary to the averment in the verifying affidavit which indicated that the authority was there at the time of filing the plaint.

The application before me is specifically one for stay of proceedings pending appeal against the order made by the trial magistrate in Milimani CMCC No.1468 of 2008 on 3rd September, 2008. A handwritten copy of the proceedings and the ruling of the trial magistrate have been availed. It is apparent from the proceedings and ruling of the trial magistrate, that what was in issue was the competence of the suit, it being contended that Order VII Rule 1(2) of the Civil Procedure Rules had not been complied with as only one of the plaintiffs had sworn and filed a verifying affidavit. There were no issues raised before the trial magistrate with regard to the pecuniary jurisdiction of the trial magistrate or the wrongful joinder of parties. It is therefore not open to this court to address these issues as they cannot be canvassed in the appeal which is pending before this court.

For the applicant to succeed in this application, he must satisfy this court that if the order for stay of proceedings is not granted, he will suffer substantial loss. It has been indicated that an application for summary judgment has already been heard in the lower court and is now pending for judgment. The question is, will the applicant suffer substantial loss if the proceedings in the lower court continue and maybe judgment is entered against him? I do not think so. The applicant will have a right of appeal against the judgment of the trial magistrate and will be at liberty to raise the issue of competence of the suit in that appeal. The applicant indicated that he resides in the suit property and therefore stands to suffer irreparably should adverse orders be made against him. That however is neither here nor there as no such orders have been made against the applicant. Indeed, if such orders are made, the applicant is not without remedy. I therefore find that no sufficient cause has been established to justify the granting of an order for stay of proceedings pending appeal. For the above reasons I find no merit in this application and do therefore dismiss it.

Those shall be the orders of this court.

Dated and delivered this 25th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Muhoro for the appellant/applicant

Miss Machio H/B for Thongori for the respondents