



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 224 OF 2005

SANDE INVESTMENT LTD t/a Westland Cottage Hospital.....1ST PLAINTIFF
SAMSON OMOLLO RADING2ND PLAINTIFF
A.W. RADING OMOLLO3RD PLAINTIFF
MARIAM MUKWANA4TH PLAINTIFF

VERSUS

KENYA COMMERCIAL FINANCE CORPORATION.....1ST DEFENDANT
KENYA COMMERCIAL BANK (K) LTD.....2ND DEFENDANT
GRAHAM JAMES GREER SILOCK3RD DEFENDANT
ADRIAN SPENCER DEARING.....4TH DEFENDANT
WESTLANDS RESIDENTIAL RESORT LTD.....5TH DEFENDANT
JOSEPH NJOKA6TH DEFENDANT

RULING

The present application is by Notice of Motion dated 20th November 2006. That application is made on behalf of the 2nd to the 4th Plaintiffs. It seeks the following order: -

1. This court be pleased to Order a Stay of execution of the Party and Party Costs in the Taxing Officer’s Ruling of 8th August 2006 pending hearing and determination of the appeal against the decision of Justice Azangalala delivered on 7.11.06.

The background to this matter is that the suit by the 2nd to 4th plaintiffs as against the 5th defendant was dismissed on the 10th of November 2005. It ought to be noted that the 1st plaintiff’s suit as against the all defendants still subsists. The 2nd to the 4th plaintiffs filed a Notice of Appeal against that dismissal but

did not seek stay. The costs that were awarded to the 5th defendant were taxed on the 8th of August 2006. The 2nd to the 4th plaintiff being aggrieved to the taxation made a reference to the High Court and on hearing that reference Justice Azangalala dismissed it by saying that there was no reason in interfering with the taxation. As can be seen from the prayer of the plaintiffs, the plaintiffs now seeks stay of execution of the taxation pending appeal. The plaintiffs' have filed another Notice of Appeal against the order of the Honourable Justice Azangalala. The plaintiffs in support of the application deponed by an affidavit sworn on 20th November 2006 that there is danger or risk of the 5th defendant proceeding with execution of the taxed costs. The plaintiffs' stated that if such execution was to proceed, they would suffer substantial loss since they were not in formal employment after sale of the suit property. In submission the plaintiffs counsel stated that the four plaintiffs had sought to restrain the defendants from exercising their statutory power of sale. That the 5th defendant raised a preliminary objection leading to the striking out of the suit of the 2nd to the 4th plaintiffs. Because the suit of the 1st plaintiff still subsist, the plaintiffs' Advocate argued that that was sufficient cause to allow stay because the decree which was issued after the striking out of the plaintiffs suit was a preliminary decree. He said that when the suit of the 1st plaintiff is finally heard and determined, the court will take into account the costs awarded to the 5th defendant as against the 2nd to the 4th plaintiffs. On substantial loss the plaintiffs Advocate stated that the 2nd to the 4th plaintiffs were individuals and whereas the 5th defendant is a Company. That the 2nd to the 4th plaintiff were relying on the income of the 1st plaintiff which is no longer there after the sale of the suit property. For that reason the plaintiffs counsel argued that if execution does proceed the plaintiffs will suffer substantial loss. He said that the Court in exercise of its discretion needed to bear that in mind.

The plaintiffs application was opposed. The 5th defendant deponed in its affidavit in reply that the plaintiffs although had filed a Notice of Appeal against the order of dismissal of the suit that they had not filed a Memorandum of Appeal and therefore seemed to have abandoned that appeal. Even in respect of the Notice of Appeal against the ruling of the Honorable Justice Azangalala that the plaintiffs had not taken active steps to file a Memorandum of Appeal. He further stated that the Order which is sought to be stayed was the Order of 7th of November 2006 which was as a result of the ruling of the Honorable Justice Azangalala. The 5th defendants counsel said that there was no decree or order appealed from which is capable of stay in terms of the provisions of Order XLIV rule 4 of the Civil Procedure Rules. The 5th defendant also said that the plaintiffs had not shown substantial loss and further that they had in any case failed to pay the amount of kshs 327, 195. 00 which was undisputed. The 5th defendant further said that the plaintiff had failed to provide security for any stay. In oral submissions the 5th defendant Advocate began by saying that this court has no jurisdiction to order stay of execution of taxed costs. He said that there is no such jurisdiction under the Civil Act or elsewhere. He stated that the taxation is governed by the Advocates Act and Rules there under and that Act is self sustaining. In this regard counsel relied on the case of **FRANCIS KABAA – NANCY WAMBUI & ANOTHER, CIVIL APPEAL NO. 298 OF 1996**. In that case the Court of Appeal had the following to say about stay of taxed costs:-

“The application according to the Notice of Motion is to stay the order of Amin J, in which he dismissed the applicant’s suit then before him. Before us the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin, J was all about. In any case, even if that were so, the appellants, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

The 5th defendant relied on various authorities which have held that the court does not have jurisdiction to stay execution for taxed costs. These cases are as follows:

1. **Elikana Mukundi Gatimu & another v John B Muya & 3 others [2006] eKLR**
2. **Orbit Chemical Industries Limited – Otieno – Odek & Company Advocates [2006] e KLR**

Having considered the arguments presented before me the submissions and the affidavits evidence I have

the following to say. It is the 2nd to the 4th plaintiffs who brought this action against the 5th defendant. The 5th defendant succeeded in having the suit against it by those plaintiffs struck off. The decree came as a result of that dismissal cannot be described as preliminary decree. It is a final decree as between the 2nd to the 4th plaintiff as between the 5th defendant. A decree according to the definition given in section 2 of the Civil Procedure Act means an order which has been passed which is capable of execution. The order of dismissal and costs awarded to the 5th defendant fits into that definition. The plaintiffs stated that if stay is not granted since they were not in formal employment they would suffer substantial loss. To better understand what the courts has held to be substantial loss an apt quote is to be found in the case of **CIVIL APPEAL NO. 722 OF 200 EQUITY BANK LIMITED V TAIGA ADAMS COMPANY LIMITED** as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would ensure if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent – that is execution is carried out – in the event the appeal succeeds, the respondent would not be in a position to pay – reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellants/applicants.”

The plaintiffs did not show to this court that the 5th defendant would be unable to refund the costs if they succeeded in the appeal. Moreover the plaintiffs statement that they will suffer substantial loss if execution is not granted because they are not in formal employment can only be raised where the plaintiffs are faced with a notice to show cause. Such a submission is misplaced in an application for stay. I find that I am in agreement with the 5th defendant counsel in his submission that this court has no jurisdiction in the Civil Procedure Rules or the Advocate Act to stay execution of the taxed costs. The Civil Procedure Act does not apply to the Advocates Act and the Advocate Act does not provide for stay of taxed costs. Moreover costs being what they are that they are awarded to a party who either succeeds in its claim before court or a party who succeeds to have a claim dismissed. In the courts view it is not just for the court to stay execution of such costs. Such a party having so succeeded should not be prevented from being compensated for from enjoying the said compensation. As stated before the court of appeal in the case of **FRANCIS KABAA – NANCY WAMBUI & ANOTHER, CIVIL APPEAL NO. 298 OF 1996** found that if indeed a party did succeed in an appeal any costs that had been paid as a result of a judgment of the High Court could be refunded. The 5th defendant was of the view that the plaintiffs application was not bonafide but I chose not to comment on that because there is no reason that I can find to say that it is not bonafide but I would say that the plaintiffs seems to want to delay the day of reckoning. Accordingly the plaintiffs application dated 20th November 2006 is dismissed with costs to the 5th defendant. The 5th defendant had requested the court to assess the cost of the application but I am of the view that the registry is sufficiently capable of assessing those costs. Orders accordingly

MARY KASANGO

JUDGE

Dated and delivered on 5th day of February 2007.

MARY KASANGO

JUDGE