



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

Misc Appli 12A of 2006

UASIN GISHU MEMORIAL HOSPITAL LTD.....PLAINTIFF

Versus

MOI TEACHING AND REFERRAL HOSPITAL BOARD.....1ST DEFENDANT

THE MINISTER FOR HEALTH.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

The Notice of Motion dated 9th November 2006 is brought pursuant to Order XLI Rule 4 of the Civil Procedure Rules, Section 3 and 3A Civil Procedure Act. The Applicant seeks an order of stay of further or other proceedings in NRB MISC APP 12A of 2006 pending the hearing and determination of the intended Appeal and asks for costs of the Application.

The grounds upon which the Application is premised are found on the face of the Application and further supported by the Affidavit of Ochanda Agunda the Deputy Director of Administration and Finance of the 1st Respondent/Applicant dated 19th November 2006, and a further Affidavit by the same deponent dated 27th March 2007.

The Application was opposed and Mr. Charles Kesse, Company Secretary of the Plaintiff/Respondent swore an Affidavit dated 24th November 2006. The 1st Respondent also filed grounds of opposition dated 24th November 2006.

The Application seeks to stay the proceedings in this case pending hearing of an appeal against a ruling delivered in this case on 13th October 2006. The Applicant had objected to the filing of this suit in Nairobi alleging that there are other suits pending in Eldoret Court which need to be determined first; that the suit is res judicata and that it is time barred.

The court overruled that objection against which the Applicant has appealed. Mr. Katwa Counsel for the Defendant/Applicant submitted that they have complied with the three conditions which are prerequisite to the grant of a stay pending appeal. They are:-

(1) That substantial loss will be suffered by the Applicant;

- (2) That the Application was brought without unreasonable delay;
- (3) Security is provided for.

Counsel urged that the Application was made soon after the court's ruling of 13th October 2006 and a Notice of Appeal has been filed and a letter was written to the court requesting for proceedings. The Notice of Appeal is (Exhibited O9) and is dated 13th October 2006 and filed in court on the same date. A letter requesting for the ruling of the court dated 13th October 2006 was also filed on the same date.

On the issue of security, Mr. Katwa argued that the titles in respect of the disputed land are in the names of the Plaintiffs and they should remain so till the appeal is heard and determined and that the court can give any other conditions it deems fit.

On the question of substantial loss, Counsel submitted that the 1st defendant is already in occupation of the suit premises, they have patients undergoing treatment and the fact that it is a referral hospital, there are students being trained as doctors and the Applicants have heavily invested therein using tax-payers, donors and partner's monies and that therefore if the case proceeds to hearing before the appeal is determined, it means that it will proceed in terms of this case and they stand to suffer loss.

That if this case proceeds to hearing it will result in duplicity because, though some cases relating to the suit land have been determined, HCC 78/05 and CA 350/05 are still pending in Eldoret and the Court of Appeal respectively. Counsel relied on the case of **WINDING UP CAUSE 43/00 GLOBAL TOURS & TRAVELS LTD** in which Justice Ringera considered what factors the court should bear in mind in considering an order of stay.

Mr. Ombwayo Counsel for the Respondent supported the Application on the grounds that if stay is not granted, the Government which has heavily invested in the suit property will suffer substantial loss. That the titles in respect of the suit property are already in the names of the Plaintiffs and they can act as security till the hearing and determination of the appeal. Counsel was also of the view that the Application was filed without unreasonable delay and the order of stay should be granted.

Mr. Kibet, in opposing the Application relied on the affidavit of Charles Arap Kesse sworn on 29th November 2006. Counsel submitted that there is no possibility of executing the Ruling of the Court of 13th October 2006 nor is there any threatened execution.

In reply to the question of delay, Mr. Kibet urged that the courts rendered its ruling on 13th October 2006 but it was not until 9th November 2006 that this Application was filed. That Rule 33 of the Rules made under the Constitution, Legal Notice 6/2006 provides for stay for 14 days soon after the decision is made and this was not sought by the Defendant/Applicant and there was unreasonable delay in bringing this Application. That in any event, the Applicant should not invoke the Civil Procedure Rules when Rule 33 of the Constitution provides for stay.

Mr. Kibet raised issue with the supporting Affidavit dated 19th November 2006 which he said is similar to the further Affidavit dated 27th March 2007 and that the reason for filing the 2nd Affidavit is that the signature on the supporting Affidavit is a photocopy that was faxed from Moi Teaching Referral Hospital (MTRH) at 12.45 p.m. though the Commissioner for oaths indicates that it was sworn before him in Nairobi and it is therefore a forgery. That the Supporting Affidavit though sworn in Eldoret, is commissioned at Nairobi yet it should be commissioned in the presence of the Advocates. That both affidavits contravened S. 5 of the Oaths and Statutory Declarations Act. Counsel also observed that the Applicant is raising the same issues raised in the Preliminary Objection and to stay the proceedings will be subjecting the Plaintiff/Respondent to injustice and further loss. Counsel cited the case of **SILVESTEIN V CHESONI (2002) 867** where the Court of Appeal said that an Appeal cannot be rendered nugatory by the mere fact of proceedings continuing and that the same position was taken in **COUNTY COUNCIL OF NAROK V KALUYASOI FARMERS CO-OPERATIVE SOCIETY 324 & 325/2005 CASE**. Counsel also relied on the case of **GRACE NDEGWA V AG** where the court

refused to uphold a Preliminary Objection and ordered the parties to proceed to full hearing. He urged that the dismissal of the Preliminary Objection is no ground for staying proceedings and the court should dismiss the Application.

In reply to the Plaintiffs submission, Mr. Katwa said that in regard to the jurat, he said that it was not shown that counsel did not go to Eldoret to commission the Affidavit and that the allegation of perjury is misplaced and that S. 5 of Cap 15 was complied with.

As regards the **CHESONI CASE**, Counsel said that in that case, the Application for stay was not under Order 41 Civil Procedure Rules but under Rule 5 (b) of the Appellate Jurisdiction Act Cap 9 which requires a party to show that the Appeal will be rendered nugatory if stay is not granted and that is not a requirement under Order 41 Civil Procedure Rules. Counsel denied that the period of 24 days before filing of this Application was unreasonable.

I have now considered all the rival arguments. Objection was taken to both the Affidavits of Agunda Ochanda in support of the Notice of Motion dated 19th November 2006 and the supplementary affidavit dated 27th March 2007. I do agree with Mr. Kibet's observation that the Jurat on the Affidavit of 19th November 2006 is a fax, with time indicated as 12.45 p.m. from 'MTRH' which I believe stands for Moi Teaching Referral Hospital which is situated in Eldoret. The Commissioner for oaths then commissioned it in Nairobi when it was already signed. Under S. 5 of the Oaths and Statutory Declarations Act Cap 5 Laws of Kenya

an oath or Affidavit is taken before a Commissioner for Oaths who then indicates in the jurat the place and on what date the oath or Affidavit is taken or made. If the Commission was done in Eldoret as Mr. Katwa contended, then the stamp should show that it was in Eldoret but not Nairobi.

It is apparent from the jurat that the Affidavit was not made in the presence of the Commissioner and that offends S.5 of Cap 15 Laws of Kenya. The Commissioner for Oaths could not ascertain who signed that Affidavit because it was not signed in his presence and that amounts to misrepresentation to the court. That Affidavit is incompetent and cannot support the Application. The Defendant/Applicant then filed a Supplementary Affidavit dated 27th March 2007. Basically, the contents of the Supporting Affidavit are repeated in the Supplementary Affidavit though it is framed as if it were a reply. Why was it necessary to file a Supplementary Affidavit? The Applicant never disclosed that the jurat on the Supporting Affidavit was a faxed copy and I believe the Supplementary Affidavit was meant to be a substitute to the Supporting Affidavit in the event that the court noticed the same on the jurat and struck off the Affidavit in support of the Application.

I find the Supporting Affidavit to be incompetent and a misrepresentation to the court that it was improperly signed before a Commissioner for Oaths. A supplementary Affidavit can only be filed in furtherance of another Affidavit which is on record and it is meant to answer to new matters that may have been raised in the Affidavit filed by opposing parties but not to repeat the same facts contained in the Supporting Affidavit. That is what the Applicant has done and I find that the 2 Affidavits are incompetent and they are hereby struck off.

In the event that I am wrong and the Affidavits are proper, I will go to the merits of this Application. What this court dealt with and the decision made on 13th October 2006 was a Preliminary Objection that was raised by the Defendant/Applicant objecting to the hearing of this matter in Nairobi instead of Eldoret High Court where it was said other matters relating to the suit property had been filed. I do note that Counsel for the Applicant repeats the same issues raised in the Preliminary Objection that was dismissed in this Application yet this is not an appellate court.

The court noted that this is a Petition brought under the Constitutional provisions alleging breach of Fundamental Rights of the Applicant. Under Rule 32 of the Rules made under Section 84 of the Constitution, such cases shall be given priority hearing over all other cases and shall be heard and determined expeditiously. It means that with the filing of this Originating summons it should be given a priority hearing to the other cases filed before it. The issue before this court in the Originating Summons

is not the ownership of the suit property but whether the order vesting the property in the Defendant/Respondent breached the Plaintiff's Fundamental Rights. The cause of action before the Eldoret Court and Court of Appeal are different from this Originating Summons and this court has determined that issue in the Preliminary Objection. Given that background, the question is whether there is anything for the court to stay?

Under Order 41 of the Civil Procedure Rules, the Applicant needs to satisfy the following requirements before an Order of stay can issue:-

- (1) That the Applicant will suffer substantial loss;
- (2) That the Application has been brought without unreasonable delay;
- (3) There is provision for security.

Was this Application brought within reasonable time? The Plaintiffs/Respondents contends that the Application was filed late. The court rendered its ruling on 13th October 2006. I do note that the Applicant filed the Notice of Appeal on the same date and asked for proceedings on the same date. Under Rule 33 of the Rules made under S.84 of the Constitution, an informal Application for stay of a judgment or ruling may be granted for 14 days pending appeal.

The Applicant did not take advantage of the 14 days allowed under Rule 33. Instead the Applicant waited for 24 days till 9th November 2006, to file this Application. With the filing of the Notice of Appeal and requesting for proceedings, it was apparent that the Applicant was keen on appealing but why did they take 24 days to seek the stay?

The Applicants never attempted to give any explanation for the delay of so many days. This Appeal arises out of a Constitutional Application that is still pending. As earlier noted Rule 32 of the Rules made under S.84 of the Constitution provides that such cases be given priority over all other cases and be heard and determined expeditiously. This is because they touch on fundamental rights of individuals. Rule 33 which allows an informal stay for 14 days pending Appeal does not say that the informal Application for stay should be made pending a formal Application for stay.

My understanding of this rule is that it is put in place to ensure that there is no delay in filing of Appeals emanating from Constitutional Applications, after the delivery of judgments or rulings. I find that inaction for 24 days by the Applicant is unreasonable delay and calls for a good explanation and the unexplained delay of 24 days is in my view, inordinate and inexcusable.

Will the Applicant suffer substantial loss if stay is not granted? As earlier pointed out, it is a Preliminary Objection that was dismissed in my ruling of 13th October 2006 that is sought to be stayed and there is no possibility of execution because there is nothing to execute. One of the objections that the Applicants raised was that the Originating Summons was filed in the wrong court and sought to have the case transferred to Eldoret High Court but that has been overtaken by events in that the hearing of all Constitutional matters has been centralized and this court is properly seized of this matter.

Further, as observed in my ruling on the Preliminary Objection, the matter pending before this court is a constitutional Application unlike those which may be pending before any other courts. It should be heard expeditiously and determined before any other Civil matter pertaining to the disputed land. Since there is no decision in this matter, there is nothing to stay and no substantial loss will be suffered by the Defendant/Applicant.

As earlier noted, the Originating Summons herein being a Constitutional Application it would have to be heard before any other case relating to this property. Though the suit property is in the names of the Plaintiffs, it is the Defendants who are in possession. So it cannot be said that the Plaintiffs are not suffering any loss. I find that an order of stay of these proceedings would be but prolonging the losses, inconvenience and anxiety of either party.

I totally agree with Justice Ringera's observation in the case of **GLOBAL TOURS & TRAVELS LTD** where he said; **"In deciding whether to order a stay, the court should especially weigh the pros and cons of granting or not granting the order. And in considering these matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously."**

I have already observed that the Application for stay was not brought timeously, I have considered the nature of the substantive matter pending before this court which needs expeditious disposal as it will halt other pending cases; I have also considered the fact that the Applicant intends to stay the proceedings due to a ruling in a Preliminary Objection. The courts have time and again dissuaded parties from dwelling on Preliminary Objections instead of going for the hearing of main suits for purposes of determining the issues once and for all. In **MUKISA BISCUIT MANUFACTURING CO. LTD. V WEST END DISTRIBUTORS LTD 1960 EA 689**, Justice Newbold observed that the courts should not dwell on Preliminary Objections but instead go to the substance of the suits as objections escalate costs, delay cases and may even confuse issues. The Defendant/Applicant should let this Originating Summons proceed to full trial for determination of the issues therein.

In conclusion, the affidavits in support of the Application having been struck out, and the court having found that in any event there is no merit in the Application, the Application for stay is hereby dismissed and it is ordered that the parties do proceed to mention the matter before the Hon. Chief Justice for allocation of hearing dates for the Originating Summons.

Dated and delivered this 2nd day of November, 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Echesa holding brief for Mr. Kibet for Plaintiff/Respondent

Ms Bisem holding brief for Katwa for the 1st defendant/Applicant

Daniel: Court Clerk