REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 50 of 2004

COUNTY COUNCIL OF MERU SOUTH ….…… APPLICANT/APPELLANT

AND

FESTUS MUNYUA …………………………...……………… RESPONDENT

RULING OF THE COURT

The application before me is the Notice of Motion dated 5.8.2004 said to be made under Order 41 Rule 4 of the Civil Procedure Rules (C.P.R.) sections 3 and 3A of the Civil Procedure Act. The applicant prays for the following orders:-

1. That this application be certified as urgent and he heard exparte in the first instance.

2. That this honourable court be pleased to order stay of execution in CMCC No. 16 of 2002 pending the hearing of the appeal.

3. That in the alternative this honourable court be pleased to grant an order of injunction to restrain the respondent from executing the ex-parte judgment in CMCC No. 16 of 2002.

4. That costs of this application be provided for.

The application is premised on four grounds on the face thereof namely:-

(a) That the respondents obtained ex-parte judgment in CMCC No. 16 of 2002 without the knowledge of and/or representation of the appellant.

(b) That the appellant is an institution of a local authority and shall suffer substantial loss in the event that execution is not stayed as appeal will be rendered nugatory.

(c) That the appeal herein is based on an application pursuant to and in the process of applying to set aside the irregular ex-parte judgment.

(d) That the respondent has already filed a Notice to show cause against the clerk to the appellant who may be put to civil jail pending the hearing of this appeal.

The application was also supported by the affidavit of one NDURUMO GAKIU, made and sworn on the 5.8.2004. The deponent has averred that unless the orders sought herein are granted, he as the clerk to the appellant is likely to be put in civil jail over the irregularly obtained ex-exparte judgment against the

appellant/applicant. Annexed to the said affidavit was a copy of a notice to show cause dated 10.12.2002 over a decretal sum of Kshs. 233,727/=.

The application was consolidated with a similar application dated 21.9.2004 and both applications were argued as one.

During the hearing of the application on 15.2.2005, Mr. Gikunda Anampiu for the applicants submitted that the pending appeal has high chances of success and that unless the orders sought are granted, the appeal will be rendered nugatory. Mr. Gikunda cited the case o**f CMC Holdings Limited V James Mumo Nzioki – Civil Appeal No. 329 of 2001 at Nairobi** in support of the application.

The application was opposed. The respondent filed a Replying Affidavit made and sworn by himself on 13.9.2004. He has deponed that he obtained ex-parte judgment against the applicant on 5.9.2002 in the sum of Kshs. 196,200/= plus assessed costs amounting to Kshs. 27,925/=. That all the applications made by the applicant to set aside the ex-parte judgment have been dismissed and that all those applications together with the present application are actuated by malice on the part of the applicant and intended solely to harass the respondent. The respondent has also averred that the pending appeal is a sham with no chances of success. Finally, the deponent averred that he is a man of means and that should the appeal succeed, he would comfortably refund the decretal amount. That the present application is vexations frivolous and an abuse of the due process of the court.

Briefly, the facts giving rise to the application are that the respondent filed a suit against the applicant way back on 10.1.2002 claiming special damages in the sum of Kshs. 24,900/= general damages for loss of user and loss of income for a destroyed posho mill. The respondent also prayed for costs of the suit. From the record, the applicant entered appearance and also filed statement of defence on 27.2.2002 and 4.4.2002 respectively. The applicant of course denied liability to the respondent in both special and general damages and prayed for dismissal of the respondent's suit with costs. The suit proceded ex-parte and the respondent given judgment. Following the said ex-parte judgment, the applicant filed an application dated 18.11.2002 seeking orders to set aside the ex-parte judgment which application was dismissed by the court for want of prosecution. The applicant thereafter filed another application on 21.3.2003 seeking orders for the reinstatement of the earlier application dated 18.11.2002. On the 29.4.2004 when the application for reinstatement came up for hearing before Mr. Omburah, SRM the applicant and his counsel were absent leading to the dismissal of the application for non-attendance.

The applicant, by another application dated 20.5.2004 and filed in court on 21.5.2004 sought an order of temporary stay of execution of the ex-parte judgment and all subsequent orders thereto pending the hearing and determination of the application.The applicant also sought an order of review of the court's orders dated 29.4.2005, which orders dismissed the applicant's application dated 18.11.2002 and to allow the said application dated 18.11.2002 to be canvassed on its merit. The application dated 20.5.2004 was also dismissed by the court on 26.7.2004. It is against that ruling of 26.7.2004 that the applicant has appealed.

The issue for my determination is whether the applicant has fulfilled the conditions set out under Order 41 Rule 4 of the Civil Procedure Rules so as to sway this court to exercise its discretion in its favour. To shed some light on the issue before me, I refer to the terms set out under 41 Rule 4 which are as follows:-

"4(1) No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) 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 bounding on him has been given by the applicant."

It is clear from the wording of the rule that the court's discretion to order stay of execution is unfettered. Nonetheless the applicant has to show sufficient cause for seeking the order of stay. The court is also to be satisfied that unless the orders sought are granted, the applicant will suffer substantial loss. The court has also to be satisfied that the application for stay has been made without unreasonable delay and finally that the applicant has furnished such security as may be ordered by the court. The court would also consider whether the intended appeal is arguable and whether it would be rendered nugatory unless the order of stay is granted. See **Kenya Commercial Bank Ltd V Benjoh Amalgamated Limited and another (Civil application No. 54 of 1999) M'Ikiara M'Rinkanya and another Gilbert Kabeere M'Mbijiwe (Civil application No. Nai 29 of 2003 (NYR 17/2003**).

I have carefully considered the totality of the facts surrounding this case and the submissions made by counsel for both the applicant and for the respondent. The subject matter of the application before me is a money decree. In **Kenya shell Ltd V Benjamin Kibiku and another (Civil Application No. Nai 97 of 1986)** it was held (Hancox J) that the court would not normally grant a stay of execution of a money decree unless there are special features to warrant the granting of stay. The decision in the Kenya Shell case (supra) was applied in **Madhupaper Kenya Limited V Crescent Construction Company Limited.**

Looking at the whole of the record, I am not persuaded that the applicant is entitled to the orders sought. This being a money decree, the applicant has not shown any sufficient cause that unless the order of stay is granted, the applicant will suffer substantial loss. All that the applicant has pleaded is that the applicant's chief officer is likely to be thrown into civil jail unless the order of stay is granted. To my mind, the jailing of the chief officer of the applicant would not result into substantial loss to the applicant.

The respondent has deponed that he is a man of means and that if the applicant's appeal succeeds, he can easily refund the decretal amount. The applicant has not controverted the respondent's statement that he is a man of means who is capable of refunding the decretal amount should the appeal succeed. It would therefore follow that though the application for stay was filed without undue delay, the same cannot succeed on the grounds that it has not been shown that substantial loss will be suffered by applicant if order of stay not granted.

In reaching the conclusion I have reached on the point of sufficient cause not having been shown by the applicant, I am aware that the discretion to grant or not to grant stay of execution is a matter of judicial discretion which should be exercised rationally and in the interests of justice. The discretion of the court as noted elsewhere in this ruling is unlimited, save that the discretion must be exercised in the interests of justice. In my view the interests of justice in this case dictate that the respondent must be protected against the whims and capriciousness of the applicant. The record also shows that both the applicant and its counsel were not vigilant in firstly defending the respondent's claim against them and secondly in prosecuting the various applications that were subsequently dismissed by the lower court. Equity demands that the court assists the vigilant and not those who are indolent and bent on delaying the course of justice in favour of those, like the respondent in this case, who have a judgment in their favour. The applicant has been indolent and this court will not come to its rescue.

The other point to consider is whether the applicant has furnished security for the due performance of such decree or order as may ultimately be binding on him. From the submissions made by Mr. Gikunda Anampiu for the applicant, there is no offer for such security. On this ground also, the applicant's application fails.

Mr. Muriuki for the respondent raised another point during his submissions and that is that the applicant's applications are incurably defective. He argued that the applicant's prayer for stay of execution is only

secondary to the prayer for an order setting aside the order of 26.7.2004. That applications for setting aside should ordinarily be filed under Order 8 B Rule 8 of the Civil Procedure Rules and not otherwise. I have considered the pleadings for the two applications. The application dated 5.8.2004 is in the main an application for stay of execution and in the alternative an order of injunction while the application dated 21.9.2004 seeks an order of stay as well as an order for the lifting of the warrants of arrest against the applicants. In my consideration of the scheme of things I have ignored the applicant's application dated 21.9.2004 which in my view was some kind of desperate attempt to put into place some stop gap measures pending the hearing and determination of the application dated 5.8.2004. T he issue of Order 8B is therefore not relevant in the circumstances.

In the result the applicant's application dated 5.8.2004 as consolidated with the application dated 21.9.2004 is dismissed in its entirety with costs to the respondent.

It is so ordered.

Dated and delivered at Meru this 13th day of April 2005.

RUTH N. SITATI

Ag JUDGE

13.4.2005