



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Suit 588 of 2003

LILA VADGAMA.....PLAINTIFF/APPLICANT

VERSUS

MANSUKHLAL SHANTILAL PATEL.....DEFENDANT/RESPONDENT

RULING

The plaintiff's Chamber Summons application dated 9th August, 2004 and filed on 11th August, 2004 was brought under Order XLI, rules 4(1), (2), and Order XXXIX, rules 2(1) and (2). It carries two substantive prayers:

- (i) that, the order of Ojwang, J dated 15th July, 2004 and/or further proceedings herein be stayed, pending the hearing of the intended appeal by the plaintiff;
- (ii) that, the defendant/respondent be restrained from setting down the hearing of his Notice of Motion dated the 31st October, 2003 prior to the disposal of the intended appeal.

The application is premised on the following grounds:

- (a) that, the appeal will be rendered nugatory if stay order is not granted;
- (b) that, the plaintiff has cogent grounds of appeal, these being —
 - (i) that, Ojwang, J “wrongfully dismissed the plaintiff’s application dated 28th May, 2004 without considering even a single merit”;
 - (ii) that, “the Judge erred totally to consider that the defendant’s preliminary objection dated 14th July, 2004 was a mere frivolous technicality”; “the Judge misdirected himself in dispensing justice on technicalities contrary to the appellate Court’s profusion of warnings to the contrary”; “the Judge erred that an affidavit was necessary in giving directions”; “the plaintiff is very serious in pursuing the appeal, Notice of Appeal has been given, and copies of proceedings applied for”;
 - (iii) that, “in avoiding to give directions sought under the plaintiff’s application dated 28th May, 2004 the Judge failed in making a finding that the plaintiff would be, and is, aggrieved, injured, and prejudiced in his pursuit of having his application dated 9th September, 2003 being heard first, and instead peradventure giving countenance to the defendant to do further mischief of preempting the said application”;
 - (iv) that, “the appeal is a *prima facie* sitter. If the orders sought are not granted, the plaintiff’s

application will be irretrievably delayed. Damages will not be sufficient remedy”;

(v) that, “the plaintiff is ready and willing to give a requisite undertaking in damages.”

This application comes with an affidavit sworn by the plaintiff on 9th August, 2004.

Many *allegations* are made in the quite long affidavit, at the end of which appears the averment: “*The facts above-contained are within my knowledge and are true, save and except my comments.*” It is a rather unorthodox affidavit which does not come in the solemn language of averments, but contains much in the form of general, chatty comments. This, I believe is *improper*; I will review the content of this affidavit and then decide whether or not it will stand as an affidavit in support of the instant application.

The first substantive paragraph of the affidavit states:

“The Hon. Court should allow this application to be heard as a matter of urgency during the Court vacation for the reason that the defendant’s advocates have used every unseemly tactic to have their application dated 31st October, 2003 heard first, the trick being that they want to delay or forestall my application dated the 9th September, 2003 which seeks orders that the defendant’s advocates be enjoined or restrained from representing the defendant as they are witnesses in this suit.”

It is obvious to me that such is not a true averment based on personal knowledge. It is only a ventilation of personal fears, being presented as fact.

I will, therefore, strike out that paragraph (which is paragraph 2) of the plaintiff’s affidavit. It fails to live up to the requirement attached to affidavits: *giving factual information to enable the Court to determine the questions placed before it.*

It is clear to me that both paragraph 2 and 3 of the affidavit are *arguments and submissions*. They do not provide any factual information in the form of evidence. Therefore paragraph 3 of the plaintiff’s affidavit is also hereby struck out.

Paragraph 3 of the affidavit is equally argumentative and is not evidence. It, too, is hereby struck out. It is the same with paragraph 4, which is also hereby struck out. It is the same with paragraph 5, which, too, is hereby struck out.

In summary, what is offered by the plaintiff as an affidavit in support of his application, is a scandalous document. I hereby strike it out and expunge it from the Court record.

That leaves the plaintiff’s Chamber Summons standing alone. I will now consider how the same was presented before me, and the responses to it which were made on the side of the defendant.

On 29th November, 2004 *Mr. Rach* and *Mr. Amoko* appeared before me, respectively for the plaintiff/applicant and the defendant/respondent. They came for the hearing of the plaintiffs Chamber Summons of *9th August, 2004*; and *Mr. Rach* made submissions on the prayer to stay my ruling of 15th July, 2004 pending appeal; and he urged too that the defendant be restrained from setting down for hearing his Notice of Motion of 31st October, 2003.

As a basis for considering the submissions of counsel, it is necessary to set out here the ruling of 15th July, 2004.

THE RULING OF 15TH JULY, 2004

“There are two applications competing for priority of hearing. One, by the plaintiff/applicant, is dated *9th September, 2003*. The other, by the defendant/respondent, is dated *31st October, 2003*.

“The parties are not in agreement as to which one should come first. So the plaintiff comes by yet another application, the Chamber Summons of 28th May, 2004— and this is what came up for hearing today.

“The defendant/respondent asks for the dismissal of the Chamber Summons of 28th May, 2004 on several grounds — one being that it will have no evidentiary basis to enable the Court to take a decision; secondly, that it fails to show the source of jurisdiction for the Court to hear and determine it; thirdly, that it should have come by Notice of Motion and not Chamber Summons.

“Certainly, a decision should be taken on which of the earlier applications should be heard first. Ideally parties should properly instruct their advocates to resolve such a question by consent.

“But I have formed the impression that the flow of communication between counsel on both sides, and also probably between the parties themselves, is rather limited.

“Hence the plaintiff/applicant moves the Court to decide the question. “Has the Court been properly moved? I do not think so. The Chamber Summons of 28th May, 2004 indicates that it has a supporting evidentiary basis, in the form of depositions. Such depositions are not annexed, however.

“Consequently there is no basis to support the Chamber Summons of 28th May, 2004.

“I dismiss this application with costs to the defendant/respondent.

“If parties want the Court to decide on a contested basis which of their plurality of applications is to heard first, they must comply with the civil procedure rules in making an application.”

The plaintiff who was, on that occasion, conducting his own case somewhat assertively, immediately thereupon sought and obtained leave to appeal to the Court of Appeal; and directions were issued for the Court’s Executive Officer to have the proceedings and the ruling prepared for his use, of course, upon making the necessary payments. It is now stated that the plaintiff thereafter filed a Notice of Appeal; and the reason the instant application came before me is that I should make certain orders pending the prosecution of the plaintiff’s appeal.

SUBMISSIONS OF COUNSEL

Learned counsel, **Mr. Rach**, enumerated the several competing applications which had recently been filed by the parties:

(i) the plaintiff’s application dated 9th September, 2003 and filed on 17th September, 2003 — *seeking to strike out the defence and/or to restrain the defendant’s advocate on record from acting for the defendant;*

(ii) the defendant’s application filed on 21st October, 2003 — seeking to strike out certain parts of the plaint and of the reply to defence;

(iii) the plaintiff’s application of 28th May, 2004 filed on 31st May, 2004 — *seeking that the plaintiff’s application of 9th September, 2003 be heard first [and this is the application which I had struck out on 15th July, 2004.]*

(iv) and now, the plaintiff’s application of 9th August, 2004 filed on 11th August, 2004 — *seeking stay of the orders of 15th July, 2004 and to restrain the defendant from proceeding with his application of 21st October, 2003.*

The Application to Stay the Orders of 15th July, 2004

Mr. Rach submitted that since leave to appeal had been given on 15th July, 2004, stay of the orders of that date should be granted; in the words of counsel: *“If leave to appeal is not to be rendered nugatory, then the application of 9th August, 2004 should be granted.”* He contended that granting the prayer was *“essential in the interests of justice.”* Learned counsel contended that it was a trite principle that if there was a risk of the appeal being rendered nugatory, then stay of orders would be granted.

Mr. Rach impugned the continued conduct of the defendant’s case by the counsel on record, notwithstanding that the plaintiff’s application of 9th September, 2003 (which has not yet been heard) had contested the propriety of them continuing to represent the defendant. This point, in my ruling, is improper at this stage, it is premature, and cannot be sufficient reason to seek stay of the orders which I had made on 15th July, 2004.

Learned counsel, *Mr. Amoko*, for the defendant submitted that paragraphs 3, 4 and 5 of the plaintiff’s affidavit bear no relevance to the application and so should be struck out; and their irrelevance comes from the fact that they *attribute to the ruling in question what had not been in the ruling.* I am in agreement with the following comments by Mr. Amoko: *“The challenged ruling was very limited, merely saying that the Court had not been properly moved.”*

It is to be noted that I have earlier treated the whole affidavit as a scandalous affidavit, and I have struck it out in its totality.

Mr. Amoko, referring to the provision in Order XLI, submitted, and quite correctly, with respect, that the grant of stay of orders pending appeal is *discretionary* and is dependent on the presence of certain specific conditions. The conditions have been stated in case law, in *Carter & Sons Ltd. v. Deposit Protection Fund Board & Others*, Civil Appeal No. 291 of 1997:

“It is helpful at this stage to remind ourselves that what we have before us is an appeal from the superior Court from an order granting a stay arising from an application made to the superior Court under Order XLI Rule 4(2) of the Civil Procedure Rules and the Judge has the power to grant a stay within the four corners of the said rule. An appeal is not automatically to operate as a stay of execution and the right of a decree-holder having been determined by a competent Court it is not fair that he should be deprived of the fruits of his decree mainly because the judgement-debtor prefers an appeal. The Court, however, has a discretion to grant a stay provided the conditions prescribed in the sub-rule are satisfied. It will, therefore, be seen that the discretion vested in the superior Court under Order XLI rule 4 of the Civil Procedure Rules is not unfettered.”

The specific conditions that define the High Court’s mode of exercise of discretion to grant or refuse stay of orders pending appeal, were well set out in *Vishram Ravji Halai & Another v. Thornton & Turpin* (1963) Ltd, Civil Application No. Nai 15 of 1990:

“The superior Court’s discretion is fettered by three conditions.

Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

Learned counsel, for greater effect, brought to my attention a persuasive authority from India, *Bansidhar v. Pribhu Dayal, A.I.R. 1954 Rajasthan 1* (Vol. 41, C.N. 1), p. 1953:

“...an appeal by itself does not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order and the section further lays down that execution of a decree shall not be stayed by reason only of an appeal having been preferred from the decree.

In other words, the ordinary rule is that an execution of the decree *need not be stayed pending an appeal unless the appellant shows good cause and the appellate Court considers it sufficient for staying the execution.*”

Suo motu I had struck out the plaintiff’s supporting affidavit for being scandalous. Learned counsel for the defendant provided support for that position by citing from *The Supreme Court Practice, 1997 (Vol.I)*, paragraph 18/19/12 (page 330):

“The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding...”

In his response, made on 24th May, 2005 Mr. Rach submitted that the test of “sufficient cause,” for the Court to grant stay of orders pending appeal in the instant matter, was inappropriate; in counsel’s words: “*The only thing that is important is, which application should be heard first.*” He submitted that the first application in terms of filing, which was the plaintiff’s, ought to be heard first; and that there was “*no earthly reason why the defendant’s application should be heard first.*”

The problem with such a submission was that **Mr. Rach** was now arguing the very application of the plaintiff which I had struck out on 15th July, 2004 — and this is what he saw as most important about the instant application. I would consider this fact to undermine the bona fides of the instant application, as counsel was not at all articulating its fundamentals; rather he was busy urging that his client’s application be heard before that of the defendant. This, in my view, amounted to an abuse of the occasion of the instant application and therefore, an abuse of the process of the Court.

There are disturbing aspects of the plaintiff’s Chamber Summons application which would pre-dispose me not to appreciate the plaintiff’s *bona fides*.

The real dispute between the parties is: Is it the plaintiff’s application of 9th September 2003 which should be first heard; or that of the defendant, of 21st October, 2003?

Is it necessary for the parties to create such a polarisation between themselves on that simple question, as to occupy the Court’s time continually in resolving the point? I do not think so. The question is a simple one for *directions by the Court*, with the parties making an ordinary, disciplined and professional appearance. The Court could decide that the first to be heard be the plaintiff’s or the defendant’s application, or could even *consolidate* the two for simultaneous hearing. The parties have denied the Court the opportunity to decide the question, and they have stridently challenged each other and failed to come up with a consent. I hold it to be wrong for any parties to seek to occupy the Court’s time and resources in such a manner.

The plaintiff has not shown good cause before me for disputing the Court’s order made on 15th July, 2004; and though he was given leave to appeal, he has not persuaded me on any grounds at all that the orders of *15th July, 2004* should be stayed pending his appeal.

The instant application is in my view an extravagant one: it alleges far too many things, some essentially conjectural, that go well beyond the simple point on which the orders of 15th July, 2004 rested: the *Court had not been properly moved* to decide the order of hearing the applications of the plaintiff and the defendant. For an application that clearly exceeds the legitimate gravamen of the plaintiff, I am not inclined to exercise my discretion to grant stay of my orders pending appeal by the plaintiff.

I do not consider that the plaintiff has been able to show *good cause*, to deserve the exercise of discretion to grant stay of the Court’s orders as he appeals. Good cause could only come *from evidence*. What he has offered is an argumentative, scandalous document which richly deserved to be struck out, and which I did expunge. The plaintiff showed no good cause; he does not deserve the Court’s discretion in his favour.

I will make the following orders:

1. The plaintiff's prayer that the Court's ruling of 15th July, 2004 and/or further proceedings herein be stayed pending the hearing of an intended appeal by the plaintiff, is refused.
2. The plaintiff and the defendant, by their counsel, shall comply with normal Court practice and take at the Registry without delay, hearing dates for their two applications — that of the plaintiff being dated 9th September, 2003; and that of the defendant dated 21st October, 2003.
3. Failing compliance with Order No. 2 herein, counsel shall present themselves in an orderly manner before the Duty Judge, on Friday 1st July, 2005 at 9.00 a.m., to be assigned the respective dates when the two applications shall be heard, or to be directed appropriately.
4. The plaintiff shall bear the defendant's costs in this application, in any event.

DATED and DELIVERED at Nairobi this 24th day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Rach, instructed by M/s. Rach & Co. Advocates

**For the Defendant/Respondent: Mr. Amoko, instructed by M/s. Inamdar & Inamdar
Advocates.**