REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Misc Appli 32 of 2004

WELDON NGETICH

T/A WELDON NGETICH & CO. ADVOCATES……..RESPONDENT

VERSUS

COUNTY COUNCIL OF KIPSIGIS…….……APPLICANT

RULING

This is an application made under the provisions of **Order XLI Rule 4(1) and (2) of the Civil Procedure Rules**. The applicant, Wheldon Ngetich t/a Wheldon Ngetich & Co., Advocates is seeking the stay of execution of this court's order issued on the 16th of March 2005 which required the applicant to refund the amount paid to him by the respondent, County Council of Kipsigis, pending the hearing and determination of the appeal which the applicant has filed notice of his intention to appeal to the Court of Appeal. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the applicant. The application is opposed. The respondent's clerk to council, Paul K. Soi has sworn a replying affidavit in opposition to the application.

This court heard the submissions made by Mr Munyao, Learned Counsel for the applicant and Mr Siele, Learned Counsel for the respondent. Having carefully considered the said submissions made and read the pleading filed by the parties to his application, the issue for determination by this court is whether the applicant has established sufficient grounds to enable this court stay the execution of order issued on the 10th of March 2005.

Order XLI Rule 4(1) of the Civil Procedure Rules provides that:

> **"(1) No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appeal from may for sufficient cause order stay of execution of such decree or order, and whether the application for such 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.**
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> **(2) No order for stay of execution shall be made under subrule(1) unless-**
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> > **(a) the court is satisfied that substantial loss my 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 binding on him has been given by the applicant."

According to the submissions made by Mr Munyao, the applicant will suffer substantial loss if the said order of this court is executed. It was submitted that the applicant, being a member of the reputable legal profession, would have his character injured if execution is levied against him. The applicant was ready to deposit security if ordered by the court. The applicant submitted that the respondent would suffer no loss if the stay of execution is granted. The respondent on its part submitted that the applicant had not offered to deposit the sum ordered refunded as security in his application; the offer had only been made by the applicant's counsel when he made oral submissions before court. The respondent submitted that no reasons had been advanced to persuade this court to order stay of execution of the order issued on the 10th of March 2005.

I have considered the grounds advanced by the applicant in light of the applicable law. The applicant's concern seems to be that if the execution is not stayed, he would be embarrassed if such execution is levied against him. The applicant has not persuaded me that he would suffer substantial loss. The applicant was required to refund the sum which was paid to him illegally in the first place. After the applicant had taxed his Advocate-client bill of costs, he executed the same against the respondent in the same Miscellaneous Cause that the Advocate-Client bill of costs was taxed. The applicant being an advocate ought to have known that upon a Advocate-client bill of costs being taxed, such an advocate (or client as the case may be) is required to file an independent suit to enforce the payment of the amount which has been taxed in his favour. *(See Section 48 and 49 of the Advocates Act)*. If this court were to order stay of execution of its order, it would be condoning the applicant's unlawful act. This court is aware that a right to appeal is a constitutional right of any aggrieved litigant. However, an aggrieved litigant should not use the appeal process to avoid to remedy an illegal act committed in circumstances that such a litigant created in the first place.

The grant of stay of execution is not automatic. An applicant has to satisfy the court that he is entitled to be granted such stay of execution. I have not been persuaded by the applicant that his appeal would be rendered nugatory or that he would suffer substantial loss if stay of execution is not granted. From the pleadings filed by the parties to this application, for all intents and purposes, the respondent is a financially stable organisation. If the applicant succeeds on his appeal and the order of this court is reversed, the amount ordered refunded to the respondent, shall be paid back to the applicant without any difficulty. I am further not persuaded that just because a lawful execution is levied against an advocate it would injure his reputation. The applicant can forestal the possibility of such an execution taking place by refunding the amount ordered.

For the reasons stated, I find no merit with the application for stay of execution made by the applicant. The said application is therefore ordered dismissed with costs.

The interim orders earlier granted by this court are hereby vacated.

DATED at NAKURU this 21st day of July 2005.

L. KIMARU

JUDGE