



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL APPEAL 38 OF 2004

DANIEL NDEKE GATUMU

T/A NDEKE GATUMU & CO. ADVOCATESAPPELLANT

VERSUS

CHRISTINE WANGARE GACHEGE.....RESPONDENT

RULING

This is an application for stay of further proceedings in Nakuru **CMCC No. 2190 of 2003** pending the hearing and determination of an appeal by the applicant. The appellant, who is an advocate of this court, preferred an appeal from the ruling and order of the subordinate court dated 12/2/2004. In the suit appealed from, the respondent had filed the matter against the appellant stating that in February 1999, the defendant acted as an advocate for one aid Abdalla Azubedi against Rahab Wanjiru Evans in Nakuru **HCCC No. 44 of 1999** and during the pendency of the said suit, the Said Rahab Wanjiru Evans (hereinafter referred to as “**the deceased**”) died and the plaintiff proceeded with the suit against the estate of the deceased.

Thereafter, one Alice Bomet was joined to the suit as the second defendant and the matter was determined and judgment entered for the plaintiff against the defendants. The plaintiff therein further alleged that following the said judgment, the advocate (the appellant in this matter) proceeded with garnishee proceedings against the estate of the deceased to satisfy the decree for costs of the said suit in the sum of **Kshs.743,533.80**. It was further stated that the appellant wrongfully and unlawfully obtained the aforesaid sum from the first defendant’s account at the Kenya Commercial Bank and also proceeded to obtain and collect a substantial sum of money from the second defendant as well.

The plaintiff claimed that the appellant should have obtained half of the said sum from the first defendant and the other half from the second defendant. The plaintiff therefore claimed from the advocate personally Kshs.372,017.90 plus interest at bank rates on the claimed sum.

The appellant filed a defence and denied the said claim and stated that he had wrongfully been sued as he was acting in his official capacity as an advocate for the plaintiff in the said **HCCC No. 44 of 1999**. He further stated that if the defendant (respondent in this matter) was aggrieved by the action taken in realisation of costs awarded to the plaintiff in the said suit, then the claim ought to have been directed to the plaintiff who was the beneficiary of the decree but not as against him as the advocate for the decree holder.

The appellant then filed an application seeking to strike out the plaintiff’s suit in **CMCC No. 2190 of 2003** on the grounds that it disclosed no reasonable cause of action against him as an advocate was

scandalous, frivolous and vexatious. He also claimed that it was intended to embarrass him and was an abuse of the court process. He further stated that if the plaintiff intended to challenge the execution process he should have done so in the same suit where the decree was issued, that is **HCCC No. 44 of 1999** as stipulated under Section 34(1) of the Civil Procedure Act instead of filing a separate suit. On the other hand, the respondent herein applied for summary judgment against the appellant on the ground that the defence aforesaid disclosed no reasonable cause of defence.

The court declined to strike out the suit and also declined to enter summary judgment as prayed. It is this ruling that gave rise to the present appeal and application. In his application for stay of execution, the applicant deposed in his affidavit in support thereof that if the subordinate court matter proceeded before his appeal was determined, he stood to suffer substantial loss and prejudice and that the appeal would be rendered nugatory. He therefore urged this court to stay the proceedings in the lower court, saying that no prejudice was going to be occasioned to the respondent if the orders sought were granted.

The respondent opposed the said application and denied that the appeal was likely to be rendered nugatory if the orders sought were not granted. She deposed that she would be greatly prejudiced if the application was allowed. I have carefully perused all the documents on record both in this court and in the subordinate court and without saying much at this juncture before the appeal is heard, I must state that I entertain serious doubts about the propriety of the subordinate court case, **CMCC No. 2190 of 2003** mainly because of two reasons as follows:-

(a) The provisions of Section 34(1) of the Civil Procedure Act which states as follows:-

“34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

In my view, if the respondent was not satisfied with the manner in which execution was done in **HCCC No. 44 of 1999**, she should have filed an application in that suit rather than filing a separate suit all together.

(b) The appellant was at all material times acting as an advocate for the decree holder in **HCCC No. 44 of 1999** and the execution complained of by the respondent was done for the benefit of the decree holder and from the pleadings on record, I do not understand how an advocate can be sued personally for allegedly recovering on behalf of his client costs pursuant to a lawful decree.

If the order of stay of proceedings is not granted, the hearing in the subordinate court will proceed and get determined and the appeal herein would be rendered nugatory in the event that the suit is decided in favour of the respondent. If that occurred, the appellant would be liable to pay about Kshs.400,000/- which is a substantial sum in the circumstances of this case.

For the reasons aforesaid, I allow the application and consequently I stay further proceedings in Nakuru **CMCC No. 2190 of 2003** pending the hearing and determination of the appellant's appeal.

The appeal should be listed for hearing within the next three (3) months from the date hereof. The appellant will have the costs of this application.

DATED, SIGNED AND DELIVERED at Nakuru this 12th day of October, 2005.

D. MUSINGA

JUDGE

12/10/2005

Ruling delivered in the presence of Mr. Matiri for the applicant and Mr. Gai for the respondent.

D. MUSINGA

JUDGE

12/10/2005

Ruling delivered in the presence of Mr. Matiri for the applicant and Mr. Gai for the respondent.