



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 1570 OF 2014

AMINA MOHAMED EGA.....PLAINTIFF

-VERSUS-

ABDIKADIR MOHAMED MOHAMUD.....1ST DEFENDANT

MOHAMED BULLE AHMED T/A HASSAN BULLE & CO. ADVOATES.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 25th June 2020 in which the Plaintiff/Applicant seeks to have the 1st and 2nd Defendants/Respondents committed to civil jail for disobeying a decree given on 7th May 2020 and issued on 4th June 2020. The decree which is said to have been disobeyed arose from a Judgement delivered in favour of the Applicant on 7th May 2020.
2. In the decree which was subsequently extracted, the Respondents were ordered to release the Applicants four titles which were held by the 2nd Respondent in addition to payment of Ksh.3,000,000/= being general damages for illegally caveating the Applicant's properties. The court also ordered that the Kshs.4,5,00,000/=which the 1st Respondent had paid as deposit towards the purchase price which aborted had been forfeited.
3. The Applicant contends that the Respondents had deliberately failed to return the titles as ordered by the court or even pay the Kshs.3,000,000/= general damages with interest as ordered by the Court. The Applicant argues that the Respondents failure to return her titles as ordered by the court has hindered her from commercially exploiting the titles and that therefore this court has to enforce the Judgement by committing the Respondents to civil jail as a way of safeguarding the dignity of the court.
4. The Respondents opposed the Applicant's application based on a replying affidavit sworn by the 1st Respondent on 30th October 2020. The Respondents contend that they were dissatisfied with the judgement which was delivered on 7th May 2020. They immediately instructed their advocate to appeal against the said Judgement. Their advocate filed a notice of appeal dated 8th May 2020.
5. On or around June 2020, the Applicants threatened to execute the Judgement by instituting contempt of court proceedings. The threats prompted their advocate to file an application for stay of execution before the Court of Appeal through application dated 7th August 2020. On 14th August 2020, the Respondents Advocate received an e-mail informing him that the application for stay had been certified urgent and that it had been directed that they dispose of the application by way of written submission for hearing of the application in the new term of the Court of Appeal after a three judge bench had been constituted. The e-mail further advised that there was no need for parties to attend court for arguments.
6. The Respondent argue that as their application is only pending ruling by the Court of Appeal, it will not be prudent for this court to commit them for contempt as to do so will be rendering their intended appeal nugatory and that there is a possibility of this court and the Court of Appeal giving conflicting decisions. They further argue that they have not deliberately refused to comply with the decree as they are only pursuing their right of appeal and that it is better for this application to await the outcome of the application pending before the Court of Appeal.
7. The Respondents argue that if the court was to go on with this application and jail them, they would serve six months in jail before their application for stay is heard and determined. The Respondents argue that the Applicant is acting in bad faith as the application for contempt was filed on 25th June 2020 but was served upon their advocate three months later on 25th September 2020 and that when the Applicant filed a replying affidavit to the application for stay pending appeal in the Court of Appeal, the Applicant did not mention that she had filed an

application for contempt before this court.

8. The parties were directed to file written submissions in respect of the application. The Applicant filed her submissions dated 2nd November 2020. The Respondent filed their submissions dated 17th December 2020.

9. I have carefully considered the Applicant's application as well as the Respondents' opposition to the same. I have also considered the submissions filed by the parties herein. The issues which emerge for determination are firstly whether it will be appropriate for this court to proceed to make a final determination on this application in the face of a pending application for stay before the Court of Appeal. Secondly, which order should be made on costs.

10. In the instant case, the contempt proceedings are based on non-compliance of a decree of court given on 7th May 2020 and issued on 4th June 2020. The decree is the subject of an appeal as can be seen from the Notice of Appeal dated 8th May 2020 a day after the Judgement. The Notice of Appeal was followed by an application which was filed in the Court of Appeal on 7th August 2020. The application before the court of appeal has already been certified urgent, parties have filed written submissions and is only pending consideration by a bench of three Judges and a ruling delivered on the application.

11. The Court of Appeal is a higher court in the hierarchy of courts in our court system. It will not be prudent for this court to proceed and pronounce itself on this application when there is a pending application for stay of execution of the judgement in the Court of Appeal. In the case of **Law Society of Kenya Vs Attorney General & Another (2019) e KLR**, while the Supreme Court of Kenya was dealing with a petition of Appeal against Judgement of the Court of Appeal, the court's attention was drawn to a decision which had been rendered by **Justice E K Ogola in Juma Nyamwai Ndungo & 5 Others Vs Attorney General & Another (2019) e KLR**. In stating that Justice Ogola should have not made a pronouncement while he was aware that there was an appeal to the supreme court touching on the same issues, the court stated as follows;

“The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10th June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of Juma Nyamwai Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party), Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of the Constitution 2010.

We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.”

12. It is therefore clear from the observations made by the supreme court in the case of **Law Society of Kenya Vs Attorney General & Another (Supra)**, that the most prudent thing to do is to let the Court of Appeal pronounce itself on the pending application for stay before this court can make any further step. Consequently, this application is put in abeyance pending the outcome of the pending application in the court of appeal. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JANUARY 2021

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Koki Mbulu for Plaintiff

M/s Lipwop for M/s Ahomo for 1st and 2nd Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE