REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 5 OF 2004

MORRIS SYANO NZUKI …….. APPLICANT

VERSUS

THE COMMISSIONER OF INSURANCE

UNITED INSURANCE COMPANY

CHIEF MAGISTRATE-NAIROBI …… RESPONDENTS

R U L I N G

The Defendant filed an application dated 16/3/2004 seeking orders for stay of execution.

However before the said application could be convassed substantively, the interested party raised a Preliminary Objection. This Ruling is therefore in relation to the Preliminary Objection, which had the following 2 limbs;

"(1) The said application is misconceived, bad in law and a gross abuse of court process, and

(2) The Honourable court has no jurisdiction to grant the orders sought".

Mr. Burugu, advocate for the Interested Party highlighted the fact that the proceedings herein were commenced by way of an application for leave to institute judicial review proceedings.The court did grant leave to the applicant to institute the proceedings for judicial review. However, the court did not grant an order that the said leave would operate as stay.Instead, the court did grant a temporary stay of execution of the warrants in CMCC No. 3756 of 1997, Milimani Commercial Courts. However, in my assessment the effect of the orders which were granted were very much in line with what would have been achieved had the court couched its order in the regular format i.e. that leave shall operate as stay of the proceedings in question. Therefore, to my mind, nothing turns on this aspect of the matter.

Koome J. did direct the applicant to institute the substantive Notice of Motion within 7 days. And she also limited the stay of execution upto 22/1/04. In compliance with these orders, the applicant filed the Notice of Motion of Motion on 15/1/04, and it was then fixed for hearing on 22/1/04.

The case was listed for hearing before Mugo J. on 22/1/04. But as the respondents needed more time to file their Replying Affidavits they applied for an adjournment. The court did grant the adjournment, and also extended the interim orders for stay of execution, by a further 21 days.

The case was next in court on 16/2/04, when it was listed before Nyamu J. Due to pressure of other work, the judge was not able to hear the application on that day, and he directed the parties to mention it,

before the Duty-Judge on 23/2/04. The court records show that the applicant did not ask the court to extend the interim orders for stay of execution, both on 16/2/04 and 23/2/04. It is also clear from the court records that the applicant's counsel did not attend court on 23/2/04, resulting in the case being adjourned indefinitely.

The applicant then filed an application dated 25/2/04 seeking to review what he perceived as an order by which stay of execution had been vacated. The correct position was that the stay had not been vacated. The order had lapsed. When the applicant realized that he had made the review application in error, he promptly withdrew it. Thereafter, he filed the present application for stay of execution.

This application is filed pursuant to the provisions of Order XXI rule 22, and Section 3A of the Civil Procedure Act. Order XXI rule 22 reads as follows;

> "(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
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> (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
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> (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit".

It is the contention of the Interested Party that these provisions have absolutely no application to this case.

The provisions of Order XXI rule 22 (1) anticipate a scenario in which a decree has been sent to another court for execution. The sub-rule enables the executing court to grant interim stay until such time as the judgment-debtor is able to apply to either the court which passed the decree or to the appellate court, for appropriate orders. In the matter before me, this sub-rule is inapplicable because there is no decree that has been sent to this court for execution.

Sub-rule (2) empowers the court which issued a decree to order the restitution of attached property or the release of the judgment-debtor who had been seized, in the process of execution. Again the case before me does not fit into that provision.

Sub-rule (3) stipulates that before the court grants an order for stay of execution, or orders either for the restitution of property or the discharge of the judgment –debtor, the court may require security or impose conditions.

It is therefore clear that the provisions of Order XXI rule 22 do not have any application to the matter before me. But the applicant has tried to persuade the court that I do have very wide powers even in these judicial review proceedings. Mr. Ndegwa advocate cited "Cracknell's Statutes on the "English Legal System," as authority for his preposition. I have read the text which was made available to me. However, I hold the view that even though the court does have wide powers in proceedings of judicial review, the said powers cannot be stretched to incorporate the provisions under Order XXI rule 22.

I also accept as an accurate enunciation of the law, the submission by the Interested Party that the provisions of Order 53 are a completely different regime, which do not envisage an applicant seeking relief under the Civil Procedure Rules.

Section 8(1) of the Law Reform Act, Cap. 26 of the Laws of Kenya provides as follows;

> "The High Court shall not, whether in the exercise of its civil or
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> criminal jurisdiction, issue any of the prerogative writs of
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> mandamus, prohibition or certiorari".

That section is the basis for the often quoted phrase to the effect that judicial review proceedings are neither of a civil nor criminal nature. A court handling judicial review proceedings is exercising a special jurisdiction. And in this case, the applicant has commenced judicial review proceedings. By so doing, he invoked the court's special jurisdiction. Yet by filing the current application under the provisions of Order XXI rule 22, the applicant is asking the court to exercise its civil jurisdiction. I hold that this court does not have the power to exercise its civil jurisdiction in this case. If the court were to purport to exercise its civil jurisdiction in these proceedings, it would violate the spirit of the provisions of section 8 of the Law Reform Act. I am fortified in my decision by the Judgment of the Court of Appeal in Civil Appeal No. 234 of 1995 The Commissioner of Lands V Kunste Hotel Limited. In that case, the appeal court was hearing a matter which touched on the interpretation of section 136 (2) of the Government Lands Act, and section 13A of the Government Proceedings Act.

By virtue of Section 136 (2), notice had to be given in writing, to the defendant, at least one month before the commencement of action. Meanwhile Section 13A of the Government Proceedings Act, also provides that no proceedings against the Government shall be instituted until after the expiry of a period of thirty (30) days after a notice in writing has been served on the Government. Githinji J.(as he then was) held that the judicial review proceedings would be struck out, as the requisite notice had not been issued to the Government, prior to the institution of the suit. When the case went on appeal, to the Court of Appeal, it was held that;

> "… in exercising the power to issue or not to issue an order of certiorari
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> the Court is neither exercising Civil nor Criminal jurisdiction. It would be
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> exercising special jurisdiction which is outside the ambit of Section 136 (1)
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> of the Government Lands Act, and also, Section 13 of the Government Proceedings
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> Act, which, had the matter under consideration been an action, would properly
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> have been invoked to defeat the present matter".

The applicant asks me to accept the invitation proffered by The Right Hon. Lord Denning, Master of the Rolls, in his book "The Disciple of Law". Lord Denning says that when English courts are faced with a problem of interpretation,

> "no longer must they examine the words in meticulous detail. No longer
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> must they argue about the precise grammatical sense.They must look
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> to the purpose or intent.To quote the words of the European Court …,
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> they must deduce from the wording and the spirit of the Treaty the meaning
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> of the Community rules.……They must divine the
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> spirit of the Treaty and gain inspiration from it. If they find a gap, they must

fill it as best they can.They must do what the framers of the instrument would

have done if they had thought about it. So we must do the same".

The invitation by Lord Denning is accepted by me. Having so accepted the invitation, I have to ascertain if there are any gaps in this matter, which require me to fill up. I note that the applicant's goods may be in real danger of being carted away, in execution of the Decree held by the Interested Party. If that be the case, I believe that the provisions of Order XLI rule 4 of the Civil Procedure Rules, provides a full answer to the applicants predicament.

But perhaps, the applicant is not saying that there is something wrong with the judgment. In other words, he might be saying that whereas the judgment is sound, he ought not to be compelled to pay the decretal amount, as the same should be the obligation of the insurer and the Commissioner of Insurance. If that be the case, there would be some gap. But in my considered view such a gap could not be filled by importing the provisions of Order XXI rule 22 into these judicial review proceedings.

On the other hand, if this court does not grant a stay pending the hearing and determination of these proceedings, I recognize the fact that the Interested Party would most probably execute the Decree against the applicant. If that happened, the applicant may be seriously inconvenienced in the interim, even if it should ultimately succeed in these proceedings. But the converse is equally true. If a stay is granted, the successful Interested Party would be deprived of the fruits of his Decree, merely because there was an unresolved dispute between the insured (applicant) and the insurer (2nd respondent).

But then again, I do recognise the fact that this court did initially grant a stay. The said order lapsed due to an inadvertent mistake on the part of the applicant's advocates. I ask myself if I should let the execution by the Interested Party to proceed, due to the fault of the applicant's counsel.

Of course, there is no guarantee that if the applicant's advocates had sought to extend the stay order, it would have definitely been extended. But again, upto the date when it lapsed, there had been no indication from the Interested Party or any other party that they were opposed to the extension of that order.

It is to be noted that the provision of Order LIII rule 4 (1) stipulates as follows;

"Copies of the statement accompanying the application for

leave shall be served with the notice of motion, and copies

of any affidavits accompanying the application for leave shall

be supplied on demand and no grounds shall, subject as hereafter

in this rule provided, be relied upon or any relief sought at the hearing

of the motion except the grounds and relief set out in the statement".

The rule limits the applicant to the grounds and reliefs set out in the statement. One of the reliefs sought by the applicant herein is a bar to execution being levied against himself. I therefore hold the view that immediately upon receipt of the chamber summons, statement and affidavit filed in this matter, the Interested Party and the respondents were put on notice that the applicant would be seeking stay of execution.Therefore, it should have been within the contemplation of the Interested party that this court may or may not grant stay of execution.

In these circumstances, I consider the most equitable orders to be as follows;

(a) The order for stay is reinstated, and shall remain in force until these proceedings are heard and

determined.

(b) The applicant shall within the next TEN (10) Days, deposit the decretal amount in court, or into an interest earning account in the joint names of the advocates for the applicants and the interested Party respectively.

(c) If the applicant should default in complying with (b) above, the order for stay shall stand vacated.

(d) The costs of this application shall be borne by the applicant in any even.

DATED at Nairobi this 27th day of April 2004.

FRED A. OCHIENG

Ag. JUDGE