



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
Winding Up Cause 44 of 1999
IN THE MATTER OF RAI PLYWOODS (K) LTD..... PLAINTIFF
VERSUS
IN THE MATTER OF THE COMPANIES ACT.....DEFENDANT
RULING

This Notice of Motion, dated 16/12/2003, is canvassed under Section 3A of the Civil Procedure Act (Cap.21, Laws of Kenya

issupported by the affidavit of Jasbir Singh Rai of even date.

The application seeks some what interesting orders, under what one may, for want of a better phrase, call the elastic inherent jurisdiction of this court. The application prays for orders that:-

1. All further proceedings in this Cause in the High Court of Kenya, including the taxation of Bills of Costs filed by the Respondent in Winding-up Cause No.44 of 1999 and in Civil Appeal No.63 of 2001 bestayed:

(i) Initially for such period as this Court may deem just, and

(ii) thereafter at the inter-partes hearing, pending the hearing and determination by the Court of Appeal of the Applicant's application, Civil Application No. NAI 307 of 2003, to set aside in toto the judgment of the Court of Appeal in Civil Appeal No.63 of 2001, delivered on 30/9/2002 and to hear the Applicant's appeal filed in the Court of Appeal on 12/4/2001 in the said Civil Appeal No.63 of 2001 afresh before a differently constituted bench of the Court of Appeal.

2. Costs of this application be provided for.

The grounds upon which the application for Stay is premised are

1. The applicants have lodged an application in the Court of Appeal - Civil Application No. NAI 307 of 2003 - to set aside judgment in Civil Appeal No.63 of 2001 dated 30/9/2002, on the grounds that:-

(a) the applicants' constitutional rights under Section 77 (9) of the Kenya Constitution have been violated in that the appellants were not given a fair hearing in the Court of Appeal, "before an independent and impartial Court".

(b) the presiding Judge (A.B. Shah, J.A.) was biased against the appellants/applicants during the hearing of the said appeal and in giving judgment therein.

(c) The rules of natural justice were not observed.

(d) The said judgment is null and void.

The said application came up for hearing before the Court of Appeal on 20.11.2003 but could not be heard owing to the shortage of Judges in the Court of Appeal. Furthermore, the Court of Appeal referred the said application to the Chief Justice for directions that the said application be heard before a bench of not less than five Judges of the Court of Appeal on a date to be fixed as soon as practicable.

The said application is still pending and it is therefore in the interest of justice that all further proceedings in this case be stayed pending the hearing and determination of the said application.

The Bill of Costs with respect to which Stay is sought proceeded ex-parte to taxation before Mrs. Omondi on 10.12.2003 who directed that written submissions were to be filed by 18/12/2003.

Unless this application is heard and Stay granted, the taxation of the said Bill will continue as aforesaid and this application will be rendered otiose to their prejudice.

It is just and equitable to grant the relief.

When the hearing came up before me on 8.1.2004, the Respondent's raised preliminary objections, as follows:-

(i) That this Court has no jurisdiction to hear and grant relief on the Notice of Motion dated 16/12/03 as drawn and filed.

(ii) The Notice of Motion dated 16/12/03 is contrary to law and the Constitution of Kenya.

(iii) The Notice of Motion of 16/12/03 is contrary to Statute: the Judicature Act (Cap.8, Laws of Kenya); the Appellate Jurisdiction Act (Cap.9, Laws of Kenya) and the Civil Procedure Act (Cap.2 Laws of Kenya)

(iv) There are no pending proceedings in the Court of Appeal and there is no legal basis for the relief sought.

(v) The Notice of Motion, dated 16/12/03 is a gross abuse of the process.

I begin with the Preliminary Objections raised by the Respondents herein. The first and foremost has to do with whether or not this Court has jurisdiction to hear and grant the relief sought in the Notice of Motion dated 16/12/2003.

To dispose of the above question, it is important to get the fact and the law right. From the pleadings and the entire documentation in this application, it is a factual matter that there is neither an appeal nor proceedings with respect to Winding up Cause No.44 of 1999, pending either in the Court of Appeal or in this Court.

The only appeal with respect to the Winding Up Cause No.44 of 1999 was Civil Appeal No.63 of 2001, which was heard and determined by the Court of Appeal, in A.B. Shah's judgment which, inter-alia, awarded the costs whose taxation is being sought to be stayed by this Court. That judgment was delivered on 13/6/2002.

Dissatisfied with the judgment of the Court of Appeal - the appellants/applicants went back to the same Court of Appeal, but this time through a Civil Application No. NAI 307 of 2003 which sought to set aside, in toto, the judgment of the Court of Appeal dated 13/6/2002.

This time round however, having run out of their legal right of appeal, the applicants challenged the Court's judgment under the guise of violation of their Constitution rights under Section 77 (9) of the

Constitution. They allege, in their Civil Application, bias and partiality in A.B. Shah, J.A., the one who delivered the main judgment.

In the said Civil Application, the applicants sought Stay of Execution of the decree, especially the taxation, arising from the judgment by the Court of Appeal, pending the hearing and determination of their Civil Application.

The Court of Appeal declined to grant such Stay, clearly because the Court would effectively be reviewing its own decision, for which a bench of not less than 5 Judges of the Court of Appeal would be required.

The Court referred the matter to the Chief Justice for directions for such an application before such bench be fixed as soon as practicable. The matter, I was told is still pending with the Chief Justice.

I have gone into the above detail to set the stage for the following conclusions.

The High Court, under Order 41 Rule 4 of the Civil Procedure Rules, may grant Stay of Execution pending appeals against orders, and/or decrees, of this Court. But this is where there is pending in the Court of Appeal, and the decree/order appealed against is of this Court.

None of the above obtains in this application for Stay. The Order for costs was by the Court of Appeal, the Civil Application was filed in the Court of Appeal.

The only Court that can grant such a Stay is the Court of Appeal; which this Court is not. But it should be noted that for whatever reasons, the Court of Appeal declined to grant such a Stay.

To seek to obtain an Order of Stay against a judgment of the Court of Appeal from the High Court is not only misconceived, mischievous, but unjust. This is tantamount to equating this High Court with the Court of Appeal under the guise of inherent powers in search of justice. The tenets of justice are double edged and is as unjust to treat unequals as equals, as it is unjust to treat equals as unequals.

Were this Court to grant the Stay prayed for in this application, it would be tantamount to countermanding an Order or decree of the Court of Appeal. I have not found any law or authority to support me in such an action, were I to grant such a Stay. None of the authorities cited by the Counsel is of any assistance to the applicants herein.

Counsel for the applicants hammered on the Constitutional rights of the applicants under Section 77 (9) of the Kenyan Constitution, and how those rights were violated through bias and partiality and alleged corruption of one of the Judges of Appeal who heard and decided Civil Appeal No.63 of 2001. The Counsel went further, and strangely relying on the grounds of the very Civil Application now pending in the Court of Appeal, stated that the judgment is null and void.

With all due respect, common sense would show that the allegations in the Civil Application can only be heard and determined by the Court of Appeal, where the Civil Application is filed.

The upshot of all the foregoing is that this Court has no jurisdiction to entertain or grant the relief sought by the applicants. I am convinced that Counsel for the applicants knows this, and that is why I find this application simply an abuse of the process of the Court.

I accordingly uphold the Preliminary Objection that this Court has no jurisdiction, inherent or otherwise, to hear and grant the relief sought. I dismiss the application with costs in favour of the Respondents and against the Applicants.

DATED in Nairobi, this 13th day of April, 2004.

O.K. MUTUNGI

JUDGE