

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.417 OF 2002

SCOT VEST LIMITED PLAINTIFF

VERSUS

SULTANA FADHIL DEFENDANT

RULING

Section 18 (1) (b) of the Civil Procedure Act states as follows:-

“18(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –

(a) -----

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.”

This application before me is brought inter alia under that section. It is also brought under Order 6 Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules but I do feel that that order need not be considered as yet as I must first address myself to whether the Mombasa RMCC No.1290 of 2002 should or should not be withdrawn from the subordinate court and be heard by this court or be transferred to another subordinate court of competent jurisdiction or be retransferred to the same subordinate court. Whether the application now pending in that case i.e. RMCCC No.1290 of 2002 is frivolous, vexatious, an abuse of the court process or scandalous are matters to be revisited at the time of hearing that application by whichever court will hear it if I decide that it should be withdrawn from the subordinate court and be transferred to another court or that I dispose of it myself. I will therefore first consider prayer 2 of this application dated 29th August 2002.

The Respondent opposed the application and filed two grounds of opposition which were that the application is misconceived and bad in law and is an abuse of the court process and that the application is frivolous, vexatious and discloses a reasonable cause of action. (I think this was meant to read that the application discloses no reasonable cause of action).

On perusing the entire application, grounds for the application, and the Affidavit in Support of it plus the annexures, I do feel the reason for seeking that the Application now pending before the subordinate court be withdrawn from there and be dealt with by this court is mainly that the Applicant in this application feels that the Respondent is abusing the court process in that after the tribunal had given its orders, the Respondent applied for stay for execution of Tribunal’s orders on the basis that it was filing an

appeal against the same Tribunal's orders. The same Appeal was filed, heard and disposed of on 12th April 2002. That decision which dismissed the Respondent's appeal also disposed of the stay orders previously obtained. The Applicant feels that should have been the end of this matter and vacant possession plus rent arrears unpaid should have been given to the Applicant. However, that was not done and when the Applicant moved to execute the orders through the subordinate court Respondent filed an application for stay of what could be described as the orders pending an application seeking that the Respondent be given upto 31st August 2002 to vacate the suit premises. That application was dated 31st July 2002 and was dismissed for non attendance but undeterred by that the Respondent filed yet another application seeking to set aside that dismissal and seeking a stay pending the hearing of that application.

I do agree that the Respondent seems in my humble opinion to be "playing some games" probably in an attempt to derail the effects of the High Court judgment on his appeal when his appeal was dismissed and thus the order of the Tribunal giving vacant possession to the Applicant here should have been enforced by now. I say so because, I cannot see the rationale of making an attempt to revive an application dated 31st July 2002 which sought that the Respondent be given upto 31st August 2002 long after the same 31st August 2002 had long expired. Even if that application were revived, what valid orders would still be available if the Respondent himself wanted to vacate the premises by 31st August 2002 and has had more than that period to vacate the premises. I do agree that in the end those applications in the court below may very well be found to constitute some element of abuse of court process.

However, having said so, it appears to me that the provisions of Section 18 (1) (b) were not meant for a case such as this one before me where there are no allegations of bias against the subordinate court and where there are no allegations that the court below lacks jurisdiction. I think that Section was meant to provide High Court with supervisory powers over subordinate courts and to ensure that those courts dispensed justice to the consumers. The power given in that Section to the High Court cannot be arbitrarily exercised. There has to be a good reason for the exercise of the same powers. Here, the present application before the subordinate court is seeking to reinstate an application the same subordinate court dismissed for want of prosecution and that court has jurisdiction to deal with the application and it is indeed the right court to deal with the application as it is the court best suited to know whether the application for setting aside its orders has merits or not based partly on the conduct of the Applicant. As I have indicated, the reinstatement of the application dated 31st July 2002 may in my humble opinion be of no consequence in view of the prayer and the time factor but those are all matters that that court will best be able to deal with.

I do feel my granting the orders prayed for would unduly interfere with the functions of the subordinate court in a matter where it has not been shown that it lacks jurisdiction or that it is likely to be biased or that it would not do justice to the matter.

Application dismissed. No order as to costs. Orders accordingly.

Dated and Delivered at Mombasa this 25th Day of September 2002.

J.W. ONYANGO OTIENO

JUDGE