



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPLICATION 172 OF 02

SEWAK SINGH RANJODH SINGH 1ST APPLICANT

SATNAM SINGH RANJODH 2ND APPLICANT

RANJODH SINGH & COMPANY 3RD APPLICANT

VERSUS

MOHAMED AFZAL HANMOHAMED 1ST RESPONDENT

MOHAMED NAZIR HANMOHAMED 2ND RESPONDENT

FEISAL AMIN HANMOHAMED 3RD RESPONDENT

MOHAMED KHALIL JANMOHAMED 4TH RESPONDENT

RULING

Notice of Motion dated 22nd October 2002 and filed into the court on the same day is seeking mainly one order and that is an order for a stay of execution of the judgment/decreed dated 8th October 2002 in the Chief Magistrate's Court Civil Case No.914 of 2000 (Mombasa) pending hearing and disposal of the appeal preferred therefrom. It is also seeking costs of the application. Two grounds of the application are given as first that the Appellants have already preferred an appeal from the decision sought to be stayed and secondly that unless stay is granted, the said appeal would be rendered nugatory with substantial loss to the applicants. The application is brought under Order 41 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. There is in support of the application an affidavit sworn by Sewak Singh Ranjodh Singh together with several annexures. I will refer to the same Affidavit as may be necessary later in the Ruling. The Respondents opposed the application and filed Replying Affidavit together with two annexures.

As I have stated hereinabove, the application is brought under Order 41 Rule 4. Order 44 Rule 4(1) and (2) state as follows: "44(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such an order thereon as may to it seem just, and any person aggrieved by an order of stay

made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under subrule (1) unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

In the court below, the fourth Defendant was Municipal Council of Mombasa. I do note that in the appeal, it has been dropped and it is not appealing against the order that was made against it. The Applicants here are the first, second, and third Defendant in the subordinate court. I have considered the application, the ground for the same application, the affidavit in support of the application and the Affidavit in reply together with the annexures. I have also considered the able submissions by the learned counsels – Mr. Mwakisha for the Applicants and Mr. Shah for the Respondents. First, I will start with what Mr. Mwakisha in his submission calls the main ground, and that is that the appeal would be rendered nugatory unless the orders sought are granted. I do feel what Mr. Mwakisha meant was that the Applicants have an arguable appeal and if the same appeal succeeds, the results would be rendered nugatory unless stay is granted. Mr. Shah says that is not for this court to consider as those are requirements under Court of Appeal rules. I do agree that in our rules, it is not specifically spelt out as is done in the Court of Appeal rules and as such looking at the rules only without much serious consideration one would come to a conclusion that this court does not need to consider whether the appeal to be preferred to this court as is the case here is arguable or not and whether if arguable the results, if favourable would be rendered nugatory or not.

However, in my humble opinion I do feel that when this court is sitting as an Appellate court as is the case now, it cannot ignore that aspect. Order 41 Rule 4(1) says as concerns the court to which an appeal is preferred that “it shall be at liberty on application being made, to consider such application and to make such order therein as may to it seem just. So the appellate court would consider what is just and at the same time abide by Order 41 Rule 4(2), but it cannot ignore whether the appeal is arguable or not. Having said so, I do however feel that in this application three matters make it difficult for me to come to a conclusion that the appeal is as it stands arguable. First is that although Mr. Mwakisha says his main ground of seeking stay is that the appeal would be rendered nugatory yet he does not state in his grounds of the application that his clients have arguable appeal. The applicant relying on the ground that the appeal is arguable and if successful the results of the same would be rendered nugatory must show on a prima facie basis what appeal he has. I have seen the Memorandum of appeal and I cannot tell whether the grounds raised there are arguable or not because, I do not have legible proceedings and the judgment I have seems to state on a number of issues that the Appellant conceded the same.

Secondly, the Affidavit in support of the application mainly dealt with what happened just before and after the judgment of the subordinate and hardly touched on the grounds for seeking stay of execution. For example paragraph 5 of the same affidavit sets out to give reasons why it was necessary that stay sought should be granted but in all grounds (a) (b) (c) and (d) the applicants mainly show activities taken by the Respondents which would show that if stay is not granted the gates would be demolished and removed. It is obvious that if stay is not granted the lower court’s orders would be executed and if demolition/removal of the gates is one of the orders then it would be executed. If the execution is not done lawfully then the applicants would have to resort to courts of law. Thirdly, I note from the Judgment of the lower court that 4th Defendant – the Municipal Council of Mombasa was ordered to take certain actions which are directly connected with the dispute about the demolition of gates in this case. That Defendant has not appealed and none can say that orders against it cannot stand. There is no arguable appeal the results of which can be rendered nugatory as far as that Defendant in the lower court is concerned. Orders given against it are directly connected to the gates. That defendant was to provide access road and thereafter the gates would be demolished.

In my humble opinion, if there is no appeal against that order then once access road is provided, gates would need to be demolished. I have dealt with the question of whether or not the appeal is arguable and

in my opinion no proper material has been availed to enable me come to that conclusion. The next question is that of loss. The only evidence by the Applicants on the question of loss is found at paragraphs 10 and 11 of the supporting affidavit. He says as follows: “10. That further any payment of monies granted to the Respondent under the judgment would lead to crippling of my business, and I am also forced to incur further expenses by way of hired security, which I would be forced to if the gates were removed. I have prior to these disturbances, not had need to hire any security as the gates sufficed, having installed the same in 1995 when I suffered a mysterious fire at my workshop. 11. THAT the losses I have incurred, I verily believe from what I have stated above, have been brought about by the Plaintiffs/Respondents conduct.”

At paragraph 9 of the same Affidavit he is referring to the loss he is suffering because of the disturbances by the Plaintiffs and that is not relevant here. It is clear to me that what the Applicants say in paragraph 10 and 11 I have reproduced do not explain how execution would cripple his business. He is certainly annoyed about the alleged activities of the plaintiffs but he is not explaining how the removal of the gates would affect him except he says it would end in his employing security. He is not saying how his loss would be substantial if he pays the amount ordered and the gate is removed. Further and even more important these are quantifiable losses and if he succeeds on appeal, he would end up with another gate installed by the Respondents and his money would be refunded. He has not stated that the loss would be substantial to the extent that no recovery would be made of the loss. Again he has not stated how the other Applicants would suffer substantial loss,. Before I end this Ruling, I need to observe that certain allegations have been made against the Applicants in the Replying Affidavit which have not been in any way challenged by the same Applicants by way of any further affidavit. They all amount to an allegation that the Applicants are coming to court with unclean hands and are not deserving of an equitable remedy. I note however that there are also allegations in the applicants Affidavit of activities some of which were carried out on public holy days which also demonstrate that the Respondents are also to an extent guilty of the same “dirty” activities.

These indicate to me that there is a lot of bad blood between the parties. That should not be so particularly now that the matter is before the courts of law. They should let the law take its course. From the above this application for stay is refused. Costs to the Respondents. Orders accordingly.

Dated and delivered at Mombasa this 18th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE