



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

PETITION. NO. 2 OF 2017

(FORMERLY CONSTITUTIONAL PETITION NO. 4 OF 2012)

RASIK LAVJI SANGHRAJKA.....PETITIONER

ERI LIMITED.....APPLICANT

-VERSUS-

ZAINUL GALIB VELJI.....RESPONDENT

RULING

1. Eri Limited, the Applicant, vide the Motion dated 30th November, 2016, seeks for stay of execution by way of attachment of property for the judgement debtor pending the hearing and determination of the appeal and costs. The application is premised on the five (5) grounds on its face and is supported by the affidavits sworn by Rasik Lavji Sanghrajka, a director of the Applicant, on the 30th November, 2016 and 29th November, 2017.

2. The application is opposed by Zainul Galib Velji, the Respondent, though the four grounds in the grounds of opposition dated 20th March, 2017.

3. That the application came up for hearing on the 15th November, 2017 when the court gave directions on filing and exchanging written submissions among others. That subsequently the learned counsel for the Applicant filed their submissions dated the 18th April, 2018 and 18th February, 2019 while the Respondent's learned counsel filed theirs dated 14th August, 2018.

4. The following are the issues for the court's determination:

a. Whether the Eri Limited, the Applicant, is a party in this proceedings.

b. Whether the Applicant has made a reasonable or satisfactory case for stay of execution to issue pending the hearing and determination of the appeal that arose from H.C.C No. 143 of 2004 [Now Kisumu ELC No. 779 of 2015]

c. Who pays the costs.

5. The court has carefully considered the grounds on the motion, the supporting and supplementary affidavit, grounds of opposition, the written submissions by both counsel, the record and come to the following determination;

a. That these proceedings were commenced through the Petition dated the 28th June, 2012 by Rasik Lavji Sanghrajka, the principal director of Eri Limited, as the Petitioner and is against Zainul Galib Velji as the Respondent. That as confirmed by the petitioner at paragraph 2 of his supporting affidavit sworn on the 29th June, 2012 and filed with the petition, Kisumu H.C.C.C No. 143 of 2004, whose plaint is therein attached is between Zainul Galib Velji as the Plaintiff and Eri Limited at the Defendant. That the foregoing confirms that Eri Limited is not a party in this proceedings (Petition) as there is no order on record to confirm that it had been enjoined. That accordingly the Notice of Motion dated and filed on the 30th November, 2016 is by a person who is not properly a party in the proceedings and should be struck out.

b. That what the Applicant is seeking for through the Motion dated and filed on the 30th November, 2016 is clearly set out at prayer 3 as "stay of execution by way of attachment of property for the judgment debtor pending the hearing and determination of the appeal in Kisumu H.C.C. No. 143 of 2004" from which this Petition arose. That in support of the application, a copy of the Notice of Appeal and memorandum of appearance on the court's ruling of 27th April, 2016 have been annexed to paragraph 4 and 5 of the

supporting affidavit sworn on the 30th November, 2016. The learned counsel for the applicant has in their submission made it clear that the application does not seek stay of the order dismissing the petition. That it is also not a reference or appeal on the taxation of the bill of costs in these proceedings but “seeks a stay of execution of the Respondent’s Bill of Costs pending the hearing and determination of Kisumu CACA No. 57 of 2016.” That the learned counsel for the Respondent under ground (1) of the grounds of opposition indicated that the “decree sought to be stayed merely dismissed the applicant’s petition. That the court made no positive order capable of being dismissed,” and in their submissions pointed out that no notice of appeal on dismissal of the petition order has been filed and therefore this application has no foundation. That the court has already declined a stay of proceedings application dated 28th July, 2016 in Kisumu H.C.C.C No. 143 of 2004 [Now Kisumu ELC No. 779 of 2015] pending the hearing and determination of an appeal which was dismissed with costs on the 22nd June, 2017. That the said application had been predicted on the same notice of appeal that the applicant has annexed to his supporting affidavit. The learned counsel submitted that the current application is therefore a gross and unmitigated abuse of the court process. That though the learned counsel for the applicant filed supplementary submissions months after the Applicant learned counsel had filed theirs, they did dispute that the Applicant’s application for stay of proceedings in Kisumu ELC 779 of 2015 had been declined on the 22nd June, 2017. That flowing the finding in (a) above that the current application is by person who is not a party in these proceedings and that no notice of appeal has been filed in respect of any of the orders in this petition, the court find and hold that the motion dated the 30th November, 2016 has no foundation to sit or be based on or upon. **[See court of appeal decision in Nairobi County Council – Vs – Resley (2002) 2 EA 493].**

c. That the bill of costs was taxed on the 31st October, 2016, while the motion was filed about one month later on the 30th November, 2016. That by then the application for execution of the decree had been filed on the 24th November, 2016. That though the Applicant may not be said to have inordinately delayed in filing the application the finding in (a) above that it is not a party in these proceedings makes the application incompetent and an abuse of the process of the court.

d. That Rasik Lavji Sangrajka is the Petitioner in these proceeding and though described as the principal director of Eri Limited, is a separate legal entity from Eri Limited. That the parties in these proceedings have not filed any Notice of Appeal or Appeal in respect to the orders and rulings made herein. They have also not moved the court for stay of execution by attachment and therefore the motion dated and filed on the 30th November, 2016 being by a stranger and hence incompetent is for striking out with costs.

6. That flowing from the foregoing and finding that the Motion dated and filed on the 30th November, 2016 has no merit, the same is strike out with costs.

Order accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 10TH DAY OF JULY, 2019.

In presence of;

Petitioner Present

Applicant Absent

Respondent Absent

Counsel Mr. Otieno for the Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE