



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 477 OF 2015**

**JENEBY ARAP TOO..... PLAINTIFF**

**VERSUS**

**SATO PROPERTIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**RULING**

Background:

On 26<sup>th</sup> June, 2018, the Plaintiff withdrew this suit and the court awarded the costs of the suit to the Defendants. The 1<sup>st</sup> Defendant filed a Bill of Costs on 31<sup>st</sup> July, 2018. The same was taxed at Kshs. 2,593,105/- on 27<sup>th</sup> March, 2019. The 1<sup>st</sup> Defendant thereafter applied for execution of the decree on costs on 7<sup>th</sup> June, 2019.

The present application:

What is now before me is a Notice of Motion application dated 24<sup>th</sup> June, 2019 by the Plaintiff (hereinafter referred to only as “the Applicant”) seeking the following orders;

1. That the Honourable Court be pleased to stay the execution of the Decree that has been issued in respect of the Taxation and Ruling delivered on 18<sup>th</sup> October, 2018 and any other order that may be issued pursuant thereto, pending the hearing and determination of the suit in ELC No. 93 of 2018.
2. That pending the hearing and final determination of the application, there be a stay of execution in respect of the taxed costs awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (hereinafter referred to as “the Respondents”).
3. That the execution for the costs awarded to the Respondents do await determination of the ongoing matter, ELC No. 93 of 2018 between Antow Trading Company Limited (hereinafter referred to as “the company”) and Sato Properties Limited and another.
4. That the costs of the application be provided for.

The Application was supported by an affidavit sworn by the Applicant on 24<sup>th</sup> June, 2019. In summary, the application was brought on the following main grounds;

- a. That this suit was withdrawn by the Applicant because it had been filed in his name instead of that of the company due to the fact that the company had been dissolved and did not have capacity to institute a suit.
- b. That ELC No. 93 of 2018 was filed after the company which is the Plaintiff in that case was restored through a ruling delivered on 29<sup>th</sup> May, 2017 in High Court Misc. Application No. 14 of 2015.
- c. That the Applicant acted in good faith in instituting the instant suit on behalf of the company in order to protect its asset when the company was dissolved.
- d. That if execution for costs is not stayed, the Applicant will suffer irreparable damage and loss since ELC No. 93 of 2018 is

ongoing with the same subject matter and parties as the instant suit.

e. That unless the Application is granted, the 1<sup>st</sup> Respondent may execute the decree against the Applicant who only acted as a director of the company to safeguard its assets.

f. That failure to withdraw the instant suit would have amounted to wasting the court's time and resources.

g. That substantial loss will result to the Applicant unless the orders sought are granted.

#### The opposition:

The Application was opposed by the 1<sup>st</sup> Respondent through a Replying Affidavit sworn by the its director Anil Bharmal Shah on 11<sup>th</sup> July, 2019. In the affidavit, the 1<sup>st</sup> Respondent averred that; following the withdrawal of this suit by the Applicant, the Applicant was ordered by the court to pay costs to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent applied for execution against the Applicant and not Antow Trading Company Limited (the company) which is a different person, separate and distinct from the Applicant. The Plaintiff in ELC No. 93 of 2018 is the company and not the Applicant. There is therefore no suit pending between the Applicant and the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent averred further that there was inordinate delay in filing the present application which shows that the Applicant is only interested in keeping the 1<sup>st</sup> Respondent from recovering its costs. The 1<sup>st</sup> Respondent averred that the Applicant refused to pay the costs despite being asked to do so and this left the 1<sup>st</sup> Respondent with no option but to commence execution against him.

#### The submissions:

At the hearing of the application, the Applicant argued that he would suffer irreparable harm if the orders sought were not granted. This position was premised on two assertions. Firstly, that the 1<sup>st</sup> Respondent had filed Insolvency Petition No. E005/2020 against the Applicant for the Applicant's failure to pay the taxed costs. Secondly, that ELC No. 93 of 2018 which involves both parties was pending. The court was invited to consider Order 22 Rule 25 of the Civil Procedure Rules and the case of Tom Ojienda & Associates v Nairobi City County Assembly [2017] eKLR.

The 1<sup>st</sup> Respondent filed written submissions and also made oral submissions during the hearing of the application. In its oral submission, the 1<sup>st</sup> Respondent argued that the application was an abuse of the court process since the 1<sup>st</sup> Respondent was concerned with the Applicant and not the company. In the written submissions filed on 3<sup>rd</sup> November, 2020, the 1<sup>st</sup> Respondent argued that a stay of execution is granted when there is something pending. The 1<sup>st</sup> Respondent argued that there is nothing to stay in this suit since the suit has come to an end and there is nothing pending save for the recovery of costs. The 1<sup>st</sup> Respondent argued further that the Applicant's application was based on Orders 22 Rule 25 and 51 of the Civil Procedure Rules. The 1<sup>st</sup> Respondent argued that Order 22 Rule 25 of the Civil Procedure Rules refers to "a suit pending". The 1<sup>st</sup> Respondent submitted that there was no pending suit between the Applicant and 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent argued further that the proceedings in ELC No. 93 of 2018 (where the Plaintiff is different from the Plaintiff in this suit) would not be affected by the payment of the taxed costs in this suit.

In response to the submissions by the 1<sup>st</sup> Respondent, the Applicant argued that although the cost order was made against the Applicant, the Applicant was acting on behalf of the company which had been dissolved. The Applicant argued that he could be declared insolvent if the orders sought were not granted.

#### Determination:

I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit in reply and the submissions by the advocates for the parties. The Applicant has sought a stay of execution of the decree on costs pending the hearing and determination of ELC No. 93 of 2018. The 1<sup>st</sup> Respondent has argued that there can be no stay of execution since this suit in which the costs order was made is not pending. The Applicant's application was brought principally under Order 22 Rule 25 of the Civil Procedure Rules which provides that:

**Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.**

In Tom Ojienda Case (supra) that was cited by the Applicant, the aforesaid provision of the Civil Procedure Rules was elaborated on by the Court as follows:

**“For this provision to apply, there must be two suits between say A and B. In one suit there must be a decree in favour of A against B. In the other suit, it must be B who is suing A. In this case, the Respondents are seeking stay of execution pending the filing, hearing and determination of the reference against the ruling and taxation in High Court Misc. Cause No. 4 of 2016. In other words, the Respondents are yet to file their reference and hence there is no suit by the Respondents against the Applicant.”**

In the present case there is a decree in favour of the 1<sup>st</sup> Respondent against the Applicant. There is however no pending suit by the Applicant against the 1<sup>st</sup> Respondent. The Applicant has argued that ELC No. 93 of 2018 is pending between the parties. However, the truth of the

matter is that the Plaintiff in that suit is Antow Trading Company Limited (the company) and not the Applicant. Antow Trading Company Limited is a limited liability company with a separate and distinct legal personality. It has instituted ELC No. 93 of 2018 in its own name. It is separate and distinct from the Applicant. The instant suit was brought by the Applicant who withdrew the same on 26<sup>th</sup> June, 2018. There is therefore no pending suit between the Applicant and 1<sup>st</sup> Respondent. In the circumstances, the provisions of Order 22 Rule 25 of the Civil Procedure Rules are not applicable.

The Applicant has also argued that he will suffer irreparable harm if the orders sought are not granted as ELC No. 93 of 2018 which concerns the same subject matter and parties is pending and should be decided by the Court before the costs sought are recovered by the 1<sup>st</sup> Respondent. I do not find this to be the correct position. As I have stated earlier, the pending suit is between Antow Trading Company Limited (the company) and Sato Properties Limited and another. The Applicant is not a party to that suit. Consequently, I am unable to see how the outcome of that suit whatever it may be will absolve the Applicant from paying the costs ordered against him in this suit.

In view of the foregoing I find no merit in the Notice of Motion dated 24<sup>th</sup> June, 2019. The application is dismissed with costs to the 1<sup>st</sup> Respondent.

**DELIVERED AND DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Omondi for the Plaintiff

Mr. Kamau h/b for Mr. A.B. Shah for the 1<sup>st</sup> Defendant

N/A for 2<sup>nd</sup> Defendant

Ms. C. Nyokabi - Court Assistant