



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC 820 OF 2017**

**KIMANI KABOGO.....PLAINTIFF /APPLICANT**

**VERSUS**

**WILLIAM KABOGO GITAU.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed the instant Notice of Motion dated 20<sup>th</sup> January 2021 for orders THAT;

**a. Spent.**

**b. THAT pending interpartes hearing of this application, the Honorable Court be pleased to grant an interim order for stay of the execution of the ruling dated 10/12/2018 and specifically stay of taxation.**

**c. THAT the Honorable Court be pleased to grant a stay of execution and stay of proceedings in this matter pending the hearing a determination of Civil Appeal No. 82 of 2019.**

**d. THAT costs of this application be in the cause.**

2. The application is based on the grounds annexed thereto and the Supporting Affidavit of even date of **Martin Njeru Nyaga**, Counsel for the Applicant. He deponed that the Applicant is aggrieved with the ruling of the Court issued on the 10/12/2018 for which he has filed an appeal vide Civil Appeal No 82 of 2019. He avowed that the doctrine of Lis Pendens requires that status quo be maintained during the pendency of a suit on appeal. That the Plaintiff stands to be prejudiced if the bill of costs proceeds for taxation on the 28/1/2021 on the ground that he will incur more costs in addition to the costs to the appeal. That it has become necessary to stay further proceedings in this matter to avoid wastage of judicial time and creation of multiplicity of proceedings pending the hearing of the appeal.

3. While resisting the application, the Respondent vide his grounds of opposition dated the 10/2/2021 contended that the impugned ruling made by the Court on the 10/12/18 was a negative order incapable of forming a basis of stay of proceedings. The Court adjudged that it has no jurisdiction to hear and determine the matter and downed its tools and opined that the proper forum for an application for stay would be the Court of Appeal. Further that a stay against payment of costs is not available for a suit that has suffered a dismissal. That taxation being a process provided for by the law cannot be stopped by the Court.

4. On stay of execution, the Respondent contended that the Applicant has failed to satisfy the 3 conditions set out in Order 42 rule 6 of the Civil Procedure Rules to warrant the grant of stay orders. That for starters the Applicant opined that taxation of the Defendant's bill of costs is not one of the considerations in granting orders of stay of execution. That in the past the Applicant has scuttled taxation of the bill and this is another attempt at frustrating the taxation of the bill that he is entitled to.

5. On the 13/5/2021 the Court directed the parties to file and exchange written submissions on the application. I have read and considered the submissions.

6. Briefly the Applicant submitted and highlighted the factors that a Court would consider in determining an application for stay of execution. Firstly, that the appeal is an arguable appeal and so as not to render it nugatory the instant application should be allowed. Secondly on the issue of the ruling having been a negative order, the Applicant averred that the effect of the said dismissal is that the Respondent is going on with construction on the suit land hence violating his right to property. That the Applicant was evicted a few months before the suit was filed.

7. The Applicant relied on the case of **Mombasa Maize Millers Co Ltd & Another Vs Western Cross Express Co Limited (2016)**

eKLR where the Court in furtherance of substantial justice and guided by the tenets of Art 10(2), b, 159(2) of the Constitution and Sections 1A, 1B of the Civil Procedure Act granted stay where the appeal was yet to be lodged. He urged the Court to follow cue in this application.

8. The Applicant averred that it has an arguable appeal and the Respondent stands to suffer no prejudice if the orders are granted.

9. The Respondent while maintaining that the application is for dismissal cited two grounds; firstly that the order striking out the suit was a negative order incapable of forming a basis for stay orders. See **Exclusive Estates Limited Vs Kenya Posts & Telecommunications Corporation & Anor (2005) 1 EA**. Secondly that the Court has no jurisdiction to determine the application having made a finding that it is bereft of jurisdiction in the first place. That the proper forum for the application should be the Court of Appeal.

10. As to whether the Plaintiffs have met the threshold for grant of stay of execution of the decree, the Respondent answered this in the negative. It was his case that the Applicant has not demonstrated substantial loss and in any event taxation of a bill of costs with respect with costs duly and properly adjudged in favour of the Respondent cannot amount to substantial loss. The Respondent argued that the application is being brought after a period of 3 years since the ruling of this Court and hence the same suffers from inordinate delay for which no explanation has been given by the Applicant. Finally, that the Applicant has not offered any security for the due performance of the decree of this Court.

### **Analysis & Determination**

11. In my view, the germane issue for determination is whether the application is merited.

12. This case met its collapse in 2018 and to date there is no sign that litigation is about to end. A background of this case is a good starting point. Vide a plaint dated the 22/12/2016 the Plaintiff sued the Defendant for indemnity arising from alleged breach of trust with respect to the suit lands, damages of Kshs 387.8 Million, punitive damages and costs of the suit. The Defendant vide his statement of defence denied the Plaintiffs claim and in particular that it held properties L.R No 12825/27 and LR No 12825/34 (suit lands) in trust for the Plaintiff and undertook to raise a Preliminary objection. True to form the Defendant filed a Preliminary Objection on the 14/12/17. The Court upheld the said Preliminary Objection on the 10/12/2018 on grounds that the Court does not possess the jurisdiction to hear and determine the matter.

13. It is trite that a Court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the Court cannot entertain any proceedings and must down its tools. See the celebrated case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1**.

14. The Court of Appeal in **Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577**, quite sufficiently summarized the law on jurisdiction as follows;

“1.....

**2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.**

**3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.**

**4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.**

**5. Where a cause is filed in Court without jurisdiction, there is no power on that Court to transfer it to a Court of competent jurisdiction.**

6. ....

7. ....”

15. The instant application impugns this Court's Ruling delivered on 10/12/2018. A reading of that Ruling particularly in the final disposition is clear that the Court having found it lacked jurisdiction, struck out the entire suit and subsequent pleadings with costs. The only recourse available to challenge that Ruling is by appeal. This Court cannot arrogate itself jurisdiction and re-open a case that was struck out by a Court of concurrent jurisdiction. Doing so would amount to sitting on its own appeal, a venture that is illegal and inappropriate in our jurisprudence.

16. It would amount to incongruity for this Court having held that it is bereft of jurisdiction to, on the other, proceed and issue orders in this application especially in a scenario where negative orders were at issue. There were no orders requiring any party to do anything or refrain from doing an act. The Court simply said it had no power to take any step on the matter and downed its tools.

17. Courts have pronounced themselves in this country times without number that a negative order is incapable of anchoring any executable orders. In the case of **Milcah Jeruto v Fina Bank Ltd [2013] eKLR** and **Electro Watts Limited v Alios Finance Kenya Limited [2018] eKLR** the Court held that stay orders cannot be granted where a negative order has been issued.

18. Further in the case of **Catherine Njeri Maranga v Serah Chege & another [2017] eKLR** where Mwongo J. in refusing to grant orders of stay cited **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR**, where the Court of Appeal stated:

**"16. In Kanwal Sarjit Singh Dhimaži v. Keshavji Juvraj Shah 2008 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:**

**"The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior Court made on 18<sup>h</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C)".**

**17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:**

**"The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order. The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..."**

19. Section 2 of the Civil Procedure Act define a decree as follows;

**" decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within [Section 34](#) or [Section 91](#), but does not include—**

**Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;**

**Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."**

20. In the case of Exclusive Estate Limited above cited the order that struck out the suit was negative and not capable of execution. I find myself in agreement with the decision of the Court of Appeal as set out above.

21. Even if I was wrong on my finding on negative orders which I am not, Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 governs an application for stay of execution and provides that an Applicant must demonstrate the following:-

**"a. Substantial loss may result to the Applicant unless the order was made;**

**b. The application was made without unreasonable delay; and**

**c. Such security as the Court orders for the due performance of such decree or order as may ultimately binding on him has been given by the Applicant."**

22. It is trite that for an order of stay of execution to be granted, the Applicant must satisfy the Court that he has demonstrated substantial loss that he stands to lose. What constitutes substantial loss has been addressed in many cases. In the case of **Mukuma vs. Abuoga (1988) KLR 645** the Court stated that;

**"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."**

Similarly, in the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, it was held as follows:

**"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money."**

The Court went further to hold that;

**“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be” In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”**

23. The Applicant has not explained nor demonstrated what substantial loss he stands to suffer. The issue of violation of his rights to property are issues that were not canvassed by the Court. The Court pronounced itself as to its lack of jurisdiction to hear the matter on account of statutory limitations.

24. It is evident that the ruling of the Court was issued in 2018, about 3 years before bringing the application. Although in our jurisdiction there is no clear cut or arithmetic way of calculating delay, it is left to the Court to determine based on the circumstances of the case inordinate delay is. It is the explanation that accompanies the delay that unlocks the discretion of the Court. In this case no explanation was forthcoming from the Applicant. The Court finds that the application suffers from unexplained inordinate delay.

25. The Applicant did not offer any security for the due performance of the decree, a major ground for granting orders of stay.

26. The other reason why the application should fail is that the specific prayer for stay of taxation proceedings is already overtaken by events. The Deputy Registrar delivered a Ruling dated 8/4/2021 taxing the Bill of Costs at **Kshs. 234,666.60/=**. A reference has been filed to this Court challenging the said Ruling.

27. Final orders;

**a. The application is bereft of merit and the same be dismissed with costs payable by the Applicant.**

28. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms Simiyu holding brief for Mr. Njeru for the Plaintiff/Applicant

Mrs. Maina for the Defendant/Respondent

Ms. Phyllis Mwangi – Court Assistant