



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 519 OF 2018

HAGOS BIRIKIRTI TEWOLDENREHEN

DE LA TORRE RAMIREZ NELLY VICTORIA

(Suing as the administrators of the estate of

MENDOZA LOPEZ AQUELINA(Deceased).....APPELLANT/RESPONDENT

-VERSUS-

EVANS IHURA.....1ST RESPONDENT/APPLICANT

EVANS IHURA NJOROGE..... 2ND RESPONDENT/APPLICANT

RULING

1) The respondents/applicants took out the motion dated 7th May 2021 whereof they sought for the following orders:

i. THAT this application be and is hereby certified urgent and heard ex-parte on a priority basis and service of the same be dispensed with in the first instance.

ii. THAT pending the hearing and determination of this application inter-partes there be a stay of the taxation proceedings slated for 11th May 2021.

iii. THAT pending the hearing and determination of this application inter-partes there be an order of stay of execution of the judgment and/or decree of the honorable Justice J. K. Sergon dated 10th July 2020 and any other incidental and/or consequential orders thereto.

iv. THAT this honourable court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice;

v. THAT the costs of this application be borne by the respondents.

2) The applicants filed the affidavit sworn by Fredrick Ragui Kariuki in support of the motion. When served, the appellant/ respondent filed the replying affidavit sworn by Osando Osiemo and a notice of preliminary objection dated 26.5.2021 to oppose the application. The preliminary objection had to be dealt with first before considering the merits of the application.

3) I have considered the grounds stated on the notice of preliminary objection plus the oral rival submissions made by counsels from both sides. It is the submission of the appellants that the respondents application is resjudicata under Section 7 of the Civil Procedure Act in that a similar application was filed heard and dismissed on 11.12.2020, therefore the instant motion is vexatious and an abuse of the court process.

4) The appellants further argued that the respondents' application has no basis in that its foundation is an invalid notice of appeal which was served out of time contrary to rule 77(1) of the Court of Appeal Rules, 2010.

5) It is also stated by the appellant that the respondents have not applied and copied the application to the respondents to be supplied with copies of the proceedings contrary to rule 82 (1) and (2) of the Court of Appeal Rules, 2010.

6) It is also argued that the respondents have not applied for substantive orders in their application. The respondents on their part argued that they are seeking for stay of taxation proceedings. They also argued that the preliminary issues touching on rules 77 and 82 of the Court of Appeal Rules can only be addressed by the Court of appeal and not this court.

7) Having considered the rival submissions, it is clear that the respondents in their motion dated 7th May 2021 are seeking for an order for stay of execution of this court's judgment/decree delivered on 10th July 2020 pending the interpartes hearing of the application.

8) It is also apparent that the respondents filed a notice of appeal on 15.12.2020 but had it served upon the appellant on 27.1.2021, outside the 7 days under rule 77(1) of the Court of Appeal Rules. It is also clear that the respondents have not shown any evidence to prove that they applied for copies of the proceedings nor have they served the appellants with a copy of the application for supply of proceedings as required under rule 82(1) and (2) of the Court of Appeal Rules.

9) It is also not in dispute that the applicants were not granted an order for stay of execution on 11th December 2020. The instant objection which is based on the Court of Appeal Rules i.e Rules 77 and 82 cannot be determined by this court since that discretion is the preserve of the Court of Appeal therefore I will not make any determination on the preliminary objection and instead state that this court lacks jurisdiction to determine the same.

10) However, the remaining issue is the question of the competency of the motion. I am satisfied that the motion is as far as it is seeking for an order for stay of execution this court's judgment/decree is resjudicata. A similar application was heard and dismissed on 11.12.2020 therefore the issue cannot be relitigated under Section 7 of the Civil Procedure Act.

11) On the basis of this singular ground, I find the motion to be incompetent and without merit. Consequently, the preliminary objection dated 16.5.2021 is upheld. The motion dated 7th May 2021 is hereby ordered dismissed for being resjudicata with costs to the appellants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondents