



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

BANKRUPTCY CAUSE NO. 1 OF 2010

IN THE MATTER OF BANKRUPTCY ACT CHAPTER 53 OF THE LAWS OF KENYA (REPEALED)

AND IN THE MATTER OF INSOLVENCY ACT NO. 18 OF 2015

AND

**IN THE MATTER OF A CONSENT REACHED BETWEEN ABUBAKAR A.H. MOHAMED (1ST JUDGEMENT CREDITOR)
AND AHMED MOHAMED SAID (BANKRUPT)**

BETWEEN

AHMED MOHAMED SAID.....BANKRUPT APPLICANT

AND

ABUBAKAR A.H. MAHAMED 1ST JUDGEMENT CREDITOR

AND

MOHMED OMAR MOHAMED.....1ST OBJECTOR

AHMED OMAR SAID2ND OBJECTOR

OMAR MOHAMED SAID3RD OBJECTOR

CORAM: Hon. Justice R. Nyakundi

Mr. S.M. Kimani for the respondent

Mr. Stephen Obaga for objector

Mr. Otara for the 1st objector

RULING

This is a notice of motion dated 17th July, 2019 premised under Section 1A, 1B and 3A of the Civil Procedure Act, Order 22 Rule 25 of the Civil Procedure Rules seeking a substantive relief of stay of release of the judgement creditors money amounting to Kshs.150,000 deposited in court. In support of the motion are the grounds on the face of it and an affidavit by **Mohamed Omar Mohamed**.

By grounds of opposition dated 22nd July, 2019, the respondent counsel **Mr. Muriuki** objected to the orders being sought by the applicant. In this matter, on 9th July, 2019 applicant moved under certificate of urgency for an order to be issued of stay to have the deposited amount of Kshs.150,000 not to be released to one **Stephen Muriuki**, as part of his legal fees. The application is premised on the Ruling by the Court of Appeal which on 11th July, 2019 awarded costs to the 1st, 2nd and 3rd respondents. Learned counsel for **Mohamed Omar Mohamed** filed this motion to have the payment stayed to **Mr. Stephen Muriuki Obaga** as earlier ordered. This application was also concretized on the

affidavit evidence of the applicant to the court.

Determination

This is an interlocutory order or decision sought before this court similar with another similar order on matters in respect to the deposited amount of Kshs.150,000 with the court.

It is my considered opinion that the provisions of Order 22 rule 25 of the Civil Procedure rules should be given a harmonious interpretation in such a manner that it does not contrast the clear provisions of Section 1A on overriding objective which gives a specific provision for the courts to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

The substance of the complaint in the notice of motion is that the applicant is in possession of a ruling by the Court of Appeal which awarded him costs. Further, that the only guarantee he has of seeking payment on the untaxed costs he observed it's from the deposit held in custody by the Deputy Registrar.

A careful appraisal of the particulars of the notice of motion and affidavit evidence shows lack of acknowledgement that an order of this court to release the said amount was made on 9th July, 2019. The application touches on incidental stay of execution of the order in issue without first demonstrating that there was an error of fact and law or some wrong criteria was applied to issue the order of release based on a notice of motion dated 7th May, 2019.

The points this application must prove to win the court's discretion on the stay order issues revolve first under section 80 of the Civil Procedure Act. It provides as follows:

“Any person who considers himself aggrieved:

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or

b. by a decree or order which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”

The applicant motion to this court has not shown that the previous decision to release the amount was clearly wrong and there is real likelihood of injustice that can be perpetuated by its existence. This is the spirit of the observations made in **State v Whitman, R 11, 431, A 2d 1229, 1233, Black's Law Dictionary Sixth Edition at page 466**, **“that the exercise of judicial discretion has been defined to mean, a power or right conferred upon public functionaries by law acting officially in certain circumstances accruing to the dictates of their own judgement and conscience, uncontrolled by the judgement or conscience of others.”**

Having said that even if I was to bring the application within the threshold of Order 42 rule 6 of the Civil Procedure there is no proof of substantial loss that may otherwise result.

In **Halsbury's Laws of England 4th Edition Volume 17** the following propositions were made:

“The court has an absolute and unfettered discretion as to the granting or refusing of a stay of execution or proceedings, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deponed to an affidavit unless the application is made at the hearing.”

It is not lost to me that the contention of counsel for the applicant went further to acknowledge that the substance of the deposit has already been heard and determined by the court. In my view the notice of motion that there is could have better provided a basis why the earlier order should be reviewed and stayed. It is also clear to the court from the parts of the motion, the contract to provide legal services is individual based retention. Assuming that the motion is properly before this court can it be said that there was a discovery of a new matter, that was not within the knowledge of the parties or the court. The answer to me is in the negative.

In this regard the applicant has been awarded costs by the Court of Appeal, yet to be taxed by the Deputy Registrar. In the interim he has sought leave of the court to stay its own order made to release the deposited amount to one **Stephen Muriuki Obaga**.

Weighing the relevant affidavit evidence carefully, on applications of this nature one is either staying proceedings or execution of an order of judgement to enable him or take a remedial action against the order in preserving further infringement or is a matter of the right of appeal arising out of the impugned order or stay relief is sought to preserve status quo; that is mainly founded on substantial loss.

Invariably, the applicant has not demonstrated the above conditions as deponed in his affidavit in support of motion are capable of any of this, for the court to exercise discretion to grant him the orders of stay of release of the money held with the Deputy Registrar Malindi.

In light of the above motion, though not clearly stated, as of now is seeking an order to review the order by setting aside the order to release the deposited amount. What the applicant has not done is to satisfy either of the threshold under Order 42 Rule 6 on stay of proceedings or review under Section 80 of the Act and Order 45 of the Civil Procedure. This motion is misdirected as it does not lie subsequent to a valid order having been entered on release of the deposit to the respondent. The exercise of discretion having been spent is not available for a second draw down to entitle the benefit of the appellant, I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Otara for the appellant