REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS APPLICATION NO. 3 OF 2019

AMELI INYANGU & PARTNERS ADVOCATES.....APPLICANT

VERSUS

MILLENIUM MANAGEMENT LIMITED.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Ameli Inyangu for the Applicant

Mr. Fred Adhoch for the Respondent

RULING

This notice of motion filed in court on 2.3.2020 pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6, Order 51 of the Civil Procedure Rules 2010 concerns the propriety of stay of execution of the ruling delivered on 14.10.2019 against the applicant made out of affidavit evidence of the respondent.

The applicant also desires this court to grant leave for the firm of **Aoko Githara & Company** to come on record post Judgment for the respondent. The application is grounded on the reasons given on the face of the motion and an affidavit of **Charanjit Singh** dated 2.3.2020.

The respondent **Fred Adhoch** challenged it by filing a replying affidavit. Besides affidavits evidence both counsels filed brief submissions on the legal propositions and why the courts discretion should be exercised to their benefit.

Determination

At the hearing of this application, the priority issue is on stay of execution of the ruling of this court dated 14.10.2019 and at a secondary level, leave for the legal firm to come on record post Judgment. I start with the secondary prayer for leave to be granted in essence under Order 9 Rule 9 of the Civil Procedure Rules.

The power of the court to grant leave for counsel to come on record post Judgment is provided for under Order 9 Rule 9A and 9 of the Civil Procedure Rules.

As the provisions suggests the salient points to note therefore is that there was a previous advocate on record. Further, the claim has been determined on the merits and Judgment pronounced by a competent court under Article 50 (1) of the Constitution. It is also advisable in such a situation to serve the application upon the previous advocate on record.

In the present application on consideration of the affidavit evidence and the issues on record there are two fundamental findings. I find no evidence for declining leave under the Rule for the applicant's counsel to come on record to represent him in the pending proceedings. The more complex one is the later on stay of execution pending an appeal, pursuant to Order 42 Rule 6 of the Civil Procedure Rule.

The Law

The principles for the grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules are well known and are of judicial notoriety. First the applicant must satisfy that the application has been brought without unreasonable delay. Secondly, normally an application for stay will not issue unless the applicant establishes substantial loss. Thirdly, there has to be commitment to provide security for due performance of the Decree. In the cases of **Stephen Wanjohi v Central Glass Industries Limited Nairobi High Court Civil Case Number 6726 of 1991, Vishram Ravji Halali v Shirkton & Turpin Nairobi Civil Application Number 15 of 1990** expressly re-emphasize the facts of the case and threshold in the three traditional conditions for the exercise of discretion in favour of the applicant.

It is also further settled that the applicant must demonstrate sufficient cause and the intended appeal or already filed appeal would be rendered nugatory for reason that stay of execution was not granted **(See Lolwe Agencies Ltd v Midland Emporium Ltd Kisumu High Court Civil Case Number 25 of 1998, Canvas Manufacturers Ltd v Stephen Reuben Karunditu Civl Application Number 158 of 1994).**

Generally, the backdrop of all these is for the court to exercise the discretion judiciously so that it does not become a common practice for unsuccessful litigants to lodge an appeal for purposes of depriving the successful litigant of the fruits of his or her Judgment. The case of **George Oraro v Kenya Television Network Nairobi High Court Civil Case Number 131 of 1992** set out the principles which should guide the court in exercise of discretion whether or not a party has satisfied the criteria for that relief.

There is also one other point which the court should not lose sight, existence of an appeal before an application for stay of execution is to be considered, granted or declined. In the comparative case of **N.N.P.C v O.E. N19J Ltd {2008} 8 NWLR PL1090 {583} The Court of Appeal** said as much as follows:

> ***"There must be a pending appeal:***
>
> ***(i). A stay of proceedings can be granted only if there is a pending appeal which is valid in Law.***
>
> ***(ii). There must be an arguable appeal. The appeal which forms the basis of an application for stay of proceedings must be competent and arguable on its merits.***
>
> ***(iii). Where an appeal is frivolous, vexatious or an abuse of the court process, an appellate court will decline jurisdiction to entertain the application, where the res will be destroyed, damaged or annihilated before the matter is disposed of appellate court will grant stay.***
>
> ***(iv). Where greater hardship will be caused, the court would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused where it would render the order of the court nugatory. A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory."***

In the instant case what has been in contention is the Judgment of **Mativo J** entered on 10.9.2019. In order to obtain a favourable decision the applicant filed identical application on 23.10.2019 seeking stay of execution to pay the sum in the drawn decree of the court. I addressed the issues which culminated in my ruling dated 27.11.2019.

It is perfectly proper and right for this court to invoke the doctrine of resjudicata under Section 7 of the Civil Procedure Act.

The applicant submissions is on stay of my ruling which touched on the primary Judgment of **Mativo J**. because that is the substratum of the suit. The principle of resjudicata as an estoppel to any further proceedings on the same issues was addressed in the case of **Fletcher & Company Limited v Billy Craig Investment Limited and Scotia Investments Limited {2012} JIMSC 128,** it was stated that:

> ***"A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the finding on a matter which came directly, not collaterally or incidentally in issue, in the first action and which is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the prior involved in the earlier decision is one of fact or Law or a mixed question of fact and Law*. It is established on some authorities that this form of estoppels arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to re-open it, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant."**

Arnold v National West Minister Bank PLC No. 1991 2 AC 93. 105. The power exercisable under Section 7 of the Act for an application of resjudicata is enunciated in the case of **William Koross v Hezekiah Kiptoo Komen & 4 others {2015} eKLR** where the court stated:

> ***"The philosophy behind the principle of resjudicata is that there has to be finality, litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than yet and add so costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go." "The practical effect of the resjudicata is that it is a complete estoppel against any suit that runs a foul of it, and there is no way of going around it, not even by consent of the parties, because it is the court itself that is debated by a jurisdictional injunction from entertaining the suit." (See also Henderson v Henderson 1843 3 Ham 100).***

In this case to prove that the applicant has brought himself within the provisions of Section 7 of the Civil Procedure Act the issue of stay of execution under Order 42 Rule 6 (1) of the Civil Procedure Rules feature prominently as against the Judgment of **Mativo J.** In my assessment of the evidence for purposes of the arguments advanced by both counsels, the matter concerned the Judgment that is now being prosecuted by way of execution proceedings. The opportunity to ventilate the issues on the dominant claim has been accorded the applicant in all the circumstances of the case.

The present application and issue of stay is directly and substantially in issue with the former notice of motion. Once it is appreciated that whatever difference there may be but the predominant underlying features of the suit are substantially similar resjudicata applies to render the notice of motion incompetent and fatally defective to sustain an action. None of the facts alleged by the applicant in the pending motion are

new, in the sense that they existed prior to the time this stay of execution was being pursued at the moment.

I believe the doctrine of resjudicata is a principle with considerable pedigree and its importance to protect the public interest, on finality on litigation and justice be done to the parties is unprecedented **(See Gordon Stewart v Independent Zaidco Company Ltd {2012} JIMCA 2 Civil 2).** The theme displayed by the applicant said the entry of Judgment by Mativo J. is to routinely file one application after another trying to undo the Judgment itself. The resjudicata doctrine as mooted by **Edward Coke in Ferver v Arden {1598} 77 Eng Rep 263, 266** represents this statement:

> ***"For as it hath been well said interest veipub ut sit finis Litium; otherwise great oppression might be done under colour and presence of Law, for if there should be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation to leave and relinquish his right all which was remedied by the rule and reason of the ancient Common Law, the neglect of which rule, hath therewith, introduced inconveniences.***
>
> ***(1). Infiniteness of verdicts, recoveries and Judgments in one and the same case.***
>
> ***(2). Sometimes contrarieties of verdicts and Judgments one against the other.***
>
> ***(3). The continuation of suits for 20, 30 and 40 years to the letter impoverishing the parties.***
>
> ***(4). All these tends to the dishonor of the Common Law which utterly abhors infiniteness and delaying of suits….."***

The power being made here in connection with the current application, no one can maintain an action for redress where resjudicata lies. At a more profound level the appellant cannot file a motion against the respondent on almost identical terms to relitigate as if it's a new claim. If the requirement on resjudicata fails me the challenging standing of the applicant under Order 42 Rule 6 of the Civil Procedure Rules is also not sustainable.

In response to the relevant provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules the nature of the affidavit evidence and filings in respect of undue delay, substantial loss and security for due performance supposedly remain unsatisfied for an order of a stay of execution to be made for the benefit of the applicant.

It is for these reasons that I would exercise discretion to refuse stay of execution and other consequential orders. On the issue of accounts what the court is able to gather so far from the material I can see no reason to re-open execution proceedings unless there is primafacie evidence of an overreach or breach of a provision of enabling statute and regulation.

I will therefore disregard the relief and not trouble myself with the submissions made by counsel in relation to this ground. On substantive remedy on stay of execution, the application as such is dismissed. The request for counsel to come on record to represent the applicant no restriction imposed. There will be an order for costs payable to the respondent.

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

.....

R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. Ms. Emukule holding brief for Adhoch for the respondent