REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 1 OF 2008

ESPOSITO FRANCO.....PETITIONER

VERSUS

AMASON KINGI JEFFAH.....1ST RESPONDENT

AMINA KALE.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA .....3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Richard Otara advocate for the Petitioner

Charles Kioko Munyithya Advocates for the Respondents

RULING

This matter was filed under certificate of urgency accompanied with a notice of motion dated 9.3.2020 pursuant to Section 1A, 1B, 3A and 38 of the Civil Procedure Act against the respondents.

That the following orders do issue:

> ***(1). That there be a temporary stay of execution of the Notice to Show Cause herein dated the 20th February 2020 and further the Notice to Show Cause be dismissed. In support of the application are grounds crafted in the following language:***
>
> > ***(i). That no decree has been drawn in this matter.***
> >
> > ***(ii). That it is only a decree that can be executed.***
>
> ***(2) That the Notice to Show Cause herein is premature.***
>
> ***(3). That the petitioner has not been served with the certificate of costs.***
>
> ***(4). That the petitioner has not been served with any decree or demand .***

Further to the grounds, is an affidavit by Franco Esposito generally reiterating the same reasons on the face of the motion.

Background

This whole legal saga arises out of taxed costs in HCCC Election Petition No. 1 of 2008 of Kshs.1,247,607/=. On 11.9.2019, a notice of motion in terms of Section 1A, 1B and 63 (e) of the Civil Procedure Act also sought stay of execution against execution and enforcement mechanism of reaching settlement of the bill of costs.

In a brief ruling dated 5.2.2020, orders of stay of execution failed the threshold as outlined under Order 42 Rule 6 of the Civil Procedure

Rules. Specifically, in that notice of motion, the applicant alluded to the proceedings in **Nairobi Civil Application Number 248 of 2008** initiated to determine a sum of Ksh.24,480,832.48/=. Learned counsel for the applicant urged this court to stay any action over the current bill until the Nairobi case is heard and determined to confer a benefit of a set off upon the applicant. The ruling of the court already on record thought that the applicant failed to satisfy the conditions for stay of execution grounded on a set off in the event **Nairobi Civil Application Number 248 of 2008** is concluded favorably.

In the instant application it is not disputed that the applicant is challenging the notice to show cause on almost similar terms like in the former notice of motion dated 11.9.2019, save for now he alleges non-service, lack of a drawn decree and a notice of demand against the applicant.

At this point for purposes of clarity it is apt to restate that the written submissions from both counsel **Munyithya** for the respondent and **Mr. Otara** for the applicant, then in notice of motion dated 11.9.2019 are as relevant and spot on in regard to the present application.

That therefore takes me to the competence of the notice of motion dated 9.3.2020.

Determination

In sum the applicant has moved the court by invoking the overriding objective under Section 1A and inherent jurisdiction of the court provided for in Section 3A to seek tenor of the court for the relief of temporary stay of execution of the notice to show cause for the applicant to demonstrate to court why he cannot pay the outstanding taxed costs of Kshs.1,247,607.00/=.

The essentials attributes of Law on stay of proceedings or execution and standards applicable are normally premised under Order 42 Rule 6(1) of the Civil Procedure Rules.

Special attention is also given to Section 7 of the Civil Procedure Act because, the applicant avoided reliance on it, in view of the fact that the matter may be considered resjudicata and estopped to proceed further.

This is a case for stay against proceedings being entertained in an action brought against the applicant to show cause why the taxed bill of costs remains outstanding. Then, it is an order of stay of proceedings which brings it squarely within Order 42 Rule 6 of the Civil Procedure Rules.

The application as moved by the mover together with supporting material furnished for the court considerations is also made under the inherent jurisdiction, normally a reserve for equitable and interest of justice remedies. In **Hallsburys Law of England 4th Edition Volume 37** in dealing with grant of proceedings the Learned authors stated:

> ***"The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the Supreme Court or under the Court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation." "Essentially, the Court has inherent jurisdiction to order, where the circumstances dictate, that the certain proceedings be stayed until such time as it is fair and just that they be heard and determined. In this regard, the Court engages in a balance of the respective prejudice to be suffered by the parties should the stay application not be determined in their favour. The fundamental principle to be observed by the Court in this regard is to ensure that justice is being done between the parties in the exercise of its discretion."***

In exercise of the unfettered discretion of the court to stay further proceedings within the textual provisions of Order 42 Rule 6 of the Civil Procedure Rules, the court bears in mind the following factors:

> ***(1). Sufficient cause***
>
> ***(2). Undue delay***
>
> ***(3). Substantive loss***
>
> ***(4). The interest of justice***
>
> ***(5). The nature of the action calling for stay of proceedings.***

In the present case; consideration for stay is not predicated on intended or an appeal. The conditions as stated in the motion revolve around questions of service and that the proceedings have not ripened to adjudicate a notice to show cause against the pending certificate of taxed costs.

I would like for purposes of this motion to establish whether the applicant can benefit under Order 42 Rule 6 on the test of sufficient cause. In the case of **Parimal v Veena The Supreme Court of India** observed and laid out guidelines as the phrase sufficient cause:

> ***"Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word sufficient is adequate, enough, it as much as may be necessary to answer the purpose intended. Therefore, the word sufficient embraces no more than that which provide a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context sufficient cause means that party had not acted in a negligent manner or there was want of bonafide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been not acting diligently or remaining inactive.***

However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

It is apparent that the certificate of costs being litigated upon with an avalanche of applications, was issued on 19.6.2019. For this proceedings the court stated in **George Oraro v Kenya Television Network Nairobi HCCC NO. 151 OF 1992,** the general principle of Law is that:

"the court does not make a practice of depriving the successful litigant of his litigation, and locking up the fruits to which primafacie he is entitled by a valid order or Judgment of the court."

The point which the applicant is making relates to non-service or non-existence of a drawn decree in support of the notice to show cause issued in terms of Section 38 of the Civil Procedure Act. Notwithstanding, this allegation when something is obvious sometimes it is not necessary to go through the tiresome procedural dictates with complaints that the process or the decision has been made without observance of the rule of natural justice. The motion arises from a ruling delivered by Taxing Master in which the applicant has been made aware in one way or another since the 19.6.2019.

From the affidavit evidence the applicant has not satisfied the condition on sufficient cause or good reason for the court to exercise discretion in his favour to stay proceedings the pending notice to show cause. ***"To borrow a leaf, the respondents counsel initial words the application for stay as set out is bad in Law, defective and an abuse of the court process. That the oxygen principles are not applicable to this and of other applications."***

It may be that the applicant could not have shown cause or the explanation put forward would not be satisfactory, but the whole arrangement does not qualify him to obtain stay of proceedings as an order of this court. Unfortunately, the nature of the applicant's grounds cannot find favour within the provisions of Order 42 Rule 6 on stay?

It is also upon the applicant to satisfy the court that the interim stay of proceedings of the notice of show cause or the decree for that matter is intended to serve the interest of justice. The court in **Global Tours & Travels Limited, Nairobi H. C. Winding up Cause No. 43 of 2000** it was stated by **Makhandia J** as follows:

"As I understand the Law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order stay of proceedings and if it is on what terms it should be granted. In deciding whether to order a stay, the court should essentially weight the pros and cons of granting or not granting the order and in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, if any, in the sense of not whether it will probably succeed or not but whether it is an arguable out the scarcity and optimum utilization of judicial time and whether, the application has been bring expeditiously."

In my view, the two conditions of interests of justice and undue delay on which such applicants are premised have not been satisfied by the applicant. The applicant has also disclosed that there is no appeal or intention to file a reference against the taxation by the Deputy Registrar.

It is also settled practice that a court cannot move to order stay of proceedings unless the application satisfies the criteria on irreparable harm or substantial loss in the chain of arguable points to support the equitable relief. The jurisdiction of the court can only be exercisable under the principles in **Halsburys Law of England 4th Edition Volume 37 Page 330 at 332** where the court must guard against the possibility of prejudice or injustice to the adverse party. On this Learned Authors observed as follows:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the courts general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed or to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases it will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in Law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not or probably would not succeed, but that he could not possibly succeed on the basis of the pleading and the facts of the case."

Consequently, on the premise of the affidavit evidence, the court is unable to hold on the arguments that there be interim stay of proceeding, on notice to show cause with regard to the certificate of costs. In **SPDC V Amadi {2011} Vol 5 – 7 (PL – MJSC),** the court rendered its decision interalia as follows:

"That in exercising discretion to grant or refuse stay of execution of a Judgment for payment of mesue profits and recovery of possession, the court must take into account among other factors:

(a). Competing interest of the parties

(b). A stay is never used as a substitute for obtaining the Judgment which a trial court has denied a party.

(c). A court will not grant a stay for purposes of enabling a party to obtain the very reliefs which he lost in the action leading to the Judgment for which an appeal has been lodged.

(d). In other words, the court will provide adequate protective to the Judgment given to a successful litigant."

In the instant case whether on lack of service or the decree is yet to be drawn is no danger to the present execution process to stop the proceedings on notice to show cause why the amount of the decretal sum cannot be settled, is in essence to deny a legal right to the respondent. This hurdle in all the applications filed by the applicant has not been surpassed to sustain interim orders of injunction or stay against the decree.

Because of the view, I hold on this matter this far I think it is necessary to consider whether the application is well within the doctrine of resjudicata under Section 7 of the Civil Procedure Act.

In the case of **Ord {1923} 2K.B. 432** the court stated:

> ***"If the res thing actually and directly in dispute has been already adjudicated, of course by a competent court, it cannot be litigated upon."***

Fundamentally also is the guideline laid down in the case of **Bell v Holmes {1956} 3 ALL ER 449 interlia**, it was held:

> ***"one of the criteria of the identity of two suits, in considering a plea resjudicata, is the inquiry whether the same evidence would support both."***

> ***"The doctrine of resjudicata is derived from the maxim. "nemo debet bis vexari, si , est, curiae quod sit pro una et eadem causa." No man should be twice sued upon one and the same set of facts, if there has been a final decision of a competent court its basis is "interest republicae ut, sit finis litum" That it is in the interest of the public that there should be an end of litigation, otherwise great oppression might be done under the colour and pretence of Law." (Ferer v Arden 1559 6 COREP 7 – at 9a)***

See also the dicta in **Mackinue – Kennedy v Air Council, 2 K. B. 517:**

> ***"A plaintiff cannot by reformulating a fresh claim relitigate the same cause again, and the court has an inherent jurisdiction to strike out as frivolous and vexatious claim or defence which has already been derived in a previous proceedings against the party raising it."***

Indeed, our courts have recognized in numerous authorities in the Law on the doctrine of resjudicata. The Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others {2017} eKLR** considered it and stated as follows:

> ***"The rule or doctrine of resjudicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of resjudicata thus rest in the public interest for swift sure and certain justice."***

(See Mburu Kinyua v Gachini Tutu {1978} KLR 69 Henderson v Henderson {1843} 67 ER 313)

The effect of this to the present application is that the decision not to stay execution against the applicant has been made by a competent court. It was pronounced on the merits in a ruling delivered on 5.2.2020.

This court had the jurisdiction to hear and determine the issue at hand at the time. The parties to this claim on the bill of cost are the same and have been litigating in and out of court severally on the same subject matter.

It is pertinent to note that both in the notice of motion dated 11.9.2019 and the one filed on 9.3.2020, the applicant wholly sought leave of this court to be granted stay of execution pending the outcome of **Civil Case No. 204 of 2008 at Nairobi Milimani Law Courts**. Is it not the same Judgment the applicant seeks to stay in this latest motion? My answer is in the affirmative; it is about the payment and settlement of certificate of costs.

In the circumstances I have no hesitation, that this matter is resjudicata under Section 7 of the Civil Procedure Act. I would only add that among the strange features of this case is an apparent failure by the applicant to show good faith and bonafides to vest a proposal upon the respondent on how he intends to settle the decretal sum. I find it difficult to agree and believe that his remedy lies in filing one application after another, on the same subject hoping one day the court may faulter and close its legal eyes to allow stay of the decree in perpetuity.

Applying the principles elucidated elsewhere in this ruling to the present set of facts, I am satisfied that this is one of those motions where with the greatest of respect to the applicant I have no hesitation in exercising discretion to dismiss it.

Therefore, the motion dated 9.3.2020 is lost with added costs to the respondents.

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 holding brief for the petitioner

2. Ms. Emukule holding brief for Munyithya for the respondent