



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 366 OF 2014

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JIMMY KIAMBA, TREASURER

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

LILIAN NDEGWA, SECRETARY

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

The Application

1. This Court delivered a ruling herein on 2nd July 2018, wherein it allowed the firm of Coulson Harney Advocates to come on record for the Applicant herein, in place of Njiru Boniface & Co Advocates. The said Njiru Boniface & Company Advocates had been appointed by Njomuki Agencies, who were the Applicant's debt collection agent, to pursue legal proceedings against the Respondents for payment of a decretal sum due to the Applicant. The Applicant then purported to terminate the agency agreement with Njomuki Agencies, which termination was also the subject of the ruling delivered on 2nd July 2018.
2. After the said ruling was delivered, the firm of Njiru Boniface & Company Advocates filed the instant application by way of a Notice of Motion dated 18th July 2018, seeking stay of execution of the order given on 2nd July 2018 pending its intended appeal, and that the Court extends the orders of stay it granted on 2nd July 2018 pending the hearing of its application.
3. The application is supported by an affidavit sworn on 18th July 2018 by David Munga, who stated that he was appointed as an agent of the Applicant company to recover a decretal sum it was awarded in a judgment of the High Court, and that he is the one who appointed the firm of Njiru Boniface & Co Advocates to act on his behalf to pursue the said claim.
4. Further, that he is aggrieved by the ruling given by this Court on 2nd July 2018, as he had been successful in the debt collection, and which he stated amounted to assisting breach of a contract by the Applicant, which is indebted to him for his agency fees. The deponent averred that he has filed a Notice of Appeal from the ruling, and that there are grave issues for consideration in the matter by the Appellate Court particularly on the law relating to irrevocability of an agency coupled with an interest.
5. Njiru Boniface & Company Advocates canvassed the application by way of written submissions dated 12th November 2018 that were filed in Court, wherein reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules as conferring powers on this Court to grant a stay of execution of its own orders when an appeal has been filed. The decisions in **Butt vs Rent Restriction Tribunal, CA Civil App No 6 of 1979**, and **Masisi Mwita vs Damaris Wanjiku Njeri, Muranga HCCA 107 of 2015** were cited for the position that the Court in exercise of its discretion as to whether or not to grant stay should do so in such a way not to prevent an appeal. It was contended by the said Advocates that if the stay is not granted, the appeal will be rendered nugatory as execution of the subject judgment had commenced and funds collected as result, and they would wish to pursue the judgment debtor till the end.

The Response

6. The Applicant's advocates on record, Coulson Harney Advocates, filed Grounds of Opposition to the application dated 24th July 2018, and the Applicant also filed a replying affidavit in response, which was sworn on 17th September 2018 by Emma Wachira, its Company Secretary. According to the Applicant, there is no prejudice or any other loss that either Njomuki agencies or Boniface Njiru & Company Advocates are likely to suffer if a stay of execution order is not granted, as they have a remedy through filing separate action to enforce any agreement as to fees or commission due, or for orders for the delivery of a bill of costs.

7. Further, that the issues raised by Njomuki Agencies as regards its success in its debt collection is not relevant to the determination of this application, and that the issue of irrevocability of an agency coupled with an interest were addressed in the ruling of 2nd July 2018, and may only be considered in the context of an appeal. In addition, that following the delivery of the ruling on 2nd July 2018, the Court did not make any orders of stay, save for an order granting leave to appeal.

8. Lastly, that the application is intended to delay the recovery of a decretal sum due to the Applicant from the Respondents, and derail efforts to have the firm of Njiru Boniface & Company Advocates account for installment payments made to it.

9. Coulson Harney Advocates, filed written submissions dated 7th December 2018 on behalf of the Applicant, and urged that the application had not met the requisite tests for the grant of an order of stay pending appeal set out in Order 42 Rule 6 of the Civil Procedure Rules, and as stated in the decisions in Selestica Limited vs Gold Rock Development Ltd, (2015) e KLR and Butt vs Rent Restriction Tribunal, (1979) e KLR.

10. It was in this regard submitted that on the test as to whether substantial loss had been demonstrated, the issue in the ruling sought to be appealed was representation of the Applicant by the Advocate of its choice, and that even if the firm of Njiru Boniface & Company Advocates is owed any fees by the Applicant, its only recourse is to file suit to seek payment of its legal fees, and that it cannot hold on to the decretal sum pending recovery of the said fees as they are unascertained, as held in Mwangi Kengara & Co Advocates vs Invesco Assurance Co. Limited, (2007) e KLR and Simon Njumwa Maghanga vs Joyce Jeptarus Kagongo T/A Chesaro & Co Advocates, (2014) e KLR respectively.

11. Therefore that the Njiru Boniface & Company Advocates will not suffer any prejudice if stay is not granted. Lastly, that the said firm of Advocates has not offered any security to guarantee the performance of any eventual order that may be made against it, which is another test for the grant of a stay of execution.

The Determination

12. I have read and carefully considered the pleadings and submissions filed by the parties to the application. The issue before the Court is whether sufficient grounds have been established to stay the ruling delivered herein on 2nd July 2018 pending appeal. It is also necessary at this stage to also clarify that this Court did not grant stay orders on 2nd July 2018 as alleged in the prayers in the instant application.

13. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

14. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

15. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties. In the present application, this Court notes that subject ruling was delivered on 2nd July 2018, while the instant application was filed herein on 18th July 2018. There was therefore no inordinate delay in filing the application.

16. On the fulfillment of the second condition, an applicant needs to show what specific loss or prejudice he will suffer if stay is not granted. Njiru Boniface & Company Advocates in this regard contend that the current Advocates on record will proceed to take over the case and continue with the collection of monies due from the judgment debtor, and that its appeal will thus be rendered nugatory. The said monies however belong to the Applicant, and the only loss that the Njomuki Agencies and Njiru Boniface & Company Advocates may suffer is any fees or commission that may have been due to them.

17. This issue of any fees or commission that may be lost by Njomuki Agencies or Njiru Boniface & Company Advocates was addressed by this Court in the ruling of 2nd July 2018, wherein this Court held as follows:

“It is thus the finding of this Court that the interest of Njomuki Agencies and by extension its sub-agent, Boniface Njiru Advocates, in the payment of their commission and fees was separate and distinct from the debt that was the subject matter of the agency. It is also my view that refusal of leave for a new advocate to come on record is not an appropriate remedy to Boniface Njiru and Company Advocates in this regard. This is for the reason that advocates are officers of the court, and are obliged to assist the court meet the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act of ensuring just, expeditious, proportionate and affordable resolution of civil disputes.

In my view, the appropriate remedy in the circumstances arising in this application is a separate action by Boniface Njiru and Company Advocates and/or Njomuki Agencies to enforce any agreement entered into on fees, or for the commission due, or for orders for the delivery of a bill of costs. “

18. There is thus no irreplaceable loss that will be suffered by Njomuki Agencies or Njiru Boniface & Company Advocates if the termination of their agency is found on appeal to have been wrongful, as they have recourse to damages. Lastly, they said agents did not affirm that they were willing to furnish any security for the due performance of any orders that may be ultimately be binding upon them should a stay be granted.

19. I accordingly find for the foregoing reasons that the Notice of Motion filed by Njiru Boniface & Company Advocates dated 18th July 2018 is not merited, and the same is hereby dismissed with costs to the Applicant herein.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE