



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 9 OF 2016

ZEDKA TECHNICAL SERVICES.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT

COUNTY SECRETARY (UASIN GISHU)2ND DEFENDANT

COUNTY PUBLIC SECRETARY (UASIN GISHU) 3RD DEFENDANT

MINISTRY OF ROADS, TRANSPORT & PUBLIC WORKS UASIN GISHU4TH DEFENDANT

RULING

The application before the court is one dated and filed on 31st October 2018. The application seeks orders of stay of execution of a court order issued on 11th October 2018 and setting aside of the same orders and the defendant/applicants be allowed to defend the application.

The application is based on the grounds that the plaintiff filed an application on 4th May, 2016 seeking orders restraining the applicant from advertising or awarding the subject tender pending determination of the suit. On 14th February 2017 the respondent filed an application dated 13th February 2017 seeking orders that the court order the County Government of Uasin Gishu to release payments of Kshs. 26,437,700/- to the plaintiff/respondent pending hearing and determination of this suit. The applicants failed to file a replying affidavit to the application due to lack of instructions.

The applicant contends that there are issues which the respondents did not disclose including the fact that the subject contract contains an arbitration clause and therefore the court did not have the jurisdiction to entertain this suit. Further, the applicants contend that the award disposes of the entire suit and yet there is a defence on record which renders the defendant condemned unheard. If stay of execution is not granted the plaintiff/respondent will not be in a position to refund the said sum thus occasioning irreparable loss to the defendant/applicant and the public.

The failure to file the replying affidavit on time was occasioned by miscommunication and the mistake of counsel which should not be visited upon the client.

The application came for hearing and applicant's advocates submitted that they had not received instructions. The court said they should proceed and counsel made submissions.

The arbitration clause has been read selectively and clause 37 (1) talks of any dispute therefore it is applicable. The draft replying affidavit disputes the amount claimed. The applicant came to court before the claim of Kshs. 11,000,000/- was processed. The plaintiff was reluctant to commence work and had to be issued with a notice to commence. If he wanted to commence the project work which has now stalled for two years, he would have referred the matter to arbitration.

The respondent filed a replying affidavit and submitted in court. The matter came up severally for hearing but the applicant adjourned the matter severally citing lack of instructions from their client. The respondent submitted that the application was heard on 27th July 2017, almost an year after filing and the applicant's counsel was ready to proceed. The respondent however stated in his replying affidavit that the matter came up for hearing on 28th June 2018 and not 27th July 2017 and counsel for the applicant indicated he was ready to proceed. The issue of lack of instructions did not arise on the day of the hearing of the application.

The applicant's delay to receive instructions is unexplained and is an afterthought. The arbitration clause is clear on matters that can be referred to arbitration and payment is not one of them, that is the issue this court was urged to determine and it rightly determined it.

The respondent did some work, that was ascertained. Application for payment was made upon completion of the second phase. It was received by the applicant and they did not respond to the letters. No explanation is given as to why payment was not done. The respondent stopped the work and claims Kshs. 29,437,700/- equivalent to the work done before stoppage. The contract between the two parties is still on and money paid will go towards completion of the hospital. If paid the respondent will proceed with the work. The applicant was represented when the application was heard.

ISSUES FOR DETERMINATION

a. Whether the order issued on 11th October 2018 should be stayed or/and set aside

The main issue in contention on the said order is the amount that was awarded by the court. The applicant contends that the payment due was Kshs. 11,437,700 and not Kshs. 29,437,700/- as awarded by the court. The difference in the amount is colossal. Further, it is apparent that there was no formal response to the application dated 13th February 2017 by the then respondents.

The applicant contends that the amount due is evidenced by the final inspection and acceptance certificate which, unfortunately, does not show the sum of any amounts due to the respondents.

The applicant contends that they were condemned unheard yet the applicant's advocate was present in court and made submissions on the same. They therefore were not condemned unheard. The application was filed on 13th February 2017 and heard on 28th June 2017 as per the record of the court. The applicant was served with the application and was given several opportunities to file a response but failed to do so. They cannot therefore claim to have been condemned unheard. They were given opportunities to be heard but failed to utilize them.

The applicant's authorities are premised on ex parte judgments, both advocates were present in the current case therefore the orders cannot be deemed to have been ex parte.

In *Pithon Waweru Maina V Thuku Mugiria (1983) eKLR* the Court of Appeal stated as follows:-

“Firstly, there are no limits of restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel V EA Cargo Handling Services Ltd (1974) EA 75 at 76 C and E b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo (1976) EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.”

The applicant adjourned the hearing of the application and sought to delay the court process by his conduct. In my opinion there was a deliberate intention to delay the course of justice. That notwithstanding, I must examine whether the applicant has established a case to warrant stay of execution orders sought.

In *Anne Njeri Mwangi v Muzaffer Musafee Essajee & another (2014) eKLR* the court relied on the case of the case of *Halai & Anor. V Thornton & Turpin (1963) Ltd (1990) KLR 365* where it was stated that the Court's discretion is fettered by three conditions:-

“Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

The applicant has failed to establish that there would be a substantial loss from refusal to grant stay. Further, there has been no proposal to furnish security by the applicant. In the premises the court's discretion has been fettered and the applicant has failed to establish the conditions precedent for stay to be granted.

I therefore do find the application in want of merit and is dismissed with cost to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of May, 2019.

In the presence of:-

Miss Wamalwa for Plaintiff/Respondents

Mr. Too for Defendant/Applicant

Ms Sarah - Court clerk

Mr. Too:-

I apply for 30 days stay. I also apply for copies of proceedings.

Miss Wamalwa:-

The application was for stay and it has not been granted. 30 days stay is prejudicial to our client.

Court:-

The application was for stay of which this court has overruled. It is not therefore in order to grant it now. However the proceedings be served upon the applicants.

S.M GITHINJI

JUDGE