REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. 42 OF 2014

AMPATH PROGRAMME MANAGEMENT.....APPELLANT

VERSUS

JOHN NJUGUNA GITAU.....1ST RESPONDENT

VERONICA WANGARE.....2ND RESPONDENT

RULING

1. AMPATH PROGRAMME MANAGEMENT (the 2nd defendant/ applicant) by an application dated **26th June 2014** supported by the affidavit sworn by **PROFESSOR SYLVESTER KIMAIYO** seeks stay of proceedings in **ELD CMCC no. 877 of 2007** pending the determination of the appeal filed herein. The application is based on the grounds that the **applicant** filed a notice of motion dated **11th September 2013** seeking review of the order of **18th October 2010 by Hon. E.A Obina SRM**. The application for review is necessitated by what is described as an apparent error on the face of the record where the court had dismissed an earlier application seeking to amend the plaint and enjoin a 2nd defendant (who is the applicant herein).

2. The application heard on merit by Hon. Mmasi and the court held that it was ***functus officio*** since judgment had already been entered in the matter and the plaintiff could not enjoin the party to the suit after judgment. The plaintiff never appealed the ruling.

3. Later the respondent again sought orders vide an application of **30th May 2012** to enjoin **Ampath Programme Management** as a 2nd defendant, and on **18th October 2012** the court allowed the plaintiff to enjoin the **2nd defendant** despite the application being ***res judicata.***

4. As a result, there are now two conflicting rulings in the court record yet the court was functus officio as there was a judgment delivered in **ELD HCCA 81 of 2008** and an appeal which was dismissed and the judgment upheld.

5. The **2nd defendant/applicant** filed an application dated **11th September 2014** seeking a review of the order dated **18/10/2012** granting leave to enjoin **Ampath Medical Programme** which was heard by the lower court on **28/1/2014**. The application was dismissed when it came up on **10/3/2014.** The appellant being dissatisfied with the ruling filed the present appeal.

6.The appellant's application seeking orders of review of the order dated 18/10/2012 was dismissed on the grounds that the court did not have jurisdiction to entertain the application of the two predecessor magistrate of similar jurisdiction. This it is argued, was contrary to order 45 rule 3.

7. That unless stay is granted the appeal will be rendered nugatory and the defendant/applicant stands to suffer irreparable loss. That the respondent is inclined to further prosecute the case against the 2nd defendant and in violation of the order if 24th November 2012 and the subsisting judgment in **ELD HCCA 81 of 2008**. The said judgment is more conclusive against the 1st, 2nd and 3rd defendants who were sued on behalf of **Ampath Programme Management**.

8. The applicant filed a supporting affidavit stating that the 1st respondent's claim against the 1st, 2nd and 3rd defendant was dismissed while the claim against the 4th defendant succeeded. The gist of the application is that the applicant is seeking stay on the proceedings in the lower court pending the appeal against the orders of the trial court to enjoin the appellant herein as a party to the suit.

9. The respondent filed a replying affidavit dated 12th September 2014, and in invoking the provisions of Order 42 Rule 6 in determining orders for stay, which includes a demonstration of:

- substantial loss;
- sufficient cause
- absence of unreasonable delay
- tendering of security that is ultimately binding.

It is contended that the appellant has not met the threshold set out under the provision. That the issues the applicant has can be raised in the lower court during the hearing of the suit. Further, that the judgment having been set aside did not preclude him from carrying out any pre-trial formalities including the lodging of an application to suitably amend the plaint or enjoin additional parties. It is contended that **res judicata** cannot apply where the judgment has been vacated by the court paving the way for retrial of the action **de novo.**

10. The applicant is faulted as having no locus to challenge the decision arrived at to set aside the judgment pursuant to the motion originated by the 2nd respondent as it was not a party at the time the motion was made. In the premises the appellant should comply with pre-trial requirements and agitate its case in the lower court.

11. Further, that there was undue delay in bringing the motion for stay as the decision subject of the decision 10th March 2014 and the application was filed on 27th June 2014, over 4 months later. No offer for security was made and the respondent shall suffer prejudice by delay in prosecuting the claim which is over 7 years old.

ISSUES FOR DETERMINATION

a. Whether the applicant has met the threshold for orders of stay.

WHETHER THE APPLICANT HAS MET THE THRESHOLD FOR ORDERS OF STAY TO BE GRANTED

Order 42 Rule 6 of the Civil Procedure code provides;

No order for stay of execution shall be made under sub rule (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.**

12. Under what circumstances did the lower court end up with what the applicant terms as two conflicting decisions? The respondent says what appears as a revised decision by the same court was actually a setting aside of a judgment, and res judicata could not apply in the remotest sense. That the decision by the High Court dismissing the respondent's appeal did not bar the 2nd respondent from filing a motion challenging the judgment on want of a retainer.

13. When the matter was determined by G. M'masi (SRM) on 17/7/2008, she entered judgment in favour of the respondent as against the 4th defendant **(VERONICAH WANGARE)** and awarded damages in favour of the respondent (at that time, the appellant was not a party in the suit). The suit against the other three defendants was missed. An appeal to the high court upheld the findings of the lower court.

14. By an application dated 25th July 2011, the appellant sought before the trial court to be enjoined as a party to the suit, and by a ruling dated 24/11/2011, the prayer was rejected on grounds that judgment had already been delivered and the matter finalized, so the court lacked jurisdiction to allow the prayers.

15. Later on the matter was taken over by OBINA (SRM), who upon perusing the record concluded that the 4th defendant thereafter prayer to enjoin the applicant herein was not opposed by the 4th defendant, and that effect meant the trial court allowed the application, thereby setting aside the judgment which had been entered against the 4th defendant. When did this happen? There was no reference to a date, and a perusal of the record shows that the learned magistrate misapprehended the orders made on 24/11/2011. The magistrate made reference to the proceedings of 14/7/11, as the basis for his conclusion and thus allowed the prayer for joinder.

16. On 14/7/11, none of the parties entered into a consent, and there were submissions made where the plaintiff (now respondent) had sought to join **AMPATH**, but this was opposed by all the parties except the **4th defendant (VERONICAH)**It is important to note that at no point did the applicant herein or the 4th defendant (VERONICAH) ever apply for setting aside the judgment. The orders by **G. M'masi (SRM)** made on 24/11/2011 read in part as follows:

> **"…The court cannot enjoin a party to a suit which has been finalized. The applicant is asking for leave to enjoin Ampath as a defendant. This court lacks jurisdiction to grant such an order as the matter has been finalized and judgment was delivered 4 years ago. The court declines to grant the orders sought and herewith dismisses the application…"**

The entire interpretation leading to the orders of 18/10/2012 is, with the greatest of respect to the honourable magistrate misconstrued, and totally irrational.

The respondent averred that the delay of 4 years is unexplained. In **UTALII**

TRANSPORT COMPANY LIMITED & 3 OTHERS –VS- NIC BANK & ANOTHER (2014) e KLR the court stated that: -

> **"... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ..."**

In my opinion the period of 4 years does amount to inordinate delay.

The applicant has not proposed anything with regards to security for costs in his application either. In the premises, a strict application of **order 42** would result in the application failing. The lower court was functus officio, and had no basis whatsoever for the interpretation he gave. The application lacks merit and is dismissed with costs to the respondent.

Delivered, Signed and Dated this 5th day of September 2019 at Eldoret

H. A. OMONDI

JUDGE