



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO. 4 OF 2016

WYCLIFFE ODARI MWAVALI.....PLAINTIFF

VERSUS

NAROK COUNTY COUNCIL.....1ST DEFENDANT

KESIKE OLE WOTUNI2ND DEFENDANT

RULING

1. This application was brought under certificate of urgency by the defendants and was certified as such. It was brought by way of notice of motion pursuant to Order 42 rule 6(2) Order 45 rule 1(1)(a), rule 2(1) Order 51 rule 1 of the Civil Procedure Rules of 2010 as read with section 3A, 80 (a) of the Civil Procedure Act and article 159 of the 2010 Constitution. The application seeks an order of stay of execution of the judgement and decree of this court dated 20/11/2017, which arose from a consent judgement entered on 1/11/2017, pending the hearing and determination of this application. It also seeks an order that the consent judgement be reviewed and set aside on the ground that it was illegitimately procured. Finally, it seeks that costs in the application be costs in cause.

2. The application is supported by 9 grounds, which are set out on the face of the notice of motion and the supporting affidavit of Simon Mukwe Sophia on behalf of the 1st defendant. The major grounds upon which the application is based are as follows.

1. The defendants have stated that the plaintiff's former advocate on record, M/S Maritim & Co. Advocates without colour of right and instructions from the defendants entered into a consent dated 1/11/2017 with the plaintiff's advocates. As a result, a consent judgement was pronounced by which the plaintiff conceded to 95% liability and was to be paid damages in the sum of Sh.50 million.

2. The defendants state that their former advocates acted contrary to their instructions.

3. That by virtue of the consent judgement the plaintiff has now filed a final notice of execution dated 18/1/2018 and for that reason the defendants are apprehensive that the attachment and sale of their properties are eminent.

4. The defendants state that unless an order of stay of execution is granted, reviewed and set aside, the defendants are likely to suffer substantial damage. Finally, the applicant has stated that this court has jurisdiction to review its decision where no appeal has been preferred.

3. In addition to the grounds in support of the application, the defendants deputy county secretary

deponed to the following major matters.

1. He has deponed that he is the Deputy County Secretary of the 1st defendant and has the knowledge of the matters that are in dispute.
2. He has deponed that on 23/1/2017, the defendants were served with a final notice of execution of a decree by the court Bailiff and as a result, he perused the court file and to his surprise, it became apparent that their former advocates on record M/Maritim and Co. Advocates had entered into a consent without instructions from the defendants.
3. He has also deponed that the defendants did not at any point in time give instructions to enter into the consent judgement with the plaintiff's advocates.
4. He has further deponed that the judgement and decree arising from the consent dated 20/11/2017 is null and void.
5. It is for those reasons that he has applied to this court to have the judgement and decree with all consequential orders to be set aside pending the hearing and determination of this application.

4. Counsel for the defendants has filed written submissions in which he has cited a number of authorities, which I have considered.

5. Counsel for the plaintiff has filed 2 grounds and a preliminary objection in opposition to the application, which I have also considered together with the authorities cited by counsel. She has submitted that the consent judgement between the parties amounted to a contract and by virtue of that, this court became *functus officio*. She has further submitted that following the adoption of the consent by the court as its judgement, she proceeded with the execution processes.

6. In the light of the affidavit evidence and the rival submissions of both counsel, I find the following to be the issues for determination

1. Whether or not this court is *functus officio*
2. Whether or not this court has jurisdiction to review the impugned judgement.
3. Whether or not the defendants have made out a case for the grant of an order of stay of execution.
4. Who bears the costs of this application?

7. Issue No. 1 and 2

I have considered the preliminary objection of counsel for the plaintiff that this court has no jurisdiction to review its judgement and decree. I find that the court is empowered by section 80 (a) of the Civil Procedure Act [Cap 21] Laws of Kenya to review its judgement and decree. There are further enabling provisions in Order 45 of the 2010 Criminal Procedure Rules, which similarly authorize this court to review its judgement and decree for sufficient good cause amongst other grounds.

8. I find from the unopposed affidavit evidence that the defendants have shown sufficient good cause to review the consent judgement. There are enabling provisions in Order 45 of the 2010 Civil Procedure Rules. In the circumstances, I find that this court has jurisdiction to review its judgement. I further find that this court has not become *functus officio*. I therefore find in favour of the defendants that there is jurisdiction in this court to review the impugned judgement.

9. Issue No. 3

I find from the unopposed affidavit evidence that the plaintiff/respondent is in the process of executing the decree following the entry of a consent judgement. I find that the execution is imminent. In the circumstances, I find that unless an order of stay of execution is granted, the defendants are likely to suffer substantial damage. I therefore find that the defendant/applicant have made out a case for grant of an order of stay of execution pending the hearing and determination of this application.

10. Issue No. 4

I have considered the issue of costs and I find that costs of this application would be costs in cause.

Ruling delivered in open court on this 6th day of February, 2018 in the presence of Ms Muigai for the plaintiff and Mr. Kamwaro holding brief for Mr. Kemboi for the defendants.

J. M. Bwonwonga

Judge

6/2/2018