



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

COMMERCIAL CASE NO. 83 OF 2018

(FORMERLY ELC CASE NO. 269 OF 2017)

BETWEEN

ERI LIMITED.....PLAINTIFF/APPLICANT

AND

EQUITORIAL COMMERCIAL BANK

(Formerly Southern Credit Banking Corporation Limited)....1ST DEFENDANT/RESPONDENT

ZAINUL GALIB VELJI.....2ND DEFENDANT/RESPONDENT

RULING

Background

1. By a ruling dated 8th September, 2016, the Plaintiff/Applicant's suit was struck out with costs.

Application

2. On 27th August, 2018, the Applicant filed a Notice of Motion under certificate of urgency seeking the following orders:

1. Application be certified urgent

2. Stay of execution pending the hearing and determination of the application

3. Stay of execution pending the hearing and determination of the Plaintiff/ Applicant's appeal

4. Costs be provided for

3. The application is based on grounds among others that the Plaintiff/Applicant has received documents from the Land Registrar Kisumu to the effect that the registration of Land Parcel No. Kisumu Municipality/Block 12/265 in the name of the 2nd Defendant/Respondent was fraudulent and that the appeal will be rendered nugatory if stay is not granted.

4. The application is supported by an affidavit sworn on 27th August, 2018 by Rasik Lavji Sanghrajka who describes himself as a director of the Plaintiff/Applicant in which he reiterates the grounds on the face of the application.

5. The application was heard *ex parte* on 27th August, 2018 and an order of stay pending the hearing of the application was granted on condition that the Plaintiff/Applicant deposits the taxed costs into a joint interest earning account to be operated by both advocates for Applicant and 2nd Respondent within the next 25 days of the date of issue.

6. The 2nd Defendant/Respondent opposed the application on the basis of grounds of opposition dated and filed on 10th September, 2018. The main ground of opposition is that this application is *res judicata* for the reason that a similar application dated 5th October, 2017 was heard and dismissed on 2nd May, 2018.

Submissions by parties

7. On 17th October, 2018, this court directed the parties to file and exchange submissions which order the parties dutifully complied with.

Plaintiff/Applicant's submissions

8. It was submitted for the Plaintiff/Applicant that it has an arguable appeal and that it will suffer substantial loss if the court does not exercise its discretion in its favour by issuing a stay order. It was further submitted that the applicant is willing to give security for due performance of the decree by depositing the taxed costs in an interest earning account in the names of both advocates as was previously ordered by this court. The Plaintiff/Applicant submitted that the application dated 5th October, 2017 and the current application are different in that the former sought orders for stay of proceedings while the latter seeks stay of execution.

9. In further support of its case, the Plaintiff/Applicant placed reliance on the law and the following authorities:-

i. Section 3A, 1A and 1B of the Civil Procedure Act

ii. Order 42 rule 6(1) and (2) of the Civil Procedure Rules

iii. ***Mombasa Technical Training Institute v Agnes Nyevu Charo & others [2012] eKLR*** in which the Court of Appeal set out the principles for granting or refusing an application for stay of execution pending appeal.

iv. ***Jayantilal Dharamshi Gorsrani v Kenya Oil Company Limited [2010] eKLR*** where the Court of Appeal held that the first test in an application for stay pending appeal should be whether the applicant will suffer substantial loss unless the order of stay is issued

v. ***Butt vs. the Rent Restriction Tribunal [1982] KLR 417*** where the Court held that the power of the court to grant or refuse an application for a stay of execution is a discretionary power that should be exercised in such a way as not to prevent an appeal.

vi. ***Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Job Kilach [2003] eKLR*** where the Court of Appeal held that a stay order ought to be granted if failure to do so will render the eventual success of the intended appeal nugatory.

vii. ***John Martin Ndirangu & Another v Gitari Cyrus Muraguri [2001] eKLR*** and ***Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd (2002) 1 EA 227*** where the Court of Appeal held that where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory

viii. On security, the Plaintiff/Applicant relied on the case of ***Nduhiu Gitahi and Another –Vs- Anna Wambui Warugongo (1988) 2 KAR***

2nd Defendant/Respondent's submissions

10. The 2nd defendant/respondent's maintains that the application is res judicata and submitted that the Plaintiff/Applicant has not responded to that contention and urged the court to strike out the application.

11. It was also submitted that this application is word for word almost similar to application dated 5th October, 2017 that was dismissed and is therefore an abuse of the court process.

12. It was additionally submitted that the Plaintiff/Applicant has neither offered security nor proved that the 2nd Defendant/Respondent is not in a position to refund the decretal sum in the event that the appeal succeeds and that the submission on these two issues amounts to evidence from the bar since it was not particularly averred by the applicant.

13. Finally, the 2nd Defendant/Respondent submitted that the application is misconceived since the Plaintiff/Applicant seeks to stay recovery of costs which it has not challenged.

14. In further support of its case, the 2nd Defendant/Respondent placed reliance on the following authorities:-

1. Section 7 of the Civil Procedure Act

2. ***Antoine Ndiaye v African Virtual University [2015] eKLR***

3. ***Giant Holdings Limited v Kenya Airports Authority [2010] eKLR*** and ***Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004*** where the Court of Appeal held that where the High Court has dismissed an application, the Superior Court does not grant any positive order in favour of the Respondents which is capable of execution.

4. ***Francis Kabaa v Nancy Wambui & another [1996] eKLR*** where the Court of Appeal held that stay cannot be granted in respect of costs

Analysis and Determination

15. I have considered the notice of motion in the light of the affidavits and grounds of oppositions on record and submissions by both parties.
16. I have also considered the provisions of **Section 7** of the **Civil Procedure Act, Cap 21** and **Order 42 (6)** of the **Civil Procedure Rules**. This application turns principally on two issues namely the doctrine of res judicata and whether applicant is deserving of the order for stay of execution. I commence my analysis by examining the principle of res judicata.
17. **Section 7** of the **Civil Procedure Act, Cap 21** states as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

18. The following cases show that the doctrine of res judicata is held with reverence in legal practice. In ***Hoystead and Others v Taxation Commissioner, (1925) ALLER REP 56 at 62*** it was stated that: -

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact;..... Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted....”

19. I am equally persuaded by the words of the Court of Appeal of Tanzania in ***Lotta Vs Tanaki & Others [2003] 2 EA 556 (CAT)*** where the Court held as follows with regard to the doctrine of res judicata;

“Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit”. Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”. See also ***E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR.***

20. The plaintiff/Applicant’s application dated 5th October, 2017 sought orders for stay of proceedings pending the hearing and determination of its appeal. By a ruling dated 2nd May, 2018, the court dismissed the application on the ground that there was no proceeding pending before the court capable of being stayed. The court in its ruling also found that the application did not seek orders of stay of execution. From the foregoing therefore, I find that this application is not res judicata as submitted by the 2nd defendant/respondent.

21. The second issue is whether the Plaintiff/Applicant is deserving of the order for stay of execution under the provisions of Order 42 (6) of the Civil Procedure Rules.

22. It is clear that all that this Court did in the ruling dated 8th September, 2016 was to strike out the Plaintiff/Applicant’s suit with costs to the 2nd defendant/Respondent.

23. The costs were taxed and a certificate of costs dated 9th February, 2018 for the sum of Kshs. 665,831/- was issued on 29th June, 2018.

24. It is not disputed that to date, the Plaintiff/Applicant has not challenged the decision of the taxing officer and the costs are therefore due and owing.

25. As stated hereinabove, the Plaintiff/Applicant was on 27th August, 2018 granted a temporary order of stay pending on condition that it deposits the taxed costs into a joint interest earning account to be operated by both advocates for Applicant and 2nd Respondent within the next 25 days of the date of issue. To date, the said order has not been complied with.

26. I have considered the decisions in ***Giant Holdings Limited v Kenya Airports Authority*** (supra) and ***Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others*** (supra) and I am persuaded that this court having struck out the Plaintiff/Applicant’s suit does not have jurisdiction to grant any positive order in favour of the Plaintiff/Applicant which is capable of execution.

27. I am equally persuaded by the decision ***Francis Kabaa v Nancy Wambui & another [1996] eKLR*** that this court cannot grant a stay in respect of costs.

28. The Plaintiff/Applicant has not demonstrated that execution for costs will render its appeal nugatory. In my view the 2nd Defendant/Respondent is enforcing his rights accruing from a lawful order of this court. As long as he is using lawful means, this Court cannot restrain him from doing so by an order of stay of execution.

DISPOSITION

29. It is not sufficient for the Plaintiff/Applicant to merely state it has an appeal that is arguable and will be rendered nugatory if stay is not granted. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. A stay order would mean that the *status quo* should remain as it were before the Ruling that struck out the suit and that would be denying a successful litigant the fruits of its judgment. The Plaintiff/Applicant has not given to the Court sufficient cause to enable it to exercise its

discretion in granting the order of stay.

30. In the premises, I find no merit in the Notice of Motion dated 27th August, 2018 and the same is dismissed with costs to the 2nd Defendant/Respondent.

DATED, DELIVERED AND SIGNED THIS 6th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Plaintiff/Applicant - Mr Achura

For 2nd Defendant/Respondent - Mr Ragot/Mr Otieno