



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO 4 OF 2013
CONSOLIDATED WITH
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL CASE NO 323 OF 2013
AND
IN THE SUPREME COURT OF KENYA AT NAIROBI
PETITION NO 19 OF 2014

WAVINYA NDETL.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

ISAACK HASSAN.....2ND RESPONDENT

THE MACHAKOS COUNTY RETURNING OFFICER.....3RD RESPONDENT

ALFRED NGANGA MUTUA.....4TH RESPONDENT

BERNARD MUIA TOM KIALA.....5TH RESPONDENT

RULING

1. Before the Court is an application by the Petitioner dated 19th March, 2018 brought under the Provisions of **Order 22 Rule 12(2) and 22(1), Order 40 Rules 1(a), 4(1) & (2) and Order 51 Rule 1** of the *Civil Procedure Rules*, **Sections 3A and 63(c) & (e)** of the *Civil Procedure Act* and all other enabling provisions of the law. The Court granted interim stay of execution sought by the Petitioner at paragraph 5 and prayer 3 having been already spent, what the Petitioner now seeks are prayers 4, 6, 7 and 8 of the application as follows:

4. THAT pending the determination of this application, the Honorable court be pleased to grant a temporary injunction restraining the 4th and 5th Respondents herein by themselves or their employees, servants, agents, assigns, auctioneers or any other person whomsoever from proclaiming, attaching, removing, selling, auctioning or dealing adversely in any way whatsoever with any of the Applicant's property.

6. THAT in the alternative to prayer 4 above, pending the determination of this application this honorable court be pleased to grant stay of execution of the purported Certificate of Costs passed on 31st July 2017 for Kshs 4,713,540.00

7. THAT this honorable court be pleased to order that the costs rightly due to the 4th and 5th Respondents in Court of Appeal Election Petition Appeal No 323 of 2013 and Supreme Court Petition No 19 of 2014 and the balance of Costs in High Court Election Petition No 4 of 2013 be paid by consecutive monthly installments of Kshs 100,000

8. THAT costs of this application be provided for".

2. The application is predicated upon the grounds as set out therein and further supported by the Affidavit of **Wavinya Ndeti**. In the grounds of the application, the Petitioner/Applicant avers that the 4th Respondent instituted insolvency proceedings against the applicant and issued a defective statutory demand, and pending the insolvency proceedings have proceeded to execute without serving her with the Certificate of Costs as taxed by the taxing master on 31st July, 2017. It is the Applicant's apprehension that she stands to suffer loss, damage and prejudice should the Respondent proceed with the execution. In the supporting Affidavit sworn on 19th March, 2018, the deponent further depones as to her apprehension of the detriment that she stands to suffer should the prayers sought not be granted. Further, that the execution by attachment and proclamation is on a non-existent purported certificate of costs. She seeks to be ordered to pay the costs that are rightly due to the 4th and 5th Respondents by way of installments.

3. In opposing the application dated 19th March, 2018, the Respondent filed Replying Affidavits of **Dr Alfred Nganga Mutua**, dated and sworn on 4th April, 2018 and 31st May, 2018. It is contended that the application is brought in bad faith; it seeks to reconsider the final orders made on 3rd November, 2017. It is deponed that the advocates who were acting for the Applicant as at 17th June 2015 were served with the certificate of taxation; the certificate of taxation in the court of appeal and Supreme Court were forwarded together with letters dated 10th May, 2017 and 3rd July, 2017. The Respondent was therefore justified to proceed with execution because vide a ruling dated 3rd November, 2017 a consent was entered into dated 26th July, 2016 and it provided for a default clause. Further, the Respondent avers that the honorable court has no jurisdiction to stay execution of costs granted in 2 superior courts. The instant application is a further attempt by the Applicant to proliferate litigation.

4. The crux of the Petitioner's application is contained at paragraph 4 in the grounds adduced in support of the application. the aforementioned paragraph reads:

“4.The applicant has never been served with the purported Certificate of Costs passed on 31st July, 2017 requiring her to pay the 4th and 5th Respondents a sum of Kshs 4,713,540.00 if at all”.

5. The Applicant contends that the Respondent failed to follow the provisions of Section 21(1) and (2) of the Insolvency Act, by applying execution 2 months after filing the application for bankruptcy order against the applicant and yet the said sections stop and or prohibit any execution process upon a creditor upon filing an application for bankruptcy order, therefore the warrants and execution have no basis in law. She relied on the case of **Standard Chartered Bank Ltd v Jenipher Atieno Odok, Kisumu HCCC 120 of 2003**.

6. In justifying why she is entitled to an injunction, the petitioner on the case of **Giella v Cassman Brown (1973) EA 358**, and submitted that the suit property is in imminent danger of being wasted, damaged or wrongfully sold in execution of a decree by the Respondent. She requested the court to exercise its discretion.

7. Counsel for the Applicant also submitted that under **Orders 22 rule 12(2) of the Civil Procedure Rules**, the court may order payment vide installments upon application and upon sufficient cause being shown to the honorable court, he submitted that the applicant has been paying Kshs 200,000/- and 100,000/- every month and where there has been delay, they have given sufficient and reasonable reasons.

8. The Respondent in his Replying Affidavit stated that the consent dated 26th July, 2016 that was executed provided for a default clause. It is submitted that the applicant failed to honor the consent and the same has not been set aside, therefore the 4th Respondent has every right to execute. Further that the Honorable Court has no jurisdiction to pronounce itself on payment by installments for the matter is *res judicata*, having already been decided upon vide the dismissal on 3rd November, 2017 on a similar application made by the applicant on 9th February, 2017.

9. The 4th Respondent submitted that the validity of the execution in light of Section 21 of the Insolvency Act was sustained vide the withdrawal of the Insolvency Petition on 11th July, 2018. Therefore the issue of validity of the execution is a non-issue in this application dated 19th March, 2018 that should not be considered for it has been overtaken by the event of withdrawal.

10. The 4th Respondent submits that the applicant was duly served with all the certificate of costs and all through was aware of the said Certificate therefore should not be allowed to hide behind the pretext of non-service. Reliance was also placed in **Shimmers Plaza Ltd v National Bank of Kenya (2015) eKLR** with regards to the finding that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. A copy of the aforementioned case was attached to the bundle of authorities submitted by the 4th Respondent.

11. The 4th Respondent's Counsel submitted that the Applicant has not satisfied the requisite conditions for grant of stay of execution sought. In submitting that there is no prima facie case, learned counsel relied on the definition in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR**. She further submitted that the only substantive prayer is the application to pay via installments but the said prayer is contradictory for it admits the costs on one hand and with the hand takes away the same costs by disputing service of the Certificate of Costs. On the issue of irreparable injury learned counsel submits that the applicant by being granted the interim orders has barred the 4th Respondent from enjoying the fruits of his judgment and there is no existence of an intention to appeal, review or challenge the certificate of costs and no security has been furnished. She submits that the damages would adequately compensate the applicant if an injunction is not issued; that the balance of convenience tilts in the favor of the 4th Respondent for he is being denied his right to enjoy a well-deserved judgment. All in all, she prays that the Petitioners application be dismissed with costs to the 4th Respondent.

12. From the foregoing, the issue to be determined is whether the applicant is entitled to the remedies sought.

13. From the pleadings it may be inferred that the applicant was aware of the Certificate of Costs; that the Insolvency Petition was withdrawn on 11th July, 2018 and a similar application to this was dismissed on 3rd November, 2017. It is not on record whether there was a setting

aside of the consent entered into by the parties dated 26th July, 2016 that resulted in dismissal of the application for payment by installments. It seems therefore, in accordance with the 4th Respondent's averments, that there was a valid and binding consent in existence that has not been complied with. **Order 25 Rule 5 of the Civil Procedure Rules** provides for the compromise of a suit, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith. The effect of this action was that the consent order becomes an order of the court upon being endorsed by the Court, and it consequently became subject to the law governing the discharge of court orders and decrees. Under the Civil Procedure Act such discharge can only be by way of appeal from the order, or review and setting aside of the order. It is in this respect to be noted that under section 67(2) of the Civil Procedure Act, that no appeal shall lie from a decree passed by the court with the consent of parties. The only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. There was no such review sought by the Applicant in the present case to set aside the consent order, and neither was there any consent by the parties herein that the Petitioner be discharged from the consent order. In the circumstances, the terms of the said consent order are still subsisting and in force and which validate the application for execution and the warrants and proclamation that the applicant seeks to challenge. The application is a veiled attempt at denying the 4th Respondent the fruits of the Judgment and in the absence of an application by the applicant to extend time to comply with the same, this court cannot grant an order of stay of execution. Further, the input of Section 7 of the Civil Procedure Act prevents this court from pronouncing itself on the application for payment via installments since a similar one had been made and determined.

14. The grant of stay Orders is discretionary, and the same will not be issued if the applicant has not shown sufficient cause. **Order 22 Rule 22 of the Civil Procedure Rules** is operative in an application for stay of execution. In the present suit the applicant has alleged she was not served with the Certificate of Costs, which I am unable to agree with, for the respondent had annexed copies of letters notifying her of the same, and she has been participating in the proceedings that led to the application for payment via installments that I earlier dismissed. Therefore such allegation is not only misleading the Court, but also imputes conducting the suit in a mischievous manner. The mischief in this case would seem to be its fervent attempt at keeping the 4th Respondent away from enjoying the fruits of his judgment. For this reason, the Applicant has not shown or established sufficient cause for the Court to grant a stay of execution of the Certificate of Costs.

15. With regard to the application for an injunction, the applicant has rightly quoted the *locus classicus* in **Giella v Cassman Brown (1973) EA 358**. The applicant has not shown that there is a prima facie case because, as pointed out by the 4th respondent, the remedy of paying by installments is double-voiced. The applicant seeks to pay the costs on one hand and disputes the said costs on the other and an injunction being an equitable remedy, he who seeks equity must do equity. With regard to the aspect of irreparable harm, the applicant has stated that she is a widow, her property is at risk of being wasted, the 4th respondent has stated that damages may adequately compensate the Applicant therefore she is not entitled to an injunction. The onus to demonstrate that she is entitled to an injunction falls squarely upon her and she has not done so and based on my above arguments, the applicant has failed to fulfil the requirements for grant of an injunction. The balance of convenience tilts in favour of the 4th Respondent who has a valid judgement after all the petitioner's appeals were dismissed and further by a valid consent which has not been varied or set aside. Hence I find the prayer for an order of injunction by the Applicant is not merited.

16. The Applicant challenges the validity of the execution herein in light of the fact that the 4th Respondent upon mounting execution of the decree has again filed for bankruptcy of the Petitioner and that being the case the Provisions of Section 21 of the insolvency Act bars any further execution. Section 21 of the insolvency Act provides as follows:-

- 1. A creditor who makes an application for a bankruptcy order in respect of a debtor may not issue an execution process against the debtor in respect of the property of the debtor to recover a debt on which the Application is based.**
- 2. If the creditor has already issued the execution process, the creditor may not continue it.**
- 3. The creditor may make an application to the relevant court for approval to issue or continue the execution process**
- 4.**
- 5. Any action taken in contravention of subsection (1) or (2) is void.**

The 4th Respondent has averred that he has since withdrawn the bankruptcy petition on the 11/7/2018 as per annexure "ANM1" in the Supplementary Affidavit. Hence upon withdrawal of the bankruptcy petition by the 4th respondent, I find that there was no bar to the execution of the decree. Indeed Section 24 of the insolvency Act provides that no restriction on execution process if bankruptcy application is withdrawn or dismissed. It follows therefore that upon the withdrawal of the bankruptcy petition by the 4th Respondent, the pending execution processes were to proceed from where they had reached. Hence Section 21 of the insolvency Act is inapplicable in the circumstances as contended by the Petitioner/Applicant in challenging the execution process as the same has already been overtaken by events namely the aforesaid withdrawal. The execution process was validated by the said withdrawal of the bankruptcy petition.

17. The decretal sums involved herein is a huge sum by any standards. The petitioner has not paid even a fraction of the said sum despite the fact that she has exhausted all the appeal processes. She has entered into a consent on the mode of payment with default clause which consent is still in force. A similar application to pay by instalments has since been dismissed by this court. It is therefore clear that the present application is only meant to keep the 4th Respondent away from realizing the fruits of the judgment. Consequently, I find the Petitioner/Applicant's application dated 19/3/2018 lacks merit. The same is dismissed with costs to the 4th Respondent.

It is so ordered.

Dated, signed and delivered at Machakos this 4th day of December, 2018.

D.K. KEMEI

JUDGE