



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CIVIL CASE APPEAL NO. 2 OF 2017**

**JOSEPH NGOTH.....1<sup>st</sup> APPELLANT**

**NASSIM KASSIM.....2<sup>nd</sup> APPELLANT**

**SWEET WATERS AFFORDABLE HOUSING SERVICES LIMITED....3<sup>rd</sup> APPELLANT**

***Versus***

**ESTHER GITONGA.....RESPONDENT**

**RULING**

1. **Joseph Ngotho, Nassim Kassim and Sweetwaters Affordable Houses Services Ltd** are the three appellants in this appeal. The three appellant were sued by the respondent Esther Gitonga before Nanyuki Chief Magistrate's Court in Civil Case No. 3 of 2017. A Ruling was delivered before that court on 7<sup>th</sup> March 2017 whereby the said court made the following orders:

1. ***THAT*** a temporary injunction is hereby granted restraining the defendants, jointly or severally, their servants, workmen and /or agents, from trading, carrying out, serving, working as or conducting the business of a contractor while not registered as such as required under Section 15 of the National Construction Authority Act, 2011 either from the offices of the 3<sup>rd</sup> defendant in Nanyuki Town or elsewhere in Kenya pending the hearing and determination of this suit.

2. ***THAT*** a temporary injunction is hereby granted, restraining the defendants, jointly or severally, together with their servants, workmen and/or agents, from holding themselves out or advertising and/or marketing themselves as contractors on any print, electronic or social media including Facebook or Twitter, while not registered as such a required by Section 15 of the National Construction Authority Act 2011, pending the hearing and determination of this suit.

3. ***THAT*** a mandatory injunction is hereby granted, directing the defendants, jointly and/or severally to repair and/or remedy the defective workmanship and substandard materials used for the construction of the plaintiff's house, at their own cost.

4. ***THAT*** the defendants are hereby ordered to immediately register the Plaintiff/Applicant's said project with the National Construction Authority as required under Rule 17 (1) of the National Construction Authority Regulations 2014.

5. ***THAT*** this matter be mentioned on the 20<sup>th</sup> of March 2017 to confirm compliance with the

above stated orders.

2. The appellants were aggrieved by the Ruling of 7<sup>th</sup> March 2017, the subject of the extracted order reproduced above, and accordingly filed this appeal pending the hearing and determination of this appeal. Appellants have sought, by their Notice of Motion application dated 17<sup>th</sup> March 2017, stay of execution of those orders, of 7<sup>th</sup> March 2017.

3. That Notice of Motion is supported by the affidavit of Joseph Ngotho dated 17<sup>th</sup> March, 2017. It is important to reproduce that affidavit to better understand the arguments raised by the appellants. It is in the following terms:

- **THAT** the Honourable Court at Nanyuki delivered a ruling in C M C Civil Case No. 3 of 2017 on 7<sup>th</sup> March 2017 in favour of the Respondent in respect of the Notice of Motion Application dated 19<sup>th</sup> January, 2017 and it accordingly issued an order of the same. **(Annexed hereto and marked “JN1” is a copy of the order dated 7<sup>th</sup> March 2017)**
- **THAT** upon being aggrieved by the decision of the Learned Honourable Magistrate E. Ngigi the 2<sup>nd</sup>, 3<sup>rd</sup> Appellants and I instructed our advocates on record to lodge an appeal against the said Ruling and order and they accordingly lodged a Memorandum of Appeal in the High Court of Kenya at Nanyuki which appeal was admitted as High Court Civil Appeal No. 2 of 2017 **(annexed hereto and marked “JN2” is a copy of Memorandum of Appeal).**
- **THAT** I have been informed by our advocates on record which information I verify believe to be true that my Appeal is meritorious as it raises serious issues of law and fact and has very high chances of success.
- **THAT** if execution and enforcement of the order issued on 7<sup>th</sup> March, 2017 was to proceed the Appellants/Applicants will suffer substantial irreparable loss and damage and their appeal will be rendered nugatory and the same will amount to an academic exercise.
- **THAT** the lower court matter is coming up for mention on 20<sup>th</sup> March, 2017 and Applicants are likely to be cited for contempt while in fact the order issued by the trial court on 7<sup>th</sup> March, 2017 on one hand bars them from undertaking the task that they were ordered to perform while on the other end directs them to perform the forbidden task.
- **THAT** it is therefore meet and just that a stay of execution of the order issued on 7<sup>th</sup> March, 2017 pending the hearing and determination of this appeal be granted to prevent the ends of justice from being defeated.
- **THAT** the respondent will not suffer any prejudice if the Orders prayed for herein are granted.
- **THAT** this application has been brought without undue delay.
- **THAT** I make this affidavit in support of my application herein and prayed that the same be allowed as prayed.

4. Learned the Counsel Mr Mukhama in his submissions in support of the application stated that the Learned trial Magistrate erred to have issued a mandatory injunction at the interim stage which he said was a final order and should not have been granted. Counsel also argued that the trial court's orders were contradictory because on one hand the orders restrained the appellants from carrying on business and on the other hand required the appellant to carry out repairs at the respondent's house. Counsel further argued that the appellants could not register with the National Construction Authority because respondent had not facilitated them for such registration.

5. The application was opposed by Learned Counsel Mr Muu on behalf of the respondent. Learned counsel stated that the trial court's orders required the appellants to comply with the Law under the National Construction Authority Act No. 41 of 2011. He argued that the appellants had failed to demonstrate how they would be prejudiced if they obeyed the orders of 7<sup>th</sup> March 2017 and nor had they shown they would suffer substantial loss. In respect to the order of mandatory injunction requiring appellants to carry out repairs on respondent's house counsel submitted that the trial court had directed the appellants to keep an account of the money spent in those repair and that if the appellants succeeded at the trial the respondent would be ordered to refund that amount to the appellants

### **ANALYSIS AND DETERMINATION**

6. This court is greatly hampered by the lack of lower courts pleading, applications and affidavits and most importantly the Ruling the subject of this appeal. It is difficult to determining whether the appellants have brought themselves within the purview of **Order 42 Rule 6 2 of the Civil Procedure Rules** without those vital documents. Under that Rule it is provided that a stay of execution cannot be made unless following prerequisites are met. They are:

*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.*

7. As it will be observed from the reproduced affidavit of the appellants above, the appellant stated they will suffer if stay of execution is not granted. They however failed to state what substantial loss they would suffer if stay of execution was not ordered. It is imperative for a party seeking stay of execution pending appeal to clearly set out what loss they would suffer if that stay was not granted. In other words they need to show whether they suffer substantial loss because they lacked sufficient funds or whatever other reason. That point has been the subject of many court decisions as follows:

In the case: **JAMES WAGALWA & ANOTHER V AGNES NALIAKA CHESETO[2012] eKLR** it was stated:

*“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein –v- Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*

*“... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

That condition of granting a stay pending appeal was also subject of the decision in the case **KENYA SHELL LIMITED –VS - KIBIRU (1986) KLR 410** in that case Platt,Ag JA (as he then was) at page 416 expressed himself as follows:

*“It is usually a good rule to see if Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare event case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions of granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”*

On the part of Gachugi, Ag.JA (as he then was) at 417 he stated:

***“It is not sufficient by merely stating that the sum of Ksh. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”***

8. It was not enough for the appellants to state they would suffer loss without setting out that loss. The appellants having failed to set out that loss failed to satisfy the condition under **Order 42 Rule 6, of the Civil Procedure Rules**, for granting stay pending appeal. On that ground alone the application fails.

9. The appellant submitted that the trial court erred to have granted mandatory injunction because it amounted to a final order. The guiding principle in an application for interlocutory injunction is that the court should avoid deciding the issues of facts with finality at interlocutory stage. This was well stated in the case.

**MBUTHIA – VS – JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR 1 held**

***“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower Court Judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”***

10. In regard to mandatory injunction the rule is that it should only be granted under special circumstance and only where the case is clear. There are two cases on this point namely:

**LOCAL BALL INTERNATIONAL FINANCE LTD –VS AGRO EXPORT & OTHERS (1986) IALLER -901** where it was stated -

***“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and high standard than was required for a prohibitory injunction.”***

11. Also in the case **MALINDI AIR SERVICES –Vs-HALIMA ABDINOOR HASSAN, Kenya Court of Appeal Civil Application No. NAI 202 of 1998.** The court had this to say-

***“A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff’s case is clear and incontrovertible.***

12. This court finds itself hampered, as stated before, by lack of lower court’s pleadings and application. The appellant other than filing the extracted order of the Ruling of the trial court of 7<sup>th</sup> March 2017 did not file any other document which could have indicated what led the trial court to issue the order of 7<sup>th</sup> March, 2017. In the absence of those documents this court cannot determine whether the trial court failed to follow the principles of granting mandatory injunction as stated in the above cases.

13. On the whole the appellants application dated 17<sup>th</sup> March 2017 **is without merit and is dismissed with costs to the respondents.**

**DATED AND DELIVERED AT NANYUKI THIS 4<sup>th</sup> DAY OF APRIL 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Ndungu

1<sup>st</sup> Appellant: Joseph Ngotho .....

2<sup>nd</sup> Appellant: Nassim Kassim .....

3<sup>rd</sup> Appellant Sweetwaters Affordable housing

Services Limited .....

For Appellant: .....

For the Respondent: .....

Language: .....

**COURT**

Ruling delivered in open court.

**MARY KASANGO**

**JUDGE**