

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CIVIL SUIT NO. 30 OFO 2014

SAMUEL KAMAU

MACHARIA.....PLAINTIFF

-VERSUS-

ALI KHAN MUSES

ESTATE SONRISA LIMITED(Wrongly sued as Estate of Sonrisa Limited)

REGISTRAR – KWALE (Sued through the Attorney General).....DEFENDANTS

RULING

1. The notice of motion application filed under Order 40 rule 1, 2, 3, of the Civil Procedure and Section 1A, 3A and 34 of the Civil Procedure Act and Section 13 of the ELC Act seeks orders for this Court to re – instate orders of temporary injunction issued on 26.1.2015 and lastly extended on 20.4.2015. He urged the Court to extend the orders until the ruling of the application dated 25.1.2015 is delivered.
2. The applicant avers the orders were not extended because he had obtained stay of execution orders from the Court of Appeal for a period of 12 months which stay lapsed on 30.4.2016. He further sought that the pending ruling be given a date of delivery on priority basis. The applicant relies on the affidavit sworn by Iwona Strzelecka and the grounds on the face of the application.
3. Mrs Oluoch – Wambi advocate submitted that the Applicant is apprehensive the plaintiff may proceed with execution if the injunction orders are not re - instated. Mr Orange advocate in opposing the application submitted that if this Court addresses the issue at hand, then this Court will be interfering with the jurisdiction of the Court of Appeal. That the applicant returning to this Court is gross abuse of the Court process.
4. Mr Orange also submitted that this Court lacks jurisdiction to grant the orders sought as the applicant is asking this Court to review the decision of the Court of Appeal. He urged this Court to find the applicant mischievous and dismiss the application. Mrs Wambi in reply submitted that their application of 25.1.15 never sought application for stay of execution.
5. The question for me to determine is whether there are orders capable of being re – instated and if so whether it is within this Court's jurisdiction to re – instate them. The parties agree the order was not extended or pursued by the applicant because he had obtained a stay order from the Court of Appeal which essentially served the same purpose as the injunctive order. The applicant also annexed documents that he has filed an application for extension of the stay orders before the Court of Appeal. It comes out clear that the applicant has returned to this Court to fill the vacuum caused by the lapse of the stay orders issued by the Court of Appeal. The applicant is using both Courts to sustain a status quo. In my view this is a clear abuse of the Court process – hoping from one Court to another seeking essentially similar orders.
6. Further the applicant submitted that they did not file this application earlier because they were having stay of execution orders from the Court of Appeal. The Court of Appeal did not grant any exparte orders when the application for extension was placed before it. Will granting the orders sought amount to over stepping my mandate ? The previous orders were issued based on an application that is pending before me. Granting the order will not amount to exceeding

jurisdiction as submitted by the Respondent as it is within the subject pending my determination except that this limb of the application was not pursued by the Applicant when that application was argued inter partes.

7. The law provides that ex parte orders can only be extended by consent of the parties. That opportunity to extend those orders pending the ruling was lost when the applicant abandoned the existing orders. The said orders can only be re – instated again by consent of the parties, as provided under Order 40 rule 2. In this instance, the respondent has opposed the re – instatement of those orders. The ex parte orders having lapsed there is no order for this Court to re – instate unless by consent.
8. On the prayer that the pending ruling be delivered on priority basis, I do make an order that same will be delivered on 30th June 2016. In the interest of justice and so that the ruling pending is not rendered into an academic exercise, I do exercise my discretion under section 3 and 3A of the Civil Procedure Act and order that the execution process be halted until 30.6.16 when the ruling will be rendered. Cost of this application is awarded to the Respondent.

Ruling dated and delivered at Mombasa this 10th day of May 2016

A. OMOLLO

JUDGE