REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION AT MILIMANI

HCCC NO.461 OF 2008

GOVERNORS BALLON SAFARIS.....PLAINTIFF

VERSUS

SKYSHIP COMPANY LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAROK.....2ND DEFENDANT

RULING

Release of money deposited and conveying Guarantee

[1] I have two applications before me. One is made by 1st Defendant and is dated 15th June 2015 while the other is by the 2nd Defendant and is dated 19th June 2015. The former application is seeking for the sum of Kshs. 23,010,674 which was deposited in court through a court order to be released to;_

MAJANJA LUSENO & COMPANY ADVOCATES,

ACCOUNT NUMBER *[particulars withheld],*

[particulars withheld*] BANK LIMITED, BANK CODE *[particulars withheld],

[particulars withheld*] BRANCH, BRANCH CODE *[particulars withheld],

SWIFT CODE *[particulars withheld]*

The latter application is seeking for two significant orders, namely;

a. **An order compelling the Plaintiff to forthwith deliver the original bank guarantee issued by Cfc Stanbic Bank on 19th February to the firm of Kemboy and Company advocates**

b. **An order compelling Cfc Stanbic Head Office to forthwith pay the firm of Kemboy and Company Advocates the sum of Kshs. 23,056,164 as specified in the triplicate bank guarantee dated 19th February 2015.**

[2] Parties filed affidavits in support of their cases and opposition. They also made succinct submissions.

A preliminary issue was, however, brought to the attention of the court by Mr. Kemboy; that Mr. Oyatsi had intituled his replying affidavit contrary to the direction and order of the court that County Government of Narok County is the party in these proceedings. Mr. Oyatsi explained the error and court resolved the issue. Let me now consider the substantive arguments proffered.

[3] Mr. AMOK argued the first application by Majanja Luseno Advocates. He was together with Luseno. He stated that they are simply enforcing an order already made by court i.e. release of the costs deposited in court to them. He urged that, there is no stay of execution or orders of this court after the Plaintiff's application for stay in Court of Appeal was dismissed.

[4] Mr. KEMBOI canvassed the other application. He, however, associated himself with the submissions by Mr. Amoko and adopted those submissions in his application. He only added that all advocates are under statutory obligation to assist the court to attain the overriding objective. And, had Mr. Oyatsi so acted, the current application would have been unnecessary. He referred to Mr. Oyatsi's replying affidavit which he said does not controvert the factual situation in the application. It simply states that the court has no jurisdiction. There is no decree from Court of Appeal. Mr. Oyatsi was simply denied a stay. He did not stop there. He asserted the law to be that, the application for leave to Supreme Court does not stop compliance of the orders of this court. He asked the court not to allow any further delay of this matter; instead it should give a quick decision thereto. He accused Mr. Oyatsi of abusing court process by giving the original guarantee to their clients instead of the advocates. He used these words:-

''Stop this abuse by a counsel of senior stature as Oyatsi. This is a bad example''.

[5] Mr. OYATSI contended that, abuse of court process can only be founded on the basis that the rule of law was not followed. There was an application for stay pending hearing of reference on which the court pronounced itself. Based on that fact, the court decided on the reference that the money would have been released to them or vehicles sold. Those are final orders on release of funds and sale of vehicles. And, therefore, the court became functus officio. He said that they went to the Court of Appeal under Certificate of Urgency. He referred the court to the Order of Court of Appeal dated 12.2.2015. Funds in court have been held by the court on the basis of the Court of Appeal decision and Order dated 12.2.2015. Therefore, the order of this court was superseded by the order of the Court of Appeal. He said that the bank guarantee was issued in terms of Court of Appeal order of 12.2.2015. Thus, we cannot talk about execution of a decree on costs because that is the matter before court. See exhibit 2 in the replying affidavit.

[6] To justify his above avowed position, Mr. Oyatsi argued that Rule 33 of Court of Appeal Rules is relevant. He said that the decisions of the Court of Appeal are embodied in an order. Rule 36 is also relevant. Registrar of Court of Appeal must send a copy of Order to Registrar of the lower court. Based on these submissions, Mr. Oyatsi quipped:

What law have I offended as to be accused of abuse of process of court?

He insisted that, indeed, it is they who have refused to comply with the law. And that they want to take short cuts. He accused them of applying laws of jungle. To him, the Ruling delivered by the Court of Appeal must be finally expressed in the Order of the Court of Appeal. There is no Order of the Court of Appeal before the court on this matter. If they were dissatisfied with Order of 12.2.2015they should go to the Court of Appeal or Supreme Court. so he argued.

[7] Mr. Oyatsi held the firm view that this court has been called upon to sit on appeal over a decision of the Court of Appeal that has been embodied in an order. He informed the court that he has even sought for leave to go to the Supreme Court. On the basis of these arguments, Mr. Oyatsi concluded that this court has no jurisdiction on this matter as the subject matter of the application arises from decision of the Court of Appeal in its orders made on 12.2.2015. According to him, the law is that he has a right to appeal on any decision the court makes.

[8] He also raised a technical point. He said that the 1st Respondent's application is grounded on Order 42 Rule 6 of Civil Procedure Rule. That order is on stay pending appeal and the court is functus officio under the said order. Also order 42 will be invoked where a party has not gone to the Court of Appeal for stay. Again, application by second Defendant is under rule 40 which is on Temporary Injunctions and breach of contract. It does not apply here. The proper forum on the guarantee is the Court of Appeal. They have not applied in the Court of Appeal for relief. For those reasons he asked the court to dismiss the two application for they are misconceived and without any legal foundation.

[9] Mr. AMOKO replied to Mr. Oyatsi's submissions and stated that this court is not functus officio. He said my orders were clear and they are not seeking any decision to be revisited at all. They are simply seeking enforcement of the order of the court. The order was a consent order, and therefore, a contract. The order was predicated upon determination of application dated 9.2.2014. The Court of Appeal order did not supersede the High Court order. It temporarily stayed it. The application was dismissed by the Court of Appeal. Orders of Court of Appeal are enforced by High Court. See Section 4 of the Appellate Act. He asked:-

What are we going to enforce in the Court of Appeal on an order dismissing their application?

He emphasized that, nobody is seeking enforcement of orders of Court of Appeal. So the extraction of the Orders of Court of Appeal is not relevant here. Pronouncement of decision is sufficient. Extraction is not a formal expression. He said that the Plaintiff has no stay of the Orders of this court. He strongly objected to the habit of Mr. Oyatsi of accusing them, the Court of Appeal and other courts of using law of the jungle every time he loses.

[10] Mr. Amoko clarified one issue; that they have cited section 1A, 3A and 34 of the CPA. Order 42 was inadvertently cited. He also stated that they have provided details of account where money should be released to. Mr. **KEMBOI** also submitted that they cited order 40 of CPR in addition to the ones on inherent jurisdiction of the court. he said that the guarantee was a contract between his firm and the Plaintiff. They are going against this obligation. Costs were stayed on condition that the sum taxed shall be deposited in court. Properties were also released to them. They moved to the Court of Appeal where the parties recorded consent. The application was dismissed and stay granted lapsed. They, therefore, reverted back to position in High Court. he said that extraction of Orders of Court of Appeal is irrelevant. This is execution. As there no dispute his application was dismissed hence, his application to go to Supreme Court, the money should be paid over to the Defendants. He revisited the accusation by Mr. Oyatsi that they are using the law of the jungle and stated that it does not bother him because it is his habit; he accused this court and the Court of Appeal. Nonetheless, the Court of Appeal said that the points he argued were not arguable. He accused Mr. Oyatsi of being in the habit of always running to the Court of Appeal every time he loses in order to delay matters. He should deliver original guarantee to them. See the supporting affidavit.

DETERMINATION

[11] I am confronted with yet a host of novel arguments by Mr. Oyatsi. Other than accusation by Mr. Oyatsi that the other advocates herein and this court are using law of the jungle, I am not bothered by the number of times he set out for a journey to the Court of Appeal or the Supreme Court or even this court as long as he is exercising his right of appeal. The *bona fides* of taking such actions rests with the particular party or advocate filing the court processes. Having said that let me move to the substantive arguments.

[12] I have carefully considered all the arguments presented before me. There is no dispute or doubt that the application for stay in the Court of Appeal was dismissed. To the best of my understanding of the law, any decree that will be drawn upon the dismissal of the application dated 9.2.2015 by the Court of Appeal cannot supersede or replace the decree of this court. I need not really state these: that the dismissal of the said application does not affect the decree of this court; that the decree of this court has not been reversed or stayed by the Court of Appeal. Mr. Oyatsi's arguments on this subject seemed very attractive but very feeble in substance and as legal realities. I wonder how an order of dismissal of an application for stay of execution by the Court of Appeal will be executed by the decree-holders or in execution or realization of

the fruits of their decree of this court. Before I forget, I should also state here that pendency of an application for certification to go to the highest court of the land, i.e. the Supreme Court, does not operate as a stay of the decree of this court. The decree-holders have a decree of this court that has not been satisfied by the Plaintiff and so it is amenable to execution by this court and not the Court of Appeal as argued by Mr. Oyatsi. The reality of law is that, the dismissal of the application for stay by the Court of Appeal revert the parties to the original position prior to the temporary stay of execution which had been agreed on by consent of the parties. The fact that the consent was recorded in and with the superadded authority of the Court of Appeal does not change this position as all that had been done there was ephemeral and withered away with the dismissal of the application. See the order of the Court of Appeal dated12.2.2015 wherein the consent order and all its terms were dependent upon the determination of the application dated 9.2.2015. And, for clarity purposes, I do not think the process of execution is caught up in the trappings of functus officio. The law is clear that execution is to be done by the court which passed or to which a decree has been sent for execution. See definition of ''court which passed a decree'' under section 29 of the Civil procedure Act and as the court of first instance, even if the decree was passed in the exercise of appellate jurisdiction, this would still be the court to execute the decree. Besides that, all question between the parties to the suit in which the decree was passed, or their representatives, and relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree. See section 34 of the Civil Procedure Act. Therefore, this court is executing the decree in this matter which remains unsatisfied. And so, the deposit of the costs in court had been made on orders of this court. As I stated earlier, and in the absence of an order of stay from the appellate court, there is absolutely nothing which prevents execution of the decree by an order releasing the sums deposited in court to the 1st Respondent.

[13] With regard to Mr. Kemboy's application I will just say and do what is enough. As I have already stated the dismissal of the application for stay by the Court of Appeal revert parties to the original position, in this case, to the decree of this court prior to the temporary stay that had been agreed upon by the parties and embodied in the order of the Court of Appeal dated 12th February 2015. There is, therefore, nothing which prevents them from executing the decree of this court howsoever as allowed under the law. However, if they chose to call-up the guarantee by Cfc Stanbic Bank, let me state as follows. The guarantee was a security bond by CFc Bank to Kemboy and Company Advocates and offered security for the fulfillment of obligations of the Plaintiff. Such security bonds are self-driving and one just has to follow the terms of the guarantee itself and call-up for the performance of the guarantee. The guarantee has not been presented to the bank and invariably, the bank has not refused to honour the guarantee. That notwithstanding, as I stated, the security bond is between the Bank and the Advocates and in any event it should be with the said advocates. Mr. Oyatsi did not, therefore, act within the law by taking the guarantee to the client of the said advocates. The said action may be viewed as not being bona fides. He should deliver it to the advocates concerned. M/S Kembo and Company Advocates will then enforce it as provided in the guarantee. In the law of security bonds, they need not wait for resolution of any disputes between the parties before the security bond can be realized. They should just act as provided in the guarantee and they will have money in hand. Therefore, I will only order the deposit of the original guarantee with M/S Kemboy and co advocates forthwith.

Orders

[14] In light thereof, I make the following orders:

a. **I allow the application dated 15th day of June 2015 by the 1st Defendant with costs to the 1st Defendant. Consequently, I order and direct that the sum of Kshs. 23,010,674 which was deposited in court vide this case shall be released forthwith to:-**

NAME: **Majanja Luseno & Company Advocates,**

ACCOUNT NUMBER: ***[particulars withheld],***

BANK: ***[particulars withheld*] Bank Limited,**

BANK CODE: ***[particulars withheld*]**

BRANCH: ***[particulars withheld]***

BRANCH CODE: ***[particulars withheld]***

SWIFT CODE: ***[particulars withheld]***

b. **Other than an order that the Plaintiff should deliver the original guarantee issued by Cfc Stanbic Bank on 19th February, 2015 to the firm of M/S Kemboy and Company Advocates forthwith, the other orders sought in the application dated 19th June 2015 are denied. I will not order any costs on this application given the circumstances of the said application. Each party shall bear own costs. It is so ordered.**

Dated, signed and delivered in court at NAIROBI this 3rd day of July 2015.

F. GIKONYO

JUDGE