REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL NO.34 OF 2007

AUSILIO MUNGATIA…….APPELLANT/RESPONDENT

VERSUS

JAPHET MBURUGU……..…..RESPONDENT/APPLICANT

R U L I N G

The Respondent/Applicant **JAPHET MBURUGU** through an application brought pursuant to Sections 1A,1B and 3A of the Civil Procedure Act CAP 21 Laws of Kenya, Order 45 Rule 1,2 and Order 22 Rule 22 of the Civil Procedure Rules 2010, has sought the following orders:-

1. ***THAT leave be granted to the firm of Messrs Wamache & Associates Advocates to come on record for the Respondent/Applicant;***
2. ***THAT this Honourable Court does review the Judgment/Decree issued on 30th October 2012;***
3. ***THAT this Honourable Court be pleased to stay the execution of the Decree that has been issued in respect of the judgment entered herein on 30th October 2012 (and without notice to the Respondent or its advocates) and any other order that may be issued pursuant thereto pending hearing and determination of this application;***
4. ***THAT the costs of this application be provided for;***

The application is based on five grounds found on the face of the application namely:

1. ***THAT the applicant will suffer irreparable damage;***
2. ***THAT the Respondent may levy execution against the applicant;***
3. ***THAT substantial loss will result to the applicant;***
4. ***THAT the application has been made without unreasonable delay;***
5. ***THAT the application ought to be granted in the interests of equity and justice.***

The applicant herein was the Defendant/Respondent while the Respondent was the Plaintiff/Applicant.

Briefly, the Respondent/Applicant's case was that a judgment/decree was issued by this Honourable court on 30th October 2012, against the applicant, whereby the appeal was allowed, orders of the trial magistrate's court set aside , and the court ordered that the suit be reinstated for hearing at Meru Chief Magistrates Court. The applicant thus contends that if the decretal amount is paid over to the respondent, this application will be rendered nugatory and the defendant will suffer irreparable loss and damage.

The application was opposed via grounds of opposition filed in court on 25th August 2015 where the

respondent contended inter alia that execution for costs cannot be stayed, that no ground for review has been established; that the application has been brought after inordinate delay; that the appeal was heard and determined and the orders sought cannot issue in a vacuum and that the application is incompetent and a non starter.

When the application came up for hearing on 26th August 2015, Mr. Mutura, Counsel for the applicant relied on the grounds of the face of the application and the affidavit sworn by the applicant in support thereof.

Mr. Kariuki, Counsel for the respondent opposed the grant of prayers 3 and 4 and sought to rely on the grounds of opposition filed in court on 25th August 2015 and two authorities. He urged that no new ground has been established to warrant the issuance of an order for review and that an order for stay of execution of costs cannot be granted. For this proposition, he relied on the case of ***Ngatia Mbiti & 2 Others V Githui Mbiti (2008) Eklr.*** He further submitted that the orders are being sought in the vacuum as the matter was yet to be heard and only the issue of costs was pending in the present case.

I have carefully considered this application, the rival submissions by the parties and the authorities relied upon by the respondent.

The instant application is brought pursuant to Order 45 Rule 1 and 2 of the Civil Procedure Rules 2010; the said Rule provides as follows:

> "***1. (1) any person considering himself aggrieved –***
>
> a. ***By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or***
> b. ***By a decree or order from which no appeal is hereby allowed,***
>
> ***And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without reasonable delay…"***

The applicant has not demonstrated that there is discovery of any new and important matter or evidence which after the exercise of due diligence was not within his knowledge nor is there any error apparent on the face of the record or other sufficient reason to warrant the issuance of the review orders. Similarly the orders that the applicant seeks to stay were made on 30th October 2012. This is a period of almost three years. The delay is inordinate and the same has not been explained. This is contrary to the applicant's contention that the application has been brought without unreasonable delay. In the case of ***Muyodi –vs- Industrial & Commercial Development Corporation & Another (2006) 1 EA 243*** the court held thus:-

> ***"For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay"***

So far, the applicant has not satisfied any of the 3 pre requisites that must be met before an order for review can be made under Order 45 Rule 1 of the Civil Procedure Rules, consequently this prayer must fail.

I now turn to prayer under Order 22 Rule 22 of the Civil Procedure Rules under which the application is premised. The same provides as follows:

> ***"the court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution or for any other order relating to the decree or execution which might have been made by the court if execution has been issued thereby, or if application for execution has been made thereof."***

So far the applicant has not shown sufficient cause if any, to warrant a stay of execution. The applicant has also not satisfied

this court that he will suffer substantial loss if this prayer is not granted. **It is not in dispute that the respondent's appeal was allowed on 30th October 2012, whereupon Makau J ordered that the suit be reinstated for hearing at the Meru Chief Magistrates court. The respondent was also awarded the costs of the appeal. The same was on 13th November 2014 taxed at Kshs.88, 922/=. In my view, it would appear that the applicant is seeking to stay execution of costs since there is nothing else to stay. In the case *of* ***Rahisi Stores (suing as a Firm) v East African Portland Cement Limited [2005] eKLR*****.** Waweru J. held that:

> ***"Taxation of costs, whether those costs be between party and party or between Advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the advocates (Remuneration) Order."***

In ***Ngatia Mbiti (supra)*** J. Kasango cited the Court of Appeal decision in ***Francis Kabaa v Mary Wambui CA 298/1991***, where it was held that there cannot be any stay of execution of costs.

There is nothing to stay and there is nothing to show that the applicant will suffer irreparable loss if an order of stay is not granted. In the result, the application dated 30/7/2015 is unmerited and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF OCTOBER, 2015

R.P.V. WENDOH

JUDGE

2/10/2015

PRESENT

Mr. Muthama for Applicant/Respondent

Mr. Wamache for Applicant/Respondent

Faith/Ibrahim, Court Assistants