



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 195 OF 2014

JUBILEE INSURANCE COMPANY LIMITED..... APPELLANT

VERSUS

DANIEL MAINGI MUCHIRI.....RESPONDENT

RULING

1. Jubilee Insurance Company of Kenya Ltd, the Appellant herein, took out the motion dated 12th August 2015 in which it sought for following orders:
 1. ***THAT the Application filed herewith be certified as urgent and the same be heard during the current court vacation.***
 2. ***THAT pending the hearing and determination of this application inter partes, there be a stay of execution of the warrants issued herein on 6th August, 2015 and allocated to Clear Real traders and the decrees issued by the chief magistrate in CMCC number 6553 of 2015 (Daniel Maingi Muchiri vs Jubilee Insurance Company of Kenya Limited)***
 3. ***THAT the warrants issued herein on 6th August, 2015 and allocated to Clear Real traders be declared invalid and/or irregular and set aside or otherwise cancelled.***
 4. ***THAT all the process prompted and/or premised upon the warrants of attachment dated 9th June 2014 be wholly set aside.***
 5. ***THAT pending the hearing and determination of an intended appeal from the decision of the Honourable Justice Serگون, there be a stay of execution of the decree issued on 6th June 2014 in CMCC number 6533 of 2013 (Daniel Maingi Muchiri vs Jubilee Insurance Company of Kenya Limited)***
 6. ***THAT the costs of the application be borne by the Plaintiff's advocate personally.***
2. The motion is supported by the affidavit of Steve Luseno leaned advocate for the Appellant. When served with the motion, Daniel Maingi Muchiri, the Respondent herein, filed the replying affidavit of Peter Ngoge to oppose the application. The Respondent contemporaneously filed the motion dated 17th August 2015 in which he sought for the following orders inter alia:
 1. ***THAT pending the hearing and determination of this application inter partes, the exparte interim orders granted herein without jurisdiction under Order 42 rule 6 by hon. Mr. Justice Onyancha on the 12th August 2015 when the High Court was functus – officio be lifted or stayed forthwith ex debito justitiae.***
 2. ***THAT the ruling and orders granted exparte by the Honourable Mr. Justice Onyancha herein***

on the 12th day of August 2015 without jurisdiction under Order 42 Rule 6 of the Civil procedure Rules when the High Court was clearly functus – officio immediately following the dismissal of the appellants civil appeal no.195 of 2014 by the Hon. Mr. Justice Sergon on the 17th July 2015 be reviewed and set aside ex debito justitiae.

3. ***THAT the Respondents application herein filed dated 12th August 2015 be struck out with costs and the Applicants/decree holder herein be permitted to continue with execution proceedings forthwith to realize the entire decretal sums plus accruing interests as awarded to him by the subordinate court in Milimani CMCC 6553 of 2013 on the 7th May 2014.***
4. ***THAT the costs of this application as well as the costs of the entire appellate proceedings herein be awarded to the Applicant herein.***

The motion is supported by the affidavit of Peter Ngoge.

3. On 27th August 2015, Justice Mabeya gave directions for the two motions to be heard together.
4. I have considered the grounds set out on the motions and the facts deponed in the affidavits filed in support and against those applications. I have further considered the oral submissions of learned counsels. It is the submission of Mr. Luseno Learned advocate for the Appellant/Applicant that the Respondent could not competently execute the decree before issuing a notice to show cause under Order 22 of the Civil Procedure Rules in view of the fact that one year has lapsed since execution proceedings commenced. The learned advocate also argued that the Appellant lodged a notice to appeal late because this court delayed in releasing the file and copies of the judgement way after the time fixed to lodge a notice of appeal had lapsed. Mr. Luseno also pointed out that the Appellant/Applicant proceeded to deposit the decretal sum as security for the due performance of the decree hence the decree should not be executed. According to Mr. Luseno, the Respondent can only have the decree satisfied by making a formal application to have the money deposited as security for the due performance of the decree released to him and that he does not have the freedom to freely execute the decree.
5. Mr. Ngoge, learned advocate for the Respondent urged this court to find that it has no jurisdiction to grant the order for stay under Order 42 Rule 6 of the Civil Procedure Rules since the Appellant/Applicant has not lodged a notice of appeal within 14 days under Rule 76 of the Court of Appeal Rules. It is Mr. Ngoge's submission that the order for stay of execution issued by Onyancha Judge on 6th June 2014 lapsed after 14 days. The learned advocate further argued that since the Respondent does not earn interest, he is entitled to execute the decree. Mr. Ngoge also pointed out that the Respondent was not required to issue a notice to show cause before executing the decree because the proceedings came within the exception of Order 22 Rule 18 of the Civil Procedure Rules. The learned advocate also argued that time begun to run from the date the appeal was dismissed and when the exparte order lapsed. Mr. Ngoge urged this court to dismiss the Appellant/Applicant's motion and to allow the one filed by the Respondent. Mr. Luseno was of the view that the orders issued by Justice Onyancha did not lapse because the Appellant/Applicant complied with the condition by depositing the amount Justice Onyancha ordered to be deposited as security exparte.
6. Mr. Luseno pointed out that the interim order was extended until the appeal is heard and determined.
7. Having considered the material placed before this court and the rival oral submissions presented by learned counsels, the following issues arose for the determination of this court:
 - i. Whether or not this court is functus officio in the matter.
 - ii. Whether or not the order for stay should be granted.
8. I will start with the first issue as to whether or not this court is functus officio. I have already considered the arguments put forward by both sides. It is argued that since the Appellant did not

lodge a notice of appeal within 14 days under Rule 76 of the Court of Appeal rules this court lacked jurisdiction to grant the order sought. Mr. Luseno argued admitted that he filed a notice of appeal out time because the court did not release a copy of the judgement to him until the time to lodge a notice of appeal had lapsed. He stated that he has now filed an application seeking for leave to lodge a notice of appeal out of time before the Court of Appeal. With respect, the provision of order 42 rule 6 of the Civil Procedure Rules relates to appeal emanating from the subordinate courts and tribunals but not appeals emanating from this court to the court of appeal. This court has been urged to find that there is no competent notice of appeal before this court or before the court of appeal, hence this court lacks jurisdiction to entertain the motion.

9. It is not in dispute that the Appellant has already lodged a notice of appeal. This court has been indirectly invited to determine its validity. If this court comes to the conclusion that there was not competent notice of appeal, then it will have to rule that it has no jurisdiction to entertain an application for stay pending appeal because there is no appeal in which the application for stay can lean on. With respect, the jurisdiction to determine the competency of the notice of appeal is the preserve of the Court of Appeal and this court cannot purport to exercise a discretion it doesn't have. It is sufficient for this court to merely satisfy itself that a notice of appeal has been lodged. Mr. Ngoge has also pointed out that the Appellant/Applicant has failed to disclose that a similar application was filed before the subordinate court.

10. It is clear from the record that the appellant/Applicant actually filed an application which is similar to the motion now before this court. Mr. Luseno did not address this court over this ground. However, I cannot comprehend why the Appellant/Applicant had to file an application before the subordinate court yet that court was already functus officio save for the execution process. It would appear the Appellant/Applicant was hell-bent to steal a march as against the Respondent. The conduct however did not in any way render the Appellant's motion incompetent but has tainted the Appellant's standing in the eyes of the law. The end result is that I am convinced that this court has jurisdiction to entertain the Appellant's motion.

11. I now consider the substance of the Appellant's application for stay of execution pending appeal. Mr. Ngoge has argued that the order issued by Justice Onyancha on 12.8.2015 lapsed after 14 days. I have perused the aforesaid order and it is apparent that on the face of it that the exparte interim order was to last until the motion is heard. It is therefore not correct to state that the exparte orders lapsed after 14 days. In an application for stay, an Applicant must show the substantial loss it would suffer if the order is denied. The Appellant has averred that the Respondent will not be in a position to refund the decretal sum if the same is released to him. The Respondent did not controvert this assertion.

12. That assertion in itself is sufficient to show that the Appellant/Applicant will suffer substantial loss if the order is denied. There is no doubt that the Appellant/Applicant filed the motion without an unreasonable delay. The question of security has already been complied with forehand, hence the Appellant has met the requirements for the grant of the order for stay.

13. In the end I find the motion dated 12.8.2015 to be well founded. It is allowed as prayed save that costs shall abide the outcome of the appeal. The Respondent's motion dated 17.8.2015 is ordered dismissed with costs also abiding the outcome of the appeal.

Dated Signed and Delivered in open court this 6th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent