



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 230 OF 2008

STEPHEN NGARUIYA KANYANJA. APPELLANT

VERSUS

COFFEE RESEARCH FOUNDATION. RESPONDENT

RULING

By the Notice of Motion dated 9th September, 2015 and filed the same day, the Respondent/Applicant seeks orders inter alia that: -

1. Pending inter partes hearing of the application, there be a stay of execution of the judgments and decrees of this court dated 31st July, 2012, 5th March 2015 and the decree of the subordinate court in Milimani CMCC No. 13558 of 2004 given on 5th March, 2015.
2. Pending the hearing and determination of the Civil Application Nos. NAI 215 of 2015(UR 178/2015) and NAI 219/2015 (UR 181/2015) in the Court of Appeal at Nairobi, the execution of the judgments and decrees of this court dated 3rd July, 2012, 5th March, 2015 and the decree of the subordinate court in Milimani CMCC No. 13558 of 2004 given on the 5th March, 2015 and all consequential orders therefrom be and are hereby stayed.
3. The Appellant through his agents M/s Fantasy Auctioneers be and are hereby ordered to return and or release the Respondent's motor vehicle Registration Number KBL 612G Nissan Ambulance seized on the 29th July, 2015.

The Application is based on the grounds set out on the body of the same and its supported by the Affidavit of **FESTUS OUMA BOLO** and its expressed to be brought under Order 51 Rule 1 of the Civil Procedure rules and Sections 1A, 3A and 63 (e) of the Civil Procedure Act.

The Respondent herein is a Parastatal established under the provisions of the Science and Technology Act, Cap 250 Laws of Kenya which following the Enactment of Kenya Agricultural and Livestock Research Act Cap, 2013, it was dissolved and its operations absorbed by the Kenya Agricultural and Livestock Research Organization (herein referred to as KALRO) as from the 1st July, 2014. The Appeal herein arises from Milimani CMCC No. 13558 of 2004 which had been filed by the Appellant in this Appeal against the Respondent.

In the Supporting Affidavit the deponent who is the Senior Administrative Officer of KALRO depones that it was being represented by the firm of J M Majiwa & Co. Advocates in the proceedings before the lower court and the last communication it received was in April 2008 to the effect that the suit was dismissed. This was vide a letter dated 10th April 2008 marked as annexure "FO1". In the same letter, the said Advocates demanded their final fees for the professional services rendered in the matter and the

same was paid and the Respondent closed their file. There was no other communication thereafter with regard to this matter.

On the 23rd July, 2015 the Respondent was served with the Auctioneers Fee Note, warrants of attachment and a warrant of sale of property in execution of a decree which decree was for a sum of Ksh.5,400,300/-. Following the said service, the Respondent instructed the firm of Milimo, Muthomi & Co. Advocates to establish the source of the decree as according to them the matter had been dismissed. At this point in time the firm of J M Majiwa was no longer in the panel of external Advocates of the Respondent.

It was upon the perusal of the court file by the current firm of Advocates on record for the Respondent that they found out that there was an Appeal that had been filed following which two judgments had been entered against the Respondents which were delivered on 3rd July, 2012 and on 5th March, 2015 by Honourable Justices M. A. Ang'awa and D. A. Onyancha respectively both of which the Respondent was not satisfied with and it instructed the Advocate on Record to Appeal.

On the 28th July, 2015 the Respondent filed an Application before this court seeking orders of stay and extension of time within which to file an Appeal. Hon. Justice Mabeya heard the Application at the ex parte stage and granted an interim order of stay of execution which was later extended to 8th September, 2015 but the Application was withdrawn vide a notice of withdrawal filed on the 12th August, 2015. The said withdrawal was informed by the opinion formed by the counsel for the Respondent that the High Court lacks jurisdiction to entertain an Application for extension of time to file an Appeal to the Court of Appeal.

On the 13th and 14th August, 2015, the Respondent filed two Applications in the Court of Appeal (referred to earlier in this judgment) which are still pending before that court. On the 13th August, 2015, the Respondent filed another Application before the lower court seeking orders for stay of execution of the decree pending the hearing and determination of the Applications pending before the Court of Appeal but the same was dismissed for lack of jurisdiction.

As this was going on the Respondent's motor vehicle Registration Number KBL 612G was on 29th July, 2015 attached by M/s Fantasy Auctioneers. The said vehicle is an Ambulance and it has not been released to date despite several letters to the Auctioneer to do so.

The Respondent is now apprehensive that unless there is intervention by this Honourable Court, the Auctioneer may not only sell the attached Motor Vehicle but may also attach more goods in execution of the decree issued herein.

The goods proclaimed by the Auctioneers are the Respondent's tools of Trade, and if attached, its operations shall grind to a halt and being a public institution handling sensitive issues of coffee for the benefit of the public, the loss would be substantial and irreparable.

The decretal sum is substantial to the tune of Ksh.5,400,200/- and if execution proceeds, the Respondent has no means to refund the decretal sum in the likely event of success of the Appeal. The Respondent is ready and willing to comply with conditions of providing security for the due performance of the decree.

The Application is opposed and the Appellant relied on the Replying affidavit sworn by Stephen Ngaruiya Kanyanja on the 22nd September, 2015 and in addition, to the Replying affidavit sworn on the 21st August, 2015 which was in response to the Respondent's Application dated 28th July, 2015.

In his Affidavit the deponent states that the Application herein was canvassed under a similar Application filed in this court dated 28th July, 2015. He further avers that the Applicant had filed another Application dated 13th August, 2015 in the lower court in CMCC No. 13558/2004 which Application was canvassed by way of written submissions and was dismissed on 8th September, 2015. The Applicant had been granted a stay of execution on 29th July, 2015 which orders were extended pending the determination of

the lower court's Application which was disallowed by the court.

In his Affidavit, he further states that the Respondent/Applicant has already filed two Applications before the court of Appeal in Nairobi which are still pending. The Respondent has always acted in bad faith and that it is trying to stifle the course of justice by filing numerous Applications and this clearly is an abuse of the court process. He urged the court to dismiss the Application, with punitive costs to the Appellant.

Counsel for the Appellant also relied on the Replying Affidavit sworn by the Appellant in opposition to the Respondent's Application dated 28th July, 2015 which reliance the counsel for the Respondent opposed on the grounds that the Application dated 28th July, 2015 was withdrawn and as per Justice Mabeya's order given on 27th August, 2015, the withdrawal notice took effect on 8th September, 2015 and with that, the said Application together with all its Affidavits both in support and in opposition ceased to have any legal force and no party could rely on them. To this extent I agree with the counsel for the Respondent and consequently the court will just consider the Appellant's replying affidavit sworn on 22nd September, 2015.

I have read, understood and considered the Application herein, the Affidavit in support, the Replying affidavit and the oral submissions made by both counsels for the respective parties. The submissions reiterates the contents in the Affidavits which I have already summarized hereinabove and I do not wish to repeat.

I have perused the court record and I note that the Respondent's Application dated 28th July, 2015 which was filed under certificate of urgency came for hearing before Justice Mabeya who certified it as urgent and granted temporary orders of stay of execution to last for 30 days within which time the Application would be heard. The Application was back in court again on the 27th August, 2015, the proceedings of that day reveals that the matter was not heard but the court extended the interim orders to 8th September, 2015. On the same date, counsel for the Respondent informed the court that there was a pending Application before the lower court which was coming up for ruling on 8th September, 2015. The counsel also applied for suspension of a withdrawal notice which was filed in court on 13th August, 2015 withdrawing the Application dated 28th July, 2015. The court extended the interim order of stay to 8th September, 2015 and also suspended the withdrawal notice to take effect the same date. The Applicant/Respondent was ordered to pay the costs of the Application to the Appellant which was assessed at Ksh.10,000/- and the same was to be paid within 7 days from the date thereof.

The Respondent filed the present Application on 9th September, 2015 and when it came up before Justice Aburili she declined to grant interim orders of stay of execution and noted that the Respondent did not comply with Hon. Mabeya's order made on 28th July, 2015.

According to the record the Application dated 28th July, 2015 was not argued on merits and/or substantively because counsel for the Respondent filed a Notice of withdrawal of the same before parties could canvass the issues raised in that Application. At no time did the parties ventilate the issues raised therein. A party to a suit is at liberty to withdraw an Application or the whole suit if he so desires subject to payment of costs to the other party which costs the court ordered the Respondent to pay in the sum of Ksh.10,000/- within 7 days and in default execution to issue.

The Application dated 13th August, 2015 as submitted by the counsel for the Respondent was dismissed for lack of jurisdiction by the lower court and therefore by bringing the present Application, it cannot be said that the Respondent has abused the court process and in any event under Order 42 Rule 6(1) of the Civil Procedure Rules the Respondent was at liberty to do so.

The Respondent learnt about the decree in this matter on the 23rd July, 2015 when its goods were proclaimed as the previous Advocates kept it in the dark regarding the proceedings that were going on.

Upon being instructed, the Advocates on record moved with haste and filed the Application dated 28th

July, 2015 although it was later withdrawn.

The counsel for the Appellant argued that the delay in filing the Application has not been explained and that the Respondent was all along represented by the firm of Advocates M/s J W Majiwa and Company but in a quick rejoinder, counsel for the Respondent submitted that though the Respondent was represented, the Advocate on record did not inform it of the proceedings and only became aware of the same when the Auctioneers proclaimed its goods. This court finds that the delay is excusable in the circumstances of the case as the Respondent was all along kept in the dark by its Advocate who was on record, then until it was served with a proclamation on 23rd July, 2015.

I agree with the counsel for the Appellant that the matter has been in court for long and that litigation should come to an end at some point but the court will also have to consider if by dismissal of the Application, it has rendered a fair trial impossible as the court rightly observed in the case of **Abdirahman Abdi Vs Safi Petroleum Products Limited & 6 Others (2011) eKLR** Civil Application No. Nai 173/2010 where a Notice of Appeal was served on the Respondent out of time and without the leave of the court and the court upon being asked to strike it out observed that: -

“the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice....”

In the days long gone the court never hesitated to strike out a Notice of Appeal if it was showing that it had been lodged out of time regardless of the length of the delay. The enactments of Sections 3A and 3B of the Appellant Jurisdiction Act and later Article 159 (2) (a) of the Constitution of Kenya 2010 changed the position.

The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay to be occasioned and prejudice to the parties should the court exercise its discretion in favour of one party. In short, the court has to weigh the ruling against another for the benefit of the wider interest of justice before coming to a decision. Article 159(2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however, to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the offending party if the court grants the orders sought. The court in that regard exercises judicial discretion.

In the case of **Ndya Nabo Vs the Attorney General** the court held that: -

“A person’s right of access to justice was one of the most important rights in a democratic society and in Tanzania (just like is here in Kenya), that right could only be limited by legislation that is not only clear but which is not violative of the Constitution.”

The fundamental right of access to justice is what links together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent impartial and accessible judiciary.

The counsel for the Respondent submitted that if the orders sought are not granted the preferred appeal shall be rendered nugatory. He further argued that the issues raised in the pending Applications before the Court of Appeal are not frivolous but genuine issues and it is only fair that the Respondent be granted a chance to argue them. The preferred Appeal raises triable issue on whether or not the initial claimed sum would attract interest of that magnitude which the Counsel for the Appellant feels is a non issue. I find that this is a triable issue.

The Respondent has also deponed in paragraph 19 of the Supporting Affidavit that it shall suffer irreparable loss if the orders sought are not granted as the Appellant has no means to refund the decretal sum in the likely event of the success of the Appeal and the preferred Appeal shall be rendered nugatory. Though both counsels did not address the court on this issue, I note that the Respondent has alluded to it in the Affidavit in support but the Appellant did not respond to it in his Replying Affidavit. It was incumbent upon the Appellant to prove to this court that he is in a position to refund the decretal sum in

the event that the preferred Appeal succeeds which he did not. The burden of proof that the appellant would refund the decretal sum lay with him but in this case he failed to discharge that burden. This was the holding in the case of **Nairobi Civil Application No. 238 Of 2005 National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another**.

On prayer 4 of the Application, the Auctioneer, M/s Fantasy Auctioneers proclaimed the Respondent's goods on the 23rd July, 2015 as shown on annexure 2(3) of the Respondents Affidavit. Upon perusal of the same, it is clear that the attached motor vehicle registration number KBL 612G is not among the items that were proclaimed therein and therefore the attachment of the said motor vehicle was illegal. The Auctioneer ought to have ascertained and listed the particulars of the said motor vehicle in the proclamation as required under Rule 11 of the Auctioneers Rules, 1997, and therefore his continued retention of the aforesaid motor vehicle is unlawful.

For the reasons stated above, I grant the following orders: -

- a. **A stay of execution of the judgments and decrees of this court dated 3rd July, 2012, 5th March, 2015 and the decree of the subordinate court in Milimani CMCC No. 13558 of 2004 given on 5th March, 2015 pending the hearing and determination of Civil Application Numbers NAI 215 of 2015 and NAI 219 of 2015 in the Court of Appeal at Nairobi.**
- b. **The Appellant through his agent M/s Fantasy Auctioneers be and are hereby ordered to release the Respondent's motor vehicle registration Number KBL 612G forthwith.**
- c. **The Respondent do deposit the entire decretal sum in an interest earning account in the names of the counsels for both parties within the next 30 days from the date hereof and in default the orders of stay shall automatically lapse.**
- d. **The costs of this Application shall abide the outcome of Civil Application No's 215 of 2015 and 219 of 2015 in the Court of Appeal.**

Dated and Delivered at **Nairobi** this 5th day of November, 2015.

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LUCY NJUGUNA

JUDGE

In the presence

..... for the Appellant

..... for the Respondent