



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO.22 OF 2006

MARY NEKESA WAFULA THRO' NEXT FRIEND

BEN WAFULA..... APPELLANT

VERSUS

BOG FRIENDS SCHOOL KAMUSINGA..... RESPONDENT

RULING

1. On 9th December, 2009, this Court allowed an Appeal by the Appellant and entered judgment in her favour for Ksh.376,000/= together with costs. Since then, there seems to have been several proceedings taken herein culminating in the applications by the Respondent for stay dated 21st and 24th August, 2013, respectively. Upon the objection by the Appellant, that the firm of Ombito & Company was improperly on record, the said applications were struck out on 4th December, 2013. At the time of delivery of the ruling to strike out the said applications, Mr. Ombito, Learned Counsel for the Respondent made an oral application for the consent dated 21/8/2013 by the firms of Ombito & Co. and J. S. Khakula & Co. to be endorsed and for stay of execution.
2. This Court endorsed that consent whose tenor was that:-

“That by consent, the Defendant/Respondents, Friends School Kamusinga have now appointed the firm of M/S OMBITO & COMPANY ADVOCATES, KALIBO HOUSE MUMIAS, NEXT TO MAMA WATOTO SUPERMARKET, P. O. BOX 909, MUMIAS to act for them alongside KHAKULA & COMPANY ADVOCATES with effect from 12/8/2013”

However, the Court declined to order a stay of execution but directed that the Respondent does file a formal application. In pursuance thereof, the Respondent took out a Motion on Notice on 5th December, 2013 seeking a stay of execution pending appeal which was heard on 20th January, 2014. This ruling is in respect of that application.

3. The application was expressed to be brought under Order 1A, 1B, and 3A. It sought two substantive Orders; to wit;

“(ii) THAT there be a temporary stay of execution, herein pending the hearing and determination of the application suit.

“(iii) THAT In the alternative, there be stay of execution herein pending final determination of the appeal herein.”

4. The grounds upon which the application was grounded were set out in the body of the motion as

- well as in the Supporting Affidavit of Edwin Namachanja sworn on 5th December, 2013. These were that, there was a valid Order of stay of execution dated 4th May, 2011 which remains valid to date, that the Appellant was flouting that Order, that there was a pending Appeal No.44 of 2010 in the Court of Appeal at Eldoret which was awaiting determination, that unless a stay is ordered the said appeal will be rendered academic. It was also contended that, it was difficult to find out the true practicing names of the Appellant's Counsel.
5. In the Affidavit in Support, it was deponed that whilst the Appellants are represented by the firm of Wabwire & Co. Advocates in terms of letters dated 05/09/13 and 20/08/13 and a certificate of urgency and application dated 19/09/13, the proclamation was authorised by a firm known as Wabwire Waswa and Co. Advocates. That there was confusion as to what firm was acting for the Appellant. That there had been fraud in this matter. That the Appellants' Advocates had given various places as their place of practice being 'Bus house; 'Naswa House' and 'Eldoret'. That there had been attempts to garnishee school accounts. That in the circumstances, there should be a stay pending appeal.
 6. Mr. Ombito, Learned Counsel for the Applicant reiterated the contents of the Affidavit in Support and submitted that there was no dispute that an appeal had been filed and that the delay in its conclusion should not be visited upon the Applicant. That the only opposition to the application was that his firm had not filed a Notice of Appointment yet the consent for his firm to come on record had been admitted by the Court. That the facts deponed in the supporting Affidavit had not been controverted by any Replying Affidavit. Counsel urged that the application be allowed as prayed.
 7. The application was opposed by the Appellant through the Grounds of Objection filed on 14/1/14 and the Affidavit of Mary Wekesa Wafula sworn on 20th December, 2013. The objection was that no Notice of Appointment had been filed, that the application was superfluous, vexatious and a non-starter and that it was an aggravation of disparaging particulars which the Court should not countenance save in the case of libel and defamation. In the Affidavit of Mary Wekesa Wafula, it was deponed that the Appellants' Counsel was the Managing Partner in the law firm of Ms Wabwire & Co. Advocates, that the Appellant should be paid directly Kshs.250,000/= and that she had suffered for too long and the Application was a further procrastination of payment which had affected her health.
 8. Mr. Waswa, Learned Counsel for the Appellant submitted that the Application had been wrongly entitled as HCCC NO.22 of 2006 yet this was an appellate matter. That the application had not been brought under Order 42 Rule 6 of the Civil Procedure Rules. That the Applicant had not demonstrated substantial loss to be suffered if the stay was not granted. That the matter was *resjudicata* as, the Applicant had submitted that, there was an Order of stay of 4th May, 2011. That the Court had on 25/06/13 directed that the Application should be prosecuted in the Court of Appeal. Counsel therefore urged that the Application be dismissed.
 9. I have carefully considered the Affidavits on record and the submissions of Counsel. From the onset, I should observe that the documents (pleadings) filed for and against the application can not be said to be the best. The Counsels involved seemed to me to have deep rooted personal differences as a result of which they lost focus on the cases of their respective clients. I make this conclusion from the conduct of Learned Counsels before me both on 04/12/13 and 20/01/14. It is also informed by the correspondence that is on record together with the allegations and counter-allegations against each other. For this reason, this Court will not rule on two issues, the suitability or the offices or abode of the Appellants' Advocates. This is so considering that there is no prayer in the Motion challenging the legality of the pleadings and/or documents filed by the said Counsel. The Court will likewise not consider the Appellant's ground (3) that; -

“The application is an aggravation of disparaging particulars which the Court should not countenance save in the Case for libel and defamation”

10. This is an application for stay pending appeal. It is an application that should be brought under Order 42 Rule 6 of the Civil Procedure Rules. One of the objections raised by the Appellant was the application had been brought under the wrong provisions of the law. The application was brought under Order 1A, 1B and 3A. It did not specify whether it was of the Civil Procedure Rules or not. To my recollection, there is no such provisions under our law. To that extent, the

application is but fatally defective. It must have been presented without much thought.
11. I am alive to the provisions of Order 51, Rule 10 of the Civil Procedure Rules which provide:-

“10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

My view is that, the effect of the proviso is that if the opposite party is not prejudiced by failure to cite the correct provision in the motion, the application should not be held to be fatally defective. In the instant case, however, although Counsel for the Appellant did not allude to any prejudice suffered by the failure to invoke Order 42 Rule 6 the Motion being entitled HCCC NO 22 OF 2006 instead of HCCA NO.22 OF 2006, was in my view misleading.

12. As already stated, this is an application for stay pending appeal. The principles under which the same is considered are well known, that is, the application should be made without undue delay, that the Applicant will suffer substantial loss unless the stay is granted and that there should be security for the due performance of the decree. I will consider one issue raised by the Appellant and that is the one of jurisdiction.

13. The Counsels did not address the Court on these principles. They rather dwelt on that the Court considered to be irrelevances and side shows.

14. The Appellant contended that this Court had held on 25/6/13 that the application for stay be heard in the Court of Appeal and that, therefore, the application before me did not lie. I have carefully perused the record. I have seen that on 25/6/13, Gikonyo J, while considering an application dated 21/6/13 that had come before him on a Certificate of Urgency made that observation. The record shows that, that application was not heard on 29/8/13 when it was supposed to come up for hearing. Instead, on 28/9/13, the current Advocates for the Applicant sneaked in yet another application for stay which was struck out on 4/12/13 for being irregularly on record. I have perused the record and confirmed that, the application dated 21/06/13 is still on record. It remains un-prosecuted. None of the Counsels brought this fact to the attention of the Court. Obviously, the current application is sub-judice the one of 21/06/13. It is irregular and an abuse of the Court process. It is illogical that Counsel would come on record and commence a new course which his predecessors had already commenced without regard to the provisions of the law and fail to disclose the same to the Court. That is despicable. That being the case, the application before me is an abuse of the Court process and is hereby struck out with costs.

15. Considering that the Applicant is a public school which is no on session and that students have just returned from their December holidays and further considering that the application of 21/6/13 is still pending and there is a real danger of execution being proceeded with, it is just and fair, that the learning in that school is not disrupted. It is important that the *status quo* be maintained before the application dated 21/06/13 is determined. In this regard, I grant an interim stay of execution of seven (7) days only. The parties to appear in Court on 14/02/14 for directions on that pending application.

Dated and Signed at Bungoma this 7th day of February, 2014.

A. MABEYA

JUDGE

Dated and Delivered at Bungoma this 10th day of February, 2014.

A. OMOLLO

JUDGE