



IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 6 OF 2014

GABRIEL S. IMBALI 1ST APPELLANT/APPLICANT

HESBORN SIMBA 2ND APPELLANT/APPLICANT

VERSUS

REV. DOUGLAS BERU

(SUING FOR AFRICAN DIVINE CHURCH) RESPONDENT

(Being an appeal from the Ruling of Hon. Benjamin Limo – Resident Magistrate in Kapsabet Principal Magistrate's Court Civil Case No. 134 of 2013 delivered on 20th December, 2013)

RULING

The application for determination is Notice of Motion dated 18th February, 2014. The main prayers are for temporary Order of stay of execution of the ruling delivered on 20th December, 2013 by Kapsabet Resident Magistrate in Kapsabet Principal Magistrate's Civil Case No. 134 of 2014 and for costs.

It is premised on the following grounds:-

- (i) That, the Resident Magistrate in his ruling delivered on 20th December, 2013 has allowed an illegal suit to proceed despite having been guided by the counsel for the Applicant on the relevant provisions of the law.**
- (ii) That, the Resident Magistrate has ignored the High Court authorities supplied to him yet he is bound by the same.**
- (iii) That the Resident Magistrate has allocated the matter to proceed to hearing on 7th March, 2014.**
- (iv) That, the Appellant has appealed against the ruling of the Resident Magistrate.**
- (v) That, should the appeal succeed, there will be no suit to proceed to hearing.**
- (vi) That, unless orders sought are granted, the suit will proceed on 7th March, 2014 before Kapsabet Resident Magistrate and the appeal filed will be rendered nugatory.**

It is further supported by the affidavit of the 1st Applicant Gabriel Imbali sworn on 18th February, 2014.

In opposing the application, the Respondent Reverend Douglas Beru swore a Replying Affidavit on 27th February, 2014.

The gist of the application is that the suit before the Magistrate's Court was incurably defective and that despite this fact having been brought before the Magistrate, the latter nonetheless allowed the suit to proceed to hearing.

But on the part of the Respondent, he sought the leave of the court to file and prosecute the suit on behalf of African Divine Church, which the court granted. That therefore, if the application is allowed, the applicants will continue with their illegalities.

Parties filed written submissions to the application which I have carefully appraised myself with. But briefly, counsel for the Applicants M/s. Andambi & Company submitted that the suit before the Magistrate's Court contravened Order 4 Rule 1 (3) of the Civil Procedure Rules.

That despite raising the objection to this fact, the learned trial Magistrate allowed the suit to proceed. The appeal is premised on the fact of the trial court allowing the suit to proceed for hearing. In this respect, counsel argued that the appeal shall be rendered nugatory if a stay of execution of the order/ruling is not granted.

Counsel for the Respondent, M/s. A. B. L. Musiega on the other hand argued that the instant application has not satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules. He submitted that the position regarding filing a representative suit was amended by the introduction of a new rule 8 in Order 1 of the Civil Procedure Rules, 2010 which allows any party to file a representative suit and carry on with it as of right.

I now take the following view of this application. The same is basically brought under Order 42 (6) (1) and 2 (1) (a) of the Civil Procedure Rules. They read as follows:-

“42 (6) (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay may by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless -

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.”

Rule (2) (1) (b) also reads;

“(2) (1) (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

In essence, an Applicant who seeks a stay of execution under Order 42 6 (2) must demonstrate the following:-

- (a) Substantial loss.
- (b) Application was brought without undue delay.
- (c) Furnish security for due performance of such order.

SUBSTANTIAL LOSS

Under this head the Applicants argued that if the stay of execution of the order is not granted, the appeal shall be rendered nugatory, which to them is substantial loss. According to them the Respondent did not comply with Order 4 Rule (1) (3) which provides that **“where there are several Plaintiffs, one of them, with written authority filed with verifying affidavit, may swear the verifying affidavit on behalf of the others”**.

But on the part of the Respondent, the defect created by non-compliance with Order 4 Rule (1) (3) was cured by compliance with Order 8 Rule 1 of the Civil Procedure Rules. The latter provides for amendment of pleadings without leave of the court. For avoidance of doubts, it is important that I duplicate the said Order 8 Rule (1). The same reads:-

“8 1(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

(2) Where an amended plaint is served on a defendant-

(a) if he has already filed a defence, the defendant may amend his defence; and

(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.

(3) Where an amended defence is served on a Plaintiff-

(a) if the Plaintiff has already served a reply on that defendant, he may amend his reply; and

(b) the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.

(4) References in subrules (2) and (3) to a defence and a reply include references to a counterclaim and a defence to counterclaim respectively.

(5) Where an amended counterclaim is served on a party (other than the Plaintiff) against whom the counterclaim is made, subrule (2) shall apply as if the counterclaim were a statement of claim and as if the party by whom the counterclaim is made were the Plaintiff and the party against whom it is made were a defendant.

(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12 (2) shall have effect at the expiry of the period within which the pleading could have been amended.”

The fact of whether leave of the court was granted, and if it was, the same also affected the verifying affidavit referred to in Order 4 Rule 1 is a fact for determination in the appeal. And as rightly pointed out by the counsel for the Applicant, if I do not allow the order sought, ultimately the appeal shall be rendered nugatory. This then means that the Applicants will be chasing the wind as the suit before the Magistrate's Court will progress without the determination of its competency. This, to me, amounts to substantial loss.

UNDUE DELAY

The Order by the learned Magistrate was issued on 20th December, 2013. The application was filed on 18th February, 2014. The delay was of approximately two months. While I cannot say that the Applicants moved in this application with the expected speed, I do not think that the delay of two months can be deemed as inordinate delay.

SECURITY FOR DUE PERFORMANCE OF THE ORDER

The security under this head may be ordered as a discretion of the court, and where the circumstances of the case demand so. The same may not necessarily be of monetary nature. The discretion should however be exercised judiciously and so as to meet the ends of justice.

I have not had the opportunity to view the plaint. But from a copy of the defence marked annexure G.S. Imbali to the Supporting Affidavit, the claim was not of monetary nature. And so any security ordered herein should appropriately be to cater for costs in the event the Applicants lose in the appeal.

In the end, I allow the application in terms of prayer 3. I further order that the Applicants deposit the sum of Ksh. 100,000/= with the court as security for costs in the appeal within fourteen (14) days from the date hereof. Costs of the application shall be in the cause.

DATED and **DELIVERED** at **ELDORET** this 17th day of July, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Andambi for the Appellants/Applicants

Mr. Momanyi holding brief for Musiega for Respondent