



REPUBLIC OF KENYA

High Court at Busia

Civil Miscellaneous Application 46 of 2013

BENSON NG'ANG'A NDIRANGUAPPLICANT

VERSUS

ANNET MUMALASI & CO. ADVOCATES1ST RESPONDENT

VERSUS

MANUEL OTIANGALA T/A KURONYA AUCTIONEERS2ND RESPONDENT

R U L I N G

1) This Court is moved by the Applicant to stay the proceedings and execution in Busia CMCC No.88 of 2013 **Benson Nganga Ndirungu –vs- 1) Annet Mumalasi t/a Annet Mumalasi & Co. Advocates 2) Manuel Otiangala t/a Kuronya Auctioneers** (hereinafter civil suit No.88 of 2013) and for extension of time to file an appeal against a ruling delivered therein on 25th October 2012. The prayers in the application dated 30th January 2013 are couched as follows:

1)Spent

2)THAT pending the inter partes hearing and determination of the Application there be a stay of all proceedings, including assessment of costs and execution in Busia C.M.C.C. No.88 of 2013, Benson Ng'anga Ndirungau –vs- Annet Mumalasi T/A Annet Mumalasi & Co. Advocates Manuel Otiangala T/A Kuronya Auctioneers.

3)THAT the Applicant be granted extension of time to file Appeal against the Ruling of Hon. B.A. Ojoo, SPM(as she then was) delivered on the 25th day of October 2012 in Busia CMCC No.88 of 2012, Benson Ng'ang'a Ndirangu –vs- Annet Mumalai T/A Annet Mumalasi & Co. Advocate and Manuel Otianga T/A Kuronya Auctioneers)

4)THAT the annexed Draft Memorandum of Appeal be deemed to be filed within time.

2) The subordinate Court proceedings giving raise to this application were somewhat feisty. The Applicant being aggrieved by execution against him in enforcement of a decree in Bungoma H.C.C Application No.43 of 2011 **Annet Mumalasi t/a Annet Mumalasi & Co. Advocates –vs- James Ndirangu Nganga (hereinafter the objection proceedings)** filed civil suit No.88 of 2013 against the Respondents herein seeking the following prayers:-

a) General damages for unlawful proclamation, attachment and loss of business.

b) A permanent injunction barring and/or restraining Defendants jointly and severally by themselves agents, servants, employees and/or anybody else claiming under them or acting under their instructions from proclaiming and/or attaching the Plaintiff's property in Busia Township or elsewhere in the Republic of Kenya.

c) Costs of this suit plus interest at court rates on (a) (b) and (c). from the date of cause of action.

d) Any other, further and/or alternative relief as this court may deem fit and just to grant.

3) That suit was resisted by the Respondents who made that litigation rather bumpy for the Applicant. First, the 1st Respondent sought to unseat the proceedings on the ground that it was filed by a person who was not licensed to practice as an advocate. The Applicant and his advocate Gacheche wa Miano withstood that onslaught when the trial Court dismissed the application on 30/08/2012.

4) About 78 days after filing that suit the applicant asked for an interlocutory injunction in the following terms:

“THAT this Honourable court be pleased to issue an order of temporary injunction restraining the Defendant/Respondents by themselves, their servants, agent, employees and/or anyone else claiming under them from proclaiming attaching, seizing or in any other manner whatsoever from tampering with the Plaintiff/Applicant's property and in particular his hotel known as Blue York Hotel, Busia Township pending the hearing and final determination of the main suit.”

5) That application dated the 31st May 2012 was heard and a ruling rendered on it on 25/10/2012. That application was dismissed but what stunned the Applicant more was this order by the Court,

“I proceed to strike out the suit and application with costs to the respondents/defendants.”

Not unexpectedly the Respondents sought an assessment of their costs

and have proceeded to execute for them.

6) In a long letter dated 30/11/2012 to the Chief Justice the Applicant's Counsel complained about the conduct of the Presiding Magistrate. Counsel thought that the manner in which she handled Civil suit No.88 of 2012 showed bias, hostility and discourtesy towards Counsel. That feisty side of those proceedings are not relevant to the determination of the application before this Court.

7) The ruling of the Subordinate Court is one of those that an appeal lies as of right [Order 43 Civil Procedure Rules 2010(**CPR 2010**)] and an appeal ought to have been filed within thirty (30) days thereof (Section 79a Civil Procedure Act). The last day would be on or about 24/11/2012. That did not happen and the Applicant blames the lateness of the delay in the Court providing his Advocate with copies of the proceedings and ruling.

8) It is true that the Applicant applied and paid a deposit for those proceedings and ruling on 31/11/2012, six days after the ruling. Those were only availed after 23/01/2013 when they were certified as a true copy of the original. Seven days after, the Applicant filed the instant application. That was prompt. The Applicant's counsel explains that he needed a copy of the proceedings and ruling so as to prepare the Memorandum of Appeal. This Court accepts that explanation and is satisfied that the Applicant has good and sufficient cause for failing to file the appeal on time. The Applicant cannot be blamed for the preparation of the proceedings and ruling which he bespoke timeously. And when he obtained them promptly moved the Court for extension of time. This Court would have no difficulty admitting the Applicant's appeal out of time.

9) I sensed that the Respondents were more aggressive in their resistance to the application for stay. It needs to be said that as of now, there is no appeal filed by the Applicant and an application for stay under the Provisions of Order 42 Rule 6 would be pre-mature. Although the Applicant's Counsel did not cite

those provisions, he proceeded to argue the application as though it was seeking a stay of execution pending appeal. Similarly the response was taken up as though it was on Order 42 Rule 6 matter.

10) The principles to be applied when an Applicant seeks stay of execution of a decree or order pending appeal from the Subordinate Court to the High Court are clearly spelt out in the Provisions of Order 42 Rule 6. The Applicant must satisfy the Court that:

- i) Substantial loss may result unless the stay is given;
- ii) The application for stay had not been lodged with delay, and
- iii) The applicant has furnished security for due performance.

The Court shall determine the application against these principles.

11) Let me start by considering the Respondent's argument that given the nature of the ruling there is nothing to stay save for costs. Counsel cited decision of the **Court of Appeal in Civil Application No.Nai 298 of 1996(UR) Francis Kabaa and 1) Nancy Wambui 2) Jane Wanjiru** in argument that the application was untenable. There the Court stated,

“Further, we do not think that stay can be granted in respect of costs.”

12) This Court has given regard to that short decision of the Court of Appeal and does not think that the view of the Court in respect to costs was the speaking part of that decision. It really was obiter. On my part I would not hesitate to grant an order staying costs where I am satisfied, inter alia, that execution of those costs would result in a substantial loss to the Applicant. But I need not say more because as I shall demonstrate shortly nothing turns on this point.

13) In dismissing the entire suit the learned Magistrate cited Section 34(1) of the Civil Procedure Act and then made this finding:

“It is not in dispute that the matter before High Court (sic) is in execution stage and the present suit is essentially seeking to stop the satisfaction of that decree against him on the grounds that he is not a party to the suit. Whereas that is a legally sound defence the plaintiff ought to have raised it by way of objection proceedings in the High Court Misc cause No.43/2011. This is a question that must only be dealt with by the Court where the decree came from.”

But the argument made by the Applicant is that as an objector in the objection proceedings he is not a party to the suit as contemplated by the provisions of Section 34. The Applicant sought to demonstrate the strength of his intended appeal. But I have to say that the Applicants effort would have been more fruitful if this application had been one under Rule 5(2) (b) of The Court of Appeal Rules which requires, inter alia, that the intended appeal is not frivolous or is arguable. The principles to be applied in respect to the application before this Court are somewhat different. They are those outlined in paragraph 10 of the decision.

14) I see two things that could happen if this Court does not grant stay. One, the Respondents would proceed with execution for their costs. Secondly, the order dismissing the application for injunction would remain undisturbed. In respect to costs, the 1st Respondent is an advocate while the 2nd Respondent an auctioneer. The Applicant has not shown, indeed argued, that it shall have any difficulty recovering costs from these two in the event of success of his proposed appeal. It is not said that the two are impecunious or that the process of recovery would be burdensome let alone impossible. The Applicant has not demonstrated that he stands to suffer considerable, extraordinary or momentous loss if he paid the costs.

15) The trial Court's ruling of 25/10/2012 dismissed the Application for interlocutory injunction and also struck out the entire suit. The order of the Court was a negative order and save for costs was

incapable of execution. In respect to costs, I have just held that the Applicant has not made out a case for staying the execution of those costs. It would therefore seem that there would be nothing left to be stayed. An application for stay of execution is misconceived when the order sought to be stayed is not a positive order capable of execution.

16) What might have been a more appropriate order for the Applicant to seek was an order for temporary injunction in the manner contemplated by Order 42 Rule 6(b), CPR 2010. That rule provides as follows:

“Notwithstanding anything contained in Subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

17) But even then the plea for injunction would fail. I would have thought that the provisions of Order 22 Rule 52 would have afforded the Applicant sufficient protection against further execution in Bungoma HCC No.43 of 2011. Order 22 Rule 52 provides:

“Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

Although the Court hearing the objection ought to order stay for not more than fourteen days in the first instance, an objector can seek extension of that period. This Court is told that the objection proceedings are still pending. What the Applicant did not tell this Court is whether there is a stay in his favour in those objection proceedings. I cannot understand the efficacy of the Applicant seeking protection by way of injunction in Busia Case No.88 of 2012 when he has or ought to obtain that protection in the objection proceedings.

18) My disposition. The Application for stay dated 30th January 2013 is dismissed with costs. The prayer for leave to file an appeal out of time is allowed. That appeal shall be filed and served within 21 days hereof. As the Applicant has succeeded in one prayer but failed in the other each party shall bear its own costs.

DATED, DELIVERED AND SIGNED ON THIS 3RD DAY OF MAY 2013.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR APPLICANT

.....FOR RESPONDENTS

**F. TUIYOTT
J U D G E**