



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 193 of 2008

NO.569

KENYA REVENUE AUTHORITY APPELLANT/RESPONDENT

VERSUS

PETER OBARA ONDARI RESPONDENT/APPLICANT

(Being an appeal from the judgment of Hon. D. Kemei, SRM in Rongo SRMCC NO.161 of 2007)

RULING

1. The application before the court is dated 4th November 2010 brought under the old **Order XXXIX rules 1, 2 & 9** of the **Civil Procedure Rules**. It seeks the following orders:-
 - (a) *A temporary injunction against the appellant/respondent restraining it, its agents, servants and/or employees from disposing, selling, damaging, wasting and/or in any other manner dealing with the applicant's motor vehicle Reg. No. KAG 620 Y pending the hearing and determination of this application interpartes.*
 - (b) *A temporary injunction do issue against the appellant/respondent restraining its agents, servants and/or employees from disposing, selling, damaging, wasting and/or in any other way dealing with the applicant's motor vehicle Reg. No. KAG 620 Y pending the hearing and determination of the Civil Appeal No.208 of 2010 at Kisumu.*
2. The application is premised on the ground that the respondent has filed an appeal against the judgment of this honourable court delivered on 31st May 2010 by Justice Makhandia (Kisumu Civil Appeal No.2-8/2010) which raises numerous triable issues and has high chances of success.
3. It is also premised on the grounds that the respondent has condemned the applicant's motor vehicle Reg. No.KAG 620 Y and issued a notice to dispose it being the subject matter in this appeal and if done the applicant will suffer substantial loss and damage. Lastly the respondent will not be prejudiced in any way if the orders sought are granted thus it is in the interest of justice that the execution of judgment and/or decree be stayed to pave way for the hearing of the appeal.
4. The application is supported by the affidavit of PETER OBARA ONDARI sworn on the 4th November 2010 who in a nutshell states that he filed an appeal being Kisumu Appeal No.208 of 2010 having been aggrieved by the decision/judgment of this Honourable Court delivered on 31st May 2010. He contends that the appeal has high chances of success and if stay of execution is not granted this

application and the said appeal will be rendered nugatory. Further that his vehicle Reg. No. KAG 620 Y has been condemned and may be disposed of by the respondent since they have issued a notice of disposal. The applicant avers that if the disposal takes place, then he will suffer substantial loss and damage especially before the determination of this application and the main appeal. Lastly he states in the said affidavit that the respondent will not be prejudiced if the orders sought herein are granted. He has annexed copies of a Memorandum of Appeal, Letter from the Judiciary confirming the appeal number and the letter from Kenya Revenue Authority condemning the above mentioned motor vehicle. Parties thereafter agreed that the application do proceed by way of written submissions.

5. It is the applicant's counsel's contention that the application herein is made pursuant to the provisions of **Order 40 Rule 1** of the **Civil Procedure Rules** which order confers an unfettered right to apply for injunction. Counsel further urges the honourable court to exercise its discretion and grant an injunction against the appellant herein as prayed in the Chamber Summons and finally that the application be heard on its merits and the issues determined on the balance of convenience. Counsel has relied on various authorities which I have had the opportunity to go through and have analyzed the same.

6. The respondent's counsel on the other hand submits that the applicant should have filed an application for stay of the judgment pending the hearing and determination of the appeal or intended appeal within a reasonable time, and therefore that the applicant is guilty of inordinate delay in bringing the instant application. Counsel also submits that the application is fatally defective and faulty as it has been brought under the wrong rules instead of **Order XLI** which makes provisions on appeals, stay and injunctions pending appeal. He submits that provisions of **Order XXXIX** refer to an existing suit and in this case there is no suit that is pending.

7. He further claims that the appeal before this court was determined on 31st May 2010 hence making this honourable court *functus officio* in awarding any injunction order under **Order XXXIX**. He further states that the applicant under the chamber summons seeks prayers of injunction yet in the supporting affidavit, the applicant is talking about stay of execution. That the applicant should have prayed for stay of the decision in his application under order **XLI**. That this honourable court being *functus officio*, it can therefore not issue a temporary injunction. Reliance on this point was placed on **Kisumu Court of Appeal Civil Appeal No.208 of 2010 – Peter Obara Ondari –vs- Kenya Revenue Authority.**

8. It is the respondent's submission that the applicant's delay in filing the application clearly shows that he has not suffered any substantial loss and damages as in fact no evidence has been put forth by the Applicant to show substantial loss. The Respondent's counsel concludes that the Respondent has adequate resources to avail to the Applicant in the event of damages being ordered against it. It is his prayer therefore that the application lacks merit and the same should be dismissed with costs.

9. Having read through the chamber summons dated 4th November 2010, the supporting affidavit by Peter Obara Ondari, and after considering submissions by counsel for the applicant and for the respondent, I do find that the applicant has come under the wrong provisions of the law being **Order XXXIX Rule 1, 2** and **9** now **Order 40 CPR** when he should have come under **Order XLI** now **Order 42 (6)** which provides for stay in case of appeal.

10. Secondly the applicant is not very sure of what orders he requires from this court as he has prayed for orders of injunction whereas in his grounds and supporting affidavit he is talking about stay of execution. This in itself makes the application fatally defective. This court can also not grant any injunctive orders as it has already determined the appeal.

11. In the premises, I find that the application lacks merit, is incompetent and fatally defective and accordingly the same is dismissed with costs to the respondent.

12. Lastly, the delay in delivering this ruling is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Mainga (absent) for Applicant

Mr. Twahir (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.