REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 180 of 2008

JOYCE LIKU JANDA....…….....PLAINTIFF

VERSUS

CARE SOMALIA SOUTHERN SUDAN…….....….DEFENDANT

RULING

On 8th July 2010, the defendant herein filed a Notice of Motion dated the same day expressed to be brought under Order XLI rule 4, Order L rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and All Enabling Provisions of the law, seeking the following orders:

1. **The application be heard ex parte in the first instance service be dispensed with.**

2. **Pending the hearing and determination of this application, there be stay of proceedings.**

3. **There be stay of proceedings pending appeal in the matter herein.**

4. **The Costs of this application be in the cause.**

It is important to note that following the review of the Civil Procedure Rules, Order XL1 rule 4 aforesaid is now Order 42 rule 6 while Order L rule 1 is now Order 51 rule 1 of the Civil Procedure Rules.

The application is based on the following grounds:

a. The learned judge entered interlocutory judgement in the matter herein. The Defendant made an application to have the same set aside which was not successful and for review which was declined.

b. The Defendant is dissatisfied with the Ruling delivered on 10th June, 2010 on the review application.

c. This application has been made without unreasonable delay.

d. That it would be just and reasonable to grant the orders sought.

The application is supported by an affidavit sworn by **Phoebe Owiti** the Defendant's internal auditor on 5th July 2010. According to the deponent, the defendant instructed its advocates on record to apply for review of the ruling delivered on 27th July 2009 which application was disallowed on 10th June 2010. The defendants were aggrieved by the said decision, especially on being informed by its advocates that the

suit was filed out of time at a time when all suits against **Invesco Assurance Company** were stayed. It is the deponent's view that the intended appeal has high chances of success in light of the aforesaid issue on limitation. It is further deposed that the intended appeal will be rendered nugatory if stay of proceedings herein is not ordered and it would be in the interest of justice for the Court to grant stay of proceedings pending appeal since the application is brought within reasonable time.

In opposition to the application, **Nyamogo Ochieng-Nyamogo**, the plaintiff's advocates swore a replying affidavit on 22nd July 2010, in which he deposed that the Motion together with the supporting affidavit are incurably defective, incompetent and do not lie. According to him, no competent appeal, or at all, exists capable of being argued with any chances of success and that the prayers sought are incapable of being granted. It is further deposed that the defendant is a vexatious litigant who filed the said incompetent , scandalous and frivolous motion with the sole purpose of delaying the fair and speedy hearing and determination of the suit. The deponent believes that the intended appeal is unlikely to upset the decisions made by the Court on 27th July 2009 and 10th July 2010. Further litigation must come to and hence the Motion ought to be disallowed with costs.

In his submissions in support of the application, **Mr. Muthania**, reiterated the contents of the supporting affidavit and added that there was an interlocutory judgement which was entered on 19th July2008. An application for review was made but was dismissed despite the fact that the defence was filed in the wrong Court. According to counsel the applicant stands to suffer if the application is allowed since the plaintiff intends to execute an action which is likely to render the intended appeal nugatory. Since the defendant stands to suffer if the said judgement is executed, it was submitted that it is only fair to grant the application because judgement was based on a technicality contrary to the provisions of Article 159(2) of the Constitution. Therefore it would be prudent to stay these proceedings as the said appeal is awaited while the Court makes such orders as to security as it deems just.

In his submissions, in opposing the application, **Mr. Nyamogo,** learned counsel for the plaintiff relied on his replying affidavit as well as the authorities filed. With respect to Article 159, counsel submitted that the said provision must be looked at from the position of both parties. The said provision requires speedy and fair justice and justice is only fair when just to all. With respect to the overriding objective, counsel submitted that the same requires speedy and fair attention to the claims of those before the court. A party who seeks to be frivolous, it was submitted, cannot be allowed to benefit from Article 159 and the said overriding objective. According to him, the defendant is frivolous because he is harping on possible execution without indicating what is there to be executed. Since the learned Judge only struck out the defendant's defence, there is nothing capable of being executed. Further Order 42 under which the application is brought only caters for stay of execution pending appeal yet there is no execution in the offing. Therefore, it is submitted that the application is brought under patently wrong provisions of the law. Further, in normal order of events a Notice of Appeal ought to have been filed and annexed so as to enable the Court decide whether or not he appeal is current. Without a Notice of Appeal the Court is unable to decide on the arguability of the appeal. Finally learned counsel submitted that the issues to be raised in the said appeal are capable of being dealt with in the formal proof. The application, it is submitted, is fraught with a litany of material omissions that do not allow it to lend itself to the court's discretionary jurisdiction and ought to be dismissed to allow the Court to proceed with the formal proof.

The marginal notes to Order 42 rule 6 states "stay in case of appeal". Whereas the body of the rule seems to deal with stay of execution the marginal notes are clearly not limited to stay pending appeal. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**

Even if I were to find that the provisions of Order 42 do not deal with stay of proceedings pending appeal, it is not in doubt that the Court has inherent jurisdiction to stay proceedings. The law is that the Court has wide power to stay proceedings when the ends of justice so require or to prevent an abuse of the Court process. See **Jadva Karsan vs. Harnam Singh Bhogal [1953] 20 LRK 74**.

However, for a party to qualify for an order of stay of proceedings pending an intended appeal one must manifest a serious intention of appealing. Where the purpose of seeking an order for stay is to stall the proceedings and frustrate the hearing of the case, the Court will not allow its process to be used for such

collateral purposes which the law does not recognise as genuine. For a party to manifest its intention to appeal, first and foremost the supplicant for orders of stay of proceedings must give a Notice of Appeal. I have perused the record herein and I have not been able to trace any notice manifesting an intention to appeal to the Court of Appeal. Neither has the defendant bothered to annex a copy thereof if the same exists. Accordingly I am unable to gauge the seriousness of the applicant in proceeding with the intended appeal. It would be a travesty of justice to bring proceedings to a halt when there is no appeal in sight as such orders might in the end be misused by unscrupulous litigants to derail an otherwise proper trial. This determination is sufficient to dispose of the present application.

Dealing with a similar matter in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001[2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held:

"... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless…These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory".

In the present case, if the intended appeal succeeds and the decision dismissing the application for review is allowed with the result that the defendant is given an opportunity to defend the suit, what would follow is that the proceedings in the formal proof would have been rendered nugatory and an appropriate order for costs can be made. However, I am not convinced that the intended appeal would thereby be rendered nugatory. The defendant's fear was that execution proceedings may be initiated. However, no judgement capable of being executed has been entered up to this stage and therefore the issue of execution is in my view premature.

In the result the application dated 8th July 2010 lacks merit and is dismissed with costs.

Dated at Nairobi this 1st day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of Ms. Solonka for the defendant/applicant