REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 100 of 2011

PETER MURAYA CHEGE.....APPELLANT/APPLICANT

VERSUS

D.N. IKUA & F.N. MWANGI T/A IKUA MWANGI & CO. ADVOCATES.....RESPONDENTS

RULING

This is an application dated 29/12/2011 brought pursuant to provisions of **Order 42 Rule 6**, **Order 51 Rule 1** of the **Civil Procedure Rules**, and **section 3A** of the **Civil Procedure Act**. It seeks for stay of execution of the consent orders of **1st December 2010** made in Nakuru **Misc. Case No.143 of 2010**, pending hearing and determination of the appeal against judgment of the trial court.

The parties had entered into a consent with regard to taxation of the Advocates/Client Bill of Costs, in the sum of Kshs.80,000/=. They applied to set aside the consent orders, but that application was dismissed.

In an affidavit sworn by the applicant he gives a background to how the consent was entered into, saying the same was fraudulent, and based on misrepresentation, which is why he is appealing against the lower court decision. He deposes that the firm of advocates who purported to act on his behalf in entering the consent never received instructions from him.

The application is opposed, and in the replying affidavit, the respondent states, the same is mischievous and only intended to delay payment of what is rightly due.

The applicants' contend that he did not instruct the Respondent to represent him in the matter **No.137 of 2004** and the purported letter of instruction dated **9th February 2009** was written long after the matter had been concluded. To justify this, he points out that the Respondent did not have any evidence that he had obtained leave to come on record after judgment had been passed.

However it is admitted that the applicant gave instructions to the Respondent to collect a debt, but says those instructions were not carried out. The Respondent is also disowning action by the firm of advocates who purportedly represented him when the consent was entered into – saying there were no instructions to compromise the suit.

Counsel urges this court to allow the orders as the applicant has an arguable appeal with high chances of success, and if the orders are not granted, then the appeal will be rendered nugatory. Reference is made to the decision in **BUTT V RENT RESTRICTION TRIBUNAL** (1982) KLR 417 that grant of stay is discretionary but should not be withheld, if in so doing the pending appeal will be rendered nugatory.

The applicant's counsel further argues that if execution proceeds, then the applicant will suffer substantial

loss as this will greatly reduce his capital (being a businessman). In any event the applicant fears that he may never recover the sum if paid out, since he is not sure about the Respondent's financial position. The applicant undertakes to abide by any conditions this court may set.

In opposing the application, the Respondent's counsel submits that the appeal has no chances of success, since they applied and were allowed to come on record in **HCCC No.137 of 2004**. Of course if they were instructed, then they would be entitled to costs. However, there is the flipside – that the firm of advocates which represented the applicant and entered into the consent had no instructions to do so. This is termed as false and the court is urged to infer from the applicant's conduct of giving instructions, then later disowning them, that it is a habit he thrives on, and he should not be believed. It is also argued that the purported substantial loss being submitted on has not been deponed to in the applicant's affidavit nor is the applicant offering any security for due performance as contemplated by **Order 42 Rule 6(2).**

The Respondent's counsel also submits that there has been an unreasonable delay in bringing this application, where ruling was delivered on 8th June 2011, almost seven months lapsed before this application was filed.

The court is urged to consider the decision in **JOSEPHINE MORAA V KEN SAGINI & ANOTHER** (2010) KLR, which held that a money decree cannot be subject of a stay of execution, and a stay order cannot be granted in respect of costs. As for its financial position, counsel submits that the Respondent is a firm of advocates who are capable of refunding the money if the appeal is successful.

Under **Order 42 Rule 6(2)** a party seeking stay of execution pending appeal is required to satisfy the court that:

(1) Substantial loss may result.

(2) The application has been made without unreasonable delay

(3) Such security as the court orders for the due performance of such decree or order is given.

Whereas grant of stay is discretionary, the general principle is that if there is no other overwhelming hindrance, it ought to be granted so that an appeal is not rendered nugatory in the event that it succeeds. From the submissions presented and the memorandum of appeal, I don't think the appeal can be branded as vexatious, there is an arguable point which merits being heard with regard to whether the firm that entered the consent had such instructions. It is said there has been a lapse of seven months before this application was filed – no explanation has been given for this delay, the only thing counsel states is that the application has been brought without unreasonable delay. The orders were made on 8th June 2011, and my perusal of the court record shows that after the application for stay was dismissed, a similar one was filed on 12th September 2011 before the lower court and it is after that one was dismissed for being *Res-Judicata*, that the present application dated 29th December 2011 was filed. I don't think that is a reasonable delay, because in the intervening period, the applicant was involved in activities intended to stem the new challenged orders. This would in effect justify the period within which the application has been made, and I would not term it as an unreasonable delay.

The applicant fears substantial loss is that the Respondent's financial base is not known, and that payment of the sum of Kshs.280,000/= will cause a huge dent on his pocket. Certainly the sum sought is not small, but the Respondent's state it is a firm of advocates which would easily refund the money. There is no denial that the Respondent is in active legal practice in Nakuru and there is nothing to suggest that it is not liquid.

Although nothing has been presented to this court to suggest that the Respondent firm is having liquidity problems, the same applies to the Respondent, merely saying **"we are in private practice and have the financial muscle to pay"** does not prove that ability. Indeed in the case of **KENYA SHELL V KARUGA**, the court refused to grant stay pending appeal because the applicants were in employment,

one of them being in the civil service and was capable of refunding the money if the same was paid and the appeal succeeded.

I find that the applicant's fears that he may suffer substantial loss and not be able to recover the money has no basis. Respondent has not demonstrated to this court existence of any known assets – being in legal practice does not necessarily translate into ability to have the sum of Kshs.280,000/- readily. It is also argued that this is not even a money decree per see, but an order for costs, and that on the strength of the various authorities cited, stay should not arise. In the case of **Ujagar Singh V Runda Coffee Estates Ltd.** (1960) EA 263, the court observed that:

"It is not normal for a court to grant stay of execution in monetary decrees, but where there are special features such as the issue or irregularity of the judgment, the fact that the amount payable…… being substantial and the fact that the plaintiff has no known assets…….. which can recoup in the event that…… appeal is successful."

Coupled with this is the fact that courts have held that stay cannot be granted in respect of costs – the case of **FRANCIS KABAA V NANCY WAMBUI & ANOTHER** – Civil Application NRB No.298 of 1996 (UR) the Court of Appeal stated that:

"Where what is sought to be stayed is the order of costs, the same cannot be granted as the appellant, if he succeeds in his appeal would be refunded his costs."

Yet in this instance although the costs are said to be the fruits of the Respondent's labour – this labour is contested and its fruits are also contested due to the manner of reaping which means if orders are not granted the applicant may suffer loss and the appeal would be rendered nugatory. To my mind, given the contested manner in which the consent was entered into, then to secure the interests of both parties it is prudent to order that:

(1) There be stay of execution pending hearing and determination of the appeal on condition that the applicant deposits the sum of Kshs.280,000/- claimed as costs, in an interest earning account in the joint names of applicant's counsel and the Respondent, within 14 (fourteen(days from today.

(2) In default the stay orders will automatically lapse – which means execution will proceed.

(3) Costs of this application shall be in cause.

Delivered and dated this 2nd day of November, 2012 at Nakuru.

H.A. OMONDI
JUDGE