



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 322 OF 2008

KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JOHN F. KINYUA.....1ST DEFENDANT

CHARLES KINUTHIA GICHANE.....2ND DEFENDANT

RULING

Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows;

“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; and

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

On 15th June, 2011, Okwengu J. (as she then was) struck out the defences and counter-claims that were filed herein by the Defendants and entered judgment for the Plaintiff against the Defendants as prayed in the plaint together with costs. Following that judgment that was made following an application by the Plaintiff, a decree was extracted and issued on 1st September, 2011. The 2nd Defendant’s advocates filed a Notice of Appeal against the said judgment and by a letter dated 15th June, 2011, applied for certified copies of the proceedings for the purposes of appeal to the Court of Appeal. I have not come across in the court file any Notice of Appeal or a letter by the 1st Defendant requesting for certified copies of the proceedings. I have noted from the record that following the said request by the 2nd Defendant, the proceedings were typed and the same are in the court file.

On 9th December, 2011, the Plaintiff filed its Party/Party Bill of Costs for taxation. The Defendants raised preliminary objections to the Plaintiff’s bill of costs which objection was dismissed by the court on 26th October, 2012. After the dismissal of the said preliminary objections, the Plaintiff’s bill of costs was taxed at Kshs.312,319/= on 18th April, 2013. The Defendants did not file a reference to the said taxation. On 11th December, 2013 the Plaintiff filed an application for execution for the recovery of its taxed costs. The Plaintiff requested the court to issue the Defendants with a notice to appear and show cause why they could not be committed to civil jail for failure to pay the said amount which notice was issued on 15th January, 2014. On 4th March, 2014 the court after hearing the parties ordered that warrants of arrest be issued against the Defendants for their failure to pay to the Plaintiff a sum of Kshs.315,294/= being the

costs that were awarded to the Plaintiff together with additional expenses. On 18th March, 2014 warrants for the arrest of the Defendants were issued. The Defendants did not appeal against the said warrants of arrest.

What I now have before me are two (2) similar applications by the Defendants. The 2nd Defendant's application which was the first to be filed has been brought by way of Notice of Motion dated 5th May, 2014 while the 1st Defendant's application has been brought by way of Notice of Motion dated 6th May, 2014. The applications were filed on 6th May, 2014 and 7th May, 2014 respectively. In the applications, the Defendants have sought a stay of execution of the judgment that was made herein by Okwengu J. on 15th June, 2011 pending the hearing and determination of the intended appeal against the same. The applications have been brought on the grounds that the Defendants have filed notices of appeal against the said judgment and have also requested for certified copies of the proceedings and the said judgment for the purposes of the intended appeal. The Defendants have contended that their intended appeals are meritorious and unless the stay sought is granted, the same would be rendered nugatory thereby occasioning the Defendants injustice, substantial loss and prejudice. The Defendants have contended that they stand the risk of being arrested and put in civil jail which would cause both injury and harm to their persons. In his affidavit in support of his application, the 2nd Defendant stated that the Defendants successfully appealed against the decision of the Anti-Corruption Court which formed the basis of the judgment that was made herein by Okwengu J. The 2nd Defendant annexed to his affidavit among others, a copy of the judgment that was made in High Court Criminal Appeal No. 120 of 2011, John Faustian Kinyua and Charles Kinuthia Gichane vs. Republic, a copy of the notice of appeal, and a draft memorandum of appeal. In his affidavit in support of his application, the 1st Defendant reiterated the contents of the affidavit that was sworn by the 2nd Defendant in support of his application. Although the 1st Defendant purported to have attached to his affidavit as annexures, copies of the notice of appeal he claimed to have filed and the letter his advocates allegedly wrote requesting for certified copies of the ruling and proceedings, the documents were not attached to the affidavit. As I have mentioned earlier in this ruling, there is no notice of appeal or a letter requesting for proceedings by the 1st Defendant on record. It is not surprising therefore that the same were not attached to the 1st Defendant's affidavit in support of his stay application.

The Defendants' applications were opposed by the Plaintiff through a replying affidavit sworn by Ben Murei on 15th April, 2014. The Plaintiff averred that the applications were scandalous, frivolous, vexatious and amounted to an abuse of the process of the court. The Plaintiff contended that pursuant to the said judgment of Okwengu J., the suit property had reverted to Kenya Re-Insurance Corporation and that what was left to be recovered by the Plaintiff from the Defendants was taxed costs in the sum of Kshs.312,319/=. The Plaintiff contended that the Plaintiff was able to refund this amount to the Defendants in the event that the Defendants' intended appeal is successful.

The applications were heard together by way of written submissions. The 1st Defendant filed his submissions on 6th November, 2014 while the 2nd Defendant filed his submissions on 18th September, 2014. The Plaintiff filed its submissions in reply on 20th February, 2015. I have considered the applications together with the affidavits that were filed in support thereof. I have also considered the Plaintiff's replying affidavit in opposition to the applications. Finally, I have considered the written submissions by the parties and the authorities that were cited in support thereof. The issue that I need to determine is whether the Defendants have met the conditions for granting a stay of execution. I am not satisfied that the Defendants have met the conditions set under Order 42 Rule (6) (2) for granting a stay of execution. As I have mentioned earlier in this ruling, the judgment the execution of which is sought to be stayed was made on 15th June, 2011. The applications for stay before me were made in May, 2014 after a lapse of over two(2) years. I am in agreement with the Plaintiff that the applications before the court have been brought after unreasonable delay and this alone should disentitle the Defendants to the orders sought. The Defendants have sought a stay pending the hearing of their intended appeals. For the 1st Defendant, no notice of appeal was filed neither was any request made for typed copies of proceedings. In the absence of a notice of appeal, the 1st Defendant is not entitled to the stay sought. For the 2nd

Defendant, the notice of appeal was filed on 23rd June, 2011 a few days after the judgment sought to be stayed. I have noted from the record that the ruling of the court was delivered duly typed and that the proceedings were typed soon after the request for the same was made by the 2nd Defendant in 2011. There is no evidence on record that the 2nd Defendant has made an attempt to pick copies of the proceedings from the court registry since the 2nd Defendant made a request for the same on 15th June, 2011. I am not satisfied that the 2nd Defendant has been keen on filing the intended appeal that todate has not been filed seven (7) years after the date of the judgment by Okwengu J.

Apart from filing the applications without unreasonable delay, the Defendants were also required to satisfy the court that they would suffer substantial loss if the stay sought is not granted. The Plaintiff's contention that the suit property L.R No. 209/10611/106 had reverted to Kenya Re-Insurance Corporation and that what it is pursuing is the recovery of costs is not disputed by the Defendants. There is no evidence placed before the court that the Defendants would not be able to recover the taxed costs of Kshs.312,319/= from the Plaintiff if they are successful in their intended appeals. Even if it is assumed that the suit property has not yet been transferred to Kenya Re-insurance Corporation, there is no evidence that the Plaintiff which is a statutory commission would not be able to account for and pay to the 2nd Defendant any income realized from the property should the 2nd Defendant succeed in his intended appeal.

The upshot of the foregoing is that I find no merit in the 1st Defendant's application dated 6th May, 2014 and the 2nd Defendant's application dated 5th May, 2014. The two applications are dismissed with costs to the Plaintiff.

Delivered and Dated at Nairobi this 19th day of January, 2018

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

N/A	for the Plaintiff
Mr. Morara	for 1 st Defendant
Mr. Bwomote	for 2 nd Defendant
Catherine	Court Assistant