



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 6 OF 2014

IAN PAUL HUTCHISON T/A BAHNOF BAR & RESTAURANT MTWAPA...APPELLANT

=VERSUS=

KENGELENI INVESTMENTS LIMITED.....1ST RESPONDENT

EVANS MAABI T/A MURPHY MERCHANTS AUCTIONEERS.....2ND RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Appellant's Application dated 26th February, 2014 seeking for the following orders:

(a) THAT this Honourable Court be pleased to order stay of execution of the Ruling of the Lower Court issued on 18th February 2014 in KILIFI PMCC No. 231 of 2013 IAN PAUL HUTCHISON T/A BAHNHOF BAR & RESTAURANT MTWAPA-VS-KENGELENI INVESTMENTS LIMITED & ANOTHER pending the hearing and determination of the Appeal filed herein.

(b) THAT this court be pleased to grant the orders it deems just to meet the ends of justice in this matter.

(e) THAT costs of this Application be in the cause

The Appellant's/Applicant's case

2. According to the Affidavit of the Appellant, the Kilifi Principal Magistrate's Court issued an order upholding the Respondents' Preliminary Objection and proceeded to strike out the appellant's Plaint and Application in PMCC No. 231 of 2013 and that the effect of the order of the Magistrate has opened up the possibility of auctioneers selling the goods that were attached on 25th October 2013.

3. It is the Applicant's case that the court misdirected itself that he had a pending case in Mombasa SRMCC No. 2656 of 2012 litigating under the same title which is not true.

The Respondents' case

4. The 1st Respondent's manager deponed that the Appellant sued the 1st Respondent in Kilifi PMCC No. 231 of 2013; that the subject matter of that suit was the removal of the appellant's goods emanating from a decree in execution of the decree in SRMCCC No. 2656 of 2012 after the Appellant failed to pay the sum of Kshs.2,531,686 to the 1st Respondent as ordered by the court.

5. It is the 1st Respondent's case that the learned Magistrate rightly upheld the preliminary objection based on merit and proceeded to strike out civil suit number 231 of 2013; that the Kilifi court could not sit on appeal or review of the orders issued by the trial Magistrate in Mombasa and that the Appellants goods had been attached pursuant to an order of the court and he should have challenged that particular order instead of filing a separate suit.

6. According to the 1st Respondent the intended appeal has no chance of success.

Analysis and findings

7. The advocate for both parties submitted at length on the principles applicable for an injunction to issue.

8. However, what both counsels did not realize is that there is no Application before me for an injunction pending the hearing of the appeal. Prayer number 2 of the Application only sought for an injunction pending the hearing of the Application inter partes and not appeal. That prayer is therefore spent.

9. The law relating to stay of execution is provided for under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. All the Applicant has to show is that he is likely to suffer substantial loss unless the order of stay of execution is granted. The Applicant also has to show that he has filed the application without unreasonable delay and also provide security for the due performance of the decree.

10. According to the Memorandum of Appeal, the appellant is aggrieved with the Ruling of the learned Magistrate in Kilifi PMCC No. 231 of 2013. In the said court, the learned Magistrate allowed the Respondent's Preliminary Objection and struck out the Appellant's suit because there was another suit dealing with the same issue and the same parties being Mombasa SRMCC no. 2656 of 2012.

11. After quoting the provisions of Section 6 of the Civil Procedure Act, and having looked at the proceedings in SRMCC No. 2656 of 2012, the learned Magistrate struck out the suit because the two matters were substantially the same.

14. According to the learned Magistrate, the Appellant should have challenged the execution proceedings in Mombasa SRMCC No. 2656 of 2012 in that court or the Appellant Court instead of filing a fresh suit in her court.

13. I am not, at this juncture, supposed to determine whether the Appellant's appeal is meritorious, or even whether it has chances of success. All I have to do is to confine myself within the requirements of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

14. The learned Magistrate in Kilifi PMCC No. 231 of 2013, whose Ruling is the subject of this proceedings, only struck out the suit.

15. I have not been told the substantial loss that the Appellant will suffer due to the striking out of the Plaintiff in Kilifi SRMCC NO. 231 of 2013.

16. If indeed the striking out of the suit in Kilifi SRMCC No. 231 of 2013 will result in the sale of the Applicant's goods in execution of a decree in Mombasa SRMCC 2656 of 2012, it follows that the Appellant ought to have filed an appeal in respect of the decree in that suit and not in respect of Kilifi SRMCC No. 232 of 2013.

17. The Appellant has also not offered any security in respect of the due performance of the decree in

SRMCCC NO. 2656 of 2012 in any event.

18. For those reasons, I dismiss the Appellant's Application dated 26th February 2014 with costs.

Dated and delivered in Malindi this **26th** day of **September**, 2014.

O. A. Angote

Judge