



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: ASIKE- MAKHANDIA, MUSINGA, MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. 55 OF 2020**

**BETWEEN**

**AMIGOS NUTS AND COMMODITIES LIMITED.....APPLICANT**

**AND**

**KAM HUNG TSUI.....RESPONDENT**

*(An application for stay of execution of the Judgment of the High Court of Kenya at Kerugoya (L.W. Gitari, J.) dated 11th May 2020*

*in*

*H.C.C. Case No. 6 of 2018.)*

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**RULING OF THE COURT**

1. On 11th May 2020, the High Court (*L.W. Gitari, J.*) delivered a judgment in which the learned judge issued orders against the applicant, *inter alia*, for specific performance of a contract to return all the goods to the respondent which are worth **USD 107,896/=** equivalent to **Kshs.10,789,600/=** and meet the cost of transport, clearance, export and import duty.
2. Being aggrieved by that judgment, the applicant lodged a notice of motion dated 16th June 2020 under certificate of urgency seeking orders for stay of execution of the judgment.
3. The notice of motion was anchored on grounds stated on the face of the application and a supporting affidavit sworn by **Peter Maina Kiumi**, one of the directors of the applicant company. In effect, the applicant is apprehensive that the impugned judgment, if enforced, will cause irreparable damage to the applicant since the respondent has already commenced attachment proceedings and has threatened to attach the applicant's tools of trade.
4. The applicant further stated that the said judgment was biased and unfathomable since the plaintiff/respondent was granted orders that it never requested for, that is that, the applicant do pay the respondent **USD 107,896.00** equivalent to **Kshs.10,789,600.00** as opposed to what was prayed for in the plaint, **USD 104,536.20** equivalent to **Kshs.10, 453,620.00**.
5. The application was opposed through a replying affidavit sworn by the respondent, in which he raised a preliminary point of law contending that the applicant's application, the affidavits in support and the memorandum of appeal are incompetent for the following reasons; that **Mr. Sammy Ndirangu Tumuti**, the applicant's Advocate who drew and filed the pleadings on the company's behalf, does not hold a current practicing certificate and consequently the pleadings drawn and filed by him ought to be struck out; that the said person presented himself as an advocate when in fact he was aware that he was not in possession of a current practicing certificate thereby misleading the Court; that the application has been brought under **Order 26 rule 2** of the **Civil Procedure Rules** and **section 1A** and **1B** of the **Civil Procedure Act** which is only limited to the High Court and Subordinate Courts.
6. The respondent also contends that the said award of Kshs.10,789,600/= as opposed to Kshs.10,453,620/= was an error apparent on the face of the record of the High Court and there are immediate and adequate reliefs available to the applicant under **Order 45 rule 1** and **2** of the **Civil Procedure Rules**.
7. We have considered the preliminary objection and the arguments made by both parties. As stated in the renowned case of **Mukhisa**

***Biscuit Company v West End Distributors Ltd [1969] EA 696***, a preliminary objection must be one that; “*consists of a point of law which has been pleaded or which arises by clear indications out of pleadings and which if argued at a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court....*”

8. In this case, the preliminary objection raises an issue as to whether the pleadings that were drawn and filed by the applicant’s Advocate should be struck out by virtue of the advocate not having a current practicing certificate. The respondent has indeed produced evidence from the Law Society of Kenya indicating that the said advocate last held a practicing certificate in the year 2017 and hence he did not have any authority to draw any pleadings.

9. It is important that we first deal with the issue of the preliminary objection raised by the respondent for the reason that if it is upheld, then the applicant’s motion will have been disposed of.

10. The issue of an advocate drawing pleadings and preparing documents without possessing a current practicing certificate was conclusively addressed by the Supreme Court in the case of ***National Bank Limited v Anaj Warehousing Limited [2015] eKLR***. We are also guided by this Court’s decision in ***Peterson Ndung’u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR*** where it expressed as follows:

***“23. Regarding the validity of instruments or documents other than of conveyance, prepared by an advocate who at the time was not holding a current practising certificate, we are persuaded by the decision of Ngugi, J. in the case of R V Resident Magistrate’s Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others [2016] eKLR where the learned Judge stated as follows:***

***“...The Supreme Court reasoned that the basis for the Court of Appeal reasoning in the Wilson Ndolo Ayah Case was not the text of the statute but public policy – public policy that declaring all documents signed by a lawyer without a practicing certificate as null and void creates a disincentive for lawyers to defy statutory provisions on taking of practicing certificates and creates a general public disposition that courts do not condone or encourage illegalities. The Supreme Court faulted this reasoning as applied to the case of admitted lawyers (who are in the roll of advocates) because it exacts a huge penalty on innocent clients who had plausible and reasonable basis for believing that the lawyer in question was duly qualified. Instead, the Supreme Court urges the Court, in line with the new Constitutional ethos, to take the lived realities of Kenyans into consideration in interpreting the statutory provision in question.”***

11. The learned Judge continued as follows:

***“The Supreme Court held that since the statute did not expressly state that any documents signed by a lawyer who did not have a practicing certificate were invalid, that interpretation was unwarranted. The court called on the overriding principles of equity in reaching the opposite conclusion. Even then, it is important to note, the Supreme Court neither limited nor announced the outer limits of the categories of documents which would be covered by the flexible rule the court announced in Anaj Warehousing Limited Case. First, the Court announced that with respect to conveyancing or other contractual documents identified in section 34 of the Advocates Act, even the flexible interpretation it had embraced would not cover documents drawn by non-lawyers or advocates who had been disbarred or suspended from practice. Secondly, the Court did not expressly provide that the flexible interpretation it announced would cover pleadings and submissions drawn by a lawyer who did not have a practicing certificate. This latter question is, of course, the question squarely facing us in the present application...As I stated above, however, I believe that the reasoning of the Supreme Court in the Anaj Warehousing Limited Case can easily be extended to the situation presented by application of section 31 of the Advocates Act where a lawyer instructed by a client who is acting in good faith draws pleadings and addresses the court on a matter only for it to be discovered later that the lawyer did not have a practicing certificate.”***

12. This Court then concluded in ***Peterson Ndu’ngu Stephen (supra)*** that:-

***“24. By parity of reasoning of the Supreme Court decision in the Anaj Warehousing Case, we find and hold that no pleadings, documents or submissions become invalid under Section 31 of the Advocates Act only by dint of their having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons such as non-advocates whose names have been struck off the roll of advocates shall be void for all purposes.”***

13. Going by the aforementioned cases, we resonate and associate ourselves fully with the holding that documents or pleadings drawn and filed by an advocate who does not possess a current practicing certificate does not become invalid and should therefore not warrant being struck out. We therefore overrule the preliminary objection.

14. Coming to the issue of grant of stay of execution, the applicant contends that the intended appeal has a high chance of success and that it stands to suffer irreparable harm if the orders sought are not granted as the respondent has commenced attachment proceedings and has threatened to attach the applicant’s tools of trade. On the other hand, the respondent contends that the execution proceedings have been overtaken by events as the auctioneers involved conducted a public auction on 3rd August 2020 and the said auction was not successful as the machines to be attached and sold had been vandalized by the applicant and were not in good working condition.

15. It was his further disposition in ***paragraph 6*** of his ***replying affidavit*** that the warrant of attachment was subsequently returned to the High Court unexecuted. Having also admitted that the erroneous award was an error apparent on the face of the record, the respondent has suggested that the applicant can file an application for rectification under ***order 45 rules 1 and 2 of the Civil Procedure Rules***.

16. A perusal of the impugned judgment clearly indicates that the learned judge addressed herself on that issue. She observed that ***“the plaintiff has submitted that there is an error on calculation of the sum to be paid as consideration for the machinery and equipment. The error is not fatal and cannot prejudice the defendant. The court has discretion to amend such errors under Section 100 of the Civil Procedure Act.”*** We respectfully agree with the learned judge.

17. Having considered the application and the record as a whole, it is our considered view that the applicant has not satisfied the two limbs under ***rule 5(2) (b)*** of the ***Court of Appeal Rules***, that the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. Arguability of the appeal is doubtful, and even if it was, it has not been demonstrated that in the event that execution is carried out and the appeal succeeds the respondent would be unable to refund the decretal sum.

18. Accordingly, the application lacks merit and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**