



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & KIAGE, JJ.A)

CIVIL APPLICATION NO. NAI 2 OF 2017 (UR 2 OF 2017)

BETWEEN

NELSON MUTAIAPPLICANT

AND

BENSON KATHUNGERESPONDENT

(An application for injunction pending the hearing and determination of an Appeal No. 58 of 2012 from the Judgment and Orders of the High Court of Kenya at Nairobi (Koome, J.) dated 22nd October, 2010

in

H. C. C. No. 189 of 2010)

RULING OF THE COURT

Whichever way we look at it, the application before us is either *res judicata* or an abuse of court process and we have no reason to grant the order sought.

The application was filed on 9th January, 2017 seeking an order of injunction under **Rule 5 (2) (b)** of the Rules of this Court to restrain the respondent from "*arresting, detaining or proclaiming(sic)*" against the applicant pending the hearing and determination of an appeal filed against the judgment of **Koome, J.** (as she then was) delivered on 22nd October, 2010. It becomes apparent immediately that the matter seems to have dragged along in the last 8 years, hence a reason for closer examination of its antecedents.

The applicant is an advocate of the High Court of Kenya, practising in the name or style of **Kandie Mutai Mudeizi & Company Advocates**, of Nairobi. In the year 2008, the respondent, who was represented by another Firm of advocates, **M/s Anthony Mulekyo & Company Advocates**, entered into an agreement to buy a piece of land from the applicant's client for Sh. 6.5 million. It was agreed that a sum of Sh 3.25 million be deposited with the applicant, which the respondent did, and that the balance be paid upon completion of the transaction within 90 days. It was never to be.

Before the completion date, the transaction was frustrated by the Registrar of Lands, who cancelled the transfer registered in favour of the vendor, thus divesting him of any transferable interest. The respondent demanded the deposit back but it was not paid. He went to the High Court on 18th March, 2010 and took

out an Originating Summons to compel the release of the deposit. The application was resisted by the applicant on the ground that he had released the bulk of the deposit to the vendor before the transaction was frustrated. He only had a balance of Sh. 300,000 which he had retained as his legal fees, but released to the respondent instead.

After considering the application, Koome, J. was of the view that the deposit had been held by the applicant in escrow and there was no basis for releasing it to the vendor before the completion date. An order was made for the balance of Sh. 2.9 million to be released to the respondent within 15 days failing which judgment for the said sum would ensue together with costs and interest.

Dissatisfied with that Ruling, the applicant filed a notice of appeal and lodged a motion under **Rule 5 (2) (b)** of the Court's Rules seeking an order for stay of execution. Meanwhile, in default of compliance with the order of Koome, J., the respondent extracted the decree and levied attachment on the applicant's Firm of Advocates. Upon objection being made by a third party claiming that the attached goods belonged to it, the attachment was lifted and set aside.

The motion for stay of execution was heard by this Court, differently constituted, and a ruling was delivered on 9th May, 2014, rejecting it. The main appeal had by then been filed, but the Court had this to say on the twin principles which the applicant had to satisfy:

"We do not wish to make a definite finding on whether or not the appellants' appeal is arguable. Suffice it to say that the applicant did receive from the respondent the sum of KShs.3,250,000 in his capacity as the vendors' advocate and therefore a stakeholder. He released the bulk of the money to the vendor without as much as seeking the consent of or even informing the respondent's advocates. Without saying more, we are not satisfied, as we should be before exercising our Rule 5 (2) (6) discretion, that the appeal is arguable. It seems to us doubtful. And we cannot be satisfied if in doubt.

On the second limb as well, and an applicant must satisfy us on both as established in a long line of authorities (See GITHUNGURI VS JIMBA CREDIT CORP. LTD [1988] KLR 83-8; MAGNATE VENTURES LTD VS ENG KENYA LTD [2009] KLR 538), we stand unsatisfied. Beyond the bare assertion by the applicant that "it may be difficult to recoup the amount" if paid over to the respondent, we have not been given material or reason to doubt the respondent's ability to pay back the same amount of money he had himself first paid to the applicant. If anything, the record seems to show that it is the respondent who has had, and continues to have, difficulty recouping the money from the applicant".

The main appeal against the Ruling of Koome, J. was filed on 16th March, 2012. As at the time this application was heard on 13th November, 2017, there was no indication that any initiative had been taken to have the appeal heard. Instead, the applicant returned to the High Court (**Ogola, J.**) on 18th December, 2015 seeking to stop warrants of arrest issued against him after failing to show cause why they should not issue in execution of the decree, and failing to comply with an order made earlier for payment by installments. In making the application, the applicant was not challenging the execution of the decree, but the mode of execution. He sought an order that the mode of execution be changed to an order for payment by monthly installments of Sh. 50,000 until full payment.

In the course of considering the application, Ogola, J. examined the *bona fides* of the applicant and had this to say:-

"The circumstances under which the applicant got into the present debt are not pleaded in this application but are in any event present in the court proceedings. This court is not able to say more on this issue. However, as for the conduct of the Debtor, this court notes that the judgment in this case was entered in the year 2010 when the debt was a meager Two Million, Nine Hundred and Fifty Thousand together with cost and interest. From that date to date, six years later, the Applicant has only paid to the Respondent Kenya Shillings One Hundred and Twenty Thousand (Kshs.120,000/=), and the interest continues to accrue. It can therefore be

concluded that the applicant's conduct is of a person who is not willing to pay the decretal amount. It should also be noted that this application was presented to court on the 18th of December 2015, three days after an attempted arrest of the Applicant pursuant to the Warrants of Arrest issued by this court on the 3rd December 2015.

7. On the Applicant's financial position, it is on record that the applicant was directed to pay a lump sum amount before further directions were given on the proposed installments. The applicant failed to honour the directive given hence the issue of the warrants of arrest. Further, it is worth noting that the Applicant has only presented to this court the same documents that he presented during the hearing of the Notice to Show Cause why execution should not issue. These same documents are in respect to periods between November 2013 and April 2014. The Applicant has further averred that he is a practising advocate and as such he is in business. This then calls into question the Applicant's bona fides in offering to pay a fair portion at once".

The learned Judge found that the applicant was not serious with the proposal he made for settlement of the decree, but still bent backwards in exercise of his discretion and issued the following orders:-

"a) The warrant of arrest issued against the Judgement/Debtor/Applicant herein on 3rd December 2015 are hereby lifted.

b) The Judgement/Debtor/Applicant is herewith allowed to liquidate the decree as follows;

(i) Make a lumpsum deposit of Shs.700,000/= to the Judgment Creditor by 30th April 2016.

(ii) Make a monthly payment by instalment to the Judgment Debtor of Shs. 100,000/= with effect from 1st June 2016.

(iii) If there is any failure of compliance with above orders the said warrants of arrest issued on 3rd December 2015 shall automatically be reinstated".

That was on 24th March, 2016.

None of those orders were challenged by the applicant as no notice of appeal was filed. But they were not complied with either. Instead, the applicant returned to this Court on 9th January, 2017 and took out the motion now before us on the basis that he had filed a notice of appeal against the ruling of Koome, J.; that the intended appeal was arguable and that if we do not grant him the injunction sought, the success of his appeal, which was already before the Court, would be rendered nugatory.

Surely, this Court, **(Karanja, JA, Mwilu, JA (now Deputy Chief Justice) & Kiage, JA)** had earlier expressed its view on the arguability of the intended appeal and the nugatory aspect. We have reproduced above the reasons why the application for stay was not granted. Baptising the current application as an injunction and then pretending that it was different from the earlier application is pure mischief. It cuts no ice since the same legal considerations apply. A court of competent jurisdiction had made orders for execution of the decree in the manner of installment payments which order was disobeyed without challenging it. The decree itself was not challenged.

Furthermore, in his affidavit in reply to this motion, the respondent disclosed that the applicant had filed yet another application before the High Court on 5th December, 2016 seeking similar orders and that a ruling of that Court was expected on 9th March, 2017. There was no rebuttal to that affidavit. Such multiplicity of applications made without pursuing the main appeal for a period of six years smacks of abuse of court process which this Court will not countenance.

We have said enough to show our displeasure and reasons why a court of equity will not exercise its discretion in favour of the applicant. As stated earlier, the application is for dismissal and we order that it

be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR