



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPLICATION NO. 4 OF 2016 (UR No. 4 OF 2016)

BETWEEN

AKHTAR BUTT.....1ST APPLICANT

HAROON BUTT.....2ND APPLICANT

AND

REGINE BUTT.....RESPONDENT

(An application for stay of execution pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Mombasa (Family Division Court), (Thande,J.) dated 18th February, 2016

in

H.C.C. Suit No. 8 of 2014 (O.S.)

RULING OF THE COURT

Through an application dated 20th May, 2016, the applicants have sought orders *inter alia* that:-

- “a) (spent).**
- b) The Honourable court be pleased to hear the applicants on the 5(2) (b) application dated 18th February, 2016 and filed herein on 23rd February, 2016.**
- c) This Honourable court be pleased to stay the execution of the warrants of arrest issued by the High Court herein as against the 1st and 2nd defendants (the applicants) on 1st March, 2016, pending the hearing and determination of the 5(2) (b) application herein.**
- d) The Honourable court be pleased to correct the fundamental factual errors appearing on the face of its ruling delivered on 22nd April, 2016 but dated the 29th April, 2016.**
- e) That the costs of and incidental to this application abide the result of the intended**

appeal.”

The genesis of this application is our refusal on 22nd April, 2016 to grant the applicants audience to prosecute their 5(2)(b) application dated 18th February, 2016. We justified our refusal thus:-

“...Prior to the application before us, there were orders issued by the High Court and affirmed by this Court more than six months ago directing the applicants to give the respondent possession of her matrimonial home. Not only have the applicants refused to comply with those orders, but the home or part of the home where the Court ordered the respondent to be restored was demolished in circumstances that *prima facie* suggest the applicants’ complicity or involvement. The applicants have in the meantime conveniently retreated to India from where they seek stay of the orders of the High Court.

In the peculiar circumstances of this case where the rule of law is at risk of being deliberately undermined, we decline to hear the applicants until they have complied in full with the orders of the High Court or until further orders of that court.”

The grounds in support of the application are that the orders sought should be granted because the applicants have done all they can to comply with the orders issued by the High Court; that full compliance is only being hampered by the 1st applicant’s ill health and by the fact that the demolished matrimonial home will take time to rebuild, due to the necessary government approvals that are long in coming. In particular, the applicants point out that while they have commissioned a firm of architects to undertake the reconstruction, they continue to await licences and approvals from the National Environmental Management Authority (NEMA) and the Mombasa County Government respectively. Further, that the household goods belonging to the respondent were lost in the demolition. In the meantime they say, they continue to timeously remit Kshs.150,000/- being the respondent’s monthly upkeep together with school fees for the minors and that they had paid the rent arrears as ordered by court, totaling Kshs.4,250,000/-

Through her replying affidavit the respondent depones that the application is a gross and blatant abuse of the court process as the applicants have refused to comply with the court orders. As such contemnors, they continue to seek the assistance and indulgence of the very courts whose orders they are hell bent on violating and that the present application is a veiled attempt to re-litigate issues that were canvassed on 29th February 2016 and a ruling thereon delivered by this Court. That the applicants continue to be in contempt of court in that; they have not reinstated the respondent to the matrimonial home as ordered; no steps have been taken to reconstruct the demolished premises as alleged and that the architectural designs alluded to have not been shown to her; that they have refused to return the household goods taken away during the demolition; and that while Kshs.4,250,000 was remitted to the respondent by the applicants, a sum of Kshs.703,863.30/- was still outstanding.

At the hearing of the application, **Prof. Mumma**, learned counsel for the applicants, reiterated the grounds laid out in the application and submitted that there had been substantial compliance with the orders, and that unless the warrants of arrest are stayed, the 1st applicant, who is presently undergoing treatment in India is likely to be arrested once she comes back into the country, which act will render the intended appeal nugatory and in the process render the compliance with the orders of the High Court well-nigh impossible.

On the other hand, **Mr. Miyare**, learned Counsel for the respondent, submitted that save for the order for payment of rent, all the other orders of the High Court had not been complied with. That this application was *res judicata* and merely intended to sanction further contempt. That the Court ought to ignore the contents of a letter dated 27th June, 2016 presented before this Court by the applicants as parties cannot be seen to litigate matters by way of correspondence and lastly, that the Court should look at the peculiar circumstances of this case as distinguishable from the authorities of **Woburn Estate Limited v. Margaret Bashforth; Malindi Civil Appeal No. 18 of 2015 and Olive Mwhiki Mugenda & Another v. Okiya Omtata & 4 others [2016] eKLR** upon which the applicants placed reliance.

What we are concerned with here is whether the applicants have complied with the orders of the High Court to warrant us to grant them latitude to prosecute their application dated 18th February, 2016. In other words, whether the applicants are now deserving of audience as prayed for in the present application is dependent on resolution of the issues of whether they have complied with the orders of the High Court.

It is trite law that he who alleges must prove. In this case, the applicants claim to have substantially complied with the orders of High Court, a contention disputed by the respondent. However, save for the sum of Kshs.4,250,000/-, which the respondent admits to have received, no proof was shown of compliance with the other limbs of the orders aforesaid. Instead, at the hearing of the application, the applicants sought to bring in extra documents by way of a letter dated 27th June, 2016 to show the alleged compliance. In so doing, they ran foul of the rules of procedure regarding the tendering of evidence. A party cannot merely address a letter to his adversary and copy it to the court and at the hearing thereof seek to rely on the contents of the letter as evidence of the facts contained therein. Evidence tendered in such unconventional manner is certainly inadmissible and cannot be relied upon. In any event, the respondent disputed the contents thereof save for payment of Kshs.4,250,000/-. This being the case, the assertions by the applicants remain mere assertions without verifiable proof. In those circumstances, the word of the respondent must prevail. It is also worth mentioning that partial compliance of the order by the applicants does not suffice and was not even contemplated.

However, to facilitate full compliance, it is necessary that the applicants be in the country. We were told that the applicants are away partly due to the 1st applicant's ill-health. It is not in doubt that she is undergoing treatment for colon cancer. In addition, looking at the orders yet to be complied with, the reconstruction of the demolished matrimonial home shall require the services of an architect and supervision by the applicants more so the 2nd applicant. As per the Deputy Registrar's report dated 23rd November 2015, the matrimonial home was completely demolished and thus the need for a full reconstruction. Bearing in mind the necessity of personal supervision of the project and the 1st applicant's ill health, we direct as follows:-

1. The warrants of arrest issued on 1st March, 2016 be and are hereby stayed on condition that the applicants shall immediately submit to the jurisdiction of the High Court.
2. Once compliance with the High Court orders is achieved, save for the warrants of arrest and committal to civil jail, the applicants will be at liberty to move this Court as appropriate for the hearing *interpartes* of their application dated 18th February, 2016.

Otherwise, the application dated 20th May, 2016 stands dismissed with costs to the respondent.

Dated and delivered at Malindi this 29th day of July, 2016.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR