



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 285 OF 2016

RAKESH RAJPAL.....PLAINTIFF

VERSUS

PAOLA GIACOSA.....DEFENDANT

RULING

This ruling is in respect of a Notice of Motion dated 10th June 2021 by the Plaintiff/Applicant seeking for the following orders:

a) Spent

b) Spent

c) The Certificate of Costs allegedly issued and delivered at Mombasa on 24.3.2021 be declared to be null and void and be set aside as a matter of right.

d) Execution for costs be stayed pending the hearing and determination of Civil Appeal No. 6 of 2021(Rakesh Rajpal vs. Paolo Giacosa).

e) Costs of this application be provided for and to abide the outcome of Civil Appeal No. 6 of 2021.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application and the supporting affidavit of Rakesh Rajpal who deponed that on 9th June 2021, he was served with a demand notice to pay Kshs. 465, 410/- on the basis of the annexed certificate of costs issued and delivered in Mombasa on 24th March 2021. That on the same date the certificate of costs was allegedly delivered, his advocates received an email from the address malindihighcourt@gmail.com with an attachment of a ruling allegedly delivered by Hon D. Wasike which was neither signed nor dated. It was also not disclosed as to in the presence of whom the alleged ruling was delivered.

The applicant deponed that this matter had never been transferred to Mombasa and that there is a pending Appeal against the Judgment of this court delivered on 25th September 2020.

Counsel submitted that the certificate of costs was issued based on an unpronounced and unsigned ruling and therefore the effect is that it does not have any force in law hence a nullity.

Mr. Kinyua cite the provisions of Order 21 Rule 1 and 3 of the Civil Procedure Rules and the Court of Appeal Case **Musa Hassan Bulhan v Kenya Airways Limited & another [2006] eKLR** to buttress the point on unsigned ruling.

Counsel further submitted that the Defendant being in Italy, and by virtue of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya, and in the event that the Appeal is successful, an order to refund the monies will be rendered nugatory as it will be impossible to enforce the Judgment in Italian Courts.

Counsel therefore urged the court to allow the application as prayed as if the orders are not granted the appeal will be rendered nugatory.

DEFENDANT'S SUBMISSIONS

Counsel for the respondent swore a Replying Affidavit sworn on 28th June 2021 where Mr. Aboubakar deposed that the Plaintiff has failed to demonstrate that he will suffer any substantial loss if he pays the costs and that the Defendant is bereft of sufficient funds to refund him the said sum of costs in the event that the appeal is successful. He added that any challenge to taxation should be raised by way of reference which the Plaintiff has failed to do.

Counsel relied on the case of **HGF v SM High Court Civil Appeal No. 20 of 2020**, and submitted on the conditions to be met in an application for stay of execution pending appeal as set out under Order 42 Rule 6 (2) namely:

a. That substantial loss may result to the applicant unless the order is made.

b. That the application has been made without unreasonable delay.

c. That such security as the court orders for the due performance of such decree as may ultimately be binding on the applicant has been given.

Mr. Aboubakar submitted that the Defendant is a person of means capable of refunding the said sum in the event that the Appeal is successful. And that there is no danger of losing the money.

On the issue of application being made without unreasonable delay, counsel submitted that the present application was filed 5 months after Judgment was delivered which amounts to undue delay.

On the issue of security for the due performance, counsel submitted that the Plaintiff has neglected to deposit the amount due as costs to court as security and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue that the Plaintiff is complaining of is that the certificate of costs was delivered in Mombasa and that the related ruling dated 24th March 2021 was neither pronounced nor signed by the Deputy Registrar. I have perused the court record and notice that the ruling in the court record show that the Deputy Registrar, Hon. D. Wasike signed the ruling and emailed the same to parties and the Plaintiff acknowledged receipt of that email.

The issue for determination is whether the Plaintiff's argument that the ruling was neither signed nor delivered by the Deputy Registrar and whether the fact that the certificate of costs was written issued and delivered in Mombasa can affect the legality of the certificate.

The Plaintiff is aware that this was a Malindi matter and the signature part was indicated that it was signed by Hon. D. Wasike Deputy Registrar Environment & Land Court Malindi. There was no error on the content of the certificate of costs. The fact that it was written that it was issued in Mombasa does not go to the root of the case as this is a typographical error. It should also be noted that the seal on the certificate of costs is for Malindi High Court and I therefore find that it was not fatal to render the certificate of costs a nullity. This can be cured by Article 159 of the Constitution which frowns upon reliance on technicalities to deny substantive justice.

Counsel is aware that the courts have been forced to embrace technology due to the Covid 19 Pandemic. The digital platform for e-filing, emails and Microsoft teams has been working very well with a few challenges here and there. Courts have been delivering judgments and rulings virtually and through emails therefore counsel cannot be heard to say that the ruling was not delivered. It is further on record that counsel has been aware of the taxation and the ruling date that had been set by the court on 24th March 2021.

The Applicant is also seeking for stay of execution of the certificate of taxation of costs pending the determination of the applicant's Appeal before the Court of Appeal. The Applicant has stated that the Appeal will be rendered nugatory if the order of stay is not granted and that the Respondent being a foreigner in Italy might not be able to refund the money.

The issues for determination in an application for stay of execution pending Appeal are as provided for under Order 42 rule 6 of the Civil Procedure Rules, 2010 which provide as follows:

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order of stay 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 the application has been made without unreasonable delay; and

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

The Judgment was delivered on 25th September 2020 and a certificate of costs subsequently issued on 24th March 2021 approximately 5 and 3 months respectively before the Plaintiff made the present application. The Applicant has not stated why he did not file an application for stay without delay. Computation of time is relative to the circumstances surrounding each case. A day or two might be termed as inordinate delay while a year or so might not be deemed as unreasonable delay.

In the case of **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS VS. NIC BANK LIMITED & ANOTHER [2014] eKLR** held thus;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality.”

The Applicant did not bother to explain why he did not file the application in good time having filed a record of Appeal on 23rd February 2021 and this ruling on costs was subsequently delivered on 24th March 2021. This application is therefore an afterthought.

Counsel for the Applicant raised an issue that in the event of a successful appeal, the applicant will not be able to enforce the Judgment in Italy where the Defendant resides. Even though Italy is not listed as a reciprocal of Kenya in the Foreign Judgment (Reciprocal Enforcement) Act, Italian Laws make provisions and conditions for recognition and enforcement of foreign Judgments from all jurisdictions outside the European Union (Law No. 218 of 31st May 1995 and the Italy Civil Procedure Code). The Plaintiff's argument that he will not be able to enforce a Judgment in Italy does not therefore have any legal basis.

I therefore find that the Applicant has not met the threshold for grant of orders of stay of execution hence the application dated 10th June 2021 is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.



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