



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 43 OF 2006

PAUL OJIGO OMANGAAPPELLANT

VERSUS

JAPHETH ANGILARESPONDENT

RULING

The applicant herein **Paul Ojigo Omanga** filed this application dated 27th January 2011 seeking the following orders:-

(i) There be a temporary stay of execution of this Honourable Court's Order / Decree issued therein on 30th January 2008, pending the same hearing and full determination of the application and or the full hearing and determination of the appellant's Chamber summons application dated 13th July 2010 and filed on 14th July 2010.

(ii) The execution proceedings already commenced against the appellant by the respondent be and are hereby suspended as the same is unconstitutional and or the Ruling of the Deputy Registrar in furtherance of the execution herein against the appellant fixed for deliverance on 2nd February 2011 be and is hereby stayed pending the full hearing and determination of the

applicant's Chamber summons application dated 13th July 2010 and filed on 14th July 2010.

(iii) Cost of the application

(iv) Any other relief of this court.

When this matter came before court on 18th May 2011 it was agreed that the parties shall file written submissions so as to dispose the current application. I have perused the lengthy supporting affidavits together with the replying affidavits in opposition to this application. I have also perused and read the skeleton submission together with the various authorities attached therewith. There is no doubt that the relationship between the applicant and the respondent is that of tenant and landlord respectively.

It's also further not in doubt that the applicant still owes the respondent some substantial sums of money as evidence by the courts decree on record. On 30th January 2008 my brother Justice Mwera made a ruling requiring that the applicant do deposit in court or pay the sum of Kshs. 600,000 directly to the respondent and thereafter a monthly rent of Kshs, 30,000. Thereafter the applicant made application to the court of appeal and was disallowed. He then made an application dated 13th July 2010 and filed on 14th July 2010. The same is still pending. According to the applicant the same is still pending as the respondent is yet to file and serve him with his submission. He has already filed his. Pending the hearing and determination of the said application dated 13th July 2010, the respondent commenced the execution proceedings hence this current application for stay. All that the applicant is asking is for stay of execution pending the determination of that application dated 13th July 2010.

I have perused the court record and on 2nd December 2010, **Mr. P. J. Otieno** sought an adjournment as the counsel for the applicant was unwell. Though **Mrs. Asunnah** said that **Mr. Ogutu** was ready to proceed, the court nevertheless stood over the matter generally. Proceedings doesn't indicate that the submissions were to be filed and served. In any event the applicant had the liberty of moving the court to have the matter listed for his application and the said application disposed in whichever fashion the court would have deem it fit. I therefore find no basis for the applicant to advance this argument. Further the applicant argues that the execution proceedings ought not to have been processed as the said application was pending. My position is that the law does not stop a party from executing any valid decree as long as there is no stay or injunction for that matter. When the applicant filed the application dated 13th July 2010, he never obtained any stay and even on 2nd October 2010 when it came up for interpartes nobody sought any orders of stay. In the premises the respondent in the absence of any stay order had the legitimate right of executing against the applicant provided it was done lawfully.

My attention has been drawn to the argument that the Deputy Registrar didn't have the capacity to adjudicate over the execution proceedings as there was a pending application in the high court and that the issues raised before the learned Deputy Registrar were similar to those pending in this court. Special powers of the Registrars on execution are donated by Order 49 Rule 7 (b) (x). The said powers are only empowering the registrar to apply or implement execution proceedings. It has no capacity to

adjudicate on whether or not there is a pending similar application in the High Court. In the event that it does that then it shall be acting *ultra vires* and the proceedings have to be challenged in the instant case, the applicant was arrested and brought before the Deputy Registrar for committal. There was no order barring the registrar from issuing any relevant orders before it. The register gave the orders it did which were quite legitimate. The issue of who is senior between this court and the Deputy Registrar is a matter of common sense and in as much as its clear that this court is superior, the law has empowered the registrar to undertake execution proceedings and not this court.

Any party who is dissatisfied with the registrar's decision files a proper reference to the High Court. None has been filed to date. The upshot therefore is that the Deputy Registrar had the jurisdiction to entertain the execution proceedings brought before him.

The application dated 13th July 2010 has not been heard. As much as the applicant has filed submission and the respondent is yet to do so the same is pending and the parties herein have the liberty to fix the same for hearing at their convenience.

One other issue that the applicant has asked me to determine is whether the motion herein dated 27th July 2011 is *res judicata*. The applicant's Chamber summons dated 13th July 2010 prays for the following substantial orders:-

(i) A stay of execution of this Honourable court order made herein on 30th January 2008 and of warrant of arrest ordered herein against the Appellant on 24th May 2010 and issued herein be recalled pending the full hearing and determination of this application and Nairobi Court of Appeal Number 63 of 2005.

(ii) Costs of this application to be born by the respondent

(iii) Any other relief of this court.

I have earlier on reproduced the prayers sought in the motion herein dated 28th January 2011. What is evident and clear in the prayers sought is that the applicant is seeking stay of the orders issued by Justice Mwera on 23rd January 2008. The appellant has package the prayers using different wordings but the bottom line is just **stay of execution**. This element of stay of execution has been argued all the way to the Court of Appeal. The court on 17th December 2010 delivered its ruling dismissing the application for stay. I don't further think that there is need to determine whether or not the issues raised before the Deputy Registrar is *resjudicata* or not.

The applicant has not preferred any application or reference over the said argument or decision and it shall be superfluous for me to make a finding on the same. The applicant has further raised a fundamental issue that he has several suits pending between him and the respondent. In fact were his suit to succeed then it shall be the respondent to pay him and not the other way round. With due respect, I have not been shown any decree or judgment to that effect. The suits between the parties if any pending in any court as long as they are unconcluded cannot stop any findings in this suit. Needless to say it is incumbent to expedite the said suit so as to set off the current claim.

The applicant has also claimed that by virtue of Article 2 (6) of the current constitution the applicant ought not to be committed to civil jail and that the respondent should have applied any other procedure in execution of the decree. With due respect, I don't think this is available in the instance case. The constitution and other laws including execution proceedings protect both the judgment creditor and judgment debtor. The law cuts both ways. If indeed the applicant thinks his constitutional rights are violated, then he should not violate the rights of others. I have further read the remarks by the court of Appeal in this matter, earlier alluded. The applicant is still a tenant to the respondent. He was ordered on 30th January 2008 to deposit in court or pay the sum of Kshs. 600,000 directly to the respondent and further make payments of Kshs. 30,000 monthly. Almost four (4) years from then I have not been given any proof of such compliance. Court orders ought to be respected and not abused. The applicant cannot have both the respondents' premises and fail to pay the rent. In short the applicant cannot enjoy the cushion of the bill of rights in our constitution. He has not demonstrated how his rights have been violated. The international laws imported and applied in Kenya in line with Article 2 (6) of the Constitution cannot be applied blindly. Every case must be dealt with separately.

The committal to civil jail is one of the available remedies available in our statutes and as long as its applied procedurally without any abuse then its legitimate. Again I absolutely concur that the constitution is superior to the Civil Procedure Act Cap 21 but the same constitution cannot be used to protect vexatious litigants who are bent to abusing the court process. This court shall uphold the constitution and its tenets in ensuring that both rights of the Applicant and respondent are protected. The authority of **Re-Zipporah Wambui Mathara, Bankruptcy case No. 19 of 2010** is distinguishable and at any rate is persuasive to this court.

The upshot of it is that the applicant application must fail. The applicant cannot shuttle from one court to another with similar if not the same application. For the above reasons I dismiss the application dated 27th January 2011 with costs to the respondent.

Orders accordingly.

Dated, signed and delivered at Kisumu this 14th of November 2011.

H. K. CHEMITEI

JUDGE

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