



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPLICATION NO NAI 4 OF 1976

WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES..... APPLICANT

VERSUS

EP ORANGA

JW KHAOYA

P MAYIEK

J NANG'OLE RESPONDENTS

Appeal against the decision of Chanan Singh Jin the High Court at Nairobi

on 8th January 1975

in

(Civil Case No 286 of 1975)

JUDGMENT

Law V-P delivered the following Judgment. This is an application by the appellant in an intended appeal for: (a) temporary injunction to restrain the respondents from operating a bank account in the name of Western Province College of Arts and Applied Sciences until final determination of the intended appeal, and (b) a stay of execution.

The applicant is a body corporate, consisting of the trustees of an association of persons established for an educational purpose, duly incorporated under the Land (Perpetual Succession) act. In or about the year 1972 the applicant and various local bodies in the Bungoma district of the Western province cooperated in the raising of funds for the purpose of establishing a college of technology. A large sum of money was raised, and over Shs 300,000 was deposited by the four respondents in a bank in Bungoma. The account was in the name of "Western Province College of Arts and Applied Sciences". A dispute has arisen as to who is entitled to operate this account. The applicant contends that the moneys in the account, which are admittedly a trust fund, were contributed by the people of Bungoma district for the purposes of a college

of technology to be established by the applicant somewhere in the Western province. The respondents contend that the money was contributed for the purpose of a college of technology to be established at Sang'alo in Bungoma district and nowhere else. The respondents are the signatories of the account and refuse to allow the money in that account to be transferred to the applicant's main account in Nairobi. Since the dispute arose, the bank at Bungoma has "frozen" the account and sums of money contributed subsequently by the people of Bungoma have been paid by the respondents into a separate account, with which we are not concerned.

By a plaint dated 10th February 1975, the applicant sued the respondents claiming, *inter alia*, declarations that the money in dispute "belong" to the Western College of Arts and Applied Sciences (hereinafter referred to as the WECO) and that the applicant is "the rightful person" to operate that account. The respondents, in their defence, pleaded that the moneys "belong" to the Sang'alo Institute of Science and Technology and not to the applicant.

Chanan Singh J, after a long and careful scrutiny of the evidence adduced before him, held that the applicant had failed to prove its claim, and he dismissed the suit with costs. The basis for his decision appears to have been that, in his view, the moneys in dispute had been contributed by the people of Bungoma for the specific purpose of a college of technology at Sang'alo in Bungoma district, and not for the purpose of the WECO establishing a college of technology at any other place of its choice, which might be in one of the two other districts in the Western province. From this decision the applicant intends to appeal, and has duly filed notice of such intention.

The proceedings before this Court began with a preliminary objection raised by Mr Muite for the respondents. He submitted that, as regards the application for a temporary injunction pending the final determination of the appeal, this Court has no jurisdiction to make such an order; and as regards the application for a stay, he submitted that the application should have been made in the first place to the High Court, as required by rule 41 of the Rules of this Court. Mr Wako for the applicant submitted that the two limbs of his application were connected and should be dealt with together. The only stay of execution which the High Court could have granted would have been in relation to costs. What the applicant is seeking is a maintenance of the status quo, by the issue of a temporary injunction to restrain the respondents from operating the bank account, which as signatories they are presumably now at liberty to do (although the judgment in the court below does not specifically say so) pending determination of the appeal.

The High Court has no power to issue a temporary injunction after it has given judgment in a suit; by order XXXIX, rule 1, it can only do so pending disposal of the suit. As the issue of a temporary injunction is an essential part of his application for a stay, Mr Wako submitted that he was in order in making his application directly to this Court.

As has often been stated, this Court has no general inherent jurisdiction. It is a creature of statute, and has such jurisdiction as is conferred on it by the legislatures of the partner states. It has, however, in relation to appeals, properly before the Court, inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, see rule 1(3) of the Rules of this Court.

In relation to appeals from courts in Kenya, this Court by section 3(2) of the Appellate Jurisdiction Act is vested with the power, authority and jurisdiction vested in the Court from which the appeal is brought, in this case the High Court. In its appellate capacity the High Court has power to order a stay of execution of any order or decree appealed from, by order XLI, rules 4 and 5, upon such terms as it may deem fit. This Court has a similar power, where a notice of appeal has been filed, under rule 5(2) of the Rules of this Court. Does this power to order a stay of execution include a power, in a proper case, to order the issue of a temporary injunction if it is considered necessary to do so, to give efficacy to an order for stay? There seems to be no East African authority directly in point. The only power vested in the High Court to issue a temporary injunction is to be found in order XXXIX, rules 1 and 2. Rule 2 is not relevant, and rule 1 limits the power of the High Court "until disposal of the suit or until further orders." Mr Wako has submitted that the Court of

Appeal has, by necessary analogy, a corresponding power to issue a temporary injunction pending disposal of an appeal. I am not persuaded by this argument. order XXXIX, rule 1, confers powers on the High Court in its original, and not its appellate, jurisdiction. The High Court has no specific power to issue a temporary injunction in connection with an order for stay of execution of a decree or order which is the subject of an appeal to the High Court. If it had such a power, then this Court would have a corresponding power. Mr Wako then submitted that this Court has the necessary power, under rule 5(2) of its rules, as part of its power to order a stay of execution “on such terms as the Court may think just”, and he relies on *Wilson v Church* (1879) 11 Ch D 576. In that case, the Court of Appeal in England held that, as the High Court judge had no jurisdiction to stay the proceedings pending appeal, an application for an injunction was properly made to the Court of Appeal, and it ordered an injunction to issue (at page 578) “to restrain the trustees from parting with any of the fund till the hearing of the appeal”. I do not know what were the relevant laws and regulations on the point in force in England in 1879, but I am not prepared to dissent from the proposition that, under rule 5(1) of the Rules of this Court, this Court may have power, in a proper case to order a temporary injunction to issue if the Court “thinks just” to do so in the exercise of its jurisdiction to order a stay of execution. But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.

I must say that I deplore this litigation, and I express the hope that it will be possible for it to be compromised. The parties on both sides are responsible and respectable persons. There is no question that the moneys in dispute have been contributed by the people of Bungoma district for the advancement of education; the only real point at issue being as to the precise location of the proposed college. Surely the parties can get together, and agree on a scheme which will ensure that those moneys are applied in accordance with the intention of the contributors. To waste money on litigation will benefit nobody, and can only damage the cause which both parties to this litigation wish to promote.

Mustafa JA: I agree with Law V-P that the application be dismissed with costs. I have only one short comment to make. The applicant has asked this Court to issue a temporary injunction to restrain the respondents from doing certain acts pending the decision of an appeal the applicant wishes to file. As has been observed on previous occasions, this Court only has such jurisdiction as is conferred on it by statute by the legislatures of the partner states. As regards appeals from Kenya, this Court is vested with the power, authority and jurisdiction of the court from which the appeals emanate, in this instance, the High Court, by virtue of section 3(1) of the Appellate Jurisdiction Act. The High Court, under order XXXIX of the Civil Procedure Rules, has the power in its original jurisdiction, to issue a temporary injunction, before the trial or a suit, “until the disposal of the suit or until further orders”. It has not been suggested that the High Court has such jurisdiction in its appellate role. In the circumstances I do not think that this Court has jurisdiction to issue the kind of temporary injunction applied for by the applicant pending the appeal before it of a judgment from the High Court. However, it may be, as Law V-P has pointed out, that this Court perhaps has the power, in a proper case, to issue a temporary injunction if it thinks it just and necessary in order to give effect to an order for stay of execution, as this Court has jurisdiction to order a stay of execution pending an appeal before it. The temporary injunction asked for by the applicant is extraneous to a stay of execution, as it does not relate to what the High Court ordered to be done or not to be done, and this Court has no jurisdiction to entertain it.

Musoke JA: I agree that the application should be dismissed with costs.

Appeal dismissed with costs.

Dated on this 10th Day of March 1976

E.J.E. LAW

.....

VICE-PRESIDENT

A. MUSTAFA

.....

JUDGE OF APPEAL

J.S.MUSOKE

.....

JUDGE OF APPEAL