REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO420 OF 2019

REGIONAL INSTITUTE OF BUSINESS MANAGEMENT.....APPELLANT

VERSUS

LUCAS ONDONG' OTIENO.....RESPONDENT

RULING

1. In its Notice of Motion application dated 17th September 2019 and filed on 18thSeptember 2019, the Appellant herein sought an order for injunction to restrain the Respondent, either in person or through its agents, Messrs Compliance Auctioneers or howsoever or otherwise from attaching or selling its goods that were proclaimed vide the Proclamation of Attachment dated 11th September 2019 pending the hearing and determination of the application/appeal.

2. It had also sought an order for stay of execution of the judgment and decree of Hon Orenge K.I (Mr), Senior Resident Magistrate that was delivered on 24th June 2019 in **Nairobi Milimani Civil Suit No 5113 of 2009 Lucas Ondong'Otieno vs Regional Institute of Business Management** and the consequential decree issued on 27th August 2019 pending the hearing and determination of the application/appeal.

3. Its said application was supported by the Affidavit of its Director, Roseline Akeyo that was sworn on 17th September 2019.It contended that it was aggrieved by the entire judgment and that its Appeal that had very high chances of successas it was premised on grounds of appeal that were arguable.

4. It was apprehensive that its operations would be unnecessarily disrupted and it besubjected to public embarrassment, loss of properties/business, irreparable damage and interference with **(sic)** its students while the appeal was pending hearing and determination.It averred that it filed its application with reasonable promptitude and that it was in the interests of justice that the same be allowed as prayed. It contended that if the same was not allowed, it would suffer prejudice and its Appeal rendered nugatory. It was emphatic that the Respondent would not suffer any prejudice if its said application was allowed.

5. In opposition to the said application, on 3rd October 2019, the Respondent herein swore a Replying Affidavit. The same was filed on even date.He stated out that the order for stay of execution that the Appellant was granted in the lower court lapsed on 24th July 2019 and that execution proceedings commenced after it failed to satisfy the decretal sum of Kshs 532,000/=, being a refund of Kshs 232,000/= and general damages in the sum of Kshs 300,000/=.

6. He raised several issues touching on the merits or otherwise of the Appellant's Appeal and further pointed out that there was no board resolution authorising the firm of M/S Miyare & Co Advocates to act for the Appellant herein. He thus urged this court to dismiss the said application *in limine*.

7. He was also categorical that the Appellant had not satisfied the provisions of Order 42 Rule 6 of the Civil Procedure Rules and on this ground also, he asked the court to dismiss its present application.

8. The court looked at the respective parties' arguments and noted that they had delved deeply into the merits or otherwise of the Appeal herein. This was not an issue that could be dealt with at this juncturebecause analysing the merits or otherwise of same as it had the potential of embarrassing the court that would be dealing with the appeal at the appropriate time. The concern of this court at this point was to establish whether or not the Appellant's application was merited or not.

9. On 17th December 2019, the Respondent informed this court that since the Appellant had already filed its Record of Appeal, the court could give its directions on the furnishing of security so as to save time. The Appellant's advocates informed the court that their instructions were to seek an unconditional stay of execution pending appeal. It was for that reason that the application proceeded for hearing and determination.

10. The court did not find it necessary to analyse the conditions for the granting of an order for stay of execution for the reason that the Respondent was not averse to the said order being granted provided that the Appellant furnished security. However, it addressed its mind to the Appellant's submissions that it was willing to furnish an undertaking as to damages as a precondition for the granting of an order for injunction and/or stay of execution pending appeal.

11. Notably, the conditions to be satisfied before an order of injunction could be granted were different from those to be met before an order for stay of execution pending appeal could be granted.The conditions for the granting of an interlocutory injunction were set out in the case of **Giella vs Cassman Brown Co Limited [1973] E.A. 358 at page 360**where it was held as follows:-

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience**

12. The Appellant did not demonstrate that he had met the three (3) conditions that were set out in the aforesaid case of **Giella vs Cassman Brown Co Limited** (Supra). That notwithstanding, it was the considered opinion of this court that its prayer for an injunction was misplaced for the reason that there was nothing to show that it had sought an injunctive order which was dismissed by the lower court, which could perhaps have persuaded this court to grant an injunction so as to safeguard the *sub stratum* of the dispute pending the hearing and determination of the Appeal herein.

13. Proclamation of goods is a process of execution. Section 38 (b) of the Civil Procedure Act Cap 21 (Laws of Kenya) stipulates that:-

> **"Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree by attachment and sale, or by sale without attachment, of any property;"**

14. That execution could only be stayed under the provisions of Order 42 Rule 6 of the Civil Procedure Rules.Notably, before an applicant can be granted an order for stay of execution pending appeal, he has to demonstrate that he has met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

> **a. That substantial loss may result unless the order is made.**
>
> **b. That the application has been made without unreasonable delay.**
>
> c. **Such security as the court orders for the due performance of the decree has been given by the applicant.**

15. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"**. It connotes that all three (3) conditions must be met simultaneously. Order 42 Rule 6 (2) of the Civil Procedure Rules is also couched in mandatory terms. It states that:-

> **"No order for stay of execution shall** (emphasis court) **be made under subrule (1) unless—**
>
> > **a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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."**

16. It therefore follows that the Appellant could not therefore be granted an unconditional order of stay of execution pending appeal unless it provided security as would be ultimately binding on it for the due performance of the decree that was issued in the lower court.

17. Turning to the Respondent's submission that the present application ought to be dismissed*in limine* on the ground that there was no board resolution authorising the firm of M/S Miyare & Co Advocates to act for the Appellant herein, this court noted that an appeal is a continuation of the proceedings in the lower court. The advocate who acts for a party in the lower court continues to act for that party on appeal unless there had been a change of advocates in the appellate court as provided by the law.

18. Indeed, Order 9 Rule 5 of the Civil Procedure Rules stipulates that:-

> **"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."** (emphasis court)

19. In view of the fact that there was nothing to show that the Appellant's advocates had just taken over conduct on his behalf on appeal and/or after judgment was delivered in the lower court necessitating an application under Order 9 Rule 9 of the Civil Procedure Rules, this court did not find it prudent to pronounce itself on that issue. There was no indication that there was a Cross-Appeal. If at all there was one, this was an issue that was best left for determination by the court hearing the Appeal herein.

20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted.

DISPOSITION

21. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 17 th September 2019 and filed on 17th October 2019 was merited and the same is hereby allowed in the following terms:-

> **1. THAT there shall be an order for stay of execution of the judgment and decree of Hon Orenge K.I (Mr), Senior Resident Magistrate that was delivered on 24th June 2019 in Nairobi Milimani Civil Suit No 5113 of 2009 Lucas Ondong Otieno vs Regional Institute of Business Management pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of itsadvocates and the advocates for the Respondent, the sum of Kshs 532,000/=within thirty (30) days from the date of this Ruling.**
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> **2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 21(1)hereinabove, the conditional stay of execution shall automatically lapse.**
>
> **3. Either party is at liberty to apply.**
>
> **4. Costs of the application will be in the cause.**

22. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July, 2020

J. KAMAU

JUDGE