



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 759 OF 2019

IBRAHIM OTIENO OCHIENG.....1ST APPELLANT

GALAXY PHARMACEUTICALS LIMITED.....2ND APPELLANT

VERSUS

PHILIP CHEGE GACHANJA.....RESPONDENT

RULING

The application dated 27th September 2021 seeks the following single order;-

1. That the Honourable Court be pleased to review, set aside and/or vary the orders made herein on the morning of 27th September 2021 and to allow the Appellants to oppose the Respondent's application dated 15th July 2021.

The affidavit of P.O. Malanga sworn on the same date supports the application. Counsel for the applicant submitted that the court should exercise its discretion and set aside the ex-parte orders granted on 27th September, 2021 for non-attendance. The applicant's appeal was dismissed for non-attendance. Although the applicants settled the decretal sum, that alone cannot be a reason to deny the applicant the right to prosecute their appeal.

According to counsel for the applicants, the non-attendance was because he mistakenly diarized the matter for the 30th September, 2021 when both counsel herein are engaged in a related matter namely **Civil Appeal No. 758 of 2019 (Ibrahim Ochieng & Another –V- Philip Chege Gachanja)**. The application was filed on the same day the appeal was dismissed.

The respondent filed grounds of opposition date 6th October, 2021. It is stated that the application which led to the dismissal of the appeal was duly served upon the applicants' counsel. There was no reply to that application. The applicants filed the Memorandum of Appeal together with an application seeking stay of execution. Interim orders were not granted and the applicants settled the decretal sum of Kshs.620,995/95 on 25th March 2020. According to counsel for the respondent, the appellants are now litigating in theory and are abusing the due process of the court. They compromised their own case and the application to reinstate the appeal is frivolous, vexatious and an abuse of the court process. The applicants had 2½ months to respond to the application.

The respondent herein filed Civil Suit number 8093 of 2018 seeking material damages arising from an accident which occurred on 28th December 2011. The respondent's vehicle registration number KBA 835Z was written off and he claimed Kshs. 360,000 as its pre-accident value. The trial court granted the respondent leave to file the suit out of time. The case was heard and determined on merit.

The trial court delivered its judgment on 29th November, 2019. Nothing seems to have happened relating to the appeal until June 2021 when the respondent opted to execute the decree. The applicants filed an application seeking stay of execution dated 25th March, 2020. That application was not filed in 2020 and the court did not certify it as urgent on 29th June, 2021. The court advised that the application be listed for hearing in the ordinary course of business.

The record shows that on 21st July, 2021, the respondent's counsel filed his Notice of Motion dated 15th July, 2021 for hearing on 27th September, 2021. The date was taken ex-parte and a hearing notice was duly served. On 27th September, 2021. Counsel for the respondent appeared and prosecuted his application which sought the following orders:-

1. THAT this Honourable Court be pleased to order that the Appellants Memorandum of Appeal dated and filed before this Honourable Court on 20th December 2019 and the Notice of Motion dated 25th March 2020 and filed before this Honourable

court both be struck out and/or be dismissed.

2. THAT, the costs of the struck out and/or dismissed memorandum of appeal and the application be provided for.”

The record shows that on 29th September, 2021. Counsel for the applicants wrote to the court asking for a hearing date for their application dated 27th September 2021. This letter is in reference to the current application that was filed on the same date. Counsel for the applicants admit that they were duly served with a hearing notice for the respondent’s application. The hearing notice is dated 21st July, 2021 and does indicate that the application filed on 15th July 2021 was to be heard on 27th September, 2021. That notice was received on 23rd July, 2021. Since then there has been no response to the respondent’s application and the same was heard ex-parte on 27th September, 2021. The applicants had over two (2) months to respond to that application but did not

Counsel for the applicants contend that although the decretal sum was duly paid, that in itself cannot be a ground to declare the appeal as an academic exercise. It is further argued that the payment was done as the respondent had proclaimed the applicant’s properties. That could be true but there is no explanation as to why there was no response to the respondent’s application. The applicants were able to get a hearing date for the application dated 27th September 2021 but did not pursue for a hearing date for their application seeking stay of execution dated 25th March 2021. The record shows that the application dated 25th March 2021 was paid for on 29th June 2021 and it is on the same date when Justice Serگون handled it under Certificate of Urgency. There is no explanation as to why it took that long from 25th March 2021 to 29th June 2021 for the application to be filed. The advent of the Corona virus cannot be the explanation for the three (3) months delay. Apart from that, there was over two and a half months for the applicants to oppose the respondent’s application but they did not do so. Even if counsel mis-diarised the hearing date, that in itself does not explain the failure to oppose the application. At least the court could have noted that the application was being opposed.

The decretal sum has been settled. The 2nd applicant vide its letter dated 29th June, 2021 forwarded a cheque for KShs.620,995/95 to M/s High Class Auctioneer’s. The cheque is in favour of Wambugu Kariuki and & Co. Advocates. There is no indication that the payment was being made on “without prejudice” basis. The forwarding letter makes reference to the case before the Chief Magistrate’s Court and it can be implied that the 2nd applicant was settling the matter. Proclamation was done on 18th March 2020 and there was no action on the part of the applicants until 28th June, 2021. When they filed a certificate of urgency certifying the application dated 25th March 2020 as urgent. Indeed that application was not filed in 2020 but was filed over one year later on 29th June 2021 as per the payment receipts issued on that date.

From the above chronology of the matter, I do find that the court’s discretion cannot be exercised in favour of the applicants. It is true that the applicants are entitled to pursue their appeal but the record show that they are guilty of laches. The applicants have not been keen to pursue their rights and the respondent was not expected to go by the applicants’ pace. The applicants’ indolence is inexcusable. The application for stay of execution was overtaken by events.

The upshot is that the application dated 27th September, 2021 lacks merit and the same is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022

S.J. CHITEMBWE

JUDGE