



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 95 OF 2020

KWACHA GROUP COMPANIES.....APPELLANTS

VERSUS

PINDORIA HOLDINGS LIMITED.....RESPONDENT/APPLICANT

RULING

The applicant filed a notice of motion dated 18th August 2021 brought pursuant to Section 3A, 63 (e) and 78 (2) of the Civil Procedure Act. Order 5 Rule 1 of the Civil Procedure Rules 2010, inherent powers of the court and all enabling provisions of the law seeking the following Orders;

1. Spent

2. That the appellant be cited for being in contempt of the court orders granted on 3rd July 2020 and extended on 18th September 2020 and 11th June 2021 respectively

3. That the appellant's memorandum of appeal dated 26th February 2020 be struck out and or dismissed with costs for being an abuse of court process

4. That the costs of this application be awarded to the respondent.

The affidavit sworn on the same day by Premij V. Pindoria supports the application. The applicant indicated that the application herein arises out of the appellant's conduct of continued abuse of court process and blatant contempt of court orders. That this court delivered a ruling on 3rd July 2020 where the appellant was directed to deposit the decretal sum in a joint interest earning account as a condition for grant of stay of execution of the decree. The court orders were extended on 18th September 2020 and 11th June 2021. The appellant obtained the orders by alleging that the Covid 19 pandemic had adversely affected their operations and needed time to raise the decretal sum. The time frame that was extended for the second time lapsed on 11th August 2021. The respondent's advocates wrote several correspondence to the appellant's advocates but none of that elicited any response

The application was opposed by the appellants through grounds of opposition dated 15th November 2021. The appellants relied on the grounds that the inability of the appellant to deposit the decretal sum does not in any way affect the competence and or the merits of the appellant's appeal, that the appeal herein is competent and the inability of the appellant to deposit the decretal sum does not prejudice the appeal and does not amount to contempt of court or abuse of court process.

Analysis and determination.

The respondents have filed the application herein seeking that the memorandum of appeal herein be struck out or dismissed with costs on the grounds that the appellant has failed to deposit the decretal sum in a joint interest earning account which amounts to abuse of court process.

Order 42 Rule 35 (1) of the Civil Procedure Rules states as follows in respect to dismissal of appeals:-

“Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.”

Order 42 Rule 35 (2) of the Civil Procedure Rules states:-

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

In the case of **ARGAN WEKESA OKUMU –V- DIMA COLLEGE LIMITED & 2 OTHERS (2015) eKLR** the court stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

On examination of the record the applicant has not shown how the delay by the appellant has been inordinate or how they are likely to be prejudiced by such delay.

The applicant has also sought that the appellant be cited for being in contempt of the court orders granted on 3rd July 2020 and extended on 18th September 2020 and 11th June 2021 respectively as the appellant have failed to deposit the decretal sum in a joint earning account.

The purpose of stay of execution order pending appeal as was emphasized in the case of **RWW vs. EKW (2019) eKLR** cited by Musyoka J. in **HE V SM (2020) eKLR** where the Court held that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. Further in **PETER KIRIA & EYE GROUP NEWSPAPER & ANOTHER (2017) eKLR** where Gikonyo J. held that insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeal where the underlying transactions typically tend to lead to colossal decretal amounts.

The question that therefore arises is whether the appellant can be found in contempt for failing to deposit the decretal sum? On perusal of the record a stay of execution was granted on condition that the decretal sum be deposited in a joint interest earning account and therefore it can be inferred that failure to deposit the decretal amount would render the order of stay of execution impertinent. There is a proviso to the stay orders which is that failure to deposit the decretal sum in the joint interest earning account within 45 days rendered the orders staying execution to have lapsed. The effect of that condition is that the respondent is at liberty to execute. The failure to comply with the court orders has the automatic remedy of execution of the decree as opposed to citation of the party in default for contempt or dismissal of the appeal. The applicant has an effective remedy of effecting execution and the current application cannot be considered as the proper remedy.

The Memorandum of Appeal provides for thirteen grounds of appeal. The appeal is against the judgment of the trial court delivered on 31st January, 2020. The appellant has a legitimate right under Article 50 of the Constitution to have the dispute determined by the court.

In the end this court finds that the application dated 18th August 2021 to be without merit and is therefore dismissed with no orders as to cost.

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

S.J. CHITEMBWE

JUDGE