



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E465 OF 2020

HEALTHSPAN MEDICAL CENTRE LIMITED.....APPLICANT

-VERSUS-

PRISCILLA MAKHOHA (Suing as the personal

Representative and administrator to the estate

of ELIZABETH ALIVITSA MBAO.....1ST RESPONDENT

FRATON GLOBAL LIMITED.....2ND RESPONDENT

MORAN AUCTIONEERS.....3RD RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 10th November 2020 taken out by the appellant whereof it sought for the following orders:

i. THAT this honourable court be pleased to certify this matter as urgent and hear it on priority basis.

ii. THAT pending the hearing and determination of this application, this honourable court be pleased to order a stay of execution of the judgment of honourable P. N. Gesora in CMCC No. 1853 of 2016 delivered in the absence of all parties on the 28th May 2020.

iii. THAT pending the hearing and determination of this application, this honourable court be pleased to grant an injunction restraining the 1st respondent herein, its servants and agents including the 3rd respondent or otherwise from selling, either by way of auction or in any way purporting to exercise their power of sale in as far as it relates to the applicant's movable and immovable property.

iv. THAT pending the hearing and determination of this application, this honourable court be pleased to stay the warrant of movable property in execution of decree of money and the warrant of sale of property in execution of decree of money both dated 6th November 2020.

v. THAT pending the hearing and determination of this application, this honourable court be pleased to grant an injunction restraining the 1st respondent herein, its servants and agents including the 3rd respondent or otherwise from selling, either by way of auction or in any way purporting to exercise their power of sale in as far as it relates to the applicant's movable and immovable property.

vi. THAT pending the hearing and determination of this application, this honourable court be pleased to set aside the warrant of attachment of movable property in execution of decree of money and the warrant of sale of property in execution of decree of money both dated 6th November 2020.

vii. THAT the honourable court be pleased to stay the consequential order in the judgment dated 28th May 2020, pending hearing and determination of the appeal from the judgment of the honourable court delivered on the 28th May 2020.

viii. THAT this honourable court be pleased to grant the applicant/intended appellant leave to file an appeal out of time against the decision of Honourable P. N. Gesora in CMCC No. 1853 of 2016 delivered in the absence of all parties on the 28th May 2020.

ix. THAT costs be in the cause.

- 2) The applicant filed the supporting affidavit sworn by Omar Mahmood. When served with the application, the 1st and 3rd respondents filed the replying affidavit sworn by Priscillah Makokha to oppose the application. Learned counsels appearing in this matter made oral submissions.
- 3) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have further considered the rival oral submissions. It is the submission of M/s Khadija, learned advocate for the applicant that the applicant was not served with a judgment notice hence it was not present in court on 28/5/2020 when the trial court delivered its judgment.
- 4) The learned advocate further stated that the applicant became aware of the delivery of judgment when its advocate checked on the e-filing portal on 24th July 2020 by which date the time to appeal had lapsed hence the need to seek for leave to appeal out of time.
- 5) The applicant's advocate annexed to the supporting affidavit a copy of the letter she wrote requesting the Deputy Registrar of this court to be provided with a copy of the judgment. It is said that a copy of the judgment was supplied to the applicant on 27th July 2020.
- 6) It is also the submission of the applicant that due to Covid 19 pandemic, it was not able to visit its counsel's office in time to give instructions hence the delay to file the motion. The learned advocate further argued that unless the order for stay is granted the applicant would suffer substantial loss in that the 1st respondent has threatened to auction its tools of trade which would be used in the administration of health services to the public during the Covid 19 pandemic.
- 7) In response, the 1st and 3rd respondent's advocate urged this court to dismiss the applicant's motion stating that the applicant offered no plausible reasons to be entitled to the orders sought.
- 8) The learned advocate further argued that the applicant sat on its laurels for a period of four (4) months after becoming aware of the judgment before filing the current motion.
- 9) It is said that the applicant was prompted to file the current motion when it was threatened with execution. It is pointed out that the applicant filed an irregular notice of appeal on 29.7.2020 and failed to file a memorandum of appeal or an application for stay.
- 10) The 1st and 3rd respondent beseeched this court that if it is inclined to grant the orders sought of stay of execution pending appeal then the applicant should be ordered to deposit the entire decretal sum of ksh.6,095,899/66.
- 11) It is apparent from the pleadings and the rival submissions that the applicant is seeking for two main orders. The **first** is for leave to appeal out of time. **Secondly** is an application for stay of execution of the decree pending appeal.
- 12) The court's discretion to grant leave to appeal out of time is dependent on the applicant providing sufficient reason. The applicant has stated that it was not served with a notice of delivery judgement and it only became aware of the delivery of judgement after the time limited to appeal had lapsed.
- 13) I have looked at the judgment and it is apparent that no party attended court at the time of delivery of judgment. It is not also contested that the applicant became aware on 24.7.2020 that judgment was delivered on 28th May 2020 when it accessed the court's e-filing portal. I am therefore convinced that the applicant offered a plausible explanation for the delay. Consequently, I grant the applicant leave of 10 days to file its appeal out of time.
- 14) The **second** order sought is that for stay of execution pending appeal. Under Order 42 rule 6(1) of the Civil Procedure Rules, the principles to be considered before granting the order are outlined. **First**, is that the application for stay must be filed without unreasonable delay. On this principle, the applicant is of the submission that due to the outbreak of the Covid 19 pandemic, it was unable to visit its advocate's office to give instructions. This averment is not controverted by the 1st and 3rd respondents.
- 15) It is apparent that on 24th July 2020 the applicant became aware that judgment was delivered on 28.5.2020. It is also apparent from the record that the applicant sought to be supplied with a copy of the judgment which was supplied on 27.7.2020.
- 16) The applicant avers that it was unable to access its advocate's office to give instructions. The applicant does not explain as to when it was able to visit the offices of its advocate. It merely alleges that it was served with a warrant of attachment on 6th November 2020.
- 17) It would appear that the applicant was jolted to take out the current motion by the warrants of attachment served upon it. The applicant has failed to explain the reason for the delay in filing the motion for stay. There was delay for more than three months. I find the delay to be unreasonable and unexplained.
- 18) The **second** principle to be considered is whether the applicant will suffer substantial loss if the order for stay is denied. In this case the applicant has stated that the appeal will be rendered nugatory and an academic exercise if the stay is not granted. It is argued that the applicant's tools of trade would be attached thus failing to offer health services during the Covid 19 pandemic. In my view, I find the reasons put forward by the applicant does not prove the substantial loss on the part of the applicant.
- 19) The **third** principle is the requirement for the provision of security for the due performance of the decree. This principle is dependent on whether the applicant has established the substantial loss it would suffer if the order for stay is denied. Since I have come to the conclusion

that the applicant has failed to establish the substantial loss, I do not think it is necessary to consider this principle.

20) In the end, the application partially succeeds. The applicant is granted leave of 10 days from the date hereof to file an appeal out of time. The application for stay of execution of the decree pending appeal is dismissed. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 7th day of January, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Applicants

..... for the Respondent