



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 103 OF 2019

MOHAMMED YUSUF.....1ST APPELLANT/APPLICANT

ANAS MOTORS LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

SAMMY JURA ONYURO.....RESPONDENT

RULING

1. On the 17 /2/2020 the appellants/ applicants hereinafter referred to as the applicants filed the application dated the **7th February 2020**. The application is brought under Sections 1A, 3A, 80, 95 of the Civil Procedure Code Act, CAP 21 Laws of Kenya and order 45 of the Civil Procedure Rules. The applicants seek the following orders

i. Spent

ii. That this Honourable Court be pleased to enlarge the stay of execution Orders issued on the 21st of January 2020 pending the hearing and determination of the application.

iii. That this Honourable Court be pleased to review and/ or vary its Order issued on the 21st day of January 2020 and in its place substitute with an Order directing the applicants to deposit an original title deed for a property whose value is equal or exceeds the decretal sum as security for performance of the decree.

iv. That the costs of this application be in the cause.

2. The application is supported by an affidavit sworn by Anas Hassan Musa Khamisa a director of the 2nd applicant's company. In brief he avers that efforts to get cash worth Kshs. 2,890,294 during this tight financial period in their company and deposit the same in a joint account as security within 45 days have proved futile owing to the hard economic times. That they are keen on pursuing the appeal. That they have title deed in his name as director of the 2nd plaintiff company and its valued at Kshs. 3,500,000/-. The title is title number Kilifi/Mtondia/693. That he is ready to deposit the said title in Court as security for performance of the decree. That if the application is not allowed there is imminent danger that the respondent might move to execute the decree rendering the appeal nugatory.

3. The application was opposed. The respondent filed grounds of opposition stating the following that ;

i. The orders of this Court made on 21st January, 2020 were consent orders, which cannot be reviewed and substituted with orders, in the manner proposed by the Appellants, at all.

ii. There is no permissible and legally admissible evidence, other than bare deposition of one Anas Hassan Musa Hassan, that the said Anas Hassan Musa Hassan is Director of the Anas Motors Limited, the 2nd Appellant, as the application was filed without any corporate seal of the 2nd Appellant, authorizing the deponent to the Supporting Affidavit to swear the supporting affidavit and represent the 2nd Appellant herein, by way of appearance, applications or acts, as required under Order 9 Rule 2 of the Civil procedure Rules, 2010.

*iii. There is no permissible and legally admissible evidence, filed on record, other than the bare deposition of one **Anas Hassan Musa Hassan**, that **Mohammed Yusuf H**, the 1st Appellant, has authorized the said **Anas Hassan Musa Hassan** to represent him in these proceedings and file processes or swear affidavits on behalf on behalf of the 1st Appellant, as the application was filed without any authority signed by of the 1st Appellant, authorizing the deponent to the Supporting Affidavits to swear the Supporting Affidavit and represent the 1st Appellant herein, by way of appearances, applications or acts, as required by the law, and as deposed to*

herein.

iv. **Anas Hassan Musa Khamisa**, the deponent to the Supporting Affidavit, in whose names the property sought to be made security herein, being land parcel **No.KILIFI/MTONDIA/692** is registered, is not a party to this appeal, and is not a party to the suit before the trial court, and as such, his property cannot be made the security for the due satisfaction of the decree of the trial court, in the event the Appellants' appeal herein fails, as the property cannot possibly be attached in execution of the decree of the subordinate court, lawfully and regularly, at all.

v. The application is incompetent for being anchored in a fatally incompetent affidavit.

vi. Granting the motion will be disproportionate, unjust and in excess of the Court's jurisdiction.

vii. It would be unjust, unlawful and disproportionate to grant the orders sought in that motion

viii. The application is inherently and fatally defective, and the relief sought cannot be granted.

ix. The application is scandalous, vexatious and an outright abuse of the process of this court.

4. Parties filed brief written submissions which I have read and considered. The applicant's submission reiterates the contents of the applicant's affidavit in support of the application. The respondent in his submissions reiterated the grounds of opposition dated the 9th June 2020. It was empathised that Anas Hassan Musa is not a party in the suit and that the decree cannot be executed against him nor can he be liable to satisfy the decree in the subordinate court if the appeal is dismissed.

ANALYSIS & DETERMINATION

5. I have considered the affidavits filed by the parties and their written submissions. On the 11/12/2019 Justice Ndungu noted that the respondent had conceded to the application for stay on condition that there was security. An order for stay of execution was issued of the judgment and decree. The stay was conditional on the judgment debtor depositing in a joint interest earning account in a reputable bank to be agreed pending upon by the parties in the names of the advocates on record within 45 days hereof. Costs of the appeal to abide the outcome of the appeal. This order was given on the 11/12/2019. The application under consideration was filed on the 7/2/2020 about 2 months after the Court order. There was no inordinate delay.

6. Under Order 45 of the Civil Procedure Rules a court can review an order if the following are established;

“the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. The applicant is Anas Hassan Musa Khamisa he claims to be a director of the 2nd Appellant Company. There is no evidence to show that he is a director of the 2nd defendant company and therefore I agree with the respondent's submission that he is a stranger in the matter. What is attached as annexures in Mr. Anas supporting affidavit are a Title deed, a search certificate and a report by Musyoki & Associates on the proposed property. I note that the decree of the subordinate court does not relate to Anas Hassan Musa Khamisa. He is a stranger in the matter and cannot seek the orders being sought. There is no sufficient cause shown by the applicant for this court to review its order dated the 11/12/2019. All in all, I find that the application lacks merit and is dismissed with costs to the respondent.

Dated, signed and delivered at KISII this 26th day of February 2021.

R. E.OUGO

JUDGE

In the presence of:

Miss A. Kaguri For the Applicant

Respondent Absent

Ms. Rael Court Assistant