



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 150 OF 2018

CEFA ENTERPRISES LTD.....APPELLANT

-VERSUS-

BENEDICT KYALO KIMUYU.....1ST RESPONDENT

BMG HOLDINGS LIMITED.....2ND RESPONDENT

MULATI SABABI.....3RD RESPONDENT

BENEDICT MBALU.....4TH RESPONDENT

RULING

1. By a Motion on Notice dated 17th August, 2020, the applicant/appellant herein seeks orders enlarging the time within which it ought to comply with the conditions for stay issued on 26th February, 2020 with a period of 14 days and to permit the Applicant to deposit Kshs 400,000.00 in Court and that upon that enlargement, a stay of execution pending the hearing and determination of this appeal be granted.
2. According to the Applicant, on 25th May, 2018 the trial court delivered a judgement against it in the sum of Kshs 2,588,320/- in Machakos CMCC No. 534 of 205 and being dissatisfied with the said decision it instructed its advocates to file the present appeal and further instructed them to apply for stay pending the hearing of the said appeal. The Court granted the said application on condition that the applicant deposits Kshs 800,000/= in a joint interest earning account. However due to financial constraints the applicant instructed its said advocates to seek extension of time to enable it raise the said sum. Though the said application was allowed, due to the circumstances prevailing between the Applicant and its landlord that led to the demolition of part of the applicant's premises by the said landlord, the operations of the applicant were hindered. This was compounded by the fact that one of the directors of the Applicant was indisposed due to old age and required urgent medical attention.
3. The applicant contended that due to the said circumstances, it was only able to raise Kshs 400,000/= which it was willing to deposit in court within 14 days.
4. According to the Applicant it stands to suffer irreparable harm and substantial loss if the orders sought herein are not granted since the amount mentioned in the proclamation was Kshs 2,588,320.00 out of which a third was directed to be paid. According to the Applicant execution of the said judgement would prejudice it if it turns out that it was not liable to pay the same since the Applicant will not be able to recover the same.
5. The application was opposed by the 1st Respondent who averred that no sufficient grounds were given by the Applicant to deserve the grant of the orders sought. It was contended that the Applicant is guilty of laches and is only on a fishing expedition aimed at denying the said Respondent the fruits of his judgement. It was deposed that the failure to comply with the conditional order for a period of 6 months was not explained and since orders are not issued in vain, the orders sought herein ought to be declined.
6. In its submissions, the Respondent contended that the Applicant has previously filed **Four** Applications seeking for similar orders. It was explained that the Applicant had filed Application dated 20h November, 2018 seeking similar prayers and based on the same grounds of illness and misfortunes. The court heard the same and delivered a ruling on 18th September, 2019 granting the Applicant the Applicant stay on condition that 1/3 of the decretal sum be deposited in court within 30 days in default the stay of execution to lapse. However, the Applicant **failed** to comply with the orders of the court. The Respondent then filed Application dated 7th October, 2019 and on 27th January, 2020 the honourable court delivered its ruling and ordered that Applicant deposit 1/3 of the decretal sum in an interest earning account in the names of both Advocates within 14 days from date of the said Ruling failing which the stay would lapse. Once again, the Applicant **failed** to

comply with the Orders of the court and filed an Application dated 24th February, 2020 for extension of time to comply with the Orders. On 10th March, 2020 the Court extended the orders issued on 27th January, 2020 for 30 days. Though these Orders were issued in March to date seven months down the line, the Orders have never been complied. Instead, the Applicant has now filed the present Application dated 17th August, 2020 in court seeking again conditional stay of the judgment and decree of judgment delivered on 25th May, 2018 in which it also seeks the enlargement of time to comply with Orders by a further 14 days. Though the Application was filed on 18th August, 2020, and automatically the 14 days have already lapsed, no attempt to comply with the said orders have been made.

7. It was submitted that the Applicant has demonstrated since 20th November, 2018 that it never intended to comply with any conditions by the court hence their numerous Applications shopping for court Orders and taking the court for academic exercises.

8. The Respondent asserted that litigation must come to an end and submitted that the Applicant has no regard for the plights and horrible conditions and suffering that the 1st Respondent was left in following the accident but keep seeking for mercy from the court. Accordingly, the Applicant has come to court with unclean hands. He is not only undeserving of the orders sought but also based on the foregoing this honourable court has already pronounced determinations on the same and is therefore *functus officio* rendering this issue *Res judicata*.

9. It was sought that the application be dismissed with costs to the 1st Respondent.

Determination

10. I have considered the issues raised in this application.

11. In this application, the Applicant is seeking two orders. The first order is that this court enlarges the time within which it is to deposit the sum of Kshs 800,000/= and secondly that instead of depositing Kshs 800,000.00, the said order be varied so as to permit him to deposit Kshs 400,000.00. instead. The two grounds for seeking the said orders are that its business was adversely affected by COVID 19 Pandemic, the health status of its aged director and a dispute between it and its landlord that has led to its business being adversely affected.

12. It is clear that the decision whether or not to vary a court order is an exercise of discretion and just like any other exercise of discretion. However, like any other judicial discretion must be on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.

13. In this case, as I found in an earlier ruling delivered on 15th December, 2020, the Applicant is a legal person separate from its directors. It has not been contended that the ailment of the Applicant's director has adversely affected the Applicant's financial operations and in what manner. It may well be that the said indisposition has affected the financial position of the deponent of the supporting affidavit but in law the deponent and the Applicant are two separate legal entities. As regards the Pandemic, while the same can be said to have adversely affected the business, the Applicant ought to have shown some evidence of attempts to comply with the orders. While he seeks to have the same varied he has not even shown good faith by depositing the amount it is able to afford. Instead, as rightly submitted by the 1st Respondent it has denuded this court with several applications and even though the court has been accommodative to it, it has completely failed to comply even with orders issued in its favour.

14. Having considered the matter and the previous proceedings, I find that it would be inequitable to grant the same. Justice must look at both sides of the coin and adopt the principle of equality of arms.

15. In this case I find no merit in the application dated 17th August, 2020 which I hereby dismiss with costs to the 1st Respondent.

16. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 25th day of February 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Langalanga for Ms Kavita for the Respondent

CA Geoffrey