REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E006 OF 2020.

JOHN KINGORI KIONI.....APPELLANT / APPLICANT

VERSES

NOBEL TYRES LIMITED.....RESPONDENT

RULING

1. The Notice of Motion by the applicant dated 2nd November 2020 seeks the following orders;

> **(a) That there be stay of execution of the proceedings in case no. NAKURU CMCC NO. 719 OF 2016. NOBEL TYRES V. JOHN KINGORI KIONI pending the determination of this application and thereafter the appeal herein.**

2. The applicant as well prays for costs of the application.

3. The application is supported by the grounds thereof and the applicant's affidavit sworn on the same date. In a nutshell the applicant's suit was closed before he could render his defence for the reason of non-attendance. Subsequently he was granted another chance and on that date when the application was due for hearing his advocate failed to attend court. The Judgement dated 27th May 2020 therefore stood and subsequently execution proceedings were commenced.

4. His application at the lower court to set aside was dismissed for lacking merit. He has therefore sought this courts intervention through the appeal process and this application. He further deponed that in the cause of time he suffered a road traffic accident which made him unable to follow up the suit. He therefore blames his advocates on record who have failed to prosecute the matter as per his instructions. According to him the matter has never been determined on merit and the reason why he pleads that the appeal has an overwhelming chance of success.

5. The respondent vide the replying affidavit of **Joseph Wainaina** dated 19th November 2020 has opposed the application basically for the reasons that the same is completely unmeritorious and is meant to deny the respondent the fruits of judgement. The applicant according to the respondent has made three similar applications and they have all been dismissed by the court.

6. The applicant cannot use the issues regarding his representations to derail the courts orders. He said that the applicant has not demonstrated what he stands to suffer should execution proceeds and in any event he has failed to offer any security to mitigate his application. He therefore prayed that the application lacks basis and it should be dismissed. The respondent has taken over 4 years to realise the end of the case and granting the appellant any chance on appeal is simply delaying the matter.

7. The parties were directed to file written submissions which they have complied. The court has perused the same as well as the cited authorities. Essentially both parties have reiterated what is contained in their affidavits.

8. What is evident is that the applicant is blaming his counsels who failed to appear on his behalf during crucial times at the lower court. Apparently there were no affidavits from the counsels who had represented the applicant on record as to why they failed to turn up in court although it appears that the trial court captured it in its ruling.

9. The province of granting a stay of execution is provided under Order 42 Rule (6) of the Civil Procedure Rules. One ought to demonstrate that there shall be substantial loss should the execution be carried out, that he has an arguable appeal which shall be rendered nugatory should stay not granted and there should be security in the event that stay is granted.

10. In this case, the only cry from the applicant is that his counsel failed to turn up in court when the application to set aside the orders closing his defence were issued. He also blamed the road traffic accident he sustained which made him hospitalised.

11. The issue of blaming once counsel is generally no longer fashionable and has fallen out with time. Once instructions are issued its expected that any diligent lawyer will take up the matter barring any unforeseen obstacles. In case of any failure to attend to the matter the

client has a redress in other forums including a claim for damages. (See **BAINS CONSTRUCTION CO. LTD VERSES JOHN MZARE OGOWE (2011) eKLR).**

12. The applicant admitted that this was not the first time he had been failed by his counsel. What then was the court supposed to do except to proceed with the matter. Indeed, the trial court was right in closing the matter. The applicant although he was granted a second chance so to speak was failed by his advocates.

13. Perhaps it would have been prudent for the counsel to swear such an affidavit in support but whichever the case the court proceeded to dismiss the matter.

14. This court has however noted the issue of the applicants healthy which had him hospitalised as a result and now he is classified as a person living with disability. The same occurred during the existence of the case. This position was not objected to by the respondent. Having stated, so this court is a court of equity. The applicant's *"sins"* are overwhelming but for his health, the court would have thrown out the application which is not meritorious.

15. Poor health however does not mean that the applicant should not meet his obligations like in this case. He must unless otherwise confront his liabilities and obligations just like any other litigant.

16. The applicant has admitted that he is willing to meet the conditions set out by the court. As indicated above and as submitted by the respondent the applicant should provide the adequate security or at least pay the decretal amount. There is nothing to suggest that the respondent shall be unable to pay back the decretal amount should the appeal succeed.

17. The court has considered the entire application as well as the memorandum of appeal on record. The only issue raised by the applicant is the failure of the trial court to give him a chance to present his defence. Under the provisions of **Article 159 of our Constitution, Section 3 and 3A of the Civil Procedure Act** there is need to have matters settled expeditiously and with minimum delay.

18. The court has considered the pleadings on record and is satisfied that even if the matter was to go for a full appeal the only ground to be argued is whether the applicant should be granted a second chance. In other words, whether the trial court's judgement and ruling should be set aside to allow the applicant present his defence. This court by its inherent powers does not see the reason of delaying the matter by taking it through the usual appeal processes. Even if for example the application is allowed or dismissed the appeal will still be pending and must be determined one way or another.

19. The above perspective of quick settlement of this matter is underpinned under the ***oxygen principles*** enshrined in Section 1A and 1B of the Civil Procedure Act which states as hereunder;

> **"1.*A. Objective of Act***
>
> ***(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***
>
> ***(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
>
> ***(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***
>
> ***[Act No. 6 of 2009, Sch.]***
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> ***"1B. Duty of Court***
>
> ***(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—***
>
> ***(a) The just determination of the proceedings;***
>
> ***(b) The efficient disposal of the business of the Court;***
>
> ***(c) The efficient use of the available judicial and administrative resources;***
>
> ***(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
>
> ***(e) The use of suitable technology.***

20. For the above reasons the Application and the Appeal is hereby settled as follows;

a) The trial court's rulings dated 2nd September 2020, 4th March 2020 and the judgement dated 27th May 2020 are hereby set aside with all the attendant consequences.

b) The lower court matter is hereby reopened to allow the applicant only to present his defence since the respondent had closed its case.

c) The applicant shall deposit the sum of Kshs. 600,000 in a joint interest earning account with the counsel for the respondent within 30 days from the date herein pending the hearing and determination of the suit.

d) The applicant shall pay to the respondent all the costs of the suit earlier on assessed, the auctioneer's costs, if any, within 30 days from the date herein.

e) In default of orders(c) and (d) above the respondent shall be at liberty to execute for the whole amount and prayer (a) and (b) shall be rendered ineffective.

f) The respondent shall have the costs of this application.

Dated signed and delivered electronically at Nakuru this 25th day of February 2021.

H.K. CHEMITEI

JUDGE