



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 25 OF 2016

RAI PLYWOODS (KENYA) LIMITED.....PETITIONER

-VERSUS-

SUB-COUNTY COOPERATIVE OFFICER, TURBO & SOY.....1ST RESPONDENT

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

[1] The Notice of Motion dated **16 October 2020** was filed herein by the 1st respondent pursuant to **Sections 1, 1A & B** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 45 Rules 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] Spent

[c] The Court be pleased to vacate, set aside, vary and/or discharge the orders of stay of proceedings issued on **4 December 2019**;

[d] This matter be fixed for hearing of the respondent/applicant's case forthwith;

[e] Costs of the application be borne by the petitioner/respondent.

[2] The application was premised on the grounds that the petitioner has abused the stay orders issued on **4 December 2019** to frustrate and delay the determination of this case as members of **Plywood Sacco** continue to suffer immense prejudice; granted that their contributions in excess of **Kshs. 355,659,088.70** have been put out of their reach by the petitioner. The 1st respondent further averred that, since no explanation for the inordinate delay in lodging its proposed appeal has been proffered by the petitioner, the conclusion to draw is that the petitioner is using the stay order for the ulterior purpose of delaying the hearing and determination of this suit. The prayer of the 1st respondent was therefore that the stay order be vacated to pave way for the further hearing and determination of this suit.

[3] In support of the application, the 1st respondent relied on the affidavit of **Roselyn Rae**, sworn on **16 October 2020**, in which a chronology of the events herein were set out. It was further averred on behalf of the 1st respondent that no action has been taken by the petitioner since the filing of the Notice of Appeal dated **12 March 2019**. A letter from the Deputy Registrar, confirming that certified copies of proceedings were supplied to counsel for the petitioner way back on **19 February 2020**, was exhibited as **Annexure RR2** to the Supporting Affidavit, to demonstrate that the window for lodging an appeal has since lapsed; and therefore that the stay order is serving no useful purpose. Thus, at paragraph 15 of the Supporting Affidavit, it was averred that:

“...litigation must come to an end and cannot be left in ‘legal limbo’ and the inordinate delay/willful failure of the Petitioner/Respondent to file an appeal when enjoying stay of proceedings order is tantamount to sacco members being held at ransom by the Petitioner/Respondent.”

[4] Thus, the 1st respondent prayed that the stay order issued on **4 December 2019** be reviewed, set aside, varied and/or discharged; that this matter be fixed for hearing of the respondent/applicant's case forthwith; and that the costs of the application be borne by the

petitioner/respondent.

[5] The application was resisted by the Petitioner. A Replying Affidavit to that end was sworn on **9 November 2020** by the petitioner's Finance Director, **Philip Varghese**, wherein it was averred that the application is not founded on proper facts; that it is mischievous and has been brought in bad faith for the purpose of misleading this Court. It was further averred by **Mr. Varghese** that the orders sought are not available, as they would be tantamount to asking this Court to sit on appeal on its ruling dated **4 December 2019**. He further averred that the petitioner instituted an appeal to the Court of Appeal on **18 March 2020** and is awaiting a hearing date to be fixed and communicated by the Court of Appeal. He exhibited copies of the Memorandum of Appeal, Index, Statement of Address of Service and a Certificate of the Record of Appeal, among other documents, as **Annexure "PV 1"** to the Replying Affidavit. He asserted that it is therefore not correct for the 1st respondent to claim that the petitioner has not taken any steps since filing the Notice of Appeal.

[6] The 1st respondent responded to the Petitioner's Replying Affidavit by filing a Supplementary Affidavit sworn on **15 December 2020** by **Mr. Yego**, Advocate. He reiterated the 1st respondent's assertion that no appeal has been filed by the petitioner; and that, at any rate, he has not been served with any Record of Appeal in the matter. Thus, in his view, the orders of stay of proceedings made on **4 December 2019** have lapsed, on the ground that no appeal was filed within 60 days of the filing of the Notice of Appeal. He added that, since the stay order was conditional on the existence of an appeal, it no longer serves any useful purpose other than unnecessarily delaying the expeditious disposal of this Petition.

[7] The appeal was urged by way of written submissions; and in his written submissions filed on **11 February 2021**, **Mr. Yego** for the 1st respondent proposed the following issues for determination:

[a] Whether the application amounts to an appeal from the stay order issued on **4 December 2019**;

[b] Whether a case has been made for the setting aside of the stay order dated **4 December 2019**.

[8] In respect of the first issue, it was the submission of **Mr. Yego** that the application does not in any way amount to an appeal from the stay order made on **4 December 2019**. He underscored the assertion that the application seeks the review of the said ruling and order of the Court on the ground that there has been discovery of new and important evidence which was not available at the time; and on the ground that there are sufficient reasons for review. As for the second issue, **Mr. Yego** pointed out that the alleged Record of Appeal is yet to be served upon the Respondents; and therefore that it is doubtful whether the said appeal exists. He urged the Court to rely on his affidavit as to the true state of facts; and to dismiss the allegations of **Mr. Varghese** as mere unverified hearsay. He therefore submitted that the 1st respondent has made out a good case to warrant reviewing the orders of **4 December 2019**.

[9] On its part, counsel for the petitioner proposed a single issue for determination; namely, whether the Court has the power to grant the orders sought. In the submission of **Ms. Odwa**, the application is, in effect asking the Court to sit on appeal over its own decision; which is untenable. She added that the Court is now *functus officio*; and that any reprieve in respect of the impugned orders can only be given by the Court of Appeal. Counsel further refuted the assertion by the 1st respondent that no appeal has been filed. She reiterated the Petitioner's contention that an appeal was filed on **18 March 2020**; and the Record of Appeal duly served on counsel for the 1st respondent.

[10] With regard to the apparent delay in the hearing and disposal of the appeal, **Ms. Odwa** pointed out that the listing of matters before the Court of Appeal is the preserve of the Court of Appeal; and that the petitioner has no role to play therein. **Ms. Odwa** accordingly took the position that the instant application is not only premature, but is also founded on a misapprehension of the facts. It was therefore her prayer that the instant application be dismissed with costs.

[11] Having given due consideration to the Notice of Motion dated **16 October 2020** and the affidavits filed in respect thereof; and having paid attention to the written submissions filed by learned counsel for the parties, I am in agreement with **Mr. Yego** that two issues arise herein for determination; the first being whether the application amounts to an appeal of the decision of the Court dated **4 December 2019**; and the second issue is whether, on the merits, a good case has been made out for review for purposes of **Order 45 Rule 1** of the **Civil Procedure Rules**.

[12] In respect of the first issue, it is a cardinal principle that a matter once determined can only be reconsidered on appeal as to the merits thereof. Hence, there is merit in the submissions of **Ms. Odwa** that it would be inappropriate to require this Court to reconsider and vary its ruling dated **4 December 2020** solely on the basis of merit. The Court would be, in essence, *functus officio* in that regard. It is noteworthy however that the instant application has been brought under **Order 45 Rule 1** of the **Civil Procedure Rules**, which does allow for review and setting aside of a decision of the Court in certain instances. It provides that:

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed and who from 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.

[13] **Mr. Yego**'s posturing is that the instant application is not an appeal as posited by **Ms. Odwa**, but is an application for review brought under the provisions of **Order 45 Rule 1** aforesaid; and, therefore, that the applicant is entitled to its consideration on merits, not only on the ground of discovery of new and important evidence but also on the ground that there are sufficient grounds for review. I agree entirely

with the position taken by **Mr. Yego**, for the instant application has clearly been expressed to have been brought under **Order 45 Rule 1** of the **Civil Procedure Rules**, which does allow a review of a decision of the court on the grounds that there is **discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the order made; or on account of some mistake or error apparent on the face of the record. A review application can also be brought under that enabling provision for any other sufficient reason.** That being the case, and looking at the prayers sought, it cannot be said that the Court is *functus officio* in the matter.

[14] Indeed, in **Dickson Muricho Muriuki vs. Timothy Kagondu Muriuki and 6 Others** [2013] eKLR, the Court of Appeal had occasion to consider the circumstances when the court would be deemed to be *functus officio*. It rendered itself thus:

"...it is profitable to note that the concept of *functus officio* should not be confused with the doctrine of *res judicata* although both have an element of prohibition of exercise of authority over the subject of the suit. The former prohibits exercise of authority by any court in the same suit the court has determined completely, while the latter relates to a situation where there are two suits; a current suit and another previous; ...whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently overstretch the application of the concept of *functus officio*...Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case..."

[15] On the merits, the 1st respondent opted for the ground of sufficient reason, contending that, since no substantive appeal was filed within the 60 days' window provided for in **Rules 82(1)** of the **Court of Appeal Rules**, the order of stay serves no purpose. Thus, on the merits, the application turns on the single question as to whether or not an appeal has in fact been filed by the petitioner. While it was the contention of **Mr. Yego** that no appeal was filed within 60 days of the filing of the Notice of Appeal, the Petitioner annexed documents to its Replying Affidavit to demonstrate that a Memorandum of Appeal as well as a Record of Appeal dated **18 March 2020** were indeed filed. It is noteworthy however that none of those documents bear the designated appeal file number or the Court of Appeal receipt stamp. Indeed, none of the documents, save for the Memorandum of Appeal, bear the signature of the Deputy Registrar in proof of lodgement.

[16] Thus, granted the divergent positions taken by the parties, the Court directed the Deputy Registrar-High Court to ascertain the factual position and file a report in that connection. A report has accordingly been filed herein dated **21 April 2021**; and it confirms that a substantive appeal was indeed filed by the petitioner before the Court of Appeal in respect of the Ruling of this Court dated **12 March 2019**, being **Kisumu Civil Appeal Number 81 of 2020**. As to whether the said appeal was filed within time is an entirely different matter; a matter that should have been pursued before the Court of Appeal in accordance with **Rule 84** of the **Court of Appeal Rules**.

[17] That being the case, the 1st respondent's application for review on the ground that no appeal was filed within the strictures of **Rules 82 and 83** of the **Court of Appeal Rules** is clearly untenable. Accordingly, the and without further ado, the application dated **16 October 2020** is hereby dismissed with costs.

Orders accordingly.

DELIVERED, SIGNED AND DATED AT ELDORET THIS 22ND DAY OF APRIL 2021

OLGA SEWE

JUDGE