



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 59 OF 2005

PIUS KINYUA T/A SALAMBO PROPRIETARY CLUB.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....DEFENDANT

RULING

1. By way of **Notice of Motion** application dated **29th January, 2021** the Applicant seeks the following Orders: -

a) Spent;

b) Spent;

c) Further execution of the Decree by way of removal of the proclaimed goods be set aside;

d) The Ruling and Orders made on 17th November, 2020 be reviewed to order No.(d) requiring the Defendant to move the Court of Appeal on the appeal within 45 days;

e) Costs of this application be provided for.

2. The **Notice of Motion** is supported by an **Affidavit** sworn on **29th January, 2021** by **Sekou Owino**, the Defendant's Head of Legal Department.

3. The **Notice of Motion** Application is premised on the grounds that on **26th January, 2021** the Plaintiff proclaimed the Defendant's goods which were scheduled for removal on **2nd February, 2021**. The Applicant further states that the intended appeal to the Court of Appeal and orders of stay issued on **17th November, 2020** will be rendered nugatory unless this application is granted.

4. It is also an averment of the Applicant that the **Ruling** delivered on **17th November, 2020** was conditional, and that one of the conditions was that the Defendant do move the Court of Appeal for hearing of the Appeal within 45 days.

5. The Applicant states that **Rule 87** of the **Court of Appeal** does not allow for an appeal to be filed without typed proceedings and that the Applicant has not been provided with typed proceedings to be able to proceed and file the Appeal within the required 45 days.

6. The Applicant states that having not been provided with typed proceedings, this Honourable Court made **order No.(d)** in error and that it is impossible for an appeal to be heard within 45 days.

7. Further, the Applicant indicates that it has paid the Plaintiff **Kshs.3,477,500.00** being 50 % of the decretal amount and that due to a confusion and mistake, the bank guarantee for the balance was not procured until **27th January, 2021**.

8. Finally, the Applicant states that the short delay in delivering the guarantee will not prejudice the Plaintiff and that it undertakes to file the Appeal as soon as the typed proceedings are delivered to its advocates.

9. The Plaintiff has opposed the said Application vide the **Replying Affidavit** sworn on **4th February, 2021**.

10. It was deponed that the **Ruling** of this Court made on **17th November, 2020** was conditional and that condition (b) required that a Bank Guarantee from Standard Chartered Bank Limited in the sum of **Kshs.3,477,500.00** be provided in favour of the Plaintiff within a period of thirty (30) days. The thirty (30) days expired on **17th December, 2020**, by which time the bank guarantee had not been provided by the Defendant.

11. The Plaintiff also states that the Defendant/Applicant has not shown any effort that they have tried to procure typed proceedings from the Court. That since the matter was concluded in **28th June, 2019**, only one letter dated **25th November, 2020** has been sent to court in that regard. The Plaintiff avers that the Defendant has not attached any copy of a receipt to show that the typed proceedings have been paid for to enable the Court release the same.

12. The Plaintiff contends that the application as filed by the Defendant is a delaying tactic and they should not be allowed to pick and choose orders of the court that they intend to obey. The Plaintiff has invited the court to note that the matter herein has been in court for a long time and that litigation must come to an end.

Directions of the Court

13. The parties took directions on disposing the application by way of written submissions. The Applicant filed its submissions on the **1st March, 2021** while the Plaintiff/ Respondent filed submissions on the **2nd March, 2021**. Parties highlighted and relied on their written submissions in their entirety. I have read through the submissions by both parties and found they replicate much on the grounds in support and opposition of the application as captured above. There is therefore no need to duplicate the same.

Analysis and determination

14. Having considered all the pleadings and written submissions by the parties, the issues that arise for determination are whether this Court can set aside further execution of the decree by way of removal of the proclaimed goods and review order **No.(d)** of the **Ruling** delivered on **17th November, 2020**.

15. On **11th March, 2020**, the Defendant filed an application for Stay of Execution pending Appeal. On **17th November, 2020**, this Court delivered a **Ruling** granting a Stay of Execution pending Appeal on the following conditions: -

a) That Applicant to pay the Respondent half the decretal amount of Three Million, Four Hundred and Seventy Seven Thousand, Five Hundred Shillings. (Kshs.3, 477,500/=).

b) That a further sum of Three Million, Four Hundred and Seventy Seven Thousand, Five Hundred Shillings (Kshs.3,477,500/=) to be secured by the provision of a Bank Guarantee from Standard Chartered Bank Limited within 30 days from today;

c) Costs to abide by the outcome of the Appeal;

d) The Appellant to move the court for hearing of the Appeal within 45 days.

16. Having listened to the arguments by both Counsel, read through their respective written submissions, I have also perused the court record. I find it is an undisputed fact that the Applicant only complied with the orders of the court issued on **17th November, 2020** in terms of order **No.(a)**. As for **order No.(b)** the Applicant claimed that there was a confusion and so the bank guarantee was availed on **17th January, 2021** instead of **17th December, 2020** when the said order lapsed. With regard to **order No.(d)**, the same has not been complied with at all and the Applicant seeks to have the same reviewed as it is an error since no appeal can be heard within 45 days. According to the Applicant, they have not been able to file the Appeal as directed by the court since they have not been supplied with the typed and certified proceedings of the court and it is impossible to have an Appeal within 45 days.

17. A further perusal of the court record shows that the Judgment in the suit was delivered on **28th June, 2019** and since then, the Applicant has only requested for typed and certified proceedings only once, which was on **25th November, 2020** (see letter to that effect). There is even no evidence or demonstration by the Applicant that they have paid for the said typed proceedings or any other effort that has been taken to acquire the same.

18. It is clear that the Applicant has been aware of their intention to appeal since **28th June, 2019**. All that they have done is to file for and obtain stay of execution pending appeal on two occasions, but is yet to file the Appeal.

The Supreme Court in the case of **County Executive of Kisumu –vs- County Government of Kisumu & 8 Others [2017]eKLR**, stated that: -

“....However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered...”

19. This Court finds that the Applicant is in court for having been caught up with the timelines issued and hence being unable to comply with the orders of the court. The Applicant has then disguised the said non-compliance with an attempt to seek for a review of the orders of the court.

20. It should be noted that the orders that were issued by this Court on **17th November, 2020** were issued in the interest of justice so as not to render the intended Appeal nugatory. They were not issued to safeguard the interest of the Applicant and allow for non-compliance of the same. And contrary to the argument by the Applicant, **order No.(d)** required that Applicant initiates the process of Appeal and not for the Appeal to be heard within 45 days. There is clearly no evidence on record that the Applicant has initiated or taken steps to initiate such process. The Applicant has all along been aware of their intention to appeal so that once it realized that the timelines within which they were required to move the court for an appeal was running out due to the delay in being furnished with the court proceedings, they ought to have moved this Court for an extension of that period. They did not, and continued dragging its feet in initiating the appeal process.

21. The circumstances of their case reveal an Applicant who has not been vigilant in securing the proceedings from the court since 2019 and hence its indolence cannot be allowed to be visited upon the Plaintiff and deny it the fruits of its Judgment. This Court is therefore hesitant to issue such further stay of execution only to serve the interest of the Applicant who has clearly shown that it is not vigilant in proceedings with the appeal. Delay defeats Equity.

22. By seeking to have the court review order **No.(b)** of the **Ruling of 17th November, 2020** for being impossible to comply with, I find that the court is being told that it ought not to have made such an order. If that were the case, the Applicant ought to have appealed against the said order as that they have raised is a ground of appeal and not review.

23. **Section 45** of the **Civil Procedure Act** clearly provides for the grounds upon which a review can be sought and granted. They are clearly:-

a) An error apparent on the face of Ruling/Judgment;

b) New evidence which could not be obtained even with exercise of due diligence;

c) Any other compelling reason advanced by the Applicant.

24. This is not the case in the instant case. I reiterate that the orders in the **Ruling of 17th November, 2020** were issued, not only to protect the Applicant's right of appeal while the timelines are issued to safeguard expeditious disposal of matters so as not to keep the Plaintiff away from a successful Judgment or enjoyment of the fruits of the same. Clearly, the application for review herein fails as there has been no proper basis for review that has been placed before the court.

25. For the above reasons explained above, I find no merit in the Applicant's Application dated **29th January, 2021** and dismiss it in its entirety.

26. Costs to the Plaintiff/Respondent.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL, 2021.

D. O. CHEPKWONY

JUDGE

20/4/2021