



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL NO. 654 OF 2019

HARRISON MWANGI.....1ST APPLICANT

JOSEPH KUNGU THAIRU.....2ND APPLICANT

VERSUS

MICHAEL OUMA OLWAYO.....RESPONDENT

RULING

1. The application dated 6th November, 2020 seeks orders **that this Honourable court be pleased, upon reinstatement, to extend and/or grant interim orders of stay of execution of the Judgment/Decree issued by the Honourable court on the 10th July, 2019 pending hearing and determination of the intended Appeal.**
2. Secondly, **that this honourable court grant the Applicants leave to file their Memorandum of Appeal out of time and further the court deem the sum of Ksh.500,000/= Received by the Respondent's advocates on the 23rd October, 2020 as duly paid.**
3. It is stated in the grounds and the affidavit in support of the Application that the orders herein dated 22nd November, 2019 for the deposit of half of the decretal sum and payment of the other half to the Respondent as a condition for stay of execution have been complied with, albeit outside the timelines set by the court. The delay in complying with the orders is blamed on the financial constraints caused by the outbreak of COVID 19 and the consequent lockdowns.
4. The application is opposed. It is stated in the replying affidavit that the application is made in bad faith and is meant to delay the enjoyment of the fruits of the judgment. It is further stated that the primary suit was filed back in the year 2016 and the judgment delivered on 10th July, 2019. That the court's orders for conditional stay of execution were not complied with and consequently auctioneers were instructed to recover the decretal sum.
5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.
6. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”

7. The Respondent has argued that the affidavit in support of the application sworn by Pauline Waruhiu, Legal Counsel, Directline Assurance Company Limited, is incompetent and defective. It is argued that the said company is not a party to these proceedings as the insurer’s right under the doctrine of subrogation has not accrued as it has not paid out the money.

8. The Respondent has exhibited the Remittance Advice for the payment of Ksh.500,000/= to the Respondent and the Bankers cheque for the deposit in court of Ksh.683,851/=. These payments are not disputed by the Respondent. The insurer’s right of subrogation has therefore accrued. In that respect I am in agreement with the following persuasive authorities:

(a) The case of **Obonyo Walter Oneya & another v Jackline Anyango Ogude (Suing as the Administrator of the Estate of Fredrick Odhiambo Sewe (Deceased) [2018] eKLR** where it was held that:

“The fact that an insurer is required to be notified of the proceedings giving rise to the judgment and to satisfy the judgment obtained against its insured leave no doubt that the insurer has an interest in the proceedings leading to the judgement and in any appeal against that judgment and consequently, it is my view that a legal officer or any authorized officer of the insurer would be seized of information pertaining to the proceedings in the primary suit and any appeal lodged against the decision or decree arising therefrom and has capacity to swear an affidavit in either the suit or the appeal. In any case there is no law that provides that only co-litigants can swear affidavits in a matter. In my view, any person with information relevant to an action and who is duly authorized can swear an affidavit in the action...”

(b) The case of **Kenya Power & Light Company Limited v Julius Wambale & another [2019] eKLR** where it was held that:

“The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.”

9. The orders dated 22nd November, 2019 were entered into by the consent of the parties. That settled the application dated 9th October, 2019 which sought leave to file a Memorandum of Appeal out of time and stay of execution orders. Compliance was to be within 45 days. The bank deposit of Ksh.500,000/= was made to the Respondent on 23rd October, 2020 as per the attached Remittance Advice. The Bankers cheque of Ksh.683,681/= deposited in court on 6th August, 2020 has also been exhibited. The payments were made almost one year later. It is clear that there was inordinate delay. The delay has not been satisfactorily explained. The outbreak of the COVID 19 Pandemic and the consequent lockdowns came much later in the month of March 2020. By this time the timelines given by the court had already lapsed. The financial constraints referred to have not been substantiated.

10. The orders the subject of the application were entered into by the consent of the parties. The Court of Appeal in the case of **Flora Wasike v Destimo Wamboko [1988] IKAR 625** is as follows in respect of consent orders:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

11. In the case of **Samuel Mbugua Ikumbu v Barclays bank of Kenya Limited [2015] eKLR** the Court of Appeal set the law relating to the setting aside or review of consent orders or judgment as follows:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”

12 Having considered the application, this court’s view is that it fails to meet the threshold for the setting aside of consent orders.

13. In the upshot, the application has no merits and is hereby dismissed with costs.

DATE, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021

B. THURANIRA JADEN

JUDGE