



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.98 OF 2019

MONARCH INSURANCE COMPANY LTD..PLAINTIFF/APPLICANT

-VERSUS-

GEOFFREY GITHINJI ITHAL.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on the respondent's application dated **23rd October 2020**. It seeks leave to cite the appellant for contempt of court and upon grant of leave the managing director of the appellant be summoned to appear in court and show cause why he should not be punished for contempt of court; and upon appearance he be jailed for 6 months for contempt of court.
2. Grounds on the face of the application are that the Chief Magistrate's court issued an order for specific performance in **CMCC No.42 of 2018** and the appellant filed application dated 20th April 2020 seeking stay of execution but was dismissed with costs on 30th January 2020; temporary stay was granted by **Justice Matheka** but was not extended and the appellant has not complied with. The applicant attached a copy of decree issued with penal notice.
3. In response the appellant filed Affidavit sworn by **Leah Muirithania** on 4th December 2020. She averred that the appellant filed application dated 24th September 2019 seeking stay of execution in Civil Suit No. CMCC No.42 of 2018 but the said application was dismissed on 30th January 2020 and the respondent is able to execute the judgment of the lower court before appeal is determined.
4. She averred that the appellant moved the court through application dated 20th April 2020 seeking review of orders of 30th January 2020 in which stay was not granted and ordered stay of execution and ordered the file to be forwarded to this court for further directions; that the application proceeded for directions but has not been canvassed and determined by the court.
5. She averred that the appellant is desirous in proceeding with this matter and since it is for specific performance, once execution has proceeded, it shall be impossible for the respondent to reimburse the applicant in the applicant is successful in the review.
6. She averred that the respondent has filed this application prematurely as the court has not determined or not to review orders of 30th January 2020; that the application for review is merited and urged court to pay attention to substantive justice and proceed with review application in the best interest of justice; that if respondent is allowed to execute the application for review will be rendered nugatory.

RESPONDENT'S SUBMISSIONS

7. The respondent submitted that the appellant has stated that it is not bound to comply with court orders because there is a pending application and stated that this application is premature and this is a sole issue that comes up for determination before this court.
8. In respect to jurisdiction to punish for contempt of court, the respondent cited the provisions of section of the **Judicature Act** as set out hereunder:

“5 (1) The High court and the court of Appeal shall have the same power to punish for contempt of the court as it is for the time being possessed by the High court of justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”

9. And submitted that the jurisdiction to punish for contempt is solely vested in this court and the Court of Appeal and jurisdiction to punish proceed upon prove that an order was issued, that it must have been served or respondent must be aware and acted against the order or failed to act as directed by the order.
10. The respondent cited the case of **Republic Vs Principal Secretary, Ministry of Defence Exparte George Kariuki Waithaka [2019]**

eKLR where the court stated as hereunder: -

“Contempt of court rests on the power of the court to uphold its dignity. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or refrain from doing a particular Act, he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders here he deliberately fails to carry out such orders...in order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespects or violates its processes otherwise courts will have no other means of ensuring that public benefit from the judgment they hand down and orders and or directions made on their behalf...”

11. The respondent further submitted that in **Samuel M.N Mweru & Others V National Land commission & 2 Others [2020] eKLR** the court held that compliance with court orders is not a matter of choice.

12. The respondent submitted that the subordinate court issued the order for specific performance on 8th May 2019; a specific performance order requiring the appellant/defendant to return the plaintiff/respondent to the position he was before the occurrence of the accident; that the order was served on the appellant who instructed its counsel to lodge appeal; the application for stay was dismissed and there is no disposition in the affidavit denying knowledge of the decree; and failure to comply with the decree is therefore deliberate.

13. The respondent submitted that the orders for stay issued upon filing of application for review was temporary stay for 14 days pending placing of the application before me and the matter was mentioned on 7th May 2020 and respondent never pursued the orders and therefore the orders abated after 7th May 2020; and application for contempt filed on 22nd October 2020; that the argument to the effect that there were stay orders and application for contempt of court is premature has no factual or legal basis.

14. The respondent submitted that the directors of the appellant/applicant were to comply with the decree of the court and they have not sworn affidavit to show cause why they have contravened court orders; that the managing director ought to convict for contempt of court and he/she directed to appear in court for conviction.

APPELLANT'S SUBMISSIONS

15. The appellant submitted that through application dated 24th September 2019, it sought to stay of execution of decree in **CMCC No.42 of 2018** but the application was dismissed on 30th January 2020; then they moved to court by application dated 20th April 2020 for review of orders of 30th January 2020 and stay of execution was granted on 23rd April 2020 by **Justice Matheka** pending further direction by this court; and the application has not been conversed and determined by this court.

16. That the appellant has been vigilant and willing to progress this matter and has done everything in its powers to ensure that proceedings continue without disruption.

17. The respondent/appellant submitted that contempt proceedings may lead to imprisonment and where a party raises allegations of breach, the court ought to lend an ear to the complaining party. Further, if the application for contempt is allowed, the appeal will be rendered nugatory; that an award for specific performance cannot be undone; that there is real danger if the appellant is forced to proceed and it shall be miscarriage of justice.

18. The appellant submitted that one of the requirements to be satisfied for contempt is whether the contemnor was deliberate in his behavior; that it is clear that the appellant was vigilant and desirous of the matter to proceed expeditiously.

19. They further indicated that it has prayed to deposit security bond in court to carry out the repairs to the extent as ordered by court in the event the appeal does not succeed.

ANALYSIS AND DETERMINATION

20. The respondent's argument is that the stay orders were issued by **Justice Matheka** for 14 days which period was to end on 7th May 2020 but the said stay orders were not extended beyond 7th May 2020.

21. The Respondent has not denied service of the decree and knowledge of order dismissing prayer for stay of execution.

22. The ruling was delivered on 30th January 2020. Application for review is dated 20th April 2020. The application was made 3 months after the ruling. In my view there was inordinate delay in seeking review and even after being granted stay of execution for 14 days from 23rd April 2020, no efforts were made to either extend stay orders or comply prompting filing application for contempt in October 2020 a period of about 5 months after the lapse of the 14-day stay orders.

23. The chronology of events portrays the appellant as a party not keen in obeying court orders. Failure to obey or delay in taking action after dismissal of application for stay portray laxity on part of the appellant and in my view the application for review is an afterthought; aimed at delaying the process of execution or denying the respondent/applicant a chance to enjoy fruits of successful litigation.

24. The applicant/respondent has demonstrated deliberate conduct by the appellant/contemnor to disobey this courts orders.

25. **FINAL ORDERS**

1. Application dated 22nd October 2020 is allowed.

2. The Managing Director of Monarch Insurance Co. Ltd/Appellant is hereby summoned to attend court to show cause why he/she should not be punished for contempt of court.

3. Costs of this Applicant to be paid by the Appellant.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 27TH DAY OF MAY, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer- Court Assistant

Ms. Kiama Counsel for Respondent

No appearance for Appellant