



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E036 OF 2020

CANNON ASSURANCE COMPANY LIMITED.....APPLICANT/APELLANT

- VERSUS -

CALEB OKWAKO JOGOGO & RISPA KANGA

(Suing as the Administrators of the Estate of

NICHOLAS OSEMBA OKWAKO-DECEASED.....RESPONDENT

RULING

This Ruling relates to an application dated 21st May, 2021 by the Applicant herein seeking the following orders;

1. Spent

2. THAT Honourable Court be pleased to issue orders for stay of execution of the warrants issued by the Honourable Court in Milimani CMCC No. 8304 of 2018 on 17/05/2021, pending the hearing and determination of this Appeal.

3. THAT the Honourable Court be pleased to extend time within which to comply with the consent order adopted on the 25th February, 2021.

4. THAT the costs of this application be proided for.

The application is premised on the grounds on the face of it and supported by the affidavit of **MUSYOKI KIOKO** sworn on 24th May, 2021. The basis for this application is that the parties herein on 25th February, 2021 entered into a consent agreement to have the decretal sum deposited in a joint interest earning account in the names of their advocates. That the parties completed all the pre- requisite documentation and procedures for joint bank account opening and the applicant forwarded the same to the bank. That while waiting for the bank's confirmation, the Respondent extracted warrants and moved to proclaim the property of the applicant despite being responsible for the delay in compliance with the consent order. Further, that the applicant being desirous of prosecuting the appeal have brought this application without any unreasonable delay.

The applicant is apprehensive that unless there is stay of execution of the warrants extracted in Milimani Cmcc No. 8304 of 2018 and extension of time for compliance with the Consent Order of 25th February, 2021, they will suffer substantial and irreparable harm as they may never recover the decretal sum should the appeal be allowed. Counsel for the applicant further averred that he had taken all the necessary steps to comply with the consent order and that the delay was as a result of the Respondent's firm that was not linked to e-citizen which information was not communicated in time by the bank.

In opposition to the application, the respondents filed a Replying affidavit sworn on 28th May, 2021. It is stated that after executing the joint account opening forms, they did not hear from the applicant again hence initiated execution as per the consent default clause. Mr. Kaburu, Counsel for the respondents confirms that his firm is on the e-citizen platform complete with IFMIS registration and argues that there is no evidence of any diligence on the part of the applicant to ensure that the account was opened within time. The respondents urged this court to reject the application as it is unfair and unjust to deny them enjoyment of the fruits of their judgment since 2018 when the suit was filed. Mr. Kaburu on behalf of the respondent has called into question the jurisdiction of this court to rewrite the parties consent under Order 42 Rule 6. He argues that the applicant instead of filing the present application should have approached him for an extension of the timeline.

Analysis and Determination:

The issue for determination is whether this court can interfere with the parties' consent, grant stay of execution and extend the timelines thereof. Although the application is not in its terms seeking to vary the order, its effect however, would be to vary the terms of the consent

order, which can only be done where certain conditions are satisfied. These conditions were set out in the case of **Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A.** where it was held:

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v. Kassam (1952)*, 19 E.A.C.A. 131, where the following passage from *Seton of Judgments and Orders*, 7th Edn., Vol. I, p. 124 was approved:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

The Court therefore has the power to vary or set aside the terms of the consent order as was similarly held in the case of *Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625* referred to by Mr. Kaburu in his submissions, where it was stated:

“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.”

At the same time the Section 95 of the Civil Procedure Act vests in this court unfettered discretion to extend time limited by the law or an order of the court. Additionally, Order 50 Rule 6 which provides;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

In the present application, the court is faced with a situation that allows the court to vary a consent order when certain conditions are met. Order 25 Rule 5 of the Civil Procedure Rules provides that once a consent of the parties has been adopted, it becomes an order of the court and therefore subject to the law governing the discharge of court orders and decrees. As a consequence, there is no distinction between an order entered by court in a contested application and one entered by consent since both are orders of the court which can be reviewed, varied or discharged as provided for under the rules. The court should not be left in a situation where it becomes bonded by the terms of a consent which the parties have agreed to have it adopted as its own order.

From the parties’ arguments and submissions before court, I agree with the respondent that the applicant was indolent and was jolted from his slumber by the warrants of attachment. Although he had forwarded all the requisite documents he failed to follow-up with the bank to ensure that the joint account was opened and operational within the timelines agreed in the consent order. The delay has been admitted by the applicant who has further in my view explained the same and moved with speed to file the present application.

A stay of execution should be granted in order to avoid substantial loss to the applicant while he is pursuing an appeal. In the present case, the respondent has already initiated execution proceedings thus the risk of substantial loss and or irreparable damage is imminent. The respondent has not rebutted the assertion that they are in a position to refund the decretal sum if the appeal is successful. The applicant has submitted that it is desirous of prosecuting its appeal and I have noted that they had already issued a cheque for the whole decretal amount.

I do find that the appeal should be determined on merit and there is no deliberate intention on the part of the applicant to stop depositing the decretal sum in the joint account.

For these reasons I grant the application and order that the decretal sum be deposited as earlier agreed within 14 days from the date of this order. That there be a stay of execution of the warrants of attachments issued on 19th May, 2021. The applicant shall pay the auctioneers costs. Costs of the application shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY, 2021

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S. J. CHITEMBWE

JUDGE