REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 117 OF 2019

TAJ MALL LIMITED..APPLICANT

VERSUS

COBRA SECURITY COMPANY LIMITED........RESPONDENT

RULING(2)

INTRODUCTION

1. The Applicant's Notice of Motion application dated 2nd December 2019 and filed on 3rd December 2019 was brought pursuant to the provisions of Section 1A, 1B, 3A, 63(e), 79G and 79 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. **Spent.**

2. **Spent.**

3. **THAT there be a stay of execution of the Judgement and Decree entered against the Applicant on the 7th December 2018 in Milimani CMCC No 3181 of 2014 pending the hearing and determination of the appellant's** (sic) **appeal preferred therefrom.**

4. **THAT this Honourable Court do make any such further orders and issue any relief it may deem just to grant in the circumstances.**

5. **THAT costs of the application be provided for.**

2. It had filed a similar Notice of Motion application dated and filed on 21stMarch 2019. This court delivered its Ruling on 28th November 2019. The Ruling herein is based on oral submissions that were made by the respective parties' advocates.

THE APPLICANT'S CASE

3. The Applicant's present application was supported by the Affidavit of its Managing Director, Ramesh Gorasia, that was sworn on 2 nd December 2019.

4. The Applicant contended that on 27th March 2019, the 2nd Respondent herein commenced the execution proceedings whereupon it instructed its advocates to file a Notice of Motion application seeking orders for a stay of execution of the aforesaid judgment pending the hearing and determination of their intended appeal. It averred that unfortunately, its advocates only canvassed the issue of extension of time within which to file an appeal but inadvertently forgot to submit on the question of the order for stay of execution pending appeal.

5. It was apprehensive that if the order for stay of execution pending appeal was not granted, its goods would be carted away and thus it would suffer prejudice and its appeal rendered nugatory.

6. It urged this court to allow its application because it was fair and just to do so.

THE RESPONDENT'S CASE

7. In response to the said application, on 13th December 2019, the Respondent filed a Notice of Preliminary Objection. It contended that this court had no jurisdiction to hear the present application on the following grounds:-

a. The Application was *res judicata,* the matters directly and substantially in issue herein having been directly and substantially in issue in a similar Application herein dated 21st March 2019 and the same having been heard and determined on its merit on 28th November 2019.

b. There was no independent claim against the purported 2nd Respondent who was an auctioneers duly instructed by the 1st Respondent and its claim, or response, if any could only be through the 1st Respondent.

c. No special circumstances had been shown to defeat the absolute bar of *res judicata*.

d. The Application was fatally defective and an abuse of the process of the court.

8. It therefore urged this court to dismiss the Applicant's present application with costs to it.

LEGAL ANALYSIS

9. The Applicant's submission was that this court ought to grant it an unconditional order for stay of execution pending appeal for the reason that although the said prayer was brought in its Notice of Motion application dated and filed on 21st March 2019, it was not canvassed. In support of its argument that its present application was not *res judicata*, it relied on the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR** where it was held that a matter was considered *res judicata* if it had been determined by a court of competent jurisdiction.

10. On the other hand, the Respondent argued that the court addressed itself to the question of an order for stay of execution pending appeal despite the Applicant not having submitted on the same and urged this court not to re-consider the same as it was *res judicata*. It also relied on the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Other** (Supra) in support of its case.

11. It also referred this court to the case of **Michael John Ochieng Orwa & Another vs Michael Kariuki Mutugi & Another [2017]eKLR** where it was held that no court should re-open a case unless it was for review, setting aside or on appeal.

12. It further placed reliance on the case of **Henderson vs Henderson (1843) 67 ER 313** where it was held that it was not for a litigant to re-open an issue which ought to have been brought in a previous application had reasonable diligence been employed. It was emphatic that the Applicant ought to have come to court on review and not file a similar application that had already been heard and determined.

13. Section 7 of the Civil Procedure Act provides as follows:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

14. In its decision of 28th November 2019, this court rendered itself as follows:-

26. Notably, the Respondent addressed itself to both issues of extension of time to file an appeal out of time and the prayer for the stay of execution pending appeal. However, the Applicant only addressed itself to the issue of extension of time to file an appeal out of time. It did not submit on why it should be granted an order for stay of execution pending appeal. To assume that the Applicant still wished to pursue the prayer for stay of execution pending appeal would definitely prejudice the Respondent as it would seem that the court would be prosecuting the case on behalf of the Applicant. The court ought not to descend into the arena of the dispute because it is expected to be a neutral arbiter in the dispute.

27. In the absence of any indication that the Applicant was still keen on pursuing the said prayer for an order of stay of execution pending appeal and the lack of demonstration of the two (2) other pre-requisites under Order 42 Rule 6(2) of the Civil Procedure Rules, this court was not persuaded that it should grant the Applicant the said order. (emphasis court).**The mandatory compliance of Order 42 Rule 6(2) of the Civil Procedure Rules was well demonstrated in the case of Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR."**

15. Having rendered itself as it did, it was clear to this court that from the aforesaid determination that the present application was res judicata. Where a matter is res judicata, the court ought not to re-open the same for determination because litigation must come to an end.

16. *Indeed, the principle behind the doctrine of res judicata has been well set out in the case of* ***Henderson v Henderson*** *(Supra) that was relied upon by the Respondent herein. It was held as follows:-*

"……where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as

part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

17. However, while wholly concurring with the Respondent that the question of an order for stay of execution pending appeal had been heard and determined which rendered the present application *res judicata*, it noted that the circumstances of the case herein were distinguishable from those of the cases that both it and the Applicant had relied upon.

18. This court took the view that there was failure on the part of the Applicant's advocates to have submitted on the question of the order for stay of execution pending appeal. This blunder by its advocates denied the court a chance to determine the legal submissions relating to said prayer for an order for stay of execution on merit because it was not clear whether or not it was still keen on pursuing the said prayer for an order for stay of execution pending appeal.

19. In the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit. This court ascribed to the same school of thought more so as the Applicant had given its clients proper instructions to seek an order for stay of execution pending appeal.

20. This court therefore took the view that although the present application herein was *res judicata*, this case fell within the exceptional rule where a court can re-open litigation. In arriving at this conclusion, it had due regard to the case of ***Arnold vs National West Minister Bank (1991) 2 A.C. 93*** *where* Lord Lowry stated as follows:-

"It appears from this review that there are arguments in favor of the proposition that estoppel constitutes a complete bar to re-litigating a point once it has been decided but I am now of the opinion that the Court can and in exceptional circumstances should relax the rule.''

21. As the Applicant had now expressed interest in pursuing its prayer for an order for stay of execution pending appeal, this court found it prudent to relax the law of *res judicata* purely to do substantive justice bearing in mind that Article 159(2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities.

22. Notably, the Respondent had conceded that the previous application dated and filed on 21st March 2019 had been filed without undue delay. The present application was filed about four (4) days from the time this court delivered its decision on 28th November 2019. The Applicant had therefore satisfied the first condition under Order 42 Rule 6 of the Civil Procedure Rules.

23. In the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, this very court held as follows:-

"It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."

24. This court had since granted the Applicant leave to file an appeal out of time. There was danger of the 2nd Respondent removing the Applicant's goods having proclaimed the same on 28th March 2019. As the Applicant was likely to suffer substantial loss before the appeal was heard and determined, this court found that it was in the interests of justice to revise its earlier position and thus found that the second condition under Order 42 Rule 6 of the Civil Procedure Rule had been fulfilled. Notably, the Respondent did not demonstrate that it had the financial ability to refund the Applicant the decretal sum in the event the Applicant was successful in its Appeal.

25. In respect of the third condition, this court noted that the Applicant had sought to be granted an unconditional order for stay of execution of appeal. That was not feasible in line with the conditions that had been set out in Order 42 Rule 6 of the Civil Procedure Rules. It was not necessary that it demonstrate its willingness and readiness to deposit security because the court had power on its own motion to order that such security be furnished.

26. Indeed, Order 42 Rule 6(b) of the Civil Procedure is clear that **"No order for stay of execution shall be made under subrule (1) unless such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant".**

27. While this court agreed with the Respondent that the Applicant could have sought relief by way of review under Order 45 Rule (1) of the Civil Procedure Rules, it nonetheless took the position to revise its earlier position on the prayer for a stay of execution pending appeal solely on the ground that it had already granted the Applicant leave to appeal out of time hence the need to safeguard its interests in the event it was to be successful in its Appeal.

28. Notably, Order 45 Rule (1) of the Civil Procedure Rules provides that:-

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.

29. This court did not delve into the question of whether or not there was a claim against the 2nd Respondent as that was a matter of appeal. It also took the view that the Applicant could not go scot free because it had taken the Respondent back in the litigation of this matter. The Respondent therefore ought to be compensated for the inconvenience of having been brought twice on an application seeking the same order.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Preliminary Objection dated 10th December 2019 and filed on 13th December 2019 was not upheld. The Applicant's application that was dated 2nd December 2019 and filed on 3rd December 2019 is hereby allowed in terms of Prayer No (3) therein as follows:-

1. THAT the Applicant shall deposit into a joint interest earning account in the names of its advocates and those of the Respondent the sum of 3,205,930/= within thirty (30) days from the date of this Ruling i.e. by 28th February 2020.

2. THAT the Applicant shall pay to the Respondent throw away costs in the sum of Kshs 100,000/= within thirty (30) days from the date of this Ruling i.e. 20th February 2020.

3. THAT in default of Paragraphs 30 (1) and (2) hereinabove, the conditional stay of execution pending appeal shall automatically lapse.

4. THAT the orders given in this court's Ruling that was delivered on 28th November 2019 remain unchanged.

5. Either party is at liberty to apply.

6. Costs of the application will be in the cause.

31. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **January** 2020

J. KAMAU

JUDGE