



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 239 OF 2019

ELIJAH MURIITHI.....1ST APPLICANT

IBRAHIM MWANGI NJENGA.....2ND APPLICANT

-VERSUS-

PETER CHRISTOPHER KAHORO MBOGO.....RESPONDENT

RULING

1. This ruling is premised on the Notice of Motion dated 2nd December, 2019 filed by the 1st and 2nd applicants and supported by the grounds laid out on its face and the facts deponed to in the affidavit sworn by *Joyce Chichi*. The following are the orders sought therein:

(i) *Spent.*

(ii) *Spent.*

(iii) *THAT there be a stay of execution of the judgment/decree delivered on 18th January, 2019 pending hearing and determination of the application and appeal.*

(iv) *THAT the period granted for complying with the orders made by this court on 4th April, 2019 be enlarged and/or extended to enable the applicants comply with the stay conditions granted on the said date.*

(v) *THAT the applicants be allowed to deposit the other half of the decretal sum in court instead of joint interest earning account.*

(vi) *Spent.*

(vii) *THAT this Honourable Court do make any other or further orders and issue any other relief it may deem just to grant in the interest of justice.*

(viii) *THAT cost of the application be in the cause.*

2. The deponent who is also an advocate practicing in the firm of advocates representing the applicants stated in her affidavit that the applicants had previously filed an application dated 2nd March, 2019 in which they sought for an order for stay of execution and leave to file an appeal out of time, which application was granted by this court vide its ruling delivered on 4th April, 2019 on condition that the applicants pay the respondent half of the decretal sum and deposit the remaining half in a joint interest earning account within 30 days.

3. The deponent asserted that the applicants complied with the aforementioned conditions albeit outside the prescribed timelines, adding that the delay was unintentional and was the result of lack of proper handover by the advocate who had conduct over the matter and who left the firm soon thereafter.

4. It was also the deponent's averment that the respondent has since lodged a declaratory suit before the Chief Magistrate's Court being CMCC NO. 8633 OF 2019 and which he is likely to proceed with, to the detriment of the applicants unless the orders being sought are granted further averring that the respondent does not stand to be prejudiced in any manner for which an award of costs cannot be offered as adequate compensation.

5. In opposing the Motion, the respondent put in a replying affidavit in which he asserted that the applicants have neither filed an appeal within the timelines set out by this court nor complied with the other orders made by this court on 4th April, 2019 and without explanation.

6. It was also the respondent's contention that the conditions for stay were agreed upon by the parties by way of a consent and the applicants have not provided any valid reasons as to why the consent ought to be varied.
7. The respondent took the view that there has been an inordinate delay in both lodging the appeal and bringing the application, hence urging this court to dismiss the said application.
8. The Motion was dispensed with through oral arguments. *Mr. Mwangi* counsel representing the applicants opted to rely on the averments made in the application although he further submitted that his clients were unable to comply with the condition requiring them to deposit half the decretal sum in a joint interest earning account for the reason that there was a delay in the opening of such account.
9. *Mr. Munywoki* advocate for the respondent retorted with the argument that though the applicants paid half the decretal sum to his client as agreed, this was done outside the timelines consented upon. The advocate also argued that the letters relating to the opening of a joint interest earning account were equally sent to the respondent's advocate outside the consented timelines.
10. It was *Mr. Munywoki's* further contention that there is no appeal on record neither have the applicants shown any efforts or steps taken towards complying with the condition requiring them to lodge their appeal.
11. *Mr. Mwangi* rejoined with the simple submission that a consent order or judgment can only be varied by another consent though adding that where parties are unable to agree, the court can step in and vary such consent.
12. I have considered the grounds present on the face of the Motion, the facts contained in the affidavits supporting and resisting it and the rival oral arguments.
13. It is well noted that the fundamental prayer being sought associates itself with the extension of time to comply with the orders made by this court on 4th April, 2019 as well as compliance with the conditions for a stay of execution.
14. **Order 50, Rule 5** of the **Civil Procedure Rules** gives the court the power or discretion to extend the time required for the performance of any act or the taking of any proceedings under the Rules.
15. Going by the record, it is correct that the applicants filed an application dated 2nd March, 2019 in which they sought for the prayers set out hereinabove. It is also correct that the prayer for a stay of execution was determined by consent of the parties, thereby leaving this court to determine the prayer on the filing of an appeal out of time. On 4th April, 2019 this court granted the applicants leave to lodge an appeal out of time but set out certain specific conditions: namely, that the applicants were to file and serve their intended appeal within 60 days from the aforesaid date.
16. Upon my perusal of the record, I observed that the applicants have not complied with this court's order and I have taken into consideration the explanation given for such non-compliance. It has been the general practice of the courts not to punish clients for the inadvertence of their counsels. The applicants' advocate acknowledged that the mistake was on their part and I find this explanation to be reasonable in the circumstances. Besides, it is my view that while there was a delay of about six (6) months between the lapse of this court's order and filing of the present application, such delay is not so inordinate or unreasonable as to prejudice the respondent to an extent that he cannot be adequately compensated through an award of costs.
17. In the premises, I find it fair to exercise my discretion in enlarging the time required for lodging an appeal.
18. This leaves me to determine the second facet of prayer (iv) and prayer (v) of the Motion to do with a stay of execution. The applicants admitted that they did not comply with the timelines for paying half of the decretal sum to the respondent neither did they comply with the part of the consent requiring them to deposit the remaining half of the decretal amount in a joint interest earning account.
19. On the subject of the timelines, it is my observation that the respondent through his advocate acknowledged that the applicants paid the first half of the decretal sum though this was done outside of the consented timelines. It is apparent from the record that the conditions for stay of execution were agreed upon between the parties and a consent recorded to that effect.
20. It is a matter of legal principle that once a consent order is in place, the same can only be interfered with or set aside under certain special circumstances. This principle was considered by the Court of Appeal in the case of **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR** when it reasoned thus:

“In Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –

A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...”

21. From my analysis of the explanation given by the applicants, I am not at all persuaded that they have established any of the grounds addressed in the above-cited authority to necessitate the varying of the consent order so as to accommodate their preferred option on the provision of security.
22. Be that as it may, I am of the considered view that whereas a court cannot rewrite an agreement entered into between parties, it maintains

the discretion to do justice. In this respect, I am guided and bound by the Court of Appeal's analysis in **Gateway Insurance Company Ltd v Aries Auto Sprays [2011] eKLR** that:

“...the time stipulated in such a consent order or judgment becomes the time fixed or granted by the court and the court would generally have discretion to enlarge such time in furtherance of the ends of justice.

Moreover although a court has no jurisdiction to re-write a contract between parties or vary the terms of the consent judgment it nevertheless has jurisdiction as a court of justice to relieve a party from the rigours of a penal or forfeiture clause even in a consent judgment or order.”

23. In view of the foregoing, I am satisfied that this court has the discretion to enlarge the time required for compliance with the conditions created by the consent order though I will reiterate that the terms therein cannot be varied as it stands.

24. In the end, the Motion succeeds only in respect to prayer (4) and (6). Consequently, the respective timelines set out in the consent order made on 28th March, 2019 and the ruling delivered on 4th April, 2019 are hereby enlarged on the condition that the applicants compile, file and serve their intended appeal within 60 days from today and also ensure to comply fully with the conditions set out in the consent order within 30 days from today.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicants

.....for the Respondent