



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 440 OF 2013

**KELVIN KINYUA MACHARIA (Suing as the legal representative of the estate of
NELLY KAMBURA NKONGE-Deceased).....PLAINTIFF/RESPONDENT**

VERSUS

AISHA MOTORS DEALERS LIMITED.....1ST DEFENDANT/APPLICANT

WASHINGTON NJOGU WARUGURU.....2ND DEFENDANT

FRANCIS NJOROGE.....3RD DEFENDANT

FAMILY BANK LIMITED.....4TH DEFENDANT

RULING

1. Before me for resolution is the Notice of Motion dated 20th February, 2020 brought by the 1st defendant/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of *Safaraz Mohamed*. The applicant sought for the following orders from this court:

(i) *Spent.*

(ii) *Spent.*

(iii) *THAT this Honourable Court be pleased to review its ruling delivered on 30th January, 2020 and wholly vacate or vary as it deems fit, the conditions imposed for the stay granted on 30th January, 2020.*

(iv) *THAT without prejudice and only if prayer (iii) above is not granted, this Honourable Court be pleased to extend the time for compliance with the ruling of 30th January, 2020 by a further 30 days.*

(v) *THAT costs of the application be in the intended appeal.*

2. Safaraz Mohamed who is the Managing Director of the applicant stated in his affidavit that following this court's ruling delivered on 30th January, 2020 granting an order for stay of execution pending appeal on the condition that the applicant deposits half the decretal sum of KShs. 2,699,675/ in a joint interest earning account and secures a bank guarantee for the remaining half within 30 days therefrom, the applicant has taken steps towards complying with the aforesaid conditions.

3. The deponent stated that the applicant requested the plaintiff's/respondent's advocate to avail details for purposes of opening a joint interest earning account and also sought financing from Equity Bank Limited which advised it to deposit either the entire sum to be guaranteed or alternatively offer immovable property as security, which conditions the applicant deems onerous for reasons, *inter alia*, that the bank guarantee to be granted to the applicant will attract interest at the rate of 14% p.a. together with other interest payable on the joint interest earning account by the applicant, thereby prejudicing the applicant in the event that its appeal succeeds.

4. The deponent also stated that the applicant's business entails importation of cars which requires a constant flow of cash hence to require it to deposit the entire decretal amount of KShs. 5,399,350/ would greatly prejudice it.

5. The deponent asserted that it is for the above reasons that the applicant urges this court to review the conditions given on 30th January, 2020.

6. The plaintiff/respondent opposed the Motion by putting in a replying affidavit in which he stated that the applicant had earlier on alluded to the respondent that the conditions associated with the order for stay of execution were fair and that it all along had an opportunity to negotiate the same with the respondent but did not.

7. According to the respondent, in the circumstances there is no basis for this court to review and/or vary the conditions already in place.

8. At the hearing of the Motion, this court directed the parties to file written submissions on the Motion. In its submissions, the applicant argued that the essence behind granting a stay of execution is to preserve the rights of the parties and not to prejudice any of the parties, as held in the case of **Orient Sacco Society Limited v Joseph Wambuku Kamau [2018] eKLR** in the following way:

“The words stated in Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198 are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

9. The applicant is of the view that unless this court reviews and varies its earlier conditions set for the granting of a stay of execution, the applicant stands to be prejudiced. According to the applicant, the decretal sum to be deposited by itself can be put to good commercial use thereby generating more income.

10. It was the submission of the applicant that the respondent’s apprehensions can be assured by the applicant’s continued business presence and permanence since filing of the suit.

11. In contrast, the respondent contended that the applicant has not provided sufficient reasons for review of this court’s earlier ruling and that the Motion has been brought in bad faith. The respondent added that the explanation given by the applicant is not credible since it cannot be heard to argue that it is difficult or impossible to comply with the conditions set by this court. Reference was made to the case of **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** where the court determined thus:

“Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review.”

12. It was also the submission of the respondent that not only has there been an unreasonable and unexplained delay in bringing the application but that the same is a mere delaying tactic to preclude the respondent from enjoying the fruits of his judgment.

13. I have considered the grounds presented in the Motion, the facts stated in the affidavits supporting and opposing the Motion, and the contending written submissions together with the authorities relied upon.

14. A brief background of the case is that the respondent instituted a suit against the applicant and 2nd to 4th defendants herein in which he sought for general and special damages under the Fatal Accidents Act and the Law Reform Act. Upon hearing the parties, this court delivered judgment on 4th April, 2019 in favour of the respondent and against the applicant in the aggregate sum of Kshs. 5,399,350/ while dismissing the case against the 2nd to 4th defendants.

15. Subsequently, the applicant filed an application in which he sought for an order for stay of execution pending an intended appeal against the aforesaid judgment. Upon hearing the parties on the application, this court granted an order for stay of execution pending appeal on the condition that the applicant deposits half the entire decretal sum in an interest earning account in the joint names of the parties’ advocates/firm of advocates and secures the remaining half of the decretal sum by way of a Bank Guarantee within 30 days of the date of the ruling, failing which the stay order would lapse.

16. It is apparent that the present Motion concerns itself with the subject of review. The applicable principles in determining whether to grant an order for review are provided for under **Order 45** of the **Civil Procedure Rules, 2010** and are as follows:

a) the discovery of new and important matter or evidence, or

b) some mistake or error apparent on the face of the record, or

c) any other sufficient reason.

17. The above provision also requires that applications seeking an order for review be brought without unreasonable delay, a position which was buttressed by the Court of Appeal in the case of **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”

18. On the subject of unreasonable delay, this court granted the order for stay of execution on 30th January, 2020 while the Motion was filed slightly short of one (1) month thereafter, on 25th February, 2020. I am satisfied that there has been no unreasonable delay in bringing the application.

19. Having settled the above, I will now consider the subject to do with whether the deponent has satisfied any of the principles associated with review of an order or decree, specifically the principle on ‘sufficient reason’ on which the application rides.

20. What then constitutes ‘sufficient reason?’ The courts have acknowledged that the meaning of the term runs far and wide. Suffice it to say that courts are called upon to apply their interpretation of the term in tandem with judicial principles and germane legal provisions. For purposes of this ruling, I stand guided by the reasoning adopted in the case of **Josiah Mwangi Mutero & another v Rachael Wagithi Mutero [2016] eKLR** in which reference was made to the following definition offered by the Supreme Court of India in **Ajit Kumar Rath v State of Orisa & Others 9 Supreme Court Cases 596 at Page 608** in respect to Rule 47 of the Indian Civil Procedure Rules which is the equivalent of Order 45 of our Civil Procedure Rules:

“It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

21. The above position was advanced by the court in the authority of **John Simiyu Khaemba & another v Cooperative Bank of Kenya & another [2019] eKLR** in this sense:

... “It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant.”

22. Turning to the present circumstances, I note that the respondent has in place a lawful decree in his favour and against the applicant in the decretal sum of Kshs. 5,399,350/, an evidently colossal amount which is yet to be satisfied.

23. I also considered the reasons given by the applicant for its non-compliance with the conditions for stay. Nevertheless, I note that the applicant did not bring any credible evidence to demonstrate the prejudice it stands to suffer should the original conditions remain. Further to this, the applicant did not bring any credible evidence to demonstrate its financial ability to pay the decretal sum if the conditions for stay are lifted and the appeal fails.

24. It is worth noting that the purpose of granting a stay of execution is not limited to preventing prejudice to either party but extends to preserving the rights of the parties. Upon considering the size of the decretal amount herein, I find that it would be prejudicial to the respondent for this court to review the original order for stay by granting an unconditional order for stay of execution in the absence of any substantial evidence to guarantee payment of the decretal sum by the applicant should the circumstances require it.

25. For the foregoing reasons, I find that the applicant has not given sufficient reasons to convince this court to review its ruling. However, this court is convinced that it would be in the interest of justice to enlarge the time required for compliance with the conditions for stay.

26. Consequently, the Motion is allowed in respect to order (iv) and the applicant is granted a further 30 days from today to comply with the conditions set in the ruling delivered by this court on 30th January, 2020 failing which the stay order shall lapse. Costs of the Motion to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 30th day of July, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st Defendant/Applicant

..... for the 2nd Defendant

..... for the 3rd Defendant

..... for the 4th Defendant