



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL CASE NO. 2 OF 2014

WENDANO MATUU CO LTD.....1ST PLAINTIFF

STEPHEN NDAMBUKI MULI.....2ND PLAINTIFF/RESPONDENT

ONESMUS MUISYO KIMATU.....3RD PLAINTIFF/RESPONDENT

-VERSUS-

JOSHUA KIMEU KIOKO.....1ST DEFENDANT/APPLICANT

JAMES KIOKO KIVUVO.....2ND DEFENDANT/APPLICANT

JOHN BOSCO NDINGA.....3RD DEFENDANT/APPLICANT

SAMUEL MWANZA NZIOKA.....4TH DEFENDANT

JUVENALIS MUSYOKI KAVITA.....5TH DEFENDANT/ APPLICANT

MANGU NGOLO.....6TH DEFENDANT

ROSE NDANU MUTUA.....7TH DEFENDANT/ APPLICANT

RULING

1. The Defendant/Applicants approached the court with the instant application vide certificate of urgency and notice of motion dated 4.10.2019, brought under Order 42 Rule 6, 51 Rule 1 and 10 of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act. What remains for determination are the prayers for an order for ***variation of the orders dated 21.1.2019 barring the defendant/applicants from further hearing until the contempt in issue is purged and do hear the defendants both on this application and the notice of motion dated 24.9.2019 on priority basis*** as well as an order of ***stay of proceedings herein and sentencing of the defendants/applicants for contempt of court pursuant to the court's orders/ruling dated 21.1.2019 pending the appeal.***

2. The application is supported by the affidavit of Joshua Kimeu Kioko, indicated as the 1st defendant/applicant deponed on 4.10.2019. He averred that the court vide its ruling dated 21.1.2019 found he and his co-defendants guilty of contempt of court and directed that he and his co-defendants appear before the court for mitigation and resentencing; that he was aggrieved with the whole of the ruling and filed a notice of appeal on 4.2.2019. He averred that his advocates on record applied for typed and certified copies of this court's proceedings and the record of appeal shall be lodged in the court of appeal registry as soon as the said typed and certified proceedings are furnished to his advocates. It was averred that the intended appeal stood to be rendered nugatory if mitigation and sentencing are done before the intended appeal is heard. It was averred that the 2nd and 3rd plaintiffs in breach of this court's orders dated 1.2.2017 transferred the 1st plaintiff's land parcel **Donyo Sabuk/Kiboko Block 1/1884** to a 3rd party named as Canon Aluminum Fabricators Ltd. It was averred that as per the records held at the Registrar of Companies at the time of the land transfer, the defendants and not the 2nd and 3rd plaintiffs were the directors of the 1st plaintiff company; that the issue of non-directors of the 1st plaintiff transferring the said land is under investigation.

3. It was averred further that the deponents and his co-defendants had cited the 2nd and 3rd plaintiffs for contempt vide a notice of motion

application dated 24.9.2019 and which could not be heard unless this court's order dated 21.1.2019 is varied. The deponent reiterated that the 2nd and 3rd plaintiffs are in contempt of court orders that were issued on 1.2.2017 that "**barred both the plaintiffs and the defendants and their agents from selling, transferring, subdividing, advertising for sale, charging or in any other way dealing or disposing the properties known as Donyo Sabuk/Kiboko Block 1/1884 and Donyo Sabuk/Kiboko Block 1/1885 pending hearing and determination of the notice of motion dated 24.6.2014.** It was averred that the 2nd and 3rd plaintiffs were in contempt and ought to be punished, because all parties are equal before the law.

4. It was averred that the court heard the notice of motion dated 24.6.2014 and vide ruling delivered on 21.1.2019 found the deponent and his co-defendants guilty of contempt of court; that the notice of motion dated 24.6.2014 is yet to be heard and determined. A copy of the ruling dated 21.1.2019, notice of appeal to the Court of Appeal, letter requesting for certified copies of this court's proceedings and ruling for purposes of the appeal, copies of the land transfer instrument and documents registered in the lands office, search at the Registrar of companies dated 23.5.2019 and the register abstract on land parcel **Donyo Sabuk/ Kiboko Block 1/1884** showing restriction on dealings on the title were annexed to the affidavit.

5. The Application is opposed. M.M. Gitonga advocate for the plaintiffs filed grounds of opposition dated 7.10.2019 where he found the application fatally defective, incompetent and bad in law. He averred that there was no appeal against the ruling that was delivered on 21.1.2019, neither was there an application for leave to file the appeal out of time. It was denied that the respondents are in contempt of the order given by Hon Justice Nyamweya on 1.2.2017. It was averred that the applicants had not demonstrated exceptional circumstances to warrant the issuance of the stay orders; that the application is an abuse of the court process; that the applicants have delayed in filing the application as the ruling dated 21.1.2019 was issued 10 months ago and that the application was intended to scuttle the sentencing of the applicants.

6. In reply to the application was a replying affidavit deposed on 19.10.2019 by Stephen Ndambuki Muli. It was averred upon advice from his counsel on record that there is no pending appeal against the decision that was rendered on 21.1.2019. The deponent denied that the respondents are in contempt of the order of Lady Justice Nyamweya that was given on 1.2.2017. It was averred that the appeal to the court of appeal was to be instituted on or before 5.4.2019 that was the deadline for filing the same, by dint of Rule 82 of the Court of Appeal Rules. That to date, 8 month later, no such appeal has been lodged.

7. Joshua Kimeu Kioko filed a further affidavit dated 4.11.2019 to which he annexed copies of the court of appeal receipts issued on filing of the appeal on 1.11.2019. It was averred that the appeal was instituted pursuant to a certificate of delay that was issued and that the respondents could not purport to address this court on the merits of the appeal that was before the court of appeal.

8. The Application was canvassed by way of written submissions. Learned counsel for the applicant filed submissions on 8.11.2019 whereas the respondent's submissions were filed on 13.11.2019.

9. Learned counsel for the applicant cited the provisions of Order 42 Rule 4 and 6(1) of the Civil Procedure Rules and the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (Application 5 of 2014) (2014) eKLR** that gave a 3-part test for grant of stay orders being: arguability. Secondly that the intended appeal would be rendered nugatory and finally the public interest test. On the element of arguability, in placing reliance on the case of **Fredrick Otieno Outa v Jared Odoyo Okello, Civil Application 10 of 2014 (2014) eKLR**, counsel submitted that there was need to safeguard the integrity and character of the subject appeal pending the resolution of the contested issues. Counsel further cited the case of **Fred Matiangi, Cabinet Secretary, Minister of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others (2018) eKLR**.

10. Learned counsel in addressing the prayer for variation of the order dated 21.1.2019 that barred the defendant/applicants from further hearing until the contempt in issue is purged and that this court hear the defendants both on this application and the notice of motion dated 24.9.2019, cited the provisions Order 42 Rule 6 (1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. Learned counsel urged the court to allow the application as prayed.

11. Learned counsel for the respondents in response framed one issue for determination, being whether the defendants had satisfied the requisite grounds for variation of a court order. Counsel cited the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Counsel in placing reliance on the case of **Christopher Musyoka Musau v NPG Warren & 8 Others (2013) eKLR** where it was held that the remedy of review was only available to a party who is not appealing and submitted that the applicant was not entitled to prayer (c) of their application.

12. On the prayer for stay of proceedings, counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules at length as well as the cases of **Equatorial Commercial Bank Ltd & 2 Others v Retreat Villas Ltd (2006) eKLR**, **Butt v Rent Restriction Tribunal (KLR) 417 and Alliance Media Kenya Ltd v World Duty Free Company Limited (2005) eKLR** and submitted that the applicant had not demonstrated the substantial loss that they would suffer or sufficient cause to warrant stay of proceedings. It was submitted that the application for stay was made after unreasonable delay that was not explained. Reliance was placed on the case of **Charles Koskei Mereng & 3 Others v Twin Constructions CO Ltd (2016) eKLR**. Counsel further submitted that there was no offer for security by the applicants and hence urged the court not to allow the application.

13. The issues for determination are whether the Applicants have fulfilled the requirements to warrant an order for stay of proceedings and whether an order for variation of orders dated 21.1.2019 could be granted.

14. From the onset and for the avoidance of doubt I wish to state that as per the record of the court, the orders that were issued by this court dated 21.1.2019 reads in material part as follows;

"69. I therefore find that the Respondents were guilty of contempt of Court and must be punished accordingly.

.....

73. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered to, I hereby direct the Respondents herein to personally appear before this Court for the purposes of mitigation and sentencing.

74. It is so ordered.”

Read, signed and delivered in open Court at Machakos this 21st day of January, 2019.

15. Whereas the application seeks the variation of **the orders dated 21.1.2019 barring the defendant/applicants from further hearing until the contempt in issue is purged and do hear the defendants both on this application and the notice of motion dated 24.9.2019 on priority basis** upon perusing the final determination of the ruling now sought to be challenged before the Court of Appeal, i have neither seen nor been availed with such order since the terms of the orders that were issued on 21.1.2019 are as reproduced in paragraph 14 above and it is clear that, as per the court record no such orders described as **“dated 21.1.2019 barring the defendant/applicants from further hearing until the contempt in issue is purged..”** were issued on 21.1.2019. The court proceedings for the 17.7.2019 indicates that leave was granted to the defendants to apply for variation but it does not say what was to be varied. Whatever was to be varied must have been within the defendant’s knowledge which has now been disclosed in the present application. Even the proceedings of 17.7.2019 do not indicate whether or not the defendants raised any issues relating to any bar to filing pleadings after the ruling aforesaid which informed the court to grant leave to seek variation. As noted above no such order had been made vide the ruling of 21.1.2019 and hence one cannot vary something which was not made. Further, it is noted that the prayer for variation is akin to a review and which is now not available to the applicants who already have preferred an appeal to the Court of Appeal. They cannot pursue a review alongside an appeal at the same time. As such I find difficulty in granting what is framed as prayer 3 in the application and at this stage decline to grant the same. This leaves the court with what is framed as prayer 4 in the application

16. The notice of motion application dated 4.10.2019 is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 and 10 of the Civil Procedure Rules. Section 3A preserves the applicants’ right to approach this court and seek “such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

17. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal and it sets out the conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.

18. I find that the cited rule is of no value to the application for stay of proceedings and I will proceed to place reliance on section 3A of the Civil Procedure Act.

19. With regard to prayer 4 for stay of proceedings, this court is called to make a balancing act between considerations of policy and justice, a judge in the exercise of his discretion ought to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the proceedings to be stayed. Where there has been a serious abuse of the process, the court should express its disapproval by refusing to prolong the proceedings any further. In the case of **Solland International Ltd v Clifford Harris & Co [2015] EWHC 2018**, it was observed that.

“Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner”.

20. In **Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110**, Beetz J., in the Canadian Supreme Court applied Lord Diplock’s principles on interim injunctions in *American Cyanamid v Ethicon* and stated that: *“A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.”*

21. In the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 (2014) eKLR**, where the

court established the criteria that the court is to consider in an application for an order of stay of proceedings. The court stated that:

“Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the Applicant. The Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”.

16. The Court in the above case quoted Ringera J (as he then was) when he stated in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000**

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

17. The court listed the following three main principles to guide a court in such applications:

a. *Whether the applicant has established that he/she has a prima facie arguable case.*

b. *Whether the application was filed expeditiously and*

c. *Whether the applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.*

18. In **Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd (2015) eKLR**, the court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

19. In weighing the principles posited in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000**, I find that I am unable to speak about the arguability of the appeal as I have not benefitted from seeing the grounds raised by the applicant and in any case that is the preserve of the appellate court. I find that the instant application was not filed expeditiously as the decision was made on 21.2.2019 and the application filed on 4.10.2019. No explanation was given for the delay but however, this in itself would not deny the applicant the orders sought.

20. On the element of sufficient cause, I am guided by the case of **Sango Bay Estates Ltd v Dresdmer Bank [1971] EA 17** and find that there is a serious issue to be determined on appeal that would warrant judicial intervention being the extent to which the determination of the application at an interlocutory stage will amount to a final determination of the rights and obligations of the parties. By analogy I place reliance on the case of **NWL Limited v Woods [1979] WLR 1294** where Lord Diplock held that cases where the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, were exceptional *“but when they do occur they bring into the balance of convenience an important additional element.”* In this regard I find refusal to grant a stay of proceedings would not prejudice the rights of the applicant to be heard on appeal. This is because the Court of Appeal has been granted powers to issue the appropriate orders under Rule 5 of the Court of Appeal Rules and that the applicant is not precluded from approaching the Court of Appeal to seek the requisite orders. Rule 5 of the Court of Appeal Rules provides in material part that:

“5. (1) No sentence of death shall be carried out until the time for giving notice of appeal has been given, until the appeal has been determined.

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —

(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

The applicants should now proceed to the Court of Appeal as that is the proper forum to address the issue of stay of sentencing. This court has already found the defendants guilty of contempt of court and has directed them to appear before it for purposes of mitigation and sentencing and hence it is prudent for the applicants to approach the appellate court for orders of stay. Further, the contempt proceedings are at the tail end and which have taken a criminal dimension and that this court cannot abdicate from its responsibility to punish an offender who has been found guilty by deferring the sentence now due. It is only a higher court that is seized with jurisdiction to grant orders of stay of sentence. No exceptional circumstances have been presented to this court to warrant an order of stay of sentence. It is my view that the applicants have not presented any sufficient cause to warrant the orders sought.

21. In light of the foregoing, I find the defendants' application dated 4.10.2019 lacks merit. The same is dismissed with costs.

It is so ordered.

Ruling signed and delivered in open court at **Machakos** this **28th** day of **July, 2020**.

D. K. Kemei

Judge