



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**PETITION NO.7 OF 2018**

**STEGRO SACCO LIMITED.....PETITIONER**

**VERSUS**

**PAUL KIBET TOO.....1<sup>ST</sup> RESPONDENT**

**SAMUEL KIPLANGAT TOWETT.....2<sup>ND</sup> RESPONDENT**

**RICHARD KIPROTICH KIRUI.....3<sup>RD</sup> RESPONDENT**

**BENARD KIPKOECH RONO.....4<sup>TH</sup> RESPONDENT**

**RICHARD CHERUIYOT LANGAT.....5<sup>TH</sup> RESPONDENT**

**PHILIP KIPNGETICH BIL.....6<sup>TH</sup> RESPONDENT**

**DANIEL KIPKOECH MUTAI.....7<sup>TH</sup> RESPONDENT**

**REUBEN KIMUTAI TERER.....8<sup>TH</sup> RESPONDENT**

**ZAKAYO KIPKEMOI SANG.....9<sup>TH</sup> RESPONDENT**

**PAUL KIMUTAI KOSKE.....10<sup>TH</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES.....11<sup>TH</sup> RESPONDENT**

**RULING**

1. The Application coming for consideration in this ruling is dated 27/11/2019 filed under certificate of urgency seeking the following orders:

- i) THAT the matter be certified as urgent and service be dispensed with in the first instance (SPENT)**
- ii) THAT there be a stay of Execution of the decree and orders herein dated 21/11/2019 pending the hearing and determination of this Application.**
- iii) THAT this court do review and set aside the orders dated 21/11/2019.**
- iv) THAT the court does make any other of further orders in the interest of justice.**
- v) THAT the costs of this Application be provided for.**

2. The Application is supported by the Affidavit of RICHARD KIPTOO CHERUIYOT, one of the directors of the 12<sup>th</sup> Respondent (STEGRO (EPZ) TEA FACTORY LIMITED) dated 27/11/2019 in which he has deposed as follows:

- i) THAT the 8<sup>th</sup> Respondent REUBEN KIMUTAI TERER is now deceased and 9<sup>th</sup>& 10<sup>th</sup> Respondents ZAKAYO KIPKEMOI SAND and PAUL KIMUTAI KOSKE are no longer directors of the 12<sup>th</sup> Respondent.**

**ii) THAT there is an error apparent on the face of the record on the judgment dated 21/11/2019 as the Response by the 11<sup>th</sup> Respondent supported the 1 – 10<sup>th</sup> Respondent's position that the 1<sup>st</sup> to 10<sup>th</sup> Respondents complied with the orders of the court.**

**iii) THAT no reason was given in the said judgment why an injunction was issued against the 1<sup>st</sup> – 10<sup>th</sup> Respondents as there was no wrong doing on their part.**

**iv) THAT no hearing notice was ever served on the Applicant's Advocate and that the matter proceeded Exparte.**

**v) THAT the Respondents were never served with submissions and they were denied a chance to be heard as directions were given in the absence of their Advocates.**

**vi) THAT the Petitioner's Advocates have on many occasions failed to serve the Respondent's Advocates with pleadings as required despite that they were on record.**

**vii) THAT there was concealment of material facts by the petitioners.**

3. The petitioners filed a Notice of Preliminary Objection together with a Replying Affidavit dated 11/12/2019 sworn by JOSEPH MABWAI the chairperson of the petitioner in which he has deposed as follows:

**i) THAT all the averments contained in the Supporting Affidavit are denied.**

**ii) THAT the orders sought are for stay of Execution of the decree, review or setting aside of orders dated 21/11/2019 are ambiguous.**

**iii) THAT the Application has not satisfied the requirements for review under Order 45 rule (1) of the Civil Procedure Rules 2010.**

**iv) THAT the Applicant has to establish the conditions for stay of Execution under Order 42 Ruble 6.**

**v) THAT the grant of orders of review is discretionary and as such should be exercised with caution in order to prevent the injustice of depriving the petitioner of the fruits of its judgment.**

**vi) THAT the hearing notice was served upon the Respondents but they decided to let the matter proceed to full hearing yet all along they were aware of the petition.**

**vii) THAT Respondents were legally removed as directors of the company through a special resolution which the court acknowledged in its judgment.**

**viii) THAT the Respondent has not satisfied the threshold for setting aside judgment and that they should be ordered to deposit security for costs should stay be granted.**

4. The parties were directed to file written submissions which I have duly considered. The 1st to 10th Respondent/Applicants are seeking stay of Execution of the decree and orders dated 21/11/2019 and also review and setting aside of the said orders. The issues for determination in this case are as follows:

i) Whether the 1<sup>st</sup> to 10<sup>th</sup> Respondent/Applicants have established the ground for review and/or setting aside of the orders of this court dated 21/11/2019.

ii) Whether this court should issue stay of Execution of the said orders.

5. The parameters on who may lodge a review application as well as how that application is to be determined, are set out Under Order 45 rule 1 of the Civil Procedure Rules, which states that:

**1. 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.**

**2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being the respondent, he can present to the appellate Court the case on which he applies for review.**

6. In the current case, I find that there is no discovery of new evidence to warrant this court to review and/or set aside the order of this court issued on 21/11/2019.

7. There is also no error apparent on the face of the record since the court stated in its judgment that the 1st to 10th Respondent/Applicants' counsel was in court when the judgment date was given and he did not file any submissions.

8. There is no reason that has been given why the said counsel did not inform the court that he had not been served with the pleadings in this case. I also find that the 1st to 10th Respondent/Applicants' counsel has not attached any draft Replying Affidavit or draft submissions to show his line of defense.

9. It was deposed in the supporting Affidavit to the Application under consideration that there was concealment of material facts by the petitioners but there is no disclosure of the said material facts.

10. On the issue of stay of execution, the conditions to be met before stay is granted are provided by Order 42 Rule 6(2) as follows:

**“No order for stay of execution shall be made under subrule (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.”**

11. The 1st to 10th Respondent/Applicants have not stated what substantial loss may result to them unless the order is made and neither have they shown the next cause of action after stay of the orders of the court or after setting them aside. I also find that the 1<sup>st</sup> to 10<sup>th</sup> Respondent/Applicants were removed from directorship following a special resolution of the 12<sup>th</sup> Respondent.

12. The suit against the 8<sup>th</sup> Respondent was withdrawn when the court was informed that the 8<sup>th</sup> Respondent was deceased.

13. I accordingly find that the Application dated 27/11/2019 lacks in merit and I accordingly dismiss it with no orders as to costs.

**Delivered, dated and signed at Kericho this 24<sup>th</sup> day of July 2020.**

**A. N. ONGERI**

**JUDGE**