



REPUBLIC OF OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO.160 OF 2019

MOHAMED KHAMISAPPELLANT

VERSUS

ZARUM INVESTMENT LTDRESPONDENT

(Being an Appeal from the Ruling of Hon. E. K. Makori (CM) in Mombasa CMCC No.460 of 2007, delivered on 8th August 2019)

RULING

1. The Appellant's **Notice of Motion** application dated **14th August, 2019** was brought under Certificate of Urgency and the following provisions **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law. It sought the following Orders:

a) Spent.

b) Spent.

c) That the Honourable Court be pleased to grant a Stay of Execution of the Order/Ruling issued/delivered on the 8th August 2019 pending hearing and determination of the appeal filed herein.

d) That the Honourable Court be pleased to issue any relief in favour of the Appellant as it may deem fit and just.

e) Spent.

f) Spent.

2. The Application is premised on the grounds set out there and is supported by an affidavit sworn on **14th August, 2019** by the Appellant. He avers inter alia that the trial Magistrate struck out his application dated **21st June, 2019** which had sought for the review of the orders issued vide Ruling delivered on **23rd May, 2019** which required that he be committed to Civil Jail.

3. The Appellant avers that if the orders sought in this instant application are not granted, he shall suffer substantial loss since the striking out of his application for review means that he is exposed to arrest and committal to Civil Jail despite having supplied new evidence to the court.

4. The Appellant further avers that his Appeal has a high chance of success for reasons that the trial court erred when;

a) it held that his application 21st June, 2019 was res-judicata;

b) the trial Magistrate failed to consider new evidence before it and;

c) ignored looking into the new settlement and the trial court erred in finding that it was functus officio.

5. The Appellant also avers that he is ready and willing to offer a title deed as security pending hearing and determination of the Appeal.

The Response.

6. The Respondent opposed the application and filed a **Replying Affidavit** sworn on the **20th August, 2019** and **Grounds of Opposition** dated **20th August, 2019** stating that the application is; a gross abuse of the court process; baseless, misconceived and lacks merit; meant to deny the Respondent the fruits of his judgment and is an afterthought and lacking in substance; vexatious and frivolous.

7. It is averred that the Appellant has been granted so many chances to settle the decretal sum by instalments. However, the Appellant has simply failed to comply without any justification and as such, the Respondent is not interested in the title deed as security but rather the full settlement of the decretal sum.

8. It is averred that the Appellant has filed similar applications previously in the Lower Court seeking orders of Stay of Execution. Therefore, the application does not raise any new issues. Further, the Appellant is undeserving of the orders sought since he has approached a court of equity with tainted hands.

9. It is further averred that the appellant has demonstrated his inability to settle the decretal sum, which continues to accrue interest to date. Consequently, this court should dismiss the application with costs because, courts cannot be converted into courts of mercy.

10. The parties agreed to canvass the application by way of written

submissions. For the Appellant, submissions were filed on **3rd October, 2019**, while the Respondent's submissions were filed on **4th November, 2019**.

11. This Court has considered the application and the submissions. This court has the discretion to grant Stay of Execution orders but, it must be guided by principles provided in **Order 42 Rule 6** of the **Civil Procedure Rules** that stipulate that:-

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 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a Stay of Execution pending the hearing of a formal application.

(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court Notice of Appeal has been given.

(5) An application for Stay of Execution may be made informally immediately following the delivery of Judgment or Ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its Appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate court or tribunal has been complied with.”

12. In the case of **Butt...Vs... Rent Restriction Tribunal, Nai Civil Appeal No. 6 of 1979** the Court of Appeal stated that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the Appeal...”

13. Vide a **Ruling** delivered by the trial court on the **23rd June, 2019**, it is stated that stay orders were issued on **8th January, 2009** wherein the Appellant had been ordered to pay monthly installments of **Kshs.30,000/=** till payment in full of the decretal sum with effect from **1st August, 2010**, together with the accrued interest. It is noteworthy that the Appellant has not demonstrated to this court that there has been any compliance with the stay orders issued on **8th**

January, 2009.

14. Presently, the Appellant seeks Stay of Execution orders on the basis that there is a threat to his personal liberty, that he is a single parent

to a **13-year-old** daughter and that the Appellant's health has deteriorated and he is undergoing treatment India.

15. It is indeed the position that where an Applicant has failed to comply with the terms of an order for Stay granted by the trial court, the repeat of the application for stay in the Appellate Court is an abuse of the process of the court. The Court of Appeal in dealing with that aspect in the case of Hunker Trading Company Limited...Vs... Elf Oil Kenya Limited (2010) eKLR, stated as follows: -

“As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of Section 3A of the Appellate Jurisdiction Act. Moreover the disobedience of the order in our view has an impact on the management of the Court resources.

Sections 3A and 3B of the Appellate Jurisdiction Act and also in the context of the High Court section 1A and 1B of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of Sections are in part material. Section 1A (3) of the Civil Procedure Act reads:-

‘A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.’

As the Applicant has admitted having failed to comply with the order of Stay by (Koome, J) we find that it is in breach of Section 1A (3) of the Civil Procedure Act and also Section 3A (3) of the Appellate Jurisdiction Act.

We do not think that the fact that the orders has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the Applicant's application to this Court under Section 3A is substantially to seek similar orders to those he was granted in the Superior Court and failed to obey. Under Section 1A (3) the Applicant has a duty to obey all court processes and orders.

In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double “O” principle”) and in this case, we have chosen to call it (“the O2 or the oxygen principle”) because it is intended to re-energise the processes of the court's and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this court's resources (time) and also an abuse of its process. The fact that the Notice of Appeal under Rule 5(2)(b) and is directed at the Judgment of (Lesiti,J), would still not take the matter outside the provisions of Section 3A which is a provision of an Act of Parliament.

As the Applicant did not appeal against the order of Stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5(2) (b) and Section 3A and is therefore incompetent. The order of Stay of Execution on terms was subsequent to the Decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the Lower Court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of

resources.

The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”

15. In this case, the Applicant was granted conditional stay order by the lower court. That order is yet to be complied with and application to review the stay orders has been dismissed by the trial court. The Applicant. The Applicant has moved this court for similar orders. This application amounts to an abuse of the court process and is barred by *resjudicata*. The Applicant in the instant application can therefore only Appeal the decision of the trial Court on stay, and cannot re-litigate the same issues already decided upon by the trial court by way of an original action.

16. This court having found that the instant Application is an abuse of the court process and a violation of the overriding objective of the Civil process under the Civil Procedure Act, then it need not delve into its merits, since the same was done by the trial court.

17. Accordingly, for the reasons set out above, the Appellant's application dated **14th August, 2019** is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 23rd day of September, 2020.

D. O. CHEPKWONY

JUDGE

23/9/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE

23/9/2020