



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 492 OF 2003**

**BINDI SHAH.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DR. JANARDAN D. PATEL.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant/applicant has brought the Notice of Motion dated 10<sup>th</sup> July, 2020 supported by the grounds set out on its face and the facts stated in his affidavit. The applicant sought for the following orders from this court:

***(i) Spent.***

***(ii) Spent.***

***(iii) THAT this Honourable Court be pleased to discharge, review, vary and/or set aside its orders issued on 20<sup>th</sup> February, 2020 and all consequential orders thereto and review them in light of the Kshs. 2,500,000/ and property valued at Kshs. 97,000,000/ deposited in court as sufficient to secure the decree of Kshs. 21,535,459/ issued in favour of the plaintiff.***

***(iv) THAT this Honourable Court be pleased to grant a fresh stay of execution against the judgment delivered on 4<sup>th</sup> March, 2019 and/or all consequential actions arising thereof pending the hearing and determination of the appeal.***

***(v) THAT costs of and relating to the application be provided for.***

2. In his affidavit, the applicant stated that he had previously filed an application seeking an order for a stay of execution pending an appeal against the judgment delivered by this court on 4<sup>th</sup> March, 2019 and that this court vide its ruling delivered on 17<sup>th</sup> October, 2019 issued a conditional order for a stay of execution.

3. The applicant stated that he complied with part of the conditions set by this court by depositing the sum of Kshs, 2,500,000/ in a joint interest earning account and by supplying a title deed for a property valued at Kshs. 97,000,000/.

4. It was the averment of the applicant that by the time the stay order had lapsed, he had only partially complied with the conditions attached thereto and the plaintiff/respondent has commenced the execution process. The applicant averred that he is at risk of suffering substantial loss since *inter alia*, he has used up a chunk of his savings in providing security for the due performance of the decree and with the respondent's source of income being unknown, there is a likelihood that she will not be able to refund the decretal sum upon payment and in the event that the appeal succeeds.

5. It was similarly the averment of the applicant that owing to the ongoing Covid-19 pandemic, his source of livelihood has been negatively impacted due to the scaling down of elective surgeries which happens to be his area of specialization.

6. The applicant is therefore of the view that unless the orders sought are granted and the respondent proceeds with execution, the appeal will be rendered nugatory.

7. The respondent opposed the Motion by putting in Grounds of Opposition dated 3<sup>rd</sup> September, 2020 and the replying affidavit of advocate *Virinder Goswami* sworn on like date.

8. The Grounds of Opposition featured the following grounds:

***(i) As far as the application for a stay of execution is concerned, the matter is res judicata as in the defendant's previous***

*application for stay dated 15<sup>th</sup> April, 2019 this court had granted a stay on conditions which the defendant has refused to comply with.*

*(ii) THAT the defendant is a self-employed surgeon of 54 years standing and a man of means who owns companies and property, as is evidenced by the title to L.R. 209/2763/9 in the name of Nanak Hospital Management Services Limited (“the subject property”) which he is proposing to deposit in court instead of a property listed in his personal name as ordered by the court.*

*(iii) The judgment dated 4<sup>th</sup> March, 2019 and the ruling of 17<sup>th</sup> October, 2019 are matters pertaining to pre-Covid-19 days.*

*(iv) There is no valid appeal as the notice of appeal lodged on 14<sup>th</sup> March, 2019 has no effect for the following reasons:*

*a) The notice of appeal having been lodged on 14<sup>th</sup> March, 2019 was not served on the plaintiff until 2<sup>nd</sup> April, 2019 in breach of Rule 77(1) of the Court of Appeal Rules which requires service on the respondent within seven (7) days of lodging.*

*b) The defendant is yet to apply for certified copies of the proceedings for purposes of the proposed appeal, as he is bound to do within 30 days of the date of judgment of this Honourable Court as mandated under Rule 82(1) of the Court of Appeal Rules.*

*c) Hence, the time to lodge an appeal has expired.*

*(v) The plaintiff will refer to the submissions filed by Sobhag H. Shah & V. Gswami Advocates on 26<sup>th</sup> June, 2019 where relevant to save time at the same time relying on authorities numbers 1, 2, 3, 5 and 6 in the bundle filed on 26<sup>th</sup> June, 2019.*

*(vi) The defendant’s application is frivolous and vexatious.*

9. In his replying affidavit, Virinder Goswami restated the grounds hereinabove save to add that the issue touching on whether the respondent is a person of straw has already been raised and addressed before this court and that in any event, the applicant is a self-employed surgeon and is therefore a man of means.

10. The deponent also stated that the title referenced in the Motion can be the basis of a bank guarantee but also stated that no basis has been laid for a review of the orders previously issued by this court.

11. At the hearing of the Motion, this court directed the parties to file written submissions on the Motion. The applicant on his part reiterated the averments made in his affidavit and contended that the principle of res judicata cannot apply to the present circumstances since the issues now raised are entirely new in contrast to the issues raised in the previous application for a stay of execution, since the present application largely seeks for a review of the previous orders.

12. The applicant further contended that contrary to the averments made on behalf of the respondent, it is not true that he has deliberately refused to comply with the conditions set by this court; rather, he tried his level best but was unable to fully comply with the said conditions. The applicant submitted that he also does not have any property registered in his personal name and that the title to the subject property is registered in the name of a company of which he is a co-director and which title offers sufficient security for the due performance of the decree.

13. It was the submission of the applicant that he has provided sufficient reasons before this court to warrant a review/varying of its earlier orders and therefore urges this court to substitute the current securities with the subject property.

14. On the subject to do with the validity of the notice of appeal, the applicant invoked the provisions of **Article 159 (2) (d)** of the **Constitution** in urging this court to administer justice without undue regard to procedural technicalities. According to the applicant, the inadvertence was on the part of his advocate and the same should not be visited upon him, as illustrated by the Court of Appeal in the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** as hereunder:

*“In the Tana case (supra) the Court observed as follows;*

*“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”*”

15. It was the submission of the applicant that he timeously applied for copies of the typed proceedings and certified copies of the judgment and decree vide the letter dated 8<sup>th</sup> March, 2019 thereby displacing the averment by the respondent that he did not.

16. In response, the respondent submitted that in the absence of compliance with the orders of 17<sup>th</sup> October, 2019 there is no proper application for a stay of execution. The respondent also submitted that a company is a separate entity from its directors and hence the applicant cannot be heard to offer security in the form of the title to the subject property which is not registered in his personal name.

17. The respondent resubmitted that there is currently no appeal to warrant the orders sought in the instant application, and cited the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where the Court of Appeal rendered itself thus:

**“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”**

18. I have considered the grounds presented in the Motion; the facts stated in the affidavits supporting and opposing the Motion; the Grounds of Opposition and the contending written submissions together with the authorities relied upon.

19. A brief background of the case is that the respondent filed a suit against the applicant and sought for various reliefs, including general and special damages arising out of a medical negligence claim. Upon hearing the parties, this court vide the judgment delivered on 4<sup>th</sup> March, 2019 awarded the respondent damages in the total sum of Kshs. 21,535,459/.

20. Soon thereafter, the applicant filed the application dated 15<sup>th</sup> April, 2019 and sought for an order for a stay of execution pending an appeal against the aforesaid judgment. Upon hearing the parties on the application, this court granted an order for a stay of execution pending the hearing and determination of the appeal on the condition that the applicant deposits a total sum of Kshs. 5,000,000/ in a joint interest earning account and further deposits in court a title deed/certificate of lease in his name, together with a valuation report.

21. Returning to the Motion, before I address its merits, I wish to make a determination on some of the grounds constituted in the Grounds of Opposition. Among the grounds is the argument that the application is *res judicata*. Upon studying and comparing the two (2) applications in question, I note that the present application is largely seeking an order for a review of the application dated 15<sup>th</sup> April, 2019 and it is apparent that the fresh order for a stay of execution sought rides on the review order. In my view, therefore, I do not find the instant application to be *res judicata*.

22. The other key issue raised in the Grounds of Opposition touches on the notice of appeal. From my perusal of the record, I note that this issue was similarly raised at the hearing of the application dated 15<sup>th</sup> April, 2019 and which application has already been determined by this court. I therefore find that the respondent cannot be heard to challenge the validity of the notice of appeal afresh through the instant application.

23. Now to the merits of the Motion, it is apparent that the substantive order sought 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.*

24. 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.”**

25. On the subject of unreasonable delay, it is noted that this court granted the order for stay of execution on 17<sup>th</sup> October, 2019 while the Motion was filed on 10<sup>th</sup> July, 2020, a period of close to nine (9) months in between. Upon considering the nature of the instant Motion and the previous order for a stay of execution which was granted by this court with specific conditions and timelines, I am of the view that there has been an unreasonable delay in the present circumstances. I say this noting that no particular explanation has been given behind such delay.

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

27. 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** with reference 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”***

28. 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.”*** ”

29. Turning to the present circumstances, it is not in dispute that the respondent has in place a lawful decree in her favour and against the applicant in the decretal sum of Kshs. 21,535,459/ which is evidently a colossal amount. It is also not in dispute that the applicant is yet to fully comply with the conditions set by this court for the granting of an order for a stay of execution.

30. From my study of the record and the instant Motion, I note that some attempts have been made by the applicant to comply by depositing the sum of Kshs. 2,500,000/ in a joint interest earning account.

31. I equally considered the certificate of title document that the applicant is willing to deposit as security for the due performance of the decree, together with the valuation report annexed to the Motion. It is noteworthy that the subject property is registered in the name of Nanak Hospital Management Services Limited, in which company the applicant claims to be a co-director. However, the applicant did not bring any credible evidence to show that he has any legal interest in the company, especially since the subject property is registered in the company’s name and not the personal name of the applicant.

32. More importantly, the legal position is that a company is a legal entity, distinct from its directors and shareholders. Taking into account this legal position, the applicant cannot be heard to rely on a title which is not registered in his personal name.

33. Upon taking into account the above circumstances and 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 allowing the applicant to deposit the title deed for the subject property which is not in his personal name.

34. For the foregoing reasons, I find that the applicant has not brought any credible evidence to support the reasons given so as to convince this court to review its ruling.

35. Concerning the order for a stay of execution, upon my denial of the order for a review I revert to my earlier finding that in addition to the inordinate delay in bringing the Motion, the applicant has not complied with the conditions which this court set earlier on, and has further not provided any sufficient security to ensure due performance of the decree. In the premises, I have no basis on which to grant a fresh order for a stay of execution.

36. Consequently, the Motion is dismissed with costs to the respondent.

**Dated, Signed and Delivered at Nairobi this 29<sup>th</sup> day of October, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant