



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 9 OF 2019

JOEL MUTUMA KIRIMI.....1ST PLAINTIFF

SHARON CHEPKORIR KOSKEI.....2ND PLAINTIFF

VERSUS

THE STANDARD DIGITAL.....1ST DEFENDANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT

RULING

1. This Ruling relates to the defendant's application dated 2nd September 2020 which sought the following orders: -

"a) Spent

b) Spent

c) This Honourable court be pleased to vary its Ruling and resulting Order of 12th August 2020 by allowing the deposit of Kshs. 4.4 million in the plaintiff's advocates account as security for stay of execution pending the filing hearing and determination of the intended appeal.

d) The honourable Court be pleased to cite Joel Mutuma, Sharon Koskei and Isaac Ringera t/a View Line Auctioneers for contempt of the court.

e) The honourable court be pleased to commit Joel Mutuma, Sharon Koskei and Isaac Ringera t/a View Line auctioneers to civil jail for disobedience of the Ruling and Order of this honourable Court delivered on 12th August, 2020".

2. The application was supported by the affidavit of **Millicent Ngetich**, the company Secretary and head of the legal department of the 2nd defendant. She averred that on 12/8/2020, the Court delivered a ruling which set aside the warrants of attachment that had been issued to View Line Auctioneers on 23/6/2020.

3. The Court also ordered a stay of execution pending the hearing and determination of the intended appeal on condition that the Defendants deposit a sum of Kshs. 8, 800,000/= in a joint interest earning account in the name of the parties' advocates.

4. That owing to financial constraint caused by the Covid 19 pandemic, the defendants negotiated with the plaintiff's advocates with a view to record a consent varying the court order of 12/8/2020. That in the said negotiations, the plaintiffs proposed that the defendants do pay Kshs. 4.4 million in the plaintiff's advocate's account to act as security.

5. Acting in good faith, the defendants' advocates deposited the said amount and sent a draft consent to that effect. That the plaintiff would later renege on the consent on the grounds that the amount deposited did not factor in the auctioneers fees. The defendants contested the auctioneers' fees because the warrants had been set aside.

6. That by the plaintiffs' advocates' letter dated 1/9/2020, the Deputy Registrar was misled to issue fresh warrants of attachment by failing to disclose that the said warrants had been set aside by the Court. That was followed with execution by view Line Auctioneers. That the execution by the plaintiffs was therefore premature as the plaintiffs have not taxed their costs nor sought the leave of the court to execute

before taxation.

7. The plaintiffs opposed the application through the Replying Affidavit of Joel Mutuma Kirimi sworn on 15/9/2020. He averred that the defendants have not taken any steps to institute the intended appeal as provided for under **Rules 75 and 77 of the Court of Appeal Rules**. That this Court was *functus officio* as it did not have the jurisdiction to determine the application.

8. He further deposed that it was the plaintiffs' understanding of the Court's ruling that failure of the defendants to deposit the sum of Kshs 8,800,000/= in a joint interest account within 14 days, the warrants of attachments issued on 23/6/2020 would apply.

9. He further averred that the Deputy Registrar's misinterpretation of the Court ruling should not be visited upon the plaintiffs and/or auctioneers, especially since the auctioneers' instructions were based on the communication received from the Court registry. That the plaintiffs were not averse to taxing their costs before execution, save that there was no legal basis for stay pending any such taxation. That no property belonging to the defendants was attached by dint of the warrants of 23/6/2020 because the defendants frustrated the process.

10. In a supplementary affidavit filed on 22/9/2020, the defendants explained the steps they had taken to file and serve the notice of appeal which the plaintiffs were aware of.

11. The parties filed their respective submissions which the Court has carefully considered. The Court has also considered the authorities relied on by the respective parties.

12. The issues for determination are; ***whether this Court has jurisdiction to entertain the application, whether the Plaintiffs and the auctioneers ought to be cited for contempt and whether the trial Courts Ruling of 12/8/2020 ought to be reviewed.***

13. The plaintiffs' contention is that the Court lacks jurisdiction and is *functus officio* since the defendants have not taken steps to institute their appeal. When does the Court become *functus officio*? In **Jersey Evening Post Ltd vs Al thani [2002] JLR 542 at 550** cited by the Court of Appeal in **Telkom Kenya Limited v John Ochanda [2014] Eklr**, it was held: -

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

14. In this case, neither the judgment nor the ruling sought to be reviewed has been perfected. The defendants do not seek to introduce new evidentiary documents, save except for the negotiation between them and the plaintiffs. The fact that the defendants may not have filed the appeal does not make this Court to be *functus officio*. If the plaintiffs feel that the defendants have not filed the appeal, then the proper procedure is to apply to either discharge the orders of stay or strike out the notice of appeal but not to block the defendants from the seat of justice.

15. In any event, the record shows that the defendants have filed a notice of appeal against the judgment and applied for certified copies of the proceedings. The plaintiffs were made aware of these correspondence. I hold that the Court has jurisdiction to determine the application.

16. On the prayer to cite the plaintiffs and the auctioneers for contempt, the plaintiffs contended that the defendants had not followed the requisite procedure. That the defendants had not proved that the terms of the order were clear, knowledge of the order and deliberate breach of the same on the part of the plaintiffs.

17. The plaintiffs did not indicate what procedural steps the defendants had failed to adhere to in their application. The defendant's case was that the plaintiffs and the auctioneers were in disobedience of the court order by proceeding with the execution yet the warrants had been set aside. The plaintiffs on their part have shifted fault on the Deputy Registrar and contended that they had misinterpreted the court order in question.

18. Paragraph 32 (a) of the ruling dated 12/8/2020 was clear. It stated that *“the warrants of attachment issued herein are hereby set aside”*. The setting aside of the warrants of attachment was predicated on the fact that the warrants were premature. They had been obtained prior to taxation and without leave of the court. They were unlawful. The Court clearly held in paragraph 15 of that ruling that the provisions of **section 94 of the Civil Procedure Act** could only be avoided if no costs were ordered and/or a party entitled to costs waives his right to costs. There was no room whatsoever for misinterpretation of that order.

19. The plaintiffs seem to have been greatly aggrieved by the ruling. This is because, in paragraph 20 of his replying affidavit, **Joel Mutuma Kirimi** states: -

“20. THAT the plaintiffs herein are not averse to taxing their costs before execution, save that the said plaintiffs contend that there is no legal basis for stay pending such taxation”.

20. That deposition shows that the plaintiffs, while aware that the Court had held that execution could not be proceeded with because costs had not been taxed in terms of **section 94 of the Civil Procedure Rules**, they are still of the view that the stay had been wrongly given and without any legal basis. It is very unfortunate for a party, more so an advocate in this case, to seek to give a contrary interpretation of the law than as already interpreted by the Court and thereby proceed to disobey a Court order.

21. It is well settled that, where a party is not in agreement with a decision of the Court, the best course is to challenge that decision on appeal or to apply for its review. Outright disobedience of a decision a party is not agreeable with, on the basis that the Court has misconstrued the law, (lack of legal basis) is unacceptable.

22. In view of the foregoing, this Court would have been minded to cite the plaintiffs and the auctioneer for commencing illegal execution but for the reason that they had sought the directions of the court through the letter dated 1/9/2020 and the Deputy Registrar gave a wrong opinion. The direction for the issuance of fresh warrants of attachment was predicated on the Deputy Registrar's misinterpretation of the ruling. I find that the same should not be visited upon the plaintiffs. For that reason, the court declines to pursue further the issue of contempt.

23. The last prayer is for the review of the ruling of 12/8/2020. **Order 45 of the Civil Procedure Rules, 2010** sets out the grounds upon which review can be made. That jurisdiction is exercisable if there is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or there is a mistake or error apparent on the face of the record; or for any sufficient reasons and above all, the application must be made timeously.

24. The defendants contended that they had agreed with the plaintiffs that they deposit half of the decretal sum with the plaintiffs' advocates that and the same acts as sufficient security. That on receipt of the amount, the plaintiff's advocates declined to execute the draft consent sent to them and insisted that the defendants do pay the auctioneers' costs which the defendants refused.

25. For the avoidance of any doubt, the costs of the auctioneers for the wrongful attachment cannot be borne by the defendants.

26. The plaintiffs did not deny or contradict this important piece of evidence. It is very unfortunate that the legal profession is no longer honourable. That the plaintiffs' advocates could have been in such communication with the defendants' advocates, receive the 50% of the decretal sum but turn around and state that the same had been paid in settlement of the decretal sum.

27. In their submissions and replying affidavit, the plaintiffs warned this Court from assuming any powers of being chief negotiator for the defendants. This Court heeds to the warning and holds that, if the defendants were hoodwinked into to making payment directly to the plaintiffs' advocates, they have themselves to blame. The Court cannot intervene if they find themselves holding the short end of the bargain.

28. The other ground for seeking the variation of the orders of 12/8/2020 was that the finances of the defendants had been greatly hit by the Covid-19 pandemic. The Court had considered this fact when delivering the impugned ruling because there was no evidence had been advanced to prove that fact. In the present application however, the defendants have attached their unaudited accounts.

29. They contended that they had made losses amounting to Kshs. 306,129,000/- before tax. That this evidence was not in existence at the time the earlier application was made because of regulatory constraints placed upon them by the Capital Markets Authority.

30. This Court has considered the aforesaid contention *vis a vis* the plaintiffs' protestation and the authority relied on. While it is not in the business of the Court to assist parties who are not able to raise securities ordered by the Court, the Court must however not be oblivious of the circumstances of the parties before it.

31. It is not in dispute that everyone, including the defendants, is undergoing tough times as a result of the Covid-19 pandemic. The pandemic has ravaged businesses world-wide since March, 2020 to-date. The defendants are no exception.

32. The order of 12/8/2020 was to the effect that the defendants do deposit a total of Kshs. 8,800,000/- in an interest bearing account in the joint names of the advocates for the parties. The defendants were led to pay to the plaintiffs advocates half of the said amount. The amount is safe in their hands.

33. On the other hand, the Court had found that the plaintiffs had failed to establish that they would be able to refund the sum decreed if the appeal succeeds. In this regard, the Court is satisfied that there are sufficient reasons to review the orders of 12/8/2020.

34. Accordingly, the application is meritorious to the extent of prayer 3 only. In the circumstances of this case, I order that each party to bear own costs.

DATED and DELIVERED at Meru this 29th day of October, 2020.

A. MABEYA, FCI arb

JUDGE