REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 12 OF 2017

MONARCH INSURANCE CO.LTD.....APPELLANT

VERSUS

RICHARD KILUNGU KATHUKYA

(suing on his own behalf and on behalf of the estate of

DISMAS KATHUKYA RICHARD.....RESPONDENT

R U L I N G

The Application

1. The Court has before it an Application brought by the Appellant in the main appeal. The Application is brought by a Notice of Motion filed on 10th July 2020. The Application is brought under "**Under Order 45 Rules 1(1), 2 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3 3A and Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law)" .** The Applicant seeks the following Orders:

1) **THAT** this Honourable court be pleased to review the judgment delivered on 25th February 2020 dismissing the appeal with costs.

2) **THAT** this Honourable court be pleased to set aside the entire judgment delivered on 25th February 2020 and deliver a ruling in respect of the Notice of Motion dated 16th March 2018.

3) **THAT** costs of this application be provided for

2. The Application relies on the following Grounds:

A. On 16th March, the Respondent's advocate filed a Notice of Motion dated 16th March 2018.

B. On 14th June 2018, this matter came up for directions before the Hon. Lady Justice F. Amin who directed as follows;

i. The Respondent to serve the application upon the appellant's advocate within seven (7) days.

ii. The Appellant to file a Replying Affidavit within seven (7) days of service.

iii. The Respondent to file a supplementary Affidavit and submissions within seven (7) days of service of the Replying Affidavit.

iv. The Appellant to file submissions within seven (7) days of service of the Respondent's submissions.

v. Oral highlighting of submissions on 25th July 2018.

C. The Parties complied with the directions of the Honourable court issued on 14thJune 2018 and proceeded to orally highlight the submissions on 25th July 2018.

D. The ruling was scheduled for delivery on 4th October 2018 when it was not delivered as it was not ready. The delivery of the ruling was deferred to 5th October 2018 when it was not ready. Parties were advised that the ruling would be delivered on notice.

E. The court issued a notice to the parties dated 7th October 2019 to the effect that the ruling was scheduled for delivery on 7th November 2019.

F. On 7th November 2019, the ruling was not delivered and parties were advised that it would be delivered on notice.

G. On 24th February 2019, the Appellant's advocate received a notice for judgment issued on 21st February 2020 that was sent via courier notifying them that judgment was scheduled for delivery on 25th February 2020.

H. On 25th February 2020, judgment was delivered dismissing the appeal whereas the same has not been heard.

I. There is an error apparent on the face of the record as this appeal has not been heard on merit. What was pending delivery was the ruling in respect of the Respondent's Notice of Motion dated 16th March 2018 in respect of which the parties filed written submissions and proceeded to orally highlight on 25th July 2018.

J. It would thus be prudent and in the interest of justice for this honourable court to review the judgment that was delivered on 25th February 2020 by setting aside in its entirety and delivering a ruling in respect of the Notice of Motion dated 16th March 2018.

K. This application has been brought without unreasonable delay.

L. No prejudice shall be suffered by the Respondent if the orders sought herein are granted as prayed. and

"*…….. on other further grounds that shall be adduced at the hearing of this application*."

3. The Application is supported by the Supporting Affidavit sworn by **PRISCHA OBURA** who is the Advocate with conduct of the Matter. In her Affidavit the Advocate relates a version of events in respect of this matter. The Deponent then says at paragraph 15 "THAT there is an error on the face of the record as the appeal has not been heard on merit and what was pending delivery was a ruling in respect of the Respondent's Notice of Motion dated 16th March 2018 in respect of which the parties filed written submissions and proceed to orally highlight on 25th July 2018. At paragraph 16 it is said "*THAT it would thus be prudent and purely in the interest of justice for this honourable court to review the judgment that was delivered on 25th February 20202 by setting it aside and delivering a ruling in respect of the Notice of Motion dated 16th March 2018."*

The Preliminary Objection

4. The Respondent opposes the Application. The Respondent has filed a Preliminary Object on a Point of Law.

5. In response to the Application filed on 14th May 2020, the Respondent has filed a Preliminary Object. The Preliminary Objection is raised on the following grounds:

"*1. The Notice of Motion is fatally defective, incompetent and an abuse of the process of the court for reasons of contravening the express provisions of* ***orders 21(7) 451(1), 2*** *and* ***Section 80*** *of the Civil Procedure Rules and Act respectively.*

2. The Application is pre-mature for reason that there is no decree which has been extracted capable of being reviewed; to that extend, the application is incompetent and should therefore be dismissed with costs.". (sic)

6. In addition, the Respondent has filed a Replying Affidavit in which he relates that he has received advice that although there were some interlocutory applications pending, due to the age of the Appeal, which was filed more than three years ago, the Court was within its discretion to decide the appeal so that the matter can finally be brought to an end. The Respondent also relies on ***CPR Order 21 Rule 7*** which provides: *The Respondent also states that there are no rules of civil procedure which allow for the review of judgments and therefore the application is an abuse of process*.

7. Interestingly, the Respondent states at paragraph 15 of the Replying Affidavit "*THAT I do believe that the Appellant is not interested in the justice of the matter but only on delaying the case which it has in the past declined to give security.*".

8. From the above, it is clear that the Appellant/Applicant is asking the Court to review its entire judgment and come up with a different result. The Applicant relies on Section 80 of the Civil Procedure Act Cap 21 which provides: "Any person who considers himself aggrieved — (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. The Respondent opposes any review on the basis that there is no decree in existence and therefore the Court's jurisdiction under Section 80 does not engage. The Appellant counters that by saying the Court should not allow itself to be bound by technicalities. However, the question of jurisdiction is fundamental, or paramount in the words of the Court of Appeal in ***the MV Lillian***. For the Court to decide what is a mere technicality and what is a substantive issue, it is informative to look at the history of this File.

9. The Plaintiff was successful at trial. The Defendant did not satisfy the decree and appealed. The Defendant and/or its Advocates

neglected to obtain a stay pending appeal. However, when the Plaintiff attempted to execute the Decree, the Defendant entered into a consent agreement for a conditional stay. The Defendant agreed for that to be adopted as an order of this Court. However, two months after default, the Defendant/Appellant roped in the Court to obtain a stay under the guise of a status quo order. That Order was made in February 2018 before a different Judge. At that time the Appeal was at the point where written submissions were due to be filed. Instead the Parties began a competition of who could file more Applications.

10. Earlier to this application is an Application filed by the Respondent under a Certificate of Urgency. That Application was brought under ***Sections 1A, 3A, Order 2 Rule 15 (1)(b)(c) and (d)*** of the ***Civil Procedure Act and Rules*** respectively and all other enabling provisions of the law. The Orders sought by the Respondent were:

1) That this application be heard ex-parte in the first instance.

2) That there be a stay of orders granted on 5th March 2018 pending the hearing and determination of this application.

3) That the court be pleased to strike out the Notice of Motion dated 19th February 2018

4) That the costs of this application be provided for.

11. The Grounds relied upon by the Respondent were:

"*1. That the consent order the Appellant wants to extend time was entered into by consent of parties.*

2. The Appellant has defaulted and the default clause has been activated.

3. The court in the circumstances lacks jurisdiction to vary the consent of the parties entered into in the manner such as the one on record.

4. That there is already an order which is clear that in default of the consent execution to issue and the Appellant has defaulted.

5. That the court has no powers to extend time in an order which emanates from a consent of parties to a suit

6. The fairness in this matter requires that the stay be granted and execution to proceed.

7. That the Applicant/Decree holder is unable to execute because of the status quo order.".

12. That Application is also Supported by the Affidavit of the Respondent. In it the Respondent explains that he was successful at trial. The Appellant did not satisfy the Decree. The Parties entered into a Consent Order where execution would not proceed provided the Appellant complied with the conditions. The Appellant did not comply. The Appellant then filed an Application and Supplemental Affidavit (on 27th February 2018) seeking status quo orders. It is said that the Judge Hon Lady Justice J. Kamau did not have jurisdiction to stay a consent order. The conditions set in the consent order were that the Appellant would deposit the decretal sum of Kshs.2.106,790 in a joint interest earning account in the name of both advocates and also to pay the Respondents costs. The Appellant did not comply. Over the course of nearly 2 ½ years the Appellant has not complied.

13. Instead the Appellant filed an Application which is the subject of the issues herein. The Application filed and dated on 19th February 2019. Prior to that Application, the Respondent had been successful at trial. The Appellant did not ask for a stay of execution and the Successful Plaintiff (the Respondent herein) commenced proceedings for execution. As a consequence the Parties entered into a Consent Agreement for execution of the judgment and decree to be stayed **provided that** the Appellant arranged security in the form of a payment into a joint interest earning account and costs. That was never done even though the consent agreement was adopted as an order of the Court on 20th November 2017.

14. Thereafter, the Appellant filed an Application under certificate of urgency. The Certificate of Urgency was signed by the Advocate with conduct. In it Ms Obura says "The appeal is scheduled for mention for directions on 12th February 2018. Given that the Application was dated a week later, the suggestion that the issues could be resolved in a short time was incorrect and misleading. The Appellant's reason for not complying was that the company was operating between November 2017 to February 2018 without a valid bank mandate and there was no-one authorised to sign the cheques during that period. It is argued that the delay of 4 months in issuing a cheque is not inordinate.

15. The Court record tells a different story, On 12th February 2018, the Matter came up for directions on the *"filing of written submissions"* in relation to the Appeal. Counsel for the Respondent informed the Court that the Appellant had not complied with the Consent Order. Counsel holding Brief for Ms Obura told the Court; "I have no instructions on the non-compliance. I would kindly request that we give Ms Obura time to respond to whether or not there was non-compliance". That is a clear suggestion that there was a possibility that there was compliance. In fact, there was no compliance and no ability to comply because there was no-one available in the whole of Kenya to sign a cheque for the Appellant Company. However, the Learned Judge Hearing the Appeal, Hon Lady Justice Kamau Directed "that this matter be mentioned on 19/2/2018 to confirm the position and/or for further orders and/or directions. Directions for the filing of written submissions will be deferred until then…". On 19th February 2018, the Learned Judge was not sitting. The next day, the Judge sitting in Chambers re-considered the Application. She said, "I have looked at the Appellant's N/M application that was dated and filed on 19/2/18 together with the Supporting Affidavit of Philomena Theuri that was sworn on the same date and the enclosure therein and note that it was required to have deposited the decretal sum of KSh2,106,790/= and the Respondent's costs in the sum of Ksh 19,000/- within 30 days of [the filing of the

consent] As it is now 2 months since the stay of execution lapsed … and no explanation was proferred in its Supporting Affidavit why the present application was not filed before the stay of execution lapsed on 20/12/2017. I hereby decline to certify this matter as urgent and/or to grant any substantive orders that have been sought therein. I hereby direct that the Appellant serves N/M Application dated 12/2/2018 on the Respondent…".

16. So it went on. When the matter came up for inter partes hearing, the Court heard from Ms Obura . the Respondent's Counsel was opposed to any changes to the Consent Order and challenged the Court's jurisdiction to vary and/or discharge an Order by Consent. In the proceedings, the Court confirms "that the Court of its own motion granted the status quo order.". The Court also decided the Respondent suffers no prejudice. The Court then went on to say that; Having heard Miss Obura, she explained that the said Affidavit was further to the Supporting Affidavit in the N/M application of 19/2/2018. As there was no application, it was erroneous on my part to have granted a status quo order. The said status quo order is hereby set aside. However, as execution has already commenced and the Appellant has filed an application seeking to vary consent orders this court deemed it in the interests of justice to deem the Further Affidavit of 27/2/18 as having been duly filed and served and was in support of its N/M application of 19/2/18. There is an arguable point of law if a court can allow one (1) party to vary a consent if the other party insists on the terms of the consent. It will be best of justice (sic) if the said issue is determined. In the premises foregoing, I hereby grant an order for status quo, the status at 10.00 am today 5/3/18 being that no execution has taken place.". The Learned Judge then gave directions for the filing of written submissions and listed the Application for a mention on 9/4/2018 to confirm compliance and /or for further orders and/or directions by the Court. That Order was extracted and signed by Hon R.M. Karimi describing herself as Deputy Registrar High Court.

17. On 16th March 2018 the Respondent filed a Notice of Motion Application under a Certificate of Urgency. The Application sought a stay of the Order of Hon J. Kamau J pending hearing of this Application and an Order striking out the Notice of Motion dated 19th February 2018. Notwithstanding the earlier order giving a date on 9th April 2018, the RM decided to conduct an ex parte hearing. It was before the same RM – Hon A. N. Karimi but she gave a different date for the file to be placed before the Hon Judge for directions on 27th March 2018. In fact, the Hon Judge had by then been transferred to Nairobi. On 9th April the Matter came before the Hon DR, M. Onkoba. There was no appearance from the Advocates, pending the posting of a new judge. On 14th May 2018, the Appellant took a date from the Registry ex parte. On 14th June the matter came before this Court as currently constituted. The Parties agreed by consent that the matter continue in Voi. Appearance on behalf of the Appellant was by Mr Mwinzi holding brief for Ms Obura. He informed the Court that he had "scanty instructions". The Court posed the question whether it should deal with a review of the Order of Hon Lady Justice Kamau. The Court made an order for directions. At paragraph 6 of the Order was a direction for the Application to be listed "for Highlighting and/or to take a Ruling date on 25th July 2018 as convenient to both Advocates. The Parties did highlight their submissions. The Respondent raised the question of the jurisdiction of the Court differently constituted to stay and/or vary a consent order. Although the issue in dispute was a point of law, namely whether a court has jurisdiction to vary a consent order and if so on what terms. Instead, the Appellant's Counsel spent an inordinate amount of time justifying its non-compliance with the Consent Order. Appellant's Counsel also urged the Court not to be persuaded by the argument that the appeal is not pending.

18. The Application now before the Court is supported by the Affidavit of the Advocate with conduct. That means the Advocate is now giving evidence before the Court. Rule 8 of the Advocates Practice Rules provides:

> *8. No advocate may appear as such before any court or tribunal in any matter in whichhe has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:*
>
> *Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears." (emphasis added)*

19. This matter is contention and is hotly contested. The Application is flawed because it is supported by an affidavit tainted by misconduct. However, it is instructive to look at the facts alleged – on oath. The Deponent Advocate states that the Ruling was due to be delivered on 4th October 2018. That is what the record shows. The Deponent then swears the Ruling not delivered because it was not ready. She has not identified the source of that information but it certainly was not the Court. The cause list for that day shows the matter was not before the Court and similarly the record shows that there was no entry into the proceedings. Therefore, the explanation concocted by Counsel was a fabrication – something she made up herself. At paragraph 9 she says that "the court issued a notice to the parties dated 7th October 2019 to the effect that the ruling was scheduled to be delivered on 7th November 2019". The alleged notice is exhibited. However, a close examination of the alleged notice alerts the observer that something is amiss. Firstly, the supposed notice is not recognised in the cause list for that day, secondly the letterhead contains a telephone number for a court in Nairobi not Voi. Thirdly, there are two different types of font used to type the document. Fourthly it is not grammatical and sixthly notices legitimately issued in Voi do not bear the Court of Arms. Mostly telling of all is that unlike the Notice of Judgment, it does not bear any stamp to show that it was received by the Advocate and/or the firm as alleged.

20. Therefore, on the question of whether the Application is fundamentally and irreparably flawed the answer must be in the affirmative. Even if the Court were to look at the merit of the Application, there is not one iota of reliable evidence put forward in support of the Application.

21. In fact the true and correct position was that both the application for stay/status quo had reached the stage of submissions before the previous Judge. Therefore, the Ruling and Judgment fell to be decided by that Judge. Neither Party took any steps to make sure the matter was resolved in accordance with the directions given by the Hon the Lord Chief Justice of the Republic for more than 12 months. The suggestion by the Appellant that it could not proceed with the Appeal for nearly 3 years because it was waiting for a stay. The stay albeit interlocutory was ordered without the benefit of the usual grounds for interfering with a Consent Order. The reason for non-compliance was not an existing and known factor at the time of the Consent. That benefit does not entitle the Appellant to sit on its hands.

22. After two years, the Judge with conduct of the file had not finalized the matter. Therefore, it fell on the current Presiding Judge of the Court to decide whether to dismiss the Appeal for want of prosecution – which would give rise to more interminable delay or to decide the matter on the merits. Applying the overriding objective as enunciated in ***Sections 1, 1A*** and in particular ***3A*** of the ***Civil Proceedings Act Cap 21*** to whit: *"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*.

23. The Court decided that it would instill some finality into the Appeal. The Judgment sets out the facts as they appear from the numerous (often contradictory) affidavits as well as the record of oral testimony contained in the proceedings. The Judgment records that submissions were not filed. The Judgment also sets out the reasons for the findings. By contrast, the Application does not set out one fact, conclusion, record, instance that would change had it filed submissions as envisaged as long ago as February 2018. The Judgment also records the Applicant/Appellant's propensity to produce documents no one has seen or heard of after the event. Meanwhile the Respondent is being kept out of the fruits of his Judgment – at the very least for costs. If the Applicant, after actively misleading the Court, and thereby possessing unclean hands had any substantive points to raise in any submissions, it should have enumerated those in the current application. The issues raised in the Appeal were factual issues not legal issues.

24. For those reasons the Application is dismissed with costs to the Respondent. The Applicant's remedy lies in Appeal.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated: 29th day of July 2020

Signed, and Delivered on line in Mombasa this the 28th day of October 2020

In the Presence of

Court Assistant: Daniel Njuguna

Appellant: Mr Kariuki

Respondent: Mr Oddiaga