



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 117 OF 2019**

**TAJ MALL LIMITED.....APPLICANT**

**VERSUS**

**COBRA SECURITY COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. In its Notice of Motion application dated and filed on 26<sup>th</sup> February 2020, the Applicant's advocates M/S Waruhiu K'owade & Ng'ang'a Advocates sought leave to come on record in place of the firm of M/S P.G. Kiangu & Co Advocates. The Applicant further sought that the court reviews Order No 1 of its decision and order of 28<sup>th</sup> January 2020. The said application was supported by the Affidavit of its Managing Director, Rameshchandra Govind Gorasia, that was sworn on 26<sup>th</sup> February 2020.

2. The Applicant stated that in a Ruling dated 28<sup>th</sup> February 2020 (**sic**), this court granted a stay on condition that it deposits into a joint interest earning account in the names of its advocates and those of the Respondent the sum of Kshs 3,205,930/= within thirty (30) days of the said Ruling. It pointed out that it had been unable to meet the said condition as it was facing financial challenges following the demolition of the Taj Mall/Airgate Centre which was its only source of income, it was heavily indebted to Shelter Afrique in the sum of

Kshs USD 2,975,935.20 as at 22<sup>nd</sup> February 2020 and that Nextgen Auctioneers had issued it with a Proclamation of Attachment dated 28<sup>th</sup> February 2020.

3. It averred that the onerous condition that was imposed by the court would take away its right of appeal contrary to the provisions of Article 50 of the Constitution of Kenya, 2010. It therefore sought that the terms of the said condition be varied so that it could be allowed to deposit a third of the decretal sum in monthly instalments of Kshs 20,000/= and the payment of the balance be secured by the depositing of a logbook of its Caterpillar Wheel Loader (hereinafter referred to as "the subject Wheel Loader") valued at Kshs 3,200,000/=.

4. In opposition to the said application, the Respondent's Head of Operations, Stephen Thuku Njoroge, swore a Replying Affidavit on behalf of the Respondent herein. The Respondent termed the present application as a blatant abuse of the court process as the Applicant rushed to court to seek stay of execution orders on 21<sup>st</sup> March 2019. It pointed out that the Applicant breached the terms of a consent dated 26<sup>th</sup> February 2019 where it had agreed to allow the application (**sic**) on condition that the Applicant filed a Memorandum and Record of Appeal within fourteen (14) days from the date thereof. It stated that it wrote to the Applicant seeking to have another consent where the entire decretal amount would be deposited in a joint interest earning account.

5. It pointed out that the court dismissed the Applicant's application seeking a stay of execution on 28<sup>th</sup> November 2019 but again departed from its finding on 21<sup>st</sup> January 2020 (**sic**) and found that it had not demonstrated that it had financial ability to refund the Applicant the decretal sum in the event the Applicant was successful in its Appeal. It further stated that the court did not consider its submissions when it granted an order for stay of execution herein. It said that it found the finding to have been disheartening.

6. It was its further contention that the present application had emboldened the Applicant in frustrating it in recovering the decretal sum but that it had not demonstrated that it had met the conditions for the court to order a review or demonstrated how the perfectly legal conditions that were set by the court took away its right of appeal.

7. It also stated that the owner of the Applicant was a man of means who had run for the Senator's seat in Nairobi County in the just concluded general elections and that the Applicant had not shown what effort it had made in prosecuting its appeal.

8. It warned this court not to get roped into the Applicant's game of being disinterested in paying the decretal sum, for the fourth time, and urged this court to dismiss the present application with costs to it.

9. On 27<sup>th</sup> May 2020, the said Rameshchandra Govind Gorasia also swore a Supplementary Affidavit. The same was filed on even date. The Applicant denied that it was delaying the Respondent's fruits of the judgment herein as it had a right of appeal that also needed to be catered for by the justice system. It attributed the delay in filing its Appeal due to the handing over of the file from M/S Mungai Kalande & Co Advocates who were previously acting for it to the firm of M/S P.G. Kaingu & Co Advocates.

10. It stated that as a sign of good faith, it had started paying the thrown away costs of Kshs 100,000/= that were ordered to be paid by the court despite the Respondent's advocates having asked it to pay throw away costs in the sum of Kshs 40,000/=. It added that as at March 2020, it was owed Kshs 69,281,875.76 by its debtors. It contended that it was willing to co-operate with the court but that it was being prevented from doing so due to its economic stature.

11. It was emphatic that the fact that one of its directors had run for a Senatorial seat before the demolition of its shopping mall was done was not a demonstration of its financial capacity. It said that it had already filed a Record of Appeal and that the variation it had sought would not cause the Respondent any prejudice and thus urged this court to allow its application as prayed.

12. First and foremost, this court found it prudent to address the issue of representation of the Applicant herein. Notably, the said firms of M/S P.G. Kaingu & Co Advocates and M/S Waruhiu K'owade & Ng'ang'a Advocates entered into a consent dated 24<sup>th</sup> February 2020 and filed on 10<sup>th</sup> March 2020 allowing the latter firm of advocates to come on record for the Applicant herein. They filed their Notice of Change of Advocates dated 11<sup>th</sup> March 2020 on even date.

13. This court also found it necessary to point out that although the Respondent appeared to have been aggrieved by its decision of 28<sup>th</sup> January 2020, there was no indication that it ever filed an appeal against it. It did not therefore find the need to pronounce itself on the assertions that had been made by the Respondent herein in that regard.

14. Turning to the substantive prayer for variation of the terms of the conditional stay, the Applicant argued that its inability to deposit the decretal sum as had been ordered by the court was a sufficient reason as envisaged in Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act Cap 21 (Laws of Kenya). It placed reliance on the cases of John Simiyu Khaemba vs Cooperative Bank of Kenya & Another [2009] eKLR and Kimita vs Wakibiru (1985) KLR 317 where the courts therein advocated for a liberal interpretation of the phrase **"any other sufficient reason."**

15. It also relied on the case of National Bank of Kenya Ltd vs Alfred Owino Bala [2015] eKLR where the court therein held that substantial loss does not represent any particular mathematical formula of what constituted substantial loss but rather it was a qualitative concept and the cases of Philip Chemwolo & Another vs Augustine Kubede (1986-89) EA 74 and Shah vs Mbogo & Another (1967) EA 116 where the common holding was that courts ought to exercise their discretion to excuse mistakes and blunders so as to decide matters before them fairly.

16. On the other hand, the Respondent referred this court to the cases of Kenya Railways Corporation vs Quick Lubes E.A Limited [2015] eKLR, Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR, Jethwa vs Shah t/a Supreme Styles [1989] eKLR, Haithar Haji Abdi & Another vs Southdowns Developers Limited [2013] eKLR and Kenya Hotel Properties Limited vs Willsden Investment Limited [2007] eKLR to support its argument that an appeal would not necessarily be rendered nugatory where it was a money decree.

17. It also placed reliance on the case of Peter Kirika Githaiga vs Lucy Wanja Kariuki & Another [2016] eKLR where the court held that bringing an application for review on an application it had refused to grant was tantamount to inviting it to sit on appeal of its earlier decision and that of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2013] eKLR to support its argument that the process of the administration of justice must be guided by certainty and clarity and not be shifting goal posts.

18. The court carefully considered the parties' respective submissions and noted that they raised similar issues as those that had been brought while arguing the applications for stay of execution pending appeal. As the question of whether or not to grant an order for stay of execution was *res judicata*, this court did not analyse the case law and submissions relating to the same. Instead, it noted that the sole issue that was before it was whether or not the Applicant had met the threshold of being granted an order for review.

19. Notably, the Applicant was within the law when it sought to have the decisions of this court that was delivered on 28<sup>th</sup> January 2020 reviewed as provided in Section 80 of the Civil Procedure Act that states that:-

**"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."**

20. However, this order can only be granted upon the applicant meeting the conditions that have been set out in Order 45 Rule 1(1) of the Civil Procedure Rules. The same stipulates that:-

**“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 (emphasis court), 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.”**

21. The court wholly associated itself with the holding in the case of **John Simiyu Khaemba vs Cooperative Bank of Kenya & Another** (Supra) that courts are called upon to interpret the ground of reviewing a decision on any other sufficient ground liberally. The conditions set out in Order 45 Rule 1 (1) of the Civil Procedure Rules are not conjunctive. Rather, they are disjunctive due to the use of “**or**” and not “**and**.” An applicant can therefore apply for review of a decision of the court on any of the grounds cited therein.

22. The question that arose in the mind of this court was whether or not the Applicant herein had demonstrated sufficient cause for this court to review its decision. It noted that the decretal sum was Kshs 3,205,930/=. If the Applicant was to deposit a third of the decretal sum which would be Kshs 1,068,643.33 in monthly instalments of Kshs 20,000/= as it had proposed, then it would take about fifty three (53) months and four (4) months which was almost four (4) years.

23. Bearing in mind that the court had directed that it files its Record of Appeal by 29<sup>th</sup> January 2019 and it would be expected that the appeal herein should have been heard in the next four (4) years, this proposal was not acceptable to court.

24. Going further, the proposal to deposit the logbook of the subject Wheel Loader was also not one that was acceptable to the court for the reason that there was no guaranteeing that at the conclusion of the Appeal, its value would be Kshs 3,200,000/= as it was envisaged to secure. It was apparent that the same would continue being in possession and sole control of and by the Applicant putting the security in a precarious position to the possible detriment of the Respondent herein. Indeed, there was no doubt that its value would depreciate due to wear and tear as a result of its usage.

25. Accordingly, having considered the circumstances of the case herein vis-a-vis the conditions of being granted an order for review, this court came to the firm conclusion that the Applicant had not persuaded this court that it ought to review its Ruling of 28<sup>th</sup> January 2020 on the ground of any other sufficient reason as aforesaid.

26. It is unfortunate that the Applicant was facing serious financial challenges but this court’s hands were tied and could not assist it in any way. This court, however, hoped that the Applicant had used the time between when it filed the present application and the date of delivery of the Ruling herein, which is roughly nine (9) months, to re-organise itself financially.

#### **DISPOSITION**

27. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s application that was dated and filed on 26<sup>th</sup> February 2020 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of November 2020**

**J. KAMAU**

**JUDGE**