



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 367 OF 2018

STEPHEN WAMBUGU MWANGI T/A

STEMER HARDWARE & PAINTS.....APPELLANT

VERSUS

APEX STEEL LIMITED.....RESPONDENT

RULING

1. In its Notice of Motion application dated and filed on 20th January 2020, the Appellant herein sought an order for time to be enlarged by fourteen (14) days to enable it deposit the decretal sum of Kshs 2,541,924/= into a joint interest earning account in the names of the parties' advocates upon receipt of all the necessary documents for opening of the account and upon the said order being granted, an order for stay of execution of the judgment of Hon Mburu (PM) that was delivered on 27th July 2018 pending the hearing and determination of the Appeal herein.
2. On the same date, the Appellant's proprietor, Stephen Wambugu Mwangi swore an Affidavit in support of the application herein. He swore a Further Affidavit on 27th July 2020.
3. The Appellant pointed out that through its Notice of Motion application dated 8th August 2018, it was granted a conditional stay of stay on condition that it deposited the decretal sum as aforesaid within sixty (60) days of the order. It contended that its advocates never communicated about the terms of the said order but they informed it that it could proceed to operate and transact with the Respondent as it continued raising their fees.
4. It stated that it was dismayed when it was served with a Notice to Show Cause (NTSC) that was slated for hearing on 21st January 2020 and upon its new advocates perusing the court file in the month of January, it became aware that it had been granted a conditional stay as aforesaid.
5. It explained that it would never have engaged in out of court negotiations if it had been aware that there was a condition stay of execution and set out the steps that should be taken to expedite the hearing of the Appeal herein.
6. Its proprietor averred that he would suffer irreparable harm and substantial loss if the orders the Appellant had sought were not granted and he was committed to civil jail to satisfy the sum of Kshs 11,612,953.37 and for it to turn out that the Appellant was not liable to pay the interest accrued. It was the said proprietor's assertion that he would not be compensated after his rights were infringed with extreme prejudice (**sic**).
7. The Appellant urged this court not to punish it for the mistakes of its previous advocates and asserted that it was willing to abide by any conditions for the granting of enlargement of time as it had sought and/or that it was ready to deposit the decretal sum within seven (7) days of the said order being granted and thus urged this court to allow its application as prayed.
8. In opposition to the said application, on 9th March 2020, the Respondent's Director, Kush Nathwani swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 10th March 2020.
9. The Respondent opposed the prayer for enlargement of time as had been sought by the Appellant herein for the reason that the conditional stay of execution was granted on 23rd July 2019 and that having failed to comply with the same, it was at liberty to proceed with execution proceedings against the Appellant herein. It was categorical that despite its advocates sending forms for account opening to the Appellant's advocates on 28th June 2019, the said account was not opened.

10. It added that it rejected the Appellant's proposal to settle the matter out of court and did not hear from it, until it moved the court to challenge the said NTSC. It averred that the Appellant was capable of satisfying the decretal sum but had not even made any single payment as a result of which interest continued to accrue and it continued to incur further charges in tracing and serving it with court process.

11. It pointed out that this was not the first time that the Appellant was changing advocates and thus termed the present application an abuse of the court process and urged this court to dismiss the same with costs to it. It, however, averred that in the event the court was to grant the Appellant the orders it had sought, then it ought to be ordered to deposit the sum of Kshs 12,545,569.37 in the names of the advocates as security for the appeal.

12. The Appellant placed reliance on Section 95 of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 50 Rule 6 of the Civil Procedure Rules, 2010 that empower the court to enlarge time where a fixed time has been prescribed.

13. It also relied on the case of Nicholas Kiptoo Arap Korir Salt vs Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR, Mugo & Others vs Wanjiru & Another [1070] EA 484 which addressed the principles which a court ought to consider before exercising its discretion to allow or disallow an application.

14. It further relied on the case of Belinda Murai & Others vs Amos Wainaina [1978] LLR 2784 where it was held that no door should be closed because of a mistake that had been made by a lawyer.

15. On its part, the Respondent placed reliance on the cases of Rufus Muriithi Nyaga vs Rebecca Magwi Njeru [2018] eKLR, Republic vs National Environment Tribunal Ex parte Palm Homes Limited & Another [2013] eKLR and Simba Coach Limited vs Kirilyu Merchants Auctioneers [2019] eKLR in support of its argument that the Appellant's present application was not merited.

16. The issue of whether or not the Appellant had met the conditions for being granted an order for stay of execution pending appeal as provided in Order 42 Rule 6(2) of the Civil Procedure Rules was not contested. What was in contention was whether or not this court could exercise its discretion in favour of the Appellant after it failed to deposit the decretal sum within the period that was provided by the court.

17. Notably, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”

18. However, this extension is not to be granted as a matter of course. The court must be satisfied that an applicant had demonstrated that it was prevented by circumstances beyond its control from complying with time lines that were ordered by the court.

19. In this case, the Appellant argued that it was not informed by its advocates of the conditions that were given for the stay of execution. On the other hand, the Respondent was categorical that the Appellant was in the habit of changing advocates and hence the explanation it had adduced for not complying was not a good one.

20. The court noted that judgment was delivered on 27th July 2018. The Appellant filed a Notice of Motion application dated 8th August 2018 on even date. As this court was satisfied that it filed the said application without undue delay, on 13th May 2019, it granted the Appellant an order for stay of execution pending appeal on condition that it deposited into a joint interest earning account the sum of Kshs 2,542,924/= by 15th July 2019 failing which the conditional stay would lapse.

21. Having considered the facts of this case, it did appear to this court that the Appellant's previous advocates may have failed to act for the Appellant as it may not have paid their fees. Whereas a court ought not to be concerned about the affairs between an advocate and his or her client, it should not be blind to the fact that it is not uncommon that advocates do refuse to act for their clients if their fees are not paid. In such a case, a court is called upon to consider if a party will suffer prejudice if it is shut out from prosecuting its case on account of its lawyer's mistakes.

22. Indeed, in the case of Belinda Murai & Others vs Amos Wainaina (Supra), the court held that although the court may not condone it, it ought to do whatever is necessary to rectify the mistake if the interests of justice so dictates.

23. Having said so, this court could not with certainty determine that the Appellant's advocates failed to inform him of the conditional stay due to non-payment of their fees. Suffice it to state that the Appellant did not comply with the court orders of 13th May 2019.

24. This court was persuaded to excuse the Appellant for not having complied with the said orders and not to vary the sum it shall deposit purely in the interests of justice so as not to shut it out from accessing justice as contemplated in Article 50 (1) of the Constitution of Kenya, 2010 and for the reason that the Respondent could be compensated by being awarded throw away costs for being pulled backwards in this matter.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 30th January 2020 was merited and the same is hereby allowed in the following terms:-

1. THAT there shall be an order for stay of execution of the Judgment of Hon D. W. Mburu (PM) that was delivered on 27th July 2019 in Nairobi Milimani CMCC No 3476 of 2018 Apex Steel Limited vs Stephen Wambugu Mwangi t/a Stemer Hardware & Paints pending the hearing and determination of the Appeal on the following conditions:-

2. THAT the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the Respondent, the decretal sum of Kshs 2,541,924/= within thirty (30) days from the date of this Ruling.

3. THAT the Appellant shall pay to the Respondent throw away costs in the sum of Kshs 50,000/= within thirty (30) days from the date of this Ruling.

4. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 25(1) (a) and (b) hereinabove, the conditional stay of execution shall automatically lapse.

5. Either party is at liberty to apply.

6. Costs of the application will be in the cause.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of November 2020

J. KAMAU

JUDGE