



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MSC.APPEAL. 5 OF 2020

OPPORTUNITY INTERNATIONAL WEDCO LIMITED

SAMELGCHOHI alias SAMUEL MAMB.....APPLICANTS

VERSUS

ELIZABETH MUENI KIAMBA & FAITH MUKUNYA

Suing as Legal Representative of the Estate of .

STEPHENI MUOKI MAILU.....RESPONDENT

RULING

1. On 17th February, 2020, the parties to this matter recorded a consent on the application dated 22nd January, 2020 by which it was agreed that the said application be allowed on condition that the sum of Kshs 676,878/- be released to the Respondent's Advocates within 14 days from the said date and that the balance be deposited in a joint interest earning account in the names of the Advocates for the respective parties with KCB Bank, Machakos Branch within 30 days from the said date and that the applicants would file and serve the memorandum of appeal within 14 days from the said date. It was further agreed that in the default of compliance with any of the said conditions, the consent would be deemed vacated and that the Respondent would be at liberty to execute.

2. It would seem that the said consent order was not complied with and by an application dated 16th March, 2020, the Applicants sought for reinstatement of the orders issued on 17th February, 2020 and for enlargement or extension of time within which to comply with the consent order and pursuant to the said order the court grants a stay pending the hearing of the appeal against the judgement in CMCC No. 536 of 2017. They also sought that the memorandum of appeal filed on 27th February, 2020 served on 5th March, 2020 be deemed as duly filed and served and that the sum of Kshs 678,878/- received by the Respondent's advocates on 5th March, 2020 be deemed as duly paid. It was further sought that the order regarding the deposit of the balance in a joint account be varied and substituted by an order depositing the same into Court.

3. Prior to the filing of the application dated 16th March, 2020, the Respondent had filed an application dated 11th March, 2020 seeking an order that the Applicants' appeal filed on 27th February, 2020 be struck out on the basis that the same was filed contrary to the consent order referred to hereinabove. That application was made in the appeal filed though the same was filed in this miscellaneous application.

4. On 7th July, 2020 I directed that the two applications be canvassed by written submissions and ordered the parties to file and exchange their submissions within 14 days and the made was stood over to 22nd July, 2020 for further orders. On that date none of the parties were in court and both applications were dismissed on the ground of non-compliance with the directions of the court.

5. Undeterred the Applicants made an application dated 27th July, 2020, the subject of this ruling, by which they are substantially seeking an order that the order made on 22nd July, 2020 dismissing their application dated 16th March, 2020 be set aside. The second prayer in that application is however not clear as it is framed in the following manner:

The Defendants/Applicant Application dated 16.03.2020 seeking orders to reinstate and or extend interim orders of stay of execution of judgement/Decree issued by the Honorable (sic) on the 17th October, 2019 in the CMCC 536 OF 2017 pending the hearing and determination of this application the intended appeal and

6. There is also a third prayer seeking an order that the memorandum of appeal filed on 27th February, 2020 served on the 5th March, 2020 be deemed as duly filed and that the sum of Kshs 687,878/- received by the Respondent advocate on the 5/3/2020 be deemed as duly paid

and other orders on the face of the application.

7. The said application was based on the fact that due to unfortunate and inadvertent error by Counsel for the Applicant, instead of diarising 22nd July, 2020 the advocates for the applicants diarised the same as 27th July, 2020. In the affidavit in support of the application which was deposited by **L. N Wataka** an advocate practising in the firm representing the applicants, it was averred that on 27th July, 2020 when Learned Counsel went to file the Applicant's submissions, was when she learnt that the application had been dismissed. It was therefore contended that the failure to attend court was inadvertent and that the mistakes of counsel ought not to be visited on the client.

8. The application was opposed by the replying affidavit deposited to by the Respondent in which the Respondent took issue with the casual manner in which the prayers in the application were framed. The Respondent also doubted the authenticity of the diary as well as the submissions annexed and was of the view that the instant application is just another trick and a delaying tactic.

9. In support of the application, the Applicants on 7th October, filed submissions dated 6th October, 2020. The said submissions are a mirror replication of the submissions filed earlier on, on 6th August, 2020 dated 27th July, 2020 in support of the application dated 16th March, 2020. In fact, the submissions filed on 7th October, 2020 similarly indicate that they are in support of the application dated 16th March, 2020 and that the said application is supported by an affidavit sworn by **Isabella Nyambura**.

10. It is therefore clear that the submissions filed pursuant to the directions of this court are irrelevant in so far as the instant application is concerned.

11. As stated hereinabove, the reason for dismissal of the application was non-compliance with the Court's directions. Those directions were issued on 7th July 2020 and parties were enjoined to file and exchange their submissions within 14 days which means the last day for compliance was 21st July, 2020. The submissions which the Applicants rely on are however dated 28th July, 2020 and according to the Applicants, the advocate went to file them on 27th July, 2020 which was itself out of time and there is no indication that they were served. While the Applicants contend that their advocates mis-diarised the date of the next attendance, there is completely no reason given for failure to comply with the court's directions which was the main reason for the dismissal of the application.

12. The decision whether or not to set aside an order dismissing an application is an exercise of discretion and like any other discretion must be exercised upon reason and must not be capriciously done or done on the whims. See **Masefield Trading (K) Ltd. vs. Francis M Kibui Nairobi (Milimani) HCCC No. 1796 of 2000 [2001] 2 EA 431**.

13. In the absence of an explanation justifying failure to comply with the Court's directions, I find no merit in the application dated 27th July, 2020 which I hereby dismiss but with no order as to costs due to non-compliance with the Court's directions by the Respondent.

14. What then should the Court do in those circumstances? The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

15. Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

“Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow.”

16. It would therefore be pointless sustaining Civil Appeal No. 20 of 2020 whose substratum no longer exists. Accordingly, the same stands struck out with no order as to costs. In line with the consent order recorded herein by the parties, I hereby direct that the sum of Kshs 488,594/- deposited herein on 23rd March, 2020 be released to the Respondent's Advocates.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 16th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kaloki for Kimondo Gachoka for the Applicant

Mr Mulyungi for the Respondent

CA Geoffrey