REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 150 OF 2018

CEFA ENTERPRISES LTD .....APPELLANT

-VERSUS-

BENEDICT KYALO KIMUYU .....1ST RESPONDENT

BMG HOLDINGS LIMITED.....2ND RESPONDENT

MULATI SABABI .....3RD RESPONDENT

BENEDICT MBALU .....4TH RESPONDENT

RULING

1. By a Motion on Notice dated 5th November, 2020, the applicant herein seeks the following orders:

1) THAT the application herein be certified urgent and be heard ex- parte in the 1st instance and determined and/or dispensed with on a priority basis.

2) THAT this Honourable court do grant stay of execution orders pending the hearing and determination of this application.

3) THAT this Honourable court be pleased to vary it's orders dated 27TH January 2020 and 20th August 2020 and allow the Appellant to pay the Deposit amount of Kshs 400,000/- by two instalments of Kshs 200,000/- each.

4) THAT this Honourable court do direct that the said amount be deposited into court.

5) THAT the costs of this application be provided for.

2. The said application is based on the following grounds:

(a) THAT the Appellant has already obtained a Bankers Cheque for Kshs 200,000/- drawn in favour of Court.

(b) THAT one of the Appellant/Applicant director AMIRALI HASSANALI MOHAMMED aged 85 years has been facing health challenges thus draining into their capability financially.

(c) THAT no party will suffer prejudice should the prayers herein be granted.

3. The said application was supported by an affidavit sworn by **Shirin Mapara** a director of the Appellant/Applicant.

4. According to the deponent, this court directed that they deposit Kshs 400,000/- into a joint account between our Advocates. However, they were unable to raise the whole amount due to the ill health of his father, **Amirali Hassanali Mohammed** who is also a director of the Appellants company who requires medical attention regularly. Due to the foregoing, he was not able to raise the whole amount of Kshs 400,000/- but only managed Kshs 200,000/-.

5. He therefore sought variation of the orders to enable him pay the balance of Kshs 200,000/- within 45 days from the date of determination

of this application.

6. He further sought that the mode of deposit be varied to enable him have the amount deposited into court and not joint Advocates account. This prayer was based on the fact that his advocates were having challenges with opening the said joint account.

7. The application was however opposed by the Respondent by a replying affidavit sworn by **Benedict Kyalo Kimuyu** the 1st Respondent herein.

8. According to the deponent, the said Application is not only bad in law but also unmerited and an abuse of the process of this Court since the Applicant has not demonstrated any sufficient grounds as to why it deserves the Court to vary its orders issued on 27th January, 2020. It was averred that the Order of the Court was for the Applicant to deposit Kshs. 770,333.33/- and not Kshs. 400,000/- which order has neither been varied nor set aside. According to the deponent, the Applicant is clearly dictating to this court what amounts the wish to deposit despite clear court orders that were not made in vain.

9. It was contended that the Applicant is guilty of laches and is only on a fishing expedition of the Court orders aimed at denying the deponent the fruits of his lawful judgement. It was averred that the Applicant has not tendered any sufficient reasons for the delay in complying with the Orders of the court and that the Applicant has not demonstrated any convincing reasons as to why it did not comply for the last 10 months.

10. The deponent asserted that Court orders are not issued in vain and the Applicant should have complied with the said orders hence the Court should decline to grant the application.

11. On behalf of the Applicant it was submitted while reiterating the contents of the supporting affidavit that by its orders dated 27th January 2020 and 10th March 2020 but issued on 20th August 2020, this Court had directed the Applicant to deposit Kshs 400,000/- and the said requirement was extended with a further 30 days in the order issued on 20th August 2020. However, the Applicant not being able to comply even with the extension has now moved the court for variation of the said order to allow him to comply with the order by paying Kshs 200,000/- which already they have obtained the Bankers cheque in the name of the court since it is practically impossible for it to be able to raise the whole amount of Kshs 400,000/- at once due to the fact that one of the Directors **Mr. Amirali H. Mohammed** 85 year old man is facing health challenges which are heavily draining into the Applicant's financial capacity.

12. It was the Applicant's submissions that this court has inherent powers to make the orders as is clearly provided under section 3 and 3A of the ***Civil Procedure Act*** and that the orders sought would help to have the matter settled and therefore would be just and convenient as is envisage in Section 63(e) of the ***Civil Procedure Act***. In the Applicant's view, the ill health of one of the directors herein amount to special circumstances as is confirmed by the Medical documents availed to court and would therefore call for the courts intervention to grant the prayers sought herein in interest of justice.

13. The Applicant was of the view that though there is pending delivery of the ruling an application dated 17th August 2020 seeking for extension of time to deposit Kshs 400,000/-, the same is spent as a similar application was made on 24th February 2020 and granted on 10th March 2020 and an order to that effect issued on 20th August 2020. However, the orders issued on 20th August 2020 granted 30 days extension which lapsed on 20th September 2020 and therefore there was no need for the Application dated 17th August 2020 filed on 18th August 2020 as the orders issued on 20th August 2020 were still in force. The Applicant's view was that the said application dated 17th August 2020 was filed prematurely in any event.

14. The Applicant urged the Court to grant this application in the interest of justice and fairness and that granting the orders sought herein would be just and convenient and shall serve the interest of justice for both parties as the Applicant do have good grounds for the Appeal which will be rendered nugatory if execution was to proceed for failure to have the deposit.

Determination

15. I have considered the issues raised in this application.

16. In this application, the Applicant is seeking two orders. The first order is that this court be pleased to vary it's orders dated 27th January 2020 and 20th August 2020 and allow the Appellant to pay the Deposit amount of Kshs 400,000/- by two instalments of Kshs 200,000/- each. The main and only ground for seeking extension of time is that one of the applicant's directors is ailing and that his condition is taking a toll on the deponent of the supporting affidavit.

17. It is clear that the decision whether or not to vary a court order is an exercise of discretion and just like any other exercise of discretion. However, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.

18. In this case, the Applicant is a legal person separate from its directors. It has not been contended that the ailment of the Applicant's director has adversely affected the Applicant's financial operations and in what manner. It may well be that the said indisposition has affected the financial position of the deponent of the supporting affidavit by in law the deponent and the Applicant are two separate legal entities.

19. Apart from the foregoing, as rightly appreciated by the Applicant this application was filed during the pendency of another similar application. Though the Applicant contends that the said application was premature and has been overtaken, the fact is that application had

not been withdrawn by the time the present application was filed. In my view, this was a grave abuse of the process of the Court. In **Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (const) 128,** it was held that:

> **" ….in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties."**

20. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.**
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> **Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.**
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> **We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized. We are certain this is what is contemplated by section 57 of the Registration of Titles Act cap 281 and also Order 36 of the Civil Procedure Rules.**
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> **We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:**
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> **"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**
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> **At page 493 of the same case *Lord Templeman* delivered himself thus:**
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> **…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**
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> **To underscore the point that the learned judge should not have dismissed the application to strike out, it is important to touch on the law relating to Originating Summons.**
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> **This Court, in the case of *MUCHERU v MUCHERU [2002] 2 EA 455* held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved *Sir Ralph Windham CJ"s* holding in *SALEH MOHAMMED MOHAMED v PH SALDANHA 3 KENYA SUPREME COURT (MOMBASA) Civil Case Number 243 of 1953 (UR)* where his Lordship said:-**
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> **"Such procedure is primarily designed for the summary and "ad hoc" determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible *and be heard in chambers unless adjourned by a judge into court."***
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> **In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-**
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> **"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."**
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> **Finally, the *third point is*, whether in the circumstances the respondents had abused the process of the court. We must therefore determine if, in the circumstances the Originating Summon as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after *Mr Church* had admitted that his occupation or possession was**

based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in *WIKIPEDIA*, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In *BEINOSI v WIYLEY 1973 SA 721 [SCA]* at page 734F-G a South African case heard by the Appeal Court of South Africa, *Mohomad CJ*, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656*, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc* in *SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)* the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness."

21. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

22. Similarly, **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** held:

> **"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."**

23. In **Re Jokai Tea Holdings Ltd. (1993) 1 ALL ER 630** it was held that:

> **"Where the Court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the "unless" order is intentional and contumacious…The court should not be astute to find excuses for such failure since obedience to such peremptory orders is the foundation of its authority, but if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed."**

24. In this case I find no merit in the application dated 5th November, 2020 which I hereby dismiss with costs.

25. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 15th December, 2020.

G V ODUNGA

JUDGE

In the presence of:

Miss Mutinda for Miss Kavita for the Respondent

Mr Ochanda for Mr Macharia for the Applicant

CA Geoffrey