REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 88 OF 2018

JOHNSON NGISHU KANYIRI.....1ST APPELLANT

PHILISILAH KIMANI .....2ND APPELLANT

VERSUS

FLORENCE WAUSI MUTISO.....RESPONDENT

RULING

1. This ruling relates to an application indicated as being brought under Order 22 rule 22, Order 42 Rule 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act by the appellants dated 8th March, 2019 seeking two main prayers: Firstly nullification of the attachment by Matrix Auctioneers and Secondly uphold the orders of stay of execution of judgement and decree in **Kithimani Civil Case No. 188 of 2015** pending the hearing and determination of the Civil Appeal herein.

2. The orders that the Applicants seek to be upheld were issued by this court. The Application is supported by an affidavit sworn by the 2nd appellant and by Eric Kirimi, from the firm of advocates on record in this matter. This court had granted orders of stay of execution upon certain terms and conditions and in which the appellants were yet to comply. Hence the interim orders appear to have since lapsed and the appellants were unable comply with the said interim orders within the time stated by the court and thus filed this application. The 2nd appellant has annexed copies of documentation indicating the process they have taken towards the performance of the orders they seek extended as well as a copy of the decree and warrant whereas the advocate for the respondent has attached nothing to her affidavit. The deponents aver that the delay in compliance was occasioned by the fact that the appellants' advocate had closed for Christmas Holidays and hence delayed to deliver the account opening forms to the respondents.

3. The Applicants deposed that they are ready and willing to release the cheques once the paperwork is complete and if the orders sought are not granted, execution shall issue and scatter their arguable appeal.

4. The Application is opposed by the Respondent vide replying affidavit deponed by the advocate on record for the respondent on 14th March, 2019. The Deponent finds that the application is an abuse of the court process, an afterthought, and with a view to deny the Respondent from enjoying the fruits of the judgement. In the said replying affidavit the deponent informed court that on 27th February 2019 she wrote to the appellants indicating intention to open a joint account and annexed the said letter. The respondent pointed out that she received the account opening forms on 11th March, 2019, that was four months after the orders of this court and by that time execution had commenced. They stated the court orders are not to be disobeyed at will.

5. The Application was canvassed by way of oral submissions. Learned Counsel for the appellants submitted that the appellants should not be penalized for the mistakes of counsel who due to administrative issues delayed to forward the account opening forms to the respondent's advocate. Learned counsel for the respondent submitted that they received one half of the decretal amount, the other half however delayed and the order given by this court was that the default of payment meant that execution was to issue. Learned counsel added that the application is res judicata as the same issue had already been handled by the court; she cited the case of **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR; Musyoki Chris & Another v Charles Kaloki Maingi (2016) eKLR**

6. Having considered the pleadings and the arguments by counsel, the issues for determination are whether the application to nullify the attachment by Matrix Auctioneers is properly before the court and whether the applicants are entitled to orders for stay of execution.

7. The application is brought under Order 22 Rule 22 of the Civil Procedure Rules and the same provide that

[Order 22, rule 22.] When court may stay execution.

22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

8. The above Section is of no relevance to the remedies sought in this court for obvious reasons.

9. With regard to the first issue, Section 85 of the Civil Procedure Act provides for **Procedure relating to arrest and attachment.** Similarly Section **34 provides for Questions to be determined by court executing decree.**

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

10. The section is couched in mandatory terms. It sets out the procedure of selling immovable property in execution of a court decree. The section applies to the court that issues the decree and in my view it is that same court that has the power to nullify the warrant of attachment. If for arguments sake I were to abrogate jurisdiction to this court, the applicant has not demonstrated how the warrant was contrary to law, illegal, void and a nullity and in any event the author of the said warrants are not party to the suit. Therefore the first issue is answered in the negative and hence prayer 4 in the application fails.

11. Now assuming that a sale has already taken place, as one side to this dispute appears to suggest, is it a correct position of law that it cannot be set aside? The answer is a resounding ''No''. If it is proved that an execution has been irregularly carried out, the court is empowered to make an order of restoration. A wrong execution is in the eyes of the law a trespass.

12. With regard to the second issue, it is a settled position of the law that Court has inherent power to stay execution. The question only remains as to what tests have to be applied. Order 42 Rule 6 under which the application is brought is what counsel seeks to direct the court to rely upon to allow prayer 3 in the application. A quick glance of the court record indicates that the same was pointed out by the respondent's advocate as being res judicata and therefore the same ought to be considered with reference to section 7 of the Civil Procedure Act.

13. The test in determining whether a matter is *res judicata* was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others, (2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgement can be pleaded by way of estoppel in the subsequent case. I find that the instant application meets the test of *res judicata.* The said prayer 3 is barred by the doctrine of res judicata and the same fails.

14. The applicants are bound by the pleadings and therefore this court cannot sit to rewrite the pleadings and consider the prayer for extension of time to comply with the court orders issued on 5th December, 2018 as imputed in the oral submissions of counsel but mentioned nowhere in the pleadings. For arguments sake, Section 3A, 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules would be the operative parts in answering the question whether the prayer to extend interim orders is merited. The sections grant the courts unfettered discretion to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.

15. **In Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,** the court stated thus**:-**

"..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

16. It is undisputed that the Applicants were granted orders by the trial court and the said orders had since lapsed. This issue was addressed in the case of **Hunker Trading Company Limited v. Elf Oil Kenya Limited [2010] eKLR** where the court found that instituting an application in the high court yet the same action was instituted in the trial court and orders issued that have not been complied with amounted to abuse of court process.

17. The points taken up by the Respondent is that the application is an abuse of the court process and an afterthought. I agree with the respondent and find that the application is vexatious and frivolous; the application is an abuse of process. This being a discretionary remedy, having looked at the respondent's affidavit and their submission, I find that the respondent had received half of the decretal amount and this is valuable quid pro quo. Therefore I reluctantly exercise discretion in their favour and allow them to pay the other half.

18. In view of the above I will address the issue of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules. The

Rule provides as follows:

> **"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
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> ***(2)*** **No order for stay of execution shall be made under sub-rule (1) unless—**
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> > **(*a*) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **(*b*) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

19. I have looked at the application herein, and with regard to the condition of undue delay, the applicants were woken from their slumber vide proclamations and therefore their swift move to court as herein was inevitable on their part. With regard to the issue of substantial loss, as observed above, there is half of the decretal amount in the respondent's hands and therefore her right to enjoy the fruits of the judgement has been realized. On the part of the appellants, execution shall occasion them double loss in light of the payment already received. On the issue of security for performance, the applicants have indicated willingness to deposit security once the paperwork is complete. Under these circumstances the appellants appear to have met the basic requirements for grant of this order.

20. It would not be in order to presume that the grant of stay of execution is automatic on filing an appeal since in the words of Order 42 Rule 6(1), a court is to "**make such order thereon as may to it seem just".** Having considered the materials placed before me, there was a similar application before the lower court wherein orders were granted and the same had partially been complied with and the time lapsed before the same could fully be complied with. I am inclined to give the appellants ten (10) days to comply with the court orders of 5th December, 2018 and direct that they pay the auctioneers charges failing which the stay shall lapse and the auctioneer shall be free to go ahead with execution. As the Respondent did not contribute to the Appellants failure to comply with the orders of this court, the Respondent is awarded the costs of this application.

It is so ordered.

Dated and delivered at **Machakos** this **24th** day of **September, 2019.**

D.K. Kemei

Judge