



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 213 OF 2017**

**SONNY DRIVING SCHOOL .....APPLICANT**

**Versus**

**ROFINA OYIERA OKUNE (Suing as the administrator Estate**

**of ROSE AWINJA OKUNE (deceased) ..... RESPONDENT**

**RULING**

1. The application dated 18<sup>th</sup> September, 2017 seeks the following orders:

**“(1) Spent**

**(2) Spent**

**(3) That time within which to comply with the conditions for stay granted on 17<sup>th</sup> July, 2017 be extended and/or that the Applicants be granted 14 days to comply with the orders granted by the Honourable Court.**

**(4) That the amount of Ksh.3,000,000/= paid to Respondents advocate on 26<sup>th</sup> July, 2017 be deemed as valid stay conditions pending appeal.**

**(5) That this Honourable Court be pleased to enlarge time within which the Applicant herein is to file the Memorandum of Appeal.**

**(6) That the costs of this Application abide the outcome of the Appeal.”**

2. On 29<sup>th</sup> May, 2017, the Applicant filed an application seeking orders of stay of execution of the judgment and decree in Milimani CMCC No. 7982/13 and to be grant leave to appeal out of time. On 17<sup>th</sup> July, 2017, the parties recorded a consent and the application was allowed on condition that the sum of Ksh. 3,000,000/= being part of the decretal sum be released within 7 days and the balance of 1,340,668.60 to await the hearing and determination of the Appeal herein. That in default of any of the terms, execution of the amount due to issue.

3. The Memorandum of Appeal was not filed within time hence the application at hand. The reason for the failure to file the Appeal within the timelines agreed upon is that parties were engaged in negotiations. It is further stated that the Applicant has complied with the condition for the payment of Ksh.3,000,000/= to the Respondent. The Applicant has urged the court to consider the said deposit to be sufficient security for the stay of execution pending the hearing and determination of the Appeal. It is stated that the Respondent will not be able to refund the remaining balance if the decretal amount in the sum of Ksh.1,262,000/= thereby rendering nugatory the intended Appeal which has high chances of success. The Applicant’s contention is that it stands to suffer irreparable and substantial loss.

4. The application is opposed. It is stated in the replying affidavit that the application is an afterthought. That the Applicant is indolent and failed to file the Appeal within time. According to the Respondent, the time for filing the Appeal lapsed on 8<sup>th</sup> August, 2017 as per the consent recorded in court and that the consent can only be set aside or varied as provided for by the law. It is stated that there is no evidence of misrepresentation, mistake, undue influence, duress or illegality to warrant the setting aside of the consent. It is further stated that the application lacks merits and that the Applicant was only awoken by the Auctioneers.

5. The application was canvassed by way of written submissions which I have considered.

6. The orders the subject of the application were entered into by the consent of the parties. In the case of **Samuel Mbugua Ikumbu v Barclays bank of Kenya Limited [2015] eKLR** which has been relied upon by the Applicant, the Court of Appeal set the law relating to the setting aside or review of consent orders or judgment as follows:

**“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”**

7. No such circumstances have been demonstrated to exist in the case at hand. Negotiations between the parties, if at all, were no bar to the filing of the Memorandum of Appeal. Consequently, I find no merits in the application. If I had been convinced otherwise, I would have allowed the application on condition that the Auctioneers fees (if any) be paid and the balance of the decretal sum deposited in a joint interest earning bank account of the counsels for the parties herein or in court within 21 days from the date hereof.

8. For the above stated reasons, I dismiss the application with costs.

**Date, signed and delivered at Nairobi this 24<sup>th</sup> day of May, 2018**

**B. THURANIRA JADEN**

**JUDGE**