



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2017

MOMBASA MAIZE MILLERS NAIROBI 1ST APPLICANT/DEFENDANT

MOMBASA MAIZE MILLERS 2ND APPLICANT/DEFENDANT

SAID SWALEH SAID 3RD APPLICANT/DEFENDANT

VERSUS

JUMWA KALAMA JEFA & ANNAH AMODING

SIMIYU suing on behalf of the estate of

MOSES KALAMA JEFFA RESPONDENTS/PLAINTIFFS

RULING

[NOTICE OF MOTION DATED 23RD MARCH, 2018]

1. Mombasa Maize Millers Nairobi Ltd, Mombasa Maize Millers and Said Swaleh Said, the 1st to 3rd applicants herein, were the defendants in Malindi CMCC No. 338 of 2014 where they had been sued by the respondents, Jumwa Kalama Jefa and Annah Amoding Simiyu on behalf of the estate of Moses Kalama Jefa for compensation as a result of a road traffic accident which caused the death of Moses Kalama Jefa. At the conclusion of the trial, the respondents were awarded Kshs. 1,758,764.
2. The applicants were aggrieved by the decision of the trial court and they moved this court vide the notice of motion dated 9th March, 2017 seeking a stay of execution of the judgement pending the hearing and determination of their intended appeal.
3. On 27th March, 2017 the advocates for the parties consented to a stay of execution on condition that the applicants would deposit the sum of Kshs. 1.4 million on or before 10th April, 2017. The applicants were also directed to file a record of appeal. When the matter came up for hearing on 20th April, 2017, the advocates for the parties indicated to the court that they had agreed to withhold the depositing of the money in court as they negotiated a settlement. The matter was mentioned twice thereafter with the advocates indicating to the court that they were still negotiating.
4. However on 28th June, 2017 the advocates informed the court that no settlement had been reached. The court directed the parties to continue with negotiations with leave to apply. The parties were also directed to take a mention date in the registry.
5. On 29th January, 2018 counsel for the respondents fixed the matter for mention on 16th April, 2018 for further directions. However, before the mention date, counsel for the respondents instructed the Interested Party, Misa M. Auctioneers to execute the decree.
6. The Interested Party attached the applicants' motor vehicle registration number KBF 655W pulling trailer registration number ZF 4672. It was then that the applicants brought the instant notice of motion application seeking orders as follows:

“1. Spent.

2. Spent.

3. That pending hearing and determination of the Application the court do issue an order of stay of execution in respect to the ongoing process of execution in CMCC No. 338 of 2014.

4. That pending hearing and determination of the application the Honourable Court do stay the execution of the decree issued herein together with all other consequential orders and actions.

5. That pending hearing and determination of this application a mandatory order of injunction do issue compelling the respondents to release forthwith M/V Registration Number KBF 655W a Mercedes Benz pulling trailer registration number ZF 4672 to the applicant.

6. That pending hearing and determination of the appeal the Court do issue an order of stay of execution in respect to the ongoing process of execution in CMCC No. 338 of 2014.

7. That pending hearing and determination of the appeal the Honourable Court do stay the execution of the decree issued herein together with all consequential orders and actions.

8. That a declaration be and is hereby issued declaring the purported proclamation, attachment, advertisement, seizure, storage, impoundment of motor vehicle registration number KBF 655W a Mercedes Benz pulling trailer registration number ZF 4672 by Misa M. Auctioneers is irregular and unprocedural and thereby illegal and therefore a nullity in law and cannot yield any lawful result.

9. That the respondents, their representatives, assigns or agents or appointees be ordered and are hereby ordered to effect prompt and immediate unconditional surrender and eventual release/return/delivery of motor vehicle registration number KBF 655W a Mercedes Benz pulling trailer registration number ZF 4672 currently held in their custody to the Applicant.

10. That pending hearing and determination of this Application a conservatory order do issue preventing the advertisement, sale and disposal, disassembling, or in any other manner conversion of motor vehicle registration number KBF 655W a Mercedes Benz pulling trailer registration number ZF 4672 or any other property belonging to the Applicant by the respondents, their agents, assigns or appointees.

11. That the Applicant be allowed to effect service of this order both directly upon the respondents and their counsel and the auctioneer and through substituted means in view of the mischievous circumstances surrounding the purported attachment and in view of the negative conduct of the respondents after the purported attachment.

12. That a declaration does and is hereby issued declaring that there is no proper decree for purposes of execution in this suit and that the existing decree herein being a nullity is incapable of execution and has no force of law nor legal effect.

13. That the costs of this Application be provided for.”

7. The application is supported by grounds on its face, a supporting affidavit sworn by Caren Nadia Jaguga, the advocate for the applicants' insurer, a further affidavit sworn on 9th April, 2018 by the same advocate and annexures to the affidavits.

8. The respondents opposed the application through a replying affidavit sworn on 28th March, 2018 by their counsel, Geoffrey Kilonzo, a further replying affidavit sworn by the same counsel on 11th April, 2018 and annexures thereto.

9. In my view, the question that must first be answered is whether the respondents were entitled to carry out execution of the decree in light of the proceedings that had taken place in this matter. The respondents' view is that they acted legally in executing the decree. The applicants think otherwise.

10. I have already highlighted the history of the matter. By the time the parties left the court on 28th June, 2017 the stay order issued on 27th March, 2017 was still in force. The respondents' submission is that the stay order had lapsed since the applicants had failed to deposit the sum of Kshs. 1.4 million in court as agreed. This argument is untenable considering that the parties had agreed on 10th April, 2017 to hold the depositing of the cheques in court. At no time was that consent by the parties set aside. In the circumstances the applicants could not therefore be accused of failing to deposit the said Kshs. 1.4 million in court. Consequently, the order of stay could not have lapsed on the ground that the applicants had failed to comply with the condition of stay requiring them to deposit the money in court.

11. Since the attachment of the applicants' motor vehicle by the respondents was illegal, it follows that the respondents should meet the expenses arising out of that action. In the circumstances, I direct that the respondents will meet the auctioneers' expenses incurred as a result of the unlawful attachment of the applicants' property.

12. The other question to be answered is whether there should be stay of execution of the judgement delivered by the trial court. Although the advocates for the parties have engaged in lengthy submissions on this issue, the answer will be found in the undisputed facts of the case.

13. It is not disputed that the applicants filed their appeal in March, 2018. The judgement appealed against was delivered in February, 2017. Section 79G of the Civil Procedure Act requires that on appeal be filed within 30 days from date of the delivery of the judgement appealed

against. The said Section authorizes the court to enlarge time for filing an appeal if an appellant shows good and sufficient cause for not filing an appeal out of time.

14. The applicants have indicated that the respondents' acquiesce to the stay orders and the court's extension of the same can only mean that there was implied leave to file the appeal out of time. The applicants further submit that the appeal was not filed due to oversight by their advocates.

15. In this case, we are talking of a situation where the applicants are yet to make an application to file an appeal out of time. What they simply did was to file Civil Appeal No. 12 of 2018. Without the leave of the court, there is no valid appeal. As matters stand, the applicants have not sought leave to appeal out of time. They rely on what they claim is implied leave. There is no such thing, for a party who desires to seek extension of time must always bear in mind that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court. Such a party should also lay the basis to the satisfaction of the court as to why time should be enlarged – see **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**. In order for a court to exercise its discretion, it must be moved through an application. A party cannot file an appeal out of time and allege that the actions of the judge and the other party made it to conclude that time had been extended.

16. In the case at hand, I am tempted to agree with the respondents that the applicants were never desirous of appealing but were only intent on delaying the enjoyment of the fruits of judgement by the respondents.

17. The stay of execution that was granted to the applicants was anchored on the hearing and determination of an appeal. There was no appeal filed in time and neither was leave obtained to file the appeal that was filed out of time. There being no valid appeal filed by the applicants, this court has no reason for sustaining the order staying execution. In the circumstances, the applicants' prayer for stay of execution fails and the same is dismissed.

18. This decision also takes care of the initial notice of motion dated 9th March, 2017. In essence there is nothing more to bar the respondents from executing the decree of the trial court. The respondents are at liberty to execute the decree less the auctioneer's charges for the botched execution by the respondents.

19. Considering the outcome of this application I do not deem it just to award costs to any of the parties. The applicants will meet their costs for this application and the respondents will also meet their costs for the same.

Dated, signed and delivered at Malindi this 25th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT