



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 12 OF 2018

THE MONARCH INSURANCE COMPANY LIMITED.....APPELLANT

-VERSUS-

**MOSES CALEB OCHANGO & CATHERINE ERNEST OCHANGO (as the
Administrators and Legal Representatives of the Estate of STAFFORD OCHANGO,
DECEASED).....RESPONDENTS**

RULING

[1] Following an application by the applicant for stay of execution, the court rendered itself vide the Ruling dated **22nd May, 2018** and issued the following orders:

[a] That there be stay of execution of the Judgment and Decree issued in **Eldoret CMCC No. 986 of 2015** pending the hearing and determination of the appeal;

[b] That security for the due performance of the Decree be furnished in the manner ordered by the Learned Trial Magistrate in the Ruling dated **20 April 2018**; namely, that 70% of the decretal sum due as at **5 March 2018** (the decretal sum being **Kshs. 6,488,750**) be deposited in an interest earning account in the joint names of Counsel for the parties herein within 14 days from the date hereof; and that the remaining 30%, in the sum of **Kshs. 1,296,149.40** be paid out forthwith to the Respondents; and at any rate not later than 14 days from the date of the Ruling, failing which the stay order would automatically lapse;

[d] That the costs of the application shall abide the appeal.

[2] The matter was then listed for mention on **17th July, 2018** to confirm compliance and for further orders. In the interim the Applicant filed an application dated **5th June, 2018** under Certificate of Urgency for extension of orders of **22nd May, 2018**. That application was compromised on **26th June, 2018** and a Consent Order recorded pursuant to which the applicant was granted 14 more days within which to comply with the court orders, and the date of **17th July, 2018** maintained for purposes of confirming compliance. On the **11th July 2018**, the Applicant filed yet another application under certificate of urgency for further enlargement of time within which to comply with the order issued on **22nd May, 2018** on the grounds that:

[a] The Court granted temporary stay of execution on **22nd May, 2018** on condition that the Appellant/Applicant the sum of deposit **Kshs. 4,542,125/=** being 70% of the decretal sum be deposited by the Appellant as security; and that payment of 30% of the decretal sum, being **Kshs. 1,946,625/=**, be paid to the Respondent within 14 days from the date of the Ruling; and that in default the order would automatically lapse.

[b] That the period within which to comply with the order lapsed on **4th June, 2018** while the appellant was in the process of complying with the said orders.

[c] That the Appellant currently has no orders of stay of execution in **Eldoret CMCC NO. 986 OF 2015**.

[d] That the Appellant has partially complied with the said Court Order and has already issued four cheques totaling the sum of **Kshs. 3,000,000/=**.

[e] That the Appellant is still willing to comply with the said Court Order if granted more time to do so.

[f] That the Appellant is willing to issue a cheque for the pending balance of the decretal sum herein, if granted more time to do so.

[g] That the Appellant shall release and deposit the balance on the decretal sum in a period of within 14-21 days from the date herein.

[h] That the Appellant will suffer irreparable loss if time is not extended within which to comply with the order issued on **22nd May, 2018**.

[i] That the appeal herein shall be rendered nugatory should execution be allowed.

[j] That it is in the interest of justice that time is extended as prayed.

[3] The application was opposed by the Respondents. Their Advocates, **M/s. Z.K. Yego Law Officers**, filed grounds of opposition in response to the application dated **13th July, 2018**, contending that:

[1] The application dated **11th July, 2018** is unmerited and constitutes an abuse of due process of court.

[b] The further extension of time sought through this Application is in vain and has no basis or foundation in law.

[c] That the order sought in paragraph 5 of the application cannot be granted since it is *Res Judicata*.

[d] That the consent order issued on **26th June, 2018** can only be extended by a further consent of parties as courts do not write agreements for parties.

[e] The Application herein lacks merit and should be dismissed with costs to the Respondents.

[4] Having considered the said application, the supporting affidavit and the grounds of opposition, as well as the submissions made on by learned counsel, it is manifest that the Applicant was provided with two opportunities to comply; one was pursuant to the Court Ruling dated **22nd May, 2018**; and the second was by consent. It did not take advantage of those opportunities. Secondly, Grounds (ii) (iv) and (vii) of the Grounds raised in support of the application clearly evince a perilous stance, namely that the Applicant is ready to pay, but on its terms. That is unacceptable and smacks of abuse of the court process.

[5] The matter having been decided by the court and thereafter compromised by consent, the court is *functus officio*. It cannot go back and reconsider its decision. Moreover, the last extension having been by consent, the same can only be varied by consent. **Gateway Insurance Company Limited -vs- Aries Auto Spares [2011] eKLR** granted that the period for compliance was part of the consent order. The Court of Appeal made this clear in **Gateway Insurance Company Limited vs. Aries Auto Sprays [2011] eKLR** thus:

"The consent order was clearly entered into freely, and stated in unambiguous terms exactly what was to happen within the time limits stipulated therein, and provided for a default clause in the event of any breach. There is no dispute about that. The parties were represented by their respective two advocates...There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been a mistake or misapprehension...The consent order was made on 22nd May, 2003, limiting the time for the doing of any act to 14 days from that day. The appellant herein lost its right to apply to court for extension on 5th June, 2003. By that date, the default clause 1(c) of the consent order had become operational, and the orders stood vacated, giving the respondent the liberty to enforce its judgment..."

Clearly therefore, in the absence of fraud or mistake, the Court would have no jurisdiction to vary the Consent Order made herein on **26 June 2018** by further extending the time for compliance.

[6] In the light of the foregoing, it is my finding that the application dated **11 July 2018** is devoid of merits and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY 2018

OLGA SEWE

JUDGE