



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MISC. APPLICATION NO. 40 OF 2018**

**JANET MUCOGO MUTUA (suing thro'**

**JOHN MUTUA MUIA.....PLAINTIFFS/RESPONDENT**

**V E R S U S**

**CHRISTOPHER MWANGI MUNGA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MARK ONE EXPRESS.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

There are two applications pending before court as follows;

1. The applicants have filed application dated 27/06/2018 seeking stay of execution of ex-parte judgment of 03/04/2018 and stay of execution of the decree in **Wang'uru PMCC No. 149 of 2015** on 20/06/2018.
2. The respondent has also filed an application dated 16/07/2018 seeking that the orders granted on 02/07/2018 be reviewed and discharged.

The Notice of Motion dated 16/7/2018 is brought under **Order 45 rule 1(1)** and seeks orders that the orders issued on 2/7/2018 be reviewed and discharged. It is based on the following grounds:

- a) There is no pending Appeal.
- b) The Judgment delivered on 3<sup>rd</sup> April 2018 was not ex-parte.
- c) That there was no decree issued on 20<sup>th</sup> June 2018.
- d) There is a similar application pending in P.M.CC No. 149 of 2015 at Wang'uru seeking the similar orders hence an abuse of the due process of the court.
- e) This Honourable Court was misled by the Applicants hence the grant of the order.
- f) The applicant is not candid to the court and has come in court with unclean hands.
- g) The ex-parte orders were fraudulently obtained from the court by the applicant/respondents by concealing material facts of the case.

The application is supported by the affidavit of the applicant Janet Musogo Mutua sworn on 16/7/2017. She deposes that the respondent misled the court into granting the ex-parte orders on 2/7/2018 as there was no pending appeal. Further that the case never proceeded exparte as alleged since she testified with her witnesses in the presence of the advocate for the applicant who all through participated in the proceedings and cross-examined witnesses. The matter was taken over by an advocate Miss Mwangi who sought adjournment twice on 9/1/2018 and 6/2/2018 who on 6/2/18 was given a last adjournment. The date was taken and on the date, the advocate for the respondent failed attend court and the court ordered the defence case to be closed. That the applicant failed to disclose material facts and was therefore not candid. That the applicant misled the court as the decree was issued on 3/4/2018 and not 20/6/2018. That the applicant concealed material facts that there was pending application in Wang'uru P.M.C.C 149/2015 which is seeking stay orders like the one they are seeking

before this court.

The respondents to this application did not file a Replying Affidavit nor did they file grounds of opposition. The application is therefore unopposed. **Order 51 rule 14 Civil Procedure Rules** provides:

***“Any respondent who wishes to oppose any application may file any one or a combination of the following documents:-***

***a) A notice of pre-liminary objection and/or***

***b) A replying affidavit and/or***

***c) Statement of grounds of opposition.***

***The said documents in sub-rule(1) and a list of authorities, if any shall be filed and served on the applicant not less than 3 clear days before the date of hearing***

***(3) -----***

***(4) If a respondent fails to comply with sub-rule (1) and (2) the application maybe heard exparte.”***

The issue which arises in this application is review. Review is provided under order **45 rule 1 Civil Procedure Rules** which provides:

**1. “(1) Any person considering himself aggrieved –**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is hereby allowed, And who from the discovery of new and important matter or evidence which, after the exercise of die diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay.”**

In short the party has to prove –

- i) Discovery of new and important matter of evidence.
- ii) Mistake or error apparent on the face of the record.
- iii) Any other sufficient reason.

Review will be ordered where a party proves the existence of anyone of this this conditions.

The applicant annexed the decree issued by the trial court and it shows that Judgment was entered on 3/4/2018 and decree issue on 20/6/18. The applicants in the application 27/6/18 misled the court that the matter proceed exparte before Wang’uru Court had filed a similar application before Wang’uru court as shown annexure JMM II which was supposed to come for hearing on 10/7/2018 which was seeking similar orders. Filing the two applications was an abuse of court process. The allegation that the Advocate Redempta Okwany failed to attend court was misleading as the applicants have shown that another advocate had taken over the matter and had taken a hearing date of 6/3/18 by consent as deponed by the applicant and she never attended court. This has not been rebutted as there is no affidavit to oppose the application. In **Uhuru Highway Development Ltd –v- Central Bank of Kenya & 2 Others C.A No. 140/1995** it was stated:-

***“it has to be clearly understood that a party who goes to a Judge in the absence of the other side assumes a heavy burden and must put before the Judge all the relevant materials including even material which is against his interest. The basis of this requirement is obvious it I universal rule of natural justice that court orders ought to be made only after hearing or giving the parties an opportunity to be heard. Ex-parte orders whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption there must be a good and compelling reason for it.”***

The applicant had filed an application similar to the present one before the trial court. They were seeking an order for stay. No appeal has been filed. Order 42 rule -6(1)- provides:-

**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 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 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.”**

The applicant having moved the trial court with an application for stay, he ought to have come to this court by way of appeal to challenge the order of the trial court. Applicant has two parallel applications one before the trial court which is pending and the one before this court where the interim order was granted. I find that there are sufficient reasons to warrant a review of the ex parte orders. The application seeks stay of execution pending the hearing of application and the appeal. There is no appeal. Where a party files an application which is clearly an abuse of court process and obtains ex-parte orders, when the court is called upon to review it, there is sufficient reason for review. The applicant respondent did not oppose the application. The power of the court to refuse or grant stay is a discretionary power. The discretion must be exercised fairly. The party who has not opposed the application is not deserving of court's discretion.

I find that the applicant has merits. I order that the interim orders are reviewed and set aside.

The application by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is brought under Order 22 Rule 22(1) Section 1A & 1B & 80 and Order 51 Rule -1- **Civil Procedure Act**.

**Order 22 rule 22(1) Civil Procedure Rules** provides:

***“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.”***

It envisages a situation where a decree has been sent for execution and a party seeks to stay the execution pending seeking an order of stay in the court which issued the order or to the appellate court. This is not the court where the decree was sent for execution as and stated in the grounds in support of the application, the application for stay was made before the trial court. The application is not therefore properly before this court because the applicant filed an application for stay before the trial court and this court. The trial court did not make any orders.

Stay of execution in the High Court is under **Order 42 rule 6(1) of the Civil Procedure Act** which I have cited Supra. It envisages a situation where a party has filed an appeal. As I have pointed out no appeal has been filed before this court and so **Order 42 r 6** does not apply. Indeed the applicant has not quoted order 40 rule 6 Civil Procedure Rules as one of the provisions under which the application is brought.

Section 1A & 1B is on the overriding objectives of the Civil Procedure Act and Rules. It is provided –

***“1A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***1B.(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –***

***(a) The just determination of the proceedings.***

***(b) The efficient disposal of the business in the Court;***

***(c) The efficient use of the available judicial and administrative resources.***

***(d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties, and***

***(e) The use of suitable technology.”***

The provisions are clear. A party must bring the application under a substantive provision of the Civil Procedure Act and urge the court to consider the overriding objectives.

On the other hand **Section 80 of the Civil Procedure Act** provides for review of decree or order. It is provided:

***“80. Any person who considers himself aggrieved –***

***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

There is no prayer for review in the application.

The applicant is seeking stay of execution of the ex parte judgment and decree pending the hearing and determination of this application. It

also seeks stay of execution pending appeal when there is no appeal filed. The application is not properly before this court in-view of the provisions under which it has been brought. The application is an abuse of court process in view of the fact that there is a similar application dated 11/5/2018 pending in the lower court at Wanguru in P.M.CC No. 149/2015 seeking some orders for stay of the Judgment delivered on 3/4/2018. The applicants did not prosecute the application which was filed on 12/6/2018. From the averments by the respondent, the applicant was directed to serve the application and take a hearing date at the registry. The applicants did not comply with the orders. He came to this court not an appeal but on the application seeking similar orders.

I am minded of the provisions of section 1A & 1B which I have quoted above. However I have quoted provisions above to show that the application is not properly before this court. Secondly the applicants have not filed an appeal before this court. Nothing has been tendered before this court to enable me to determine whether there is an arguable appeal or appeal on merits. The orders for stay pending appeal cannot be granted as there is no appeal which has been filed nor is there any appeal pending.

In conclusion I find that the application dated 27/6/2018 is not properly before this court and is an abuse of the court process. I order as follows:

- 1) The application dated 27/6/2018 is dismissed with costs.
- 2) The application dated 16/7/2018 has merits and is allowed.

Costs to the applicant.

**Dated at Kerugoya this 1<sup>st</sup> Day of August 2018.**

**L. W. GITARI**

**JUDGE**

**Mr. Mogusu for Applicant**

**Respondent – Absent**

**C/A - Naomi**