



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 108 OF 2017

SANA INDUSTRIES LIMITED.....1ST APPELLANT

ATTORNEY GENERAL.....2ND APPELLANT

VERSUS

ROBERT AYUNGA.....1ST RESPONDENT

SAMUEL THUO.....2ND RESPONDENT

RULING

1. The Applicant herein was sued by the Respondents in Thika CMCC No. 945 of 2014. The judgment in the lower Court was delivered on 14/03/2017. Counsel for the 1st Appellant immediately applied for a stay of execution. The 1st Appellant was granted a 30-day stay of execution. Before the expiry of the thirty-days, the 1st Appellant moved the lower Court *vide* a Notice of Motion dated 27/04/2017 seeking for stay of execution pending the hearing and determination of this appeal.

2. That application was heard *inter partes* and the Learned Trial Magistrate delivered a ruling thereon on 22/06/2017. The Applicant was successful for it obtained the following orders::

In the best interests of justice and to allow the appeal to proceed, the 1st Defendant's [1st Appellant's] application is allowed as per prayer 3. The 1st Defendant to comply with the evidence that it will deposit the half share of the judgment (sic) in a joint [interest] earning account to be opened by both advocates.

3. The 1st Appellant did not comply with the orders of the lower Court. Instead, it filed the Application in this Court on 26/07/2017.

4. After hearing that Application *inter partes*, I dismissed the Application in a ruling dated 02/11/2017. In material part, I ruled as follows:

I would decline to grant stay of execution anyway even if I were exercising my discretion in the first instance. However, as I already pointed above, I would decline to grant the request for stay for another reason: that the lower Court, in exercise of competent jurisdiction, already entertained a similar application and granted the orders sought. It would, therefore, be improper for this Court to entertain a similar application. For the record, I should point that I have analysed the Notion of Motion filed in the lower Court and the one filed in this Court. While requesting for similar orders, it is noteworthy that the main ground upon which the 1st Appellant sought the orders in the lower Court were that it feared that the Respondents would be unable to refund any decretal amounts paid to them. In this Court, however, the ground mutated to the one reproduced above: that payment of any decretal amount will cripple the operations of the 1st Appellant. This in itself, in my view, goes to the credibility of the arguments urged by the 1st Appellant respecting their application for stay before this Court.

5. This should have ended matters. It did not. On 29/02/2018, the Applicant re-appeared before this Court under Certificate of Urgency with the present Application. This time it seeks a "stay of execution of the decree issued on 11th January, 2018 by the Chief Magistrate's Court, Thika in the interim pending the hearing and determination of the instant appeal." It also seeks for certain orders lifting warrants of attachment already issued in the Lower Court as well as release of a Motor Vehicle attached in execution of the decree.

6. As I understand it, the Applicant claims that they have been unable to abide by the orders of the Learned Trial Magistrate in issuing the stay orders. Those orders had required the Applicant to deposit half the decretal amount in a joint interest bearing account between the two advocates pending the hearing and determination of the appeal. The Applicant says that the Counsel for the Respondents has adamantly refused to accept the monies for purposes of opening the bank account as ordered by the Court. The Applicant further says that the efforts to deposit that amount in the Lower Court also failed hence necessitating various applications in the Lower Court.

7. When the Application first came before me, I directed the parties to await a substantive ruling from the Lower Court. That ruling was delivered on 15/03/2018. It dismissed the Applicant's Application which sought, inter alia, for an order that the Respondents be compelled to open a joint interest bearing account so that it could comply with the Court orders of 22/06/2017.

8. The Lower Court formed the opinion that the "*Applicants have misused the Court process and are keen to blocking the Respondents from enjoying the fruits of their judgment.*" Holding that litigation must come to an end, the Court only granted the prayer permitting the Applicant's advocates to come on record and dismiss all other prayers including those asking for the return of the attached goods.

9. When the matter was first placed before me *ex parte*, I gave interim orders injunctioning the selling of the attached goods on the condition that the Applicant deposits the decretal amount in Court by the Close of Business on 09/02/2018.

10. The Applicant deposited Kshs. 1.2 Million in Court in compliance with this order.

11. One of the issues that was raised before me was whether the deposit of Kshs. 1.2 Million satisfied the condition imposed on 09/02/2018 that the "decretal sum" be deposited in Court. The Applicant says that going by the Trial Court's ruling of 22/06/2017 that is the amount it was required to deposit in Court. The Respondents, on the other hand, insist that the correct amount to be deposited was Kshs. 2.4 Million since that was the amount in the judgment.

12. I would readily accept that the Court's orders of 09/02/2018 was ambiguous in referring to "decretal amount" in the face of the Trial Court's ruling of 22/06/2017 which had ordered the Applicant to deposit half the decretal sum as a condition for grant of the stay. I would, in the circumstances, not penalize the Applicant by denying them audience on that score alone.

13. When the matter came up before me, the Respondents raised a Preliminary Objection. The gist of the Preliminary Objection is two-fold: First, that the Application is *res judicata* a similar application having been entertained by this Court. Second, that the Application is vexatious and an abuse of the process of the Court because similar applications were, at the time, pending before the Lower Court.

14. I am unable to sustain the Preliminary Objections. I do not think the Application is *res judicata* in its entirety. The Respondent is right that the part of the Application seeking stay pending the hearing and determination of the appeal is *res judicata*. I would also agree that the Application is inelegantly drawn. What the Applicant seems to be seeking is an order that will enable it to satisfy the conditions attached to the stay that was granted on 22/06/2017. They claim that they have been unable to satisfy those conditions owing to obstruction by the Respondents' counsel. That is an application which has not been determined by this Court. If sustained, it would justify the other consequential orders they seek – including the release of the attached goods. For the same reasons, I do not find the Application to be an abuse of the process of the Court absent findings of fact that the Application is premised on false allegations that they were unable to satisfy the conditions placed by the Court despite their best efforts. If their allegations are true, it would definitely be unfair to saddle them with execution in the face of the existing orders of 22/06/2017.

15. I would therefore dismiss the Preliminary Objection and order that the Application dated 09/02/2018 proceed to hearing. The Preliminary Objection was triggered, in large part, by the imprecise way in which the prayers were phrased. I will therefore order that the costs will be in the Cause.

16. Orders accordingly.

Dated and delivered at Kiambu this 26th day of October, 2018.

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JOEL NGUGI

JUDGE