



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 90 OF 2014**

**NJORO CANNING FACTORY.....APPELLANT**

**VERSUS**

**JOHN MICHEAL MBUGUA.....1<sup>ST</sup> RESPONDENT**

**SAMCON LTD.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal under Section 65 1(b) of the civil Procedure Act Cap 21 Laws of Kenya and Order 42 rule 1 of the Civil Procedure Rules 2010 from the judgment and decree of Hon. S. Mungai, Chief Magistrate Nakuru delivered on 4<sup>th</sup> June 2014 in CMCC No. 962 of 2006)***

**RULING**

1. Judgment in the trial court was delivered on the 4<sup>th</sup> June 2014 in favour of the Respondents. The appellant was dissatisfied and filed this appeal.

Upon application, the court on the 19<sup>th</sup> November 2015 granted the appellant an order of conditional stay of execution pending determination of the appeal, that it was to file in court a Bank guarantee of Kshs.2.4 Million or deposit in a fixed joint account in the names of both parties' Advocates within thirty days, a sum of Kshs.2,00,000/=.

2. The appellant filed a bank guarantee as directed and which lapsed on the 15<sup>th</sup> June 2016, but failed to review the same for another period after the 15<sup>th</sup> June 2016.

It is after the said expiry that on the 27<sup>th</sup> July 2016 the respondents moved to execute the decree under warrants of attachment issued to Nasioki Auctioneers and proclaimed its movable property on the 27<sup>th</sup> July 2016.

3. By its Notice of Motion Application dated the 29<sup>th</sup> July 2016 and brought under the provisions of **Order 42 rule 6(2), of Civil Procedure Rules** Section 3A of the Act, the Appellant sought the following orders:

**1. Spent**

**2. Spent**

**3. That pending the hearing and determination of the intended appeal this Honourable Court be pleased to stay execution of the judgment and decree arising there from in Nakuru CMCC**

**No.962 of 2006 and/or proclamation arising therefrom.**

4. The main ground for the application is that having filed the bank guarantee as directed by the court, and renewed the same and having overlooked to renew the same when it expired on the 15<sup>th</sup> June 2016, and having filed another guarantee on the 29<sup>th</sup> July 2016, the applicant has urged that the later guarantee be deemed duly filed and accepted as perfect security.

It is averred in its supporting affidavit that it was due to sheer inadvertent that the guarantee was not renewed and if not accepted, it would render the appeal nugatory there is already a proclamation upon the applicants goods.

5. In opposing the application, the respondents by their Replying Affidavit sworn by the 1<sup>st</sup> Respondent on the 3<sup>rd</sup> November 2017 states that the application is *Res judicata*, similar orders having been sought in an application dated 25<sup>th</sup> March 2015, and that the applicant failed to explain why it did not renew the bank guarantee 1½ months after it lapsed.

It is submitted that failure to renew the bank guarantee is tantamount to failure to comply with the conditional stay orders.

6. I have considered the application, affidavits in support and against. There is no dispute that the applicants did comply with the court orders upon which the stay was given. It is stated that the appellant inadvertently failed to renew the bank guarantee for 1 ½ months and stated human error as the failure to renew it.

The Auctioneers fees raised upon proclamation of Kshs.69,400/= has not been paid since the interim stay order was issued on the 3<sup>rd</sup> August 2016. it is dated the 27<sup>th</sup> July 2016.

7. The appellant has filed a further Bank guarantee that will expire on the 28<sup>th</sup> July 2017.

The Respondent has urged the court to deny the orders that they state the applicant violated and further says that there is no inadvantage when a party fails to obey a court order.

I have considered the authorities cited by the respondents. No prejudice has been shown that the respondents would suffer if the guarantee now filed is accepted pending hearing of the appeal.

8. The court is empowered to consider the best interest of both parties to a suit and the prejudices that each may suffer if certain orders are either denied or allowed. It is not prudent or necessary to deny a party a relief just because a certain procedural step has not been taken where it is clear that the party had clear intentions to do what is required to be done, but due to an error, human or otherwise sufficient reason is shown. See **Section 1A and 3A of the Civil Procedure Act**.

9. I am satisfied that the inadvertence by the appellant to renew the bank guarantee when it had done so since November 2015 was a genuine human error.

I am persuaded that acceptance of the bank guarantee filed, and which will expire in July 2017 is sufficient good will by the appellant to comply with the orders of stay of execution given on the 3<sup>rd</sup> August 2015.

10. I do not agree with submission by the respondents that the application is *Res judicata* as the appellants seek not for an order of stay of execution *per se*(Order 3) but extension of time and acceptance of the bank guarantee(Order 4) as filed.

11. There are Auctioneers costs that were necessitated by the appellants failure to renew the guarantee. The fees is stated at Kshs.69,400/=. The appellant has not challenged the fees. I take it that it is acceptable to it.

12. For those reasons I shall allow the appellants application dated 29<sup>th</sup> July 2016 in terms of prayers No. 3 and 4.

I further direct that the Auctioneers fees of Kshs.69,400/= be paid by the Appellant within 30 days of this is ruling as well as the costs of the application to the respondents.

It is so ordered.

**Dated, Signed and Delivered this 13<sup>th</sup> Day April of 2017.**

**J.N. MULWA**

**JUDGE**