REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 28 OF 2016

MAUREEN ATIENO OTIENO (*Suing as the personal representative of the estate of* **CHARLES O. MIRUKA……..........…APPELLANT/RESPONDENT**

VERSUS

PHILIP JUMA ……………...........................……APPLICANT/RESPONDENT

RULING

Before me is the Notice of Motion dated 20th March 2017 in which the Judgment Debtor/Applicant seeks an interim stay of proceedings and/or execution in Kisumu CMCC No. 312 of 2006 and further that this court do review and/or vary or set aside its orders dated 23rd February 2017 allowing the Decree Holder/Respondent to proceed with execution but subject to fulfilment of the conditions imposed by Honourable Lucy Gitari, the trial magistrate, as she then was, in a judgment dated 18th October 2012 and in its place dismiss the appeal.

The gist of the application as stated on the face of the application is that there is an error apparent on the face of the record as there still exists a moratorium against Blue Shield Insurance Company. The Notice for extension of the moratorium is annexed to the supporting affidavit of the Judgment Debtor/Applicant sworn on 20th March 2017.

The Decree Holder/Respondent opposed the application on grounds that –

> **(a) " The application is fatally defective.**
>
> **(b) The application lacks merit.**
>
> **(c) The appellant has fulfilled all the conditions to execute the decree in the lower court in that she has obtained letters of grant of administration in Kisumu HCCC Succession No. 316 of 2006 in the matter of the estate of Charles Otieno Miruka.**
>
> **(d) Stay of execution and/or review are not available to the applicant".**

The application was canvassed by way of written submissions. The applicant is represented by the firm of Otieno, Yogo, Ojuro & Company Advocates while the respondent is represented by Bruce Odeny & Company Advocates.

For the applicant it is submitted that this court does have jurisdiction to grant the orders sought; that the affidavits of Geoffrey O. Yogo and Collins Orieyo both dated 20th January 2017 show the error was

inadvertent in that both advocates had to attend to more than one superior court and non-attendance was therefore not intentional. This court was referred to several cases on the same matter, viz:

- **Ngala Nyagilo V. George Otieno Ongudho [2014] eKLR**
- **Madzayo Mrima & Company Advocates V. Kenital (K) Limited [2012] eKLR**

The court is urged to find that advocates cannot control the timing of the courts and as such the non-attendance of the advocates should not be visited upon their innocent client. The court is further urged to take judicial notice of Section 3A of the Civil Procedure Act and also consider that the respondent shall not suffer irreparable loss if the application is allowed.

In reiterating the respondent's opposition to the application it is submitted that, firstly, the application is premised on irrelevant provisions of the law as Sections 1A, 1B and 3A do not provide for review. That the application is an abuse of the court process and Section 3A can only be invoked where rules do not provide for the procedure. On this Counsel for the respondent has cited **Kisumu HCCC No. 236 of 2000 Ranjinder Singh Valika V. Noolez Shamji & Shloah Investments.**

Secondly that the appeal was not opposed and that in fact the applicant did not attend the hearing despite being duly notified. It is contended that this court should not aid a party who has been indolent.

Thirdly it is argued that the submissions of Counsel for the applicant are not relevant to the issue before this court.

Fourth, that even on the merits the application cannot succeed as the order sought is one to review a ruling but not an order or a decree. On this Counsel has cited **Kisumu HCCC No. 34 of 2004, Nathan Ondego Mdeizi V. National Housing Corporation.** It is further submitted that the applicant has not laid a proper basis for the order as dictated by Order 45 of the Civil Procedure Rules; that no proof of existence of a moratorium was brought to court at the time this court heard the appeal and neither did the applicant prove that Blue Shield was a party to the proceedings. It is also contended that there was no proof at the hearing that the applicant was insured by Blue Shield Insurance Company. That in any event if the contention is that this court misconstrued the law then this matter should be one for appeal but not for review. The court was referred to **Nairobi HCCC No. 1227 of 1996 – Edward Kings Onyancha & Another V. China Jiangsu International Economic Technical Corporation** where Visram J quoted a passage in **National Bank of Kenya Limited V. Ndungu Njau – C/A No. 211 of 1996.** This court is urged to find that based on the aforegoing this application lacks merit and should be dismissed with costs.

I have considered the application, the grounds thereof, the supporting affidavits, the grounds of opposition and rival submissions of Learned Counsel for the parties.

First of all I agree with Counsel for the Respondent that the submissions filed on behalf of the applicant do not address the application before the court. That application is the one dated 20th March 2017 which was filed under a certificate of urgency of even date. The same seeks to vary the orders of this court made in the ruling delivered on 23rd February 2017. There can be no doubt about that as the ruling itself is attached. It is also the application that was certified urgent on 23rd March 2017 and placed before me for directions on 4th April 2017 and which subsequently was by agreement to be canvassed through written submissions. Clearly the submissions refer to another application which has never been set down for hearing.

The above notwithstanding and all technicalities aside it is my finding that this application has no merit. In its ruling, now sought to be reviewed, this court was clear that the appeal against the ruling of the lower court, was dismissed because firstly the existence of a moratorium was not proved. Secondly because it was not shown that Blue Shield Insurance Company in whose favour there was a moratorium was a party in the suit or that there was a declaratory judgment against it. Further but more importantly it was not demonstrated that the applicant was insured by Blue Shield Insurance Company such as would entitle him to enjoy the terms of that moratorium or stay. This court found, as did the Trial Court, that those issues had not been clarified at the trial and in the appeal. To this application and his supporting

affidavit the applicant has attached a copy of the notice of extension of the moratorium for thirty days effective 15th February 2017. Whereas this could prove this court wrong in holding that there was no moratorium at the time of its ruling the applicant has still not demonstrated that he was insured by Blue Shield Insurance Company and that Blue Shield Insurance Company was liable to satisfy the decree made against him by the lower court and that as such he is subject to the moratorium. Therefore whereas I appreciate that this court has discretion to grant the orders sought my finding is that it has not been demonstrated that there is an error apparent on the face of the record or indeed any other ground to warrant this court to review its ruling delivered on 23rd February 2017.

Accordingly the application dated 20th March 2017 is dismissed with costs to the Decree Holder/Respondent.

It is so ordered.

Signed and dated at Kisumu this 18th day of October 2017

E. N. MAINA

JUDGE

Signed and delivered at Kisumu this 19th day of October 2017

D. S. MAJANJA

JUDGE