



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 18 OF 2017

**PHILMARK SYSTEMS SERVICES LIMITED.....
APPELLANT**

VERSUS

**ANDMORE ENTERPRISES LIMITED.....
.....RESPONDENT**

RULING

1) By a notice of motion dated 12.7.17 brought under Order 50 rule 5, Order 42, 45 and 51 of the Civil Procedure Rules, Section 3A,80 and 95 of the Civil Procedure Act; the applicant/appellant prays for orders that

a. This application be certified urgent and be admitted for hearing in the first instance

b. That the Honourable court be pleased to order interim stay of any further execution of the judgment and decree of the trial court dated 20.1.17 and stay the garnishee proceedings already commenced in Kisumu CMCC NO. 322 OF 2016 and/or other consequential orders and/or pending hearing and determination of this application inter partes and/or further orders of the court

c. The court be pleased to set aside and/or review the court orders dated 22.5.17 and 31.5.17 respectively and enlarge time within which the applicant should comply with regard to providing security

d. The court be pleased to grant an order of stay of execution of the decree and judgment of the trial court dated 20.7.17 and/or in whichever manner pending hearing and determination of KISUMU HIGH COURT CIVIL APPEAL NO. 18 OF 2017 currently pending between the parties

e. The garnishee order nisi and absolute be set aside and/or stayed pending the hearing and determination of the appeal

f. Costs of this this Motion be in the cause

2) The application is based on the grounds among others that:

a. This court on 22.5.17 issued an order of stay of execution of the judgment and decree in this appeal pursuant to consent by parties

- b. The applicant could not comply with one of the conditions for reasons beyond his control**
- c. The applicant was informed by her insurer that they could not provide a financial guarantee**
- d. The applicant has now availed a bank guarantee which is sufficient security in the circumstances**
- e. It would be both just and equitable and in the interest of justice to grant the orders sought**

3) The application is supported by an affidavit sworn on 12th July 2017 by Oliver Oyoo Ogwa who describes himself as financial director of the applicant, who reiterates the grounds on the face of the application. The deponent avers that the applicant paid a total of Kshs. 1,400,000/- out of the undisputed sum as shown by 2 deposit slips marked **OOO-1** but was unable to get an insurance guarantee by 29.5.17 as agreed. He further avers that the applicant had obtained a bank guarantee for Kshs. 5,368,707.02 from African Corporation Bank as shown by a copy marked **OOO-3**. He additionally avers that the garnishee proceedings being undertaken before the subordinate court will subject the applicant to financial ruin and cause it irreparable loss and damage.

4) The application is opposed on the grounds set out in the grounds of opposition dated and filed on 12.7.17 and a replying affidavit sworn on 10.5.17 by Richard B.O. Onsongo, the respondent's advocate. He avers that the orders sought to be set aside or varied were made by consent and can only be set aside or varied by consent or on basis of factors which can vitiate a contract. He further avers that the garnishee has indicated that they have sufficient funds to answer the decree as shown by a replying affidavit sworn on 30.6.17 by Winnierohi Wafula, the garnishee's legal manager marked **BOR-1**.

5) I have considered the application in the light of the supporting and replying affidavits, the grounds of opposition and submission filed on behalf of both parties. Prayers 1 and 2 have been spent. The main issue for determination in this application is whether the court should enlarge time that was agreed by the parties in a consent recorded on 22.5.17.

6) The principles for setting aside a consent order have been the subject of numerous cases. In opposing the application, the respondent cited 2 of cases. In ***Flora Wasike v Destino Wamboko [1988] eKLR***, the court held; -

"1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

2. The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.

3. In this case, there were no grounds which would justify the setting aside of the consent judgment."

7) In ***Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR*** the court cited ***National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503*** with approval where the Court of Appeal of Kenya stated:-

a. "This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

8) The applicant on the other hand cited ***Hiram vs Kassam (1952) 19EACA 131*** where the court held:-

"Prima facie, any order made in the presence and with the consent of counsel is binding on all

parties to the proceedings or action and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court..... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.” (Emphasis mine)

9) It was submitted for the applicant that at the time the consent was recorded, the applicant believed that it would secure an insurance guarantee and it was not until 7.6.17 that it was notified by Monarch Insurance Company Ltd that the company no longer issued financial commitment to any entity.

10) It is evident that at the time the consent was recorded, the applicant was not possessed of sufficient material regarding the availability of the insurance guarantee and information that the guarantee could not be granted was only communicated after the time for its provision had elapsed.

11) The applicant has in my considered view placed before the court evidence to show that non-compliance with the consent order was occasioned by factors beyond its control. The fact that the applicant has secured a bank guarantee for Kshs. 5,368,707.02 for the disputed judgment sum from African Corporation Bank as shown by a copy marked **000-3** is an indication that the applicant is willing to comply with the consent order.

12) The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of cases, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

13) For the foregoing reasons; the notice of motion dated 12.7.17 is allowed in the following terms:

a. The court hereby grants an order of stay of execution of the decree and judgment of the trial court dated 20.7.17 pending hearing and determination of KISUMU HIGH COURT CIVIL APPEAL NO. 18 OF 2017 currently pending between the parties

b. There is evidence that an insurance guarantee is not available to the applicant. This court therefore hereby therefore sets aside orders dated 22.5.17 and 31.5.17 respectively and grants the applicant 14 days to provide a bank guarantee for the disputed sum

c. Upon complying with order (b) above, the garnishee order nisi and absolute shall be stayed pending the hearing and determination of the appeal

d. Applicant is condemned to pay to the respondent throw away costs in the sum of Kshs.20,000/- within 7 days from today's date.

e. In default of compliance with any of the orders herein, the respondent shall be at liberty to execute for the balance of the decretal sum.

DATED AND DELIVERED THIS 19th DAY OF October 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant -

Respondent -