



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 173 OF 2015

MOHAMED AZIM MANJI.....APPELLANT/APPLICANT

VERSUS

PERPETUAL KATUMBI NZIOKI

(Suing as the mother and personal representative of the estate of

RYAN MAINA MIGOSI - deceased)RESPONDENT

RULING

0. This is a ruling on an application by Notice of Motion dated 16th February 2016 seeking extension of time to file the Memorandum of Appeal and for an order that the Memorandum of Appeal already filed herein on 11th November 2015 be deemed as properly filed within time and for an order for extension of time to comply with an order of the court on an application for stay of execution pending appeal from the decree in PMCCC NO. 26 of 2013.
0. The Application was based on rounds set out in the application and upon facts set out in a supporting Affidavit sworn by the appellant on 16th February 2016 primarily that the applicant's tenants' goods had been proclaimed by an auctioneer on 8th February 2016 in recovery of the decretal sum of Ksh.892,415.70; that the applicant had been unable to comply with the previous order of this Court (B. Thurania-Jaden, J.) made on 5th June 2015 for the deposit within 30 days of the decretal sum in an interest earning account in the names of counsel for both parties owing to miscommunication with his insurers and the said insurer was then able within 14 days of the application to deposit the decretal sum.
0. The application was opposed by the respondent who filed grounds of opposition dated 22nd February 2016 principally that the application was an abuse of process as the order for stay of execution was given eight months previously and the applicant had disobeyed the same; that the applicant had not explained what he was doing towards compliance with the order of the Court for the last eight months; and that the application was only prompted by the commencement of execution of the judgment.
0. I have considered the application, the affidavit evidence and submissions filed by Counsel for the parties – M/S Wangari Muchemi & Co Advocates for the Appellant and M/S Mutunga & Co Advocate for the Respondent – respectively dated 4th March 2016 and 10th March 2016. While counsel for the applicant relied on mistake of counsel principle for not visiting the applicant with the consequences of the default of his advocates, counsel for the respondent urged the court to find that the applicant had chosen to disobey the orders of the Court and was guilty of laches in moving the court for extension of time and further that the memorandum of appeal was filed outside prescribed time without leave of court.
0. It is clear that there is lack of candour on the part both of the applicant and his counsel because of

the various versions of explanations given for the default in compliance with the order of court of 5th June 2015. While the applicant in an affidavit drawn by the advocate states that the failure to comply with the order of the court was due to oversight on the part of the advocate, and that the Insurance need 14 days to organize its finances to pay the deposit (see paragraph 12 of the Supporting Affidavit), the grounds of the application of 16th February, 2016 claim that it the appellant who needs time to negotiate with Insurance company as he is not able to pay the decretal sum (see Ground no.7 of the Grounds of the Application).

0. In paragraph 4, 5, 6 and 8 of the Supporting affidavit, the applicant blames his counsel as follows:

“4. That I am informed by my advocates that on 15th June 2015, the Court delivered a ruling in Machakos HC Misc. Application No. 177 of 2014 directing that the decretal sum of Ksh.700,817 be deposited in a joint interest earning account of both counsels for the parties or in court within 30 days. Annexed hereto and marked MAM” is a copy of the ruling.

5. That after the ruling the advocates wrote to the Insurance Company to comply with the order but due to an oversight they did not see the email and the Order was not acted upon.

6. That I am informed that the advocate who was handling the matter filed away the file without lodging the Memorandum of Appeal in time and also failed to follow payment deposits.

6. That consequently, the respondent proclaimed my tenants goods on 9th [February] 2016 and I was called to pick them on 15th February 2016 when time was almost over. Annexed hereto and marked MAM 3 is the warrant and proclamation.

8. That I am not financially able to pay the decretal sum and the insurance is seeking time to enable them deposit the money as directed by the Court.”

0. How could the same counsel who knew of the terms of the order of the court have filed the Memorandum of Appeal on 11th November 2015 and not take any steps to pursue the deposit of the decretal sum and or extension of time to deposit the money, until three months later when the applicant levied execution? In view of the clear complicity of the applicant in the failure to obey the order of the court, the principle of mistake of counsel does not assist the applicant who is not an innocent party.

0. Delay in filing appeal was previously explained as an act of the Insurance company. In her ruling of 5th June 2015 B. Thurania-Jaden, J. observed that the delay in filing the appeal is blamed on the bureaucracy in the office of the applicant’s insurer.

0. In ***Hunker Trading Company Limited v Elf Oil Kenya Limited*** [2010] eKLR, a decision to which this court referred the counsel before submissions, the Court of Appeal held that it was an abuse of the court process for a party to repeat an application for stay of execution in the Court of Appeal having failed to obey an order of the High Court on a previous application for stay of execution. The court said:

“The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”

0. As noted in paragraph 1 of the ruling of B. Thurania-Jaden , J of 5th June 2015 -

“The application dated 11th August 2014 [sought] orders that there be a stay of execution of the decree in PMCC Kithimani No. 26 of 2013. Secondly, the application seeks orders that leave be granted to appeal out of time.”

Conclusion

0. The present application comes after the respondent has moved to levy execution of the decree. It is a fresh application for stay of execution but sought on the same terms granted by the Court upon a previous application for stay of execution. I take the view that the application herein seeking an order for deposit of the decretal sum some eight months after the first order for stay of execution was granted upon such terms is merely a retake of an application for stay of execution. The application was not brought, as it could have been, at the time of filing of the Memorandum of Appeal before the levying of execution. It is clearly a new application for stay of execution based on the new facts that the respondent's auctioneers have proclaimed the applicant tenants' goods on 9th February 2016.
0. Indeed, because execution had been levied by the respondent, Prayer 2 of this application sought pending hearing of the application stay of execution in the same terms as the one of 11th August 2014 already dealt with by the previous court and granted upon terms which the applicant has failed to obey. It is an abuse of the process of the court to the extent that its effect is to obtain a fresh order of stay of execution after the respondent has levied execution only that the terms of the stay would be the terms granted by a previous court and disobeyed by the same applicant who now seeks the aid of the court. It has not been demonstrated that there are good grounds for the review of the orders of the court or for extension of the time for compliance with the order of the court.
0. However, as the Memorandum of Appeal has already been filed, albeit (five) 5 months after the Order of the Court of 5th June 2015, the same may proceed to hearing upon the necessary directions under section 79B of the Civil Procedure Act.

Orders

0. Accordingly, for the reasons set out above, I grant the Applicant's Notice of Motion dated 22nd February 2016 in terms of prayers 3 and 4 but decline to grant any stay of execution in the manner prayed for in prayer No. 5 of the Notice of Motion, or otherwise. The costs of the application will abide the outcome of the appeal.

DATED AND DELIVERED THIS 30TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kinyua for Mrs. Muchemi for the Appellant/Applicant

No appearance for the Respondents

Ms. Doreen - Court Assistant.