



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO.246 OF 2009

GEORGE ONSONGO MAGETO.....PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT/APPLICANT

RULING

Introduction:

1. On 16th January, 2015, this court (differently constituted) entered judgment against the applicant/defendant in favour of the respondent in the sum of **Kshs. 5,000,000/=** being damages for defamation and loss of business.

The court also awarded the respondent costs of the suit together with interest.

2. On 28th January 2015, the applicant herein lodged a notice of appeal against the entire judgment.

3. By an application dated 22nd May 2015, the applicant sought orders of stay of execution of the said judgment and orders of 16th January 2015, and all consequential orders pending the hearing and determination of the appeal filed by the applicant.

4. In a ruling delivered on 3rd February, 2016, this court granted the applicants prayer for stay of execution pending appeal, but on condition that it deposits the full decretal sum together with costs in a joint interest earning account to be held by the advocates for the applicant and respondent within 30 days from the date of the order/ruling failure of which the stay order shall be vacated and the respondent be at liberty to proceed with the execution of the decree.

5. It is the said orders of conditional stay of execution made on 3rd February 2016 that have triggered the instant application dated 8th April, 2016.

Applicant's Case:

6. The application dated 8th April, 2016 is brought under **Order 21 Rule 12 and 2 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Article 159 of the Constitution.**

7. In the said application, the applicant seeks orders as follows:

1. Spent

2. That pending the hearing and determination of this application, the Honourable court be pleased to grant interim stay of execution of the judgment and decree of this court dated the 16th day of January 2015 and all consequential orders.

3. That the honourable court be pleased to extend time within which the Defendant/Applicant can comply with the court's orders made on the 3rd day of February 2016.

4. That the Defendant/Applicant be deemed to have duly complied with the order of this Honourable court made on 3rd February 2016.

5. That the sum of Kshs. 1,564,625/= that is in Account number 0056004001119 held at Credit Bank Limited in the name of the Advocates of record for the parties herein be held in the account until the determination of the Appeal filed by the Applicant.

6. That cost of this application be provided for.

8. The application is supported by the grounds on the face of the said notice of motion and the affidavit of one **BILLY MOMANYI**, the applicant's Kisii Branch Manager in which he states that applicant released the entire decretal sum of **Kshs. 5,565, 625/=** and the same was on 29th March, 2016 placed in a joint interest earning account as ordered by the court by which time the respondent had already on 15th March, 2016, engaged the services of **M/s Omwoyo Auctioneers** to carry out the execution.

9. The applicant's Kisii Branch Manager depones that the delay in fulfilling the court's condition on stay by depositing the decretal sum within the 30 days was occasioned by the fact that a signatory to the account who should have ensured the timely compliance with the court order was bereaved.

10. The applicant's deponent states that the respondent has already been paid the sum of **Kshs. 4,000,000/=** to forestall the execution being a substantial sum of the decretal sum thereby leaving a balance of **Kshs. 1,564,625/=** which the applicant prays should be held in the joint interest earning account pending the hearing and determination of the appeal.

Respondent's Case:

11. Through his replying affidavit sworn on 22nd April 2016, the respondent opposed the applicant's application and states that the stay of execution orders granted to the applicant on 3rd February, 2016 were conditional that it deposits the decretal sum in a joint interest earning account within 30 days which 30 days lapsed on 3rd March, 2016 by which time the applicant had not made the deposit thereby leaving the respondent with no option but to execute the decree.

12. The respondent further depones that the warrants were issued on 10th March, 2016 and proclamation done on 15th March, 2016 by which time the applicant had still not made the requisite deposits of the decretal sum in the joint earning account.

13. The respondent contends that the execution was therefore lawful and justified in view of the applicant's failure to comply with a lawful court order.

14. When the application came up for hearing before me on 27th April 2016, Advocates for both parties chose to give oral submissions to the application as follows:

Applicant's Submissions:

15. Mr. Ochoki advocate for the applicant submitted that the applicant seeks the court's discretion to extend the time within which the decretal sum should have been deposited in the joint interest earning account and that the balance of **Kshs. 1,564, 625/=** that is currently in the joint account after **Kshs. 4,000,000/=** was paid out to the respondent should be held in the said account pending the hearing and determination of the appeal.

16. The applicant argued that the respondent would not suffer any prejudice if the amount was held in the account until the appeal is determined and that the reasons to delay in making the deposit had been explained in the applicant's affidavit in support of the application.

Respondent's Submissions

17. Mr. Gisemba, counsel for the respondent sought the dismissal of the application on the basis that the applicant had not complied with the terms of the court order of 3rd February, 2016.

18. Mr. Gisemba contended that even after the expiry of the 30 days stay period, the respondent did not execute immediately but took almost a month to do so, by which time, the applicant ought to have complied with the order of conditional stay.

19. The respondent argued that the applicant has not given any cogent reasons so as to warrant the issuance of the discretionary orders sought.

Analysis and Determination:

20. Upon considering the instant application, the respondent's replying affidavit and the rival submissions by advocates for both parties, I note that the only issue that requires my determination is whether or not the applicant has made out a case to warrant the exercise of this court's discretion in its favour.

21. Unfortunately for the applicant, I find that its application falls way too short of the threshold for the exercise of this court's discretion in his favour for the following reasons:

22. Firstly, the applicant as at 3rd February, 2016 already had the benefit of riding on this court's discretion when its application for stay of execution pending appeal was allowed. The wordings of the court's order on granting the stay were very clear that in the event of failure to deposit the full decretal sum in the joint interest earning account within the stipulated 30 days, the stay granted would stand vacated.

23. Clearly therefore, as at 4th March 2016, the stay orders stood vacated and therefore, the applicant cannot be seen to seek an extension of orders that are no longer in existence in the first place.

24. Secondly, the reasons advanced by the applicant for its failure to comply with conditions of the order of stay are not plausible or credible at all. The applicant claims that one of the signatories to the account was bereaved and therefore the money would not be released on time so as to beat the timeline of 30 days set by the court.

25. The applicant does not however disclose to the court which specific signatory was bereaved or who had died, for that matter, so as to enable the court exercise its discretion in its favour.

26. It is now trite law that the discretionary powers of the court should be exercised cautiously, judiciously and only in the most deserving cases.

27. In the instant case, the applicant expects this court to exercise its discretion in its favour in a vacuum in the absence of tangible evidence of bereavement. **In the case of Lolwe Agencies Ltd vs Midland Emporium Ltd HCCC No. 25 of 1998 (Ksm)** it was held that judicial discretion should be exercised judicially which means that it must be exercised upon reason and principle and not upon caprice or personal opinion.

28. It is noteworthy that the applicant did not even bother to disclose to the court the identity of the signatory who was alleged to have been bereaved. At best, the part of the applicant's affidavit that contains this information on bereavement ought to have been struck out of the court record for containing matters of inadmissible rumour and hearsay.

29. Lastly, the court takes great exception to the lethargic and casual manner in which it has treated its orders made on 3rd February 2016. It would appear that the respondent went back to sleep or sit on its laurels immediately after obtaining the stay of execution orders on 3rd February 2016 only to be awoken from its deep slumber on 29th March, 2016, almost 2 months after the order was made and almost 30 days after the stay of execution orders had been vacated.

30. It is quite ironical and unbelievable that the applicant herein, a banking institution of high standing and that is expected to understand the import of timelines in any banking transaction could afford to ignore the clear timelines given by the court.

31. In a nutshell therefore, I find that the application dated 8th April 2016 does not have merit and has been overtaken by events. The said application is hereby dismissed with costs to the respondent.

Dated, signed and delivered in open court this 16th day of August, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Applicant
- N/A for the Respondent
- Omwoyo: court clerk