



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 544 OF 2011

PICKWELL PROPERTIES LIMITED :::::::::::::::::::: PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED :::::::::::::::::::: DEFENDANT

R U L I N G

INTRODUCTION

1. Before the court is a **Notice of Motion** application dated and filed in court on 7th November 2014, by the Plaintiff/Applicant pursuant to order 45 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.
2. The application seeks the following orders:-
 - a) *That the order of this honorable court made on 5th December 2013 be reviewed and set aside.*
 - b) *That the Defendant pays the costs of this application.*
3. The application is premised on the grounds that the stay of execution granted to the Defendant under Order 42 Rule 6 was subject to an appeal being filed by the Defendant. However the Defendant has failed to institute an appeal within the appointed time or at all and has further failed to comply with the terms of the orders granting it the said stay of execution. In the premises the Defendant's conduct after the grant of the stay is a continuing abuse of the process of this court.
4. The application is supported by the affidavit of **Sheetal Kapila** dated and filed in court on **7th November 2014** with annexures thereto. The deponent deposes to be the advocate who has the conduct of the matter on behalf of the Plaintiff and is aware of the issues herein. The affidavit mainly expounds on the above grounds.
5. The application is opposed. Mr. Austin Ayisi has filed a replying affidavit sworn on 20th January 2015 opposing the application on behalf of the Defendant. The Defendant has filed a Certificate of Delay dated 18th February 2015 in an attempt to explain that the delay in filing the intended appeal was as a result of the missing court file.
6. Parties made oral submissions before the court. The Plaintiff/Applicant submitted that

Judgement was entered in favour of the Plaintiff in 20th March 2013. The Defendant then filed a Notice of Appeal on 21st March 2013, and also applied for a copy of the proceedings on the same day, which were ready for collection on 9th April 2014. However, the Defendants failed to file the intended appeal. The Applicant submitted that the Defendant obtained a stay of execution on the premise that it intended to appeal. However, that has not happened and so it is submitted that the Defendant's intentionally set out to abuse the process of this court. The Applicant further alleges that the Defendant has failed or refused to honour the terms upon which the aforesaid stay of execution was granted and this continuous to abuse the process of this court and hence the said orders should be reviewed.

7. On their part the Defendants submitted that the delay in filing the intended appeal was caused by the fact that the court file went missing. However, the Defendant submitted that they nonetheless complied with the conditions upon which the said stay of execution was granted by paying to the Plaintiff a sum of Kshs.60,000,000/=. On these grounds the Defendant submitted that this application is not merited and should be dismissed.

8. I have considered the application and submissions of the parties. In my view, the issue for determination is whether or not a review is a remedy against a defaulting party to comply with the terms of stay of execution.

9. The terms upon which this court on 5th December 2013 stayed the execution herein were as follows:-

a) The value of the decretal sum including costs based on the Judgment delivered on 20th March 2013 be ascertained.

b) The Defendant shall within 7 days of such ascertainment in (a) above pay to the Plaintiff half of the decretal sum pending the outcome of the intended appeal.

c) The Defendant shall within 7 days of such ascertainment in (a) above deliver to the Plaintiff a bank guarantee for the balance of the said decretal sum pending the outcome of the intended appeal.

d) In the event that the parties are not able to ascertain the decretal sum due within fourteen (14) days from today then the Applicant shall pay Kshs. 60,000,000/= to the Respondent and deliver to them a bank guarantee for the balance of the said decretal sum pending the outcome of the intended appeal.

e) The costs of this application shall be for the Plaintiff/Respondent.

10. The Defendant now claims to have complied with order (d) above which was in the alternative. However, there is no averment by the Defendant as to whether or not, and if not, why not, it has not complied with the second limb of the same order which required them to deliver a bank guarantee to the Plaintiff for the balance of the decretal sum pending the outcome of the intended appeal. It is clear that in order for the Defendant to determine the amount of the guarantee payable, the decretal amount had to be ascertained. While the Plaintiff made efforts to ascertain the decretal sum due and attempted to involve the Defendant in the process, the Defendant made no effort to ascertain the decretal sum and was content to pay the Kshs.60,000,000/= without due regard to the balance which was to be secured by the said bank guarantee. The Defendant is therefore in willful disobedience of the orders of this court. However, how is disobedience of court orders treated? Is an application for review of the court orders a cure for such disobedience, or, put another way, can review orders be granted as a means of punishing a disobedient party?

11. Order 45, under which an order of review may be granted, states that"-

Order 45 Rule 1

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. Clearly, Order 45 Rule 1 is not applicable. There is no new and important matter or evidence which has come forth to enable this court to review its Ruling. Again, the citation of Sections 1A, 1B and 3A is not enough to found a legal grounding whose main prayer is review. A case for review has not been proved and so it cannot be available. If it is the allegation by the Plaintiff that the Defendant is in contempt of court, the Plaintiff should know the appropriate cause of action, and take it. The Defendant should also know that if it is found to be in contempt of court, there could be far reaching consequences which could also amount to the court denying the Defendant audience before the court. However, neither the Plaintiff nor the Defendant have made any submission on the aforesaid bank guarantee, and for all I know, I would be speculation on that issue without proper submission before the court.

13. In the upshot, I do not consider it necessary to determine whether or not the Defendant had good reasons for delay in filing the appeal.

14. In the end, the Notice of Motion before the court is dismissed.

15. I make no orders on costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Wilson holding brief for Wandabwa for the Plaintiff

Mr. Musyoka holding brief for Ayisi for the Defendant

Teresia – Court Clerk