



No. 239

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 156 OF 2010

JACKTONE AMOLLO OYARE PLAINTIFF

VERSUS

PETER ADONGO OKONGO DEFENDANT

AND

JAMES OWUOR AMOLLO APPLICANT

RULING

1. On 4th October 2011, the plaintiff who is now deceased filed an application by way of Notice of Motion dated 3rd October 2011, seeking a stay of execution of the decree issued in **Migori SPM's Court Misc. Application No. 37 of 2010, Peter Adongo Okongo vs. Jackton Amolo Oyare** pending the hearing and determination of this suit. The plaintiff's application was heard before Lagat Korir J. who in a ruling delivered on 5th October 2012 allowed the application conditionally. The stay sought by the plaintiff was allowed on condition that the plaintiff would execute a bond in the sum of Kshs. 100,000.00 as a security for costs within 14 days from the date of the said ruling and the Plaintiff shall also take steps to comply with Order 11 of the Civil Procedure Rules and set down the case for hearing within 60 days. The court made a further order that if the plaintiff fails to comply with the condition requiring the compliance with Order 11 and settling down the case for hearing within 60 days, the stay granted by the court would lapse automatically.
2. The applicant herein, **James Owuor Amollo** who is the legal representative of the estate of the plaintiff has now brought an application dated 10th April 2013 seeking a review of the said order by Lagat Korir J. In summary, the review is sought on the grounds that when the order of 5th October 2012 was made, the plaintiff was deceased and as such could not comply with the conditions that were imposed by the court. The applicant has deposed in his affidavit in support of the application that the plaintiff, Jackton Amollo Oyare died on 15th March 2012 before the ruling herein was delivered on 5th October 2012. The applicant has deposed further that the death of the plaintiff has put financial strain on the applicant and as such he may not be able to execute the bond that was ordered by the court. The applicant's application was opposed by the defendant. In his grounds of opposition dated 30th May 2013 the defendant contended that the application is defective and incompetent and that the same is an abuse of the process of the court.
3. On 6th June 2013 the advocates for the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 21st June 2013 while the defendant filed his

submissions on 22nd July 2013. I have considered the application by the applicant together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the defendant in opposition to the application. Finally, I have considered the parties' respective submissions and the authorities cited. The law on review of decrees and orders is now settled. This court has unlimited power to review its decrees and orders for sufficient cause. What I need to determine in the application before me therefore is whether the applicant has shown sufficient cause to warrant the review of the orders made herein on 5th October 2012 by Lagat Korir J. It is not in dispute that the original plaintiff, Jacktone Amolo Oyare died on 15th March 2012. The applicant is his duly appointed legal representative and was joined in this suit in that capacity by consent on 6th June 2013. It is not in dispute also that the orders made by the court herein on 5th October 2012 which had timelines to be complained with by the original plaintiff could not be complied with because the said plaintiff was deceased as at the date when the said orders were made. I am of the opinion that the applicant has shown sufficient cause to warrant the review of the orders made herein on 5th October 2012. When the court delivered its ruling on 5th October 2012, none of the parties was present. There is no evidence in the court record that the parties were notified of the ruling date. The court's attention was therefore not drawn to the fact that the original plaintiff was deceased. I have no doubt that the court could not have made the orders of 5th October 2012 if the court had notice that the original plaintiff was deceased. The delivery of the ruling could have been stayed until the deceased original plaintiff is substituted.

4. I am persuaded therefore that the orders of the court made on 5th October 2012 should be reviewed so that the same may be complied with by the applicant herein who has now been joined in these proceedings as plaintiff in place of the deceased original plaintiff. I am inclined to review the said orders by extending the timelines within which the original plaintiff was required to comply with the conditions that were imposed by the court. I have considered the grounds put forward by the defendant in opposition to the application. The defendant has opposed the application majorly on technical grounds. The defendant has not shown what prejudice or injustice he will suffer if the orders sought are granted. The defendant has argued that the application is incompetent and bad in law for failure to cite the correct provisions of the law on which it has been brought and for failure to attach to the application the order sought to be reviewed. These to me are mere technical objections which this court is enjoined to overlook pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 for the sake of substantive justice. I have noted from the record that the order sought to be reviewed herein was extracted, signed and sealed by the Deputy Registrar on 2nd February 2013 before the present application was brought. Can the applicant be denied the orders sought merely because this order which is before the court has not been annexed to the affidavit in support of the application for review? My answer is no. Such action would sacrifice justice at the altar of technicality which the Constitution of Kenya expressly forbids. On the issue of the provisions of the law under which the application was brought, I am in agreement with the defendant that the application should have been brought under Order 45 rules 1 and 2 of the Civil Procedure Rules. I am of the view however that the omission to cite the said provisions of the Civil Procedure Rules is not fatal to the application. First, because Order 51 rule 10 of the Civil Procedure Rules 2010 provides that no application shall be refused merely on account of the applicant's failure to state the provisions of the law under which the application has been brought and secondly, because failure to state the provisions of the law under which the application has been brought is a mere technical issue which does not go to the substance or the merit of the application before the court and as such can be overlooked for the sake of substantive justice.
5. The upshot of the foregoing is that I find merit in the application dated 10th April, 2013. This court's orders made on 5th October 2012 are reviewed and varied as follows;
 - a. **The order of stay of proceedings and execution of the decree issued in Migori SPM's court Misc. Application No. 37 of 2010 shall remain in force pending the hearing and determination of this suit.**
 - b. **The time within which the plaintiff was to execute a bond in the sum of Kshs. 100,000.00 as a security for costs is extended by sixty (60) days from the date hereof.**
 - c. **The time within which the parties were to comply with Order 11 and list this matter for**

- hearing is extended by 120 days from the date hereof.
- d. The stay granted herein shall lapse automatically if this case is not set down for hearing within 120 days from the date hereof.
 - e. The costs of the application herein shall be in the cause.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant/Plaintiff

Mr. Minda h/b for Mr. Mudei for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE