



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 650 OF 2011

NARWA CHEMISTS LTD.....RESPONDENT/APPLICANT

VERSUS

**JOSEPH NGERA KIAMA & PATRICK NDIRANGU NDERITU T/A TEMPLE STORE
PHARMACEUTICALS.....APPELLANTS/RESPONDENTS**

RULING

1. The applicant has filed the notice of motion dated 3rd February, 2014 under **section 63(e)** and **3A** of the **Civil Procedure Act** and **order 51 rule 1** of the **Civil Procedure Rules** essentially seeking orders:
 1. That the honourable court be pleased to issue an order discharging and or setting aside the stay of execution orders of the court issued on 29th November, 2012 on CMCC No. 7981/2010 and recorded by the consent letter dated 18th February, 2013 by the applicant's and the respondents' advocates.
 2. That the honourable court be pleased to issue an order for the release of the sum of KShs. 2,700,000/- together with the interest held in the joint account number 1139721887 Kenya Commercial Bank, Milimani Branch in the names of Kiplagat & Company Advocates and P.G. Kaingu & Company Advocates to the applicant through its lawyers M/S Kiplagat & Company Advocates.
2. The application is premised on the grounds that close three (3) years have lapsed since judgment was delivered and a conditional order for stay pending appeal granted yet the respondents have not prosecuted the appeal. The application is supported by the affidavit of **Nicholas Kipkemoi Kitoel** sworn on 2nd February, 2014.
3. The application is opposed vide a grounds of opposition dated 30th September, 2014 in which the respondents termed the application as frivolous, vexatious and an abuse of the court process.
4. A default judgment was entered for the applicant against the respondents for a sum of KShs. 2,088,913.90/- together with costs and interest on 18th November, 2011. The respondents subsequently filed an application dated 25th January, 2012 seeking an order for stay of execution pending appeal. The said application was disallowed on the grounds that only one condition for granting stay order; thus filing application timeously was met.
5. The respondents thereafter came to this court with another application dated 3rd July, 2012 for stay of execution of the decree of the lower court. Upon hearing the application on 16th October, 2012, it was ordered that a sum of KShs. 2.6 Million be deposited in court by the respondents pending hearing and determination of the appeal and that the appeal be heard within eight months of the date of the order failure to which the stay order would automatically stand discharged. The

respondents failed to deposit the monies as ordered and another order, similar to that of 16th October, 2012 was issued on 6th November, 2012 and 29th November, 2012. Still, the respondents failed to deposit the monies as ordered.

6. On 18th February, 2013, a consent was recorded as follows:

“...THAT subject to the above, there be a stay of execution of the decree issued in CMCC 7981/2010 pending the hearing and determination of the above appeal which should be prosecuted within eight months as the court’s diary may avail failure to which the stay lapses.”

7. The respondents have to date not prosecuted their appeal occasioning the application herein.
8. At the hearing of this application, **Mrs. Cheruiyot**, Counsel for the applicant relied on the averments in the supporting affidavit. **Kaingu**, Counsel for the respondents relied on the grounds of opposition and argued that they have been diligent in visiting the registry to check the proceedings and ensure that the appeal has been admitted. He added that the time frame fixed for hearing of the appeal was subject to the court’s diary.
9. I have considered the pleadings filed in respect of this application and the rival submissions. What is in dispute is whether the time frame fixed for prosecuting the appeal by the consent has lapsed or not.
10. My reading of the consent order is that the appeal was to be prosecuted within eight months of the consent. Such that the respondents were to fix a date available in the court’s diary within eight months from the date of the consent. Acting otherwise would go against the terms of the consent.
11. It is worth noting however, that courts can alter the terms of consent on occasions of fraud, collusion or in general for a reason sufficient to enable the court to set it aside. Such have to be demonstrated.
12. **Seton on Judgments and Order (7th Edn.), Vol 1, p 124**, state as follows:

“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 with 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.”

13. In this case, the consent was recorded by legally competent persons, and the respondents have not placed any evidence before this court to prove that there was difficulty in obtaining a date within the period set down by the consent. I must also mention that the laxity with which the respondents deposited the decretal sum as they continued enjoying the stay orders is a pointer that they were not ready to prosecute their appeal.
14. I acknowledge the respondents right of appeal, however, judicial controversies must come to an end. They should not be allowed to drag on with the rights of the winning party hanging indefinitely.
15. In the premises, I find merit in the application and accordingly I make orders as follows:
 - a. The orders for stay of execution granted on 29th November, 2012 are vacated.
 - b. The applicant is at liberty to commence execution process to give effect to the judgment of lower court delivered on 18th November, 2011.
 - c. Costs to the applicant.

Dated, Signed and delivered in open court this 24th of October 2014.

J.K.SERGON

JUDGE

In the presence of:

Mrs. Cheruiyot for the Applicant

Kaingu for the Respondents