REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION

CIVIL SUIT NO. 1197 OF 2005

STEPHEN MUNGA MWANGI……….......…...…PLAINTIFF/APPLICANT

VERSUS

THE GOVERNMENT OF THE

UNITED STATES OF AMERICA...……..… 1ST DEFENDANT/RESPONDENT

COMMERCIAL BANK OF AFRICA ……..2ND DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 27th August 2012, the Plaintiff/Applicant herein seeks the following orders:

1. **THAT the Hon. Court do review an order made on 12th July 2012 to the Respondents granting indefinite stay of execution till determination of an intended appeal to the Court of Appeal.**
2. **THAT the applicant be at liberty to execute the garnishee order.**
3. **THAT the costs of this application be borne by the respondents in any event.**

The application is based on the following grounds:

a. **The respondents have not lodged appeal to the Court of appeal.**

b. **The respondents are indolent parties as it took them six years to act in this matter.**

c. **The respondents are enjoying indefinite stay of execution and thus there is need to review it to enable the applicant execute the garnishee order issued in his favour.**

d. **The delay of the respondents in not filing the appeal amounts to deprivation of justice to the applicant.**

e. **The conduct of the respondents in pursuit of appeal is wanting and its sole purpose is to deny the applicant the fruits of the lawful judgement.**

f. **The order of stay granted to the respondents has far reaching consequences to the applicant as it is sine die in nature unless the court intervenes. And other reasons to be stated in the annexed affidavit of Stephen Munga Mwangi.**

The same Motion is supported by an affidavit sworn by **Stephen Munga Mungai,** the applicant herein in which he deposes that the claim herein arose from wrongful dismissal by the respondents and after attempts to settle the same out of court failed he filed the present suit, served the summons and upon expiry of the period for appearance and defence applied for and obtained interlocutory judgement and proceeded with formal proof. After the entry of judgement a garnishee order was drawn in his favour but when he attempted to execute the same the respondents moved to court after six years and sought to set aside the ex parte judgement. The said application was according to him heard and dismissed and the respondents being aggrieved by the said dismissal filed a Notice of Appeal and pursuant thereto applied for and obtained an indefinite order of stay of execution. However, since obtaining the said orders, the respondents have instead slept on their rights as no appeal has ever been filed a move which in his view amounts to indolence and deprivation of justice to him. The continued delay, he deposes, causes mental torture to him as he is aged. Since the respondents are not interested in filing the appeal, it is his view that the order of stay of execution granted herein on 12th July 2012 be lifted in order to pave way for execution since his Constitutional rights are being infringed by the continued existence of the said orders yet the respondents have no plausible defence to his claim and the intended appeal is not arguable.

In opposition to the application the respondents filed the following grounds of opposition:

1. **The Application is fatally defective and ought to be struck out with costs to the Respondent.**
2. **The Application lacks merit and does not satisfy the provisions of the law under which it is sought to be brought under.**
3. **The Application is misleading.**
4. **The Application is designed to waste time and to delay the hearing of the appeal.**
5. **The evidence in the affidavit is irrelevant, scandalous and frivolous and the same ought to be expunged from the record.**

In support of his application the applicant reiterated the contents of the said supporting affidavit and submitted that in granting the orders of stay the court overlooked what he had stated in his replying affidavit.

On behalf of the respondents, **Mr Wanyoike** learned counsel submitted that the ruling was made on 10th July 2012 and the decision appealed from was made on 10th May 2012. According to him the respondents have written letters to the Deputy Registrar who has indicated that the proceedings are ready but are pending proof-reading. Further the application is technically defective as the order sought to be reviewed is not annexed. In his view the application does not satisfy the provisions of Order 45 of the Civil Procedure Rules.

I have considered the foregoing. From the record it is clear that the respondents have written requests for supply of copies of the proceedings. There is no indication from the file that the same have been supplied. There is a copy of the proceedings in the file which has been corrected in ink. It would therefore seem that the respondents' contention that the proceedings are yet to be proof read is not altogether incorrect.

In order for the Court to review its decision Order 45 provides that it must be satisfied that there is 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 that there is some mistake or error apparent on the face of the record, or that there exist any other sufficient reason.

In the instant case there is no allegation that the first two grounds exist. However a deliberate delay in filing an appeal may in appropriate circumstances be deemed to constitute sufficient cause.

In **Reuben Indiatsi Nasibi vs. Alfred Machayo & Others Nairobi High Court (Civil Division) Civil Case No 2463 of 1996** while dismissing an application seeking to extend stay of execution pending an appeal I expressed myself as follows:

> **"The other issue is that for the last six or so years the 1st respondent has been baby-sitting his notice of appeal without taking steps to ensure that the appeal is lodged. Whereas the 1st respondent contends that the proceedings are yet to be supplied, there is no indication of the steps taken by the 1st respondent to expedite the process. In the absence of such evidence one cannot help agreeing with the applicant that the 1st respondent has no interest in pursuing the appeal. Where a party has been granted an indulgence in form of a stay of execution in order to enable him pursue an appeal, it behoves him to take all the necessary steps to ensure that the said appeal is expedited. He should not just sit back and twiddle his thumbs under the pretext that he is awaiting proceedings. The exercise of judicial discretion in favour of a party places a corresponding duty on the party to avoid abuse of the said orders. Under section 1A(1) of the Civil Procedure Act the overriding objective of this Act and the rules made under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act while subrule (3) thereof enjoins a party to civil proceedings or an advocate for such a party to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. In *Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010* the Court of Appeal dealing with the said objective stated *inter alia* as follows:**
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>> **'the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management**

practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained'.

In arriving at my decision I associate myself with the decision in *<u>Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009</u>* in which the Court expressed itself thus:

'The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow'.

To extend the lifespan of the stay granted herein where there is lack of evidence of diligence on the part of the 1st respondent would in my view hinder the attainment of justice in the circumstances of this case. In this case, therefore, it is clear that the 1st respondent and/or his advocate have utterly disregarded the said objective. To invoke the overriding objective in these circumstances in order to sustain the conditional stay granted would, in my view, be tantamount to abusing the said objective at will. To the contrary the objective should be invoked to enable the applicant enjoy his fruits of judgement now and not tomorrow since he has waited long enough."

However the circumstances in that case were distinguishable from the present case since here it has not been shown that the respondents have been indolent as alleged by the applicant. To the contrary the delay in supplying the proceedings is laid squarely at the doorsteps of the Court. That being the position, it would be unjust to review the orders of stay granted herein. If the applicant's contention is that the stay ought not to have been granted that would be a ground for an appeal rather than a ground for review. As was stated by the Court of Appeal in **<u>Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418</u>**:

"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

A ground that may be good for an appeal is not necessarily a ground that would warrant the Court in granting an application for review. See **<u>National Bank of Kenya Ltd vs. Ndungu Njau Civil Appeal No. 211 of 1996.</u>**

In the premises I am not satisfied that the applicant has made out a case that would warrant the review of the order staying execution pending appeal. If the applicant feels that the respondents are deliberately dragging their feet he is at liberty to apply to the Court of Appeal to have the Notice of Appeal struck out in which event the orders of stay would have no legs to stand on. That however, is a jurisdiction

exclusively reserved for the Court of Appeal.

In the result the Notice of Motion dated 27th August 2012 fails and is dismissed with costs to the respondents.

Dated at Nairobi this 29th day of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Plaintiff in person

Miss Oyombe for Mrs Wanyoike for Defendants/Applicants